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What is the scope of competition law in the UAE? - A comparative study with developed and developing nations

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A thesis submitted in partial fulfillment of the requirements for the Master of Laws degree in Law

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What is the scope of competition law in the UAE? - A comparative study with developed and developing nations.

by

Alisha Ansari

Graduate Program in Law

A thesis submitted in partial fulfillment
of the requirements for the degree of Master of Laws

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Abstract

Competition Law is primarily a regulator for fair competitive behavior amongst businesses of the same sector.¹ Competition policy and trade liberalization promotes economic efficiency, development and growth in the economy.² My thesis revolves around the scope of competition law in the United Arab Emirates. The study focuses on competition and foreign investments as tools of economic growth by citing industry-specific examples and highlighting court cases where an abuse of dominance occurred. I have undertaken a comparative study of competition law as between developed nations and developing nations. The comparative study informs my recommendations for the role of competition law in the UAE.

Keywords:

Competition Law, Developed Nations, Developing Nations, Globalization, United Arab Emirates, Foreign Direct investment, Economy, Efficiency, Global pressure

¹ “The Importance of Competition Policy” Office of Fair Trading, The Times 100, online: <<http://businesscasestudies.co.uk/office-of-fair-trading/the-importance-of-competition-policy/the-purpose-of-competition-policy.html#axzz2Zpv9zdXW>>

² World Trade Organisation, Working Group on the Interaction, between Trade and Competition Policy, Synthesis Paper on the Relationship of Trade and Competition policy to Development and Economic Growth, Note by the Secretariat, 18 September 1998

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List of Abbreviations

UAE- United Arab Emirates

GDP- Gross Domestic Product

UK- United Kingdom

TFEU- Treaty on the Functioning of European Union

CADE- Conselho Administrativo de Defesa Economica

ICA- Investment Canada Act

FDI- Foreign Direct Investment

US- United States (of America)

EU- European Union

GDP- Gross Domestic Product

WTO-World Trade Organisation

OECD- Organisation for Economic Co-operation and Development

Chapter 1

Introduction

1. Question

What is the scope of competition law in the United Arab Emirates? - A comparative analysis between developed and developing nations.

2. Objective

The objective of this thesis is to assess the significance of the newly passed competition law in the UAE by studying the specific industries, which are exempted from regulation. The study focuses on competition and foreign investments as tools of economic growth and highlights court cases where an abuse of dominance occurred. The industry-specific comparisons are drawn between the UAE and different economies of the world to attempt to justify and forecast a more decisive role for competition law in the country.

3. Brief Overview

The first chapter focuses on developed nations. I will examine the legal and economic framework of Canada, the US and the EU, in relation to their established competition laws. The developed nations can pose as an economic ideal for the emerging markets and the regulation of the markets under existing competition laws serves as an example for the developing world.

It is important to have specific guidelines to prevent unfair trading within an emerging market, where the businesses and society are in a phase of growth and industrialization.³

³ Jean-Claude Trichet, "The growing importance of emerging economies in the globalized world and its implications for the international financial architecture" European central bank,

The economies of India, South Africa and Brazil are taken as examples of the developing world and emerging market. The UAE, being an emerging market as well, can draw lessons and comparisons with these economies in the light of competition law regulation to better understand the national and international business dynamics.

Greater foreign investment improves economic growth and often acts as a catalyst for enhanced competition law enforcement.⁴ Therefore, I will focus on industry specific foreign investment in the respective countries. Also, I will analyze the general advantages of competition law described in this introduction chapter as a comparing mechanism for all developed and developing nations in the thesis. The language of the competition law statutes of the respective countries will be discussed as well, to better understand their scope and relevance.

4. Hypothesis

My hypothesis in this research is that key industries that form a substantial part of the country's GDP have been exempted from regulation under competition law of the UAE. With these sectors of the economy still under strict protectionist policies, the scope of competition law in the UAE, with respect to being a force for growth, investment and consumer welfare, is therefore limited.

5. Selected constructs

Below, certain concepts have been defined so it is easier for the reader to follow. They are fundamental words that recur throughout the thesis.

Eurosystem, 26 November 2007, online: <

http://www.ecb.int/press/key/date/2007/html/sp071126_1.en.html>

⁴ Najid Ahmad et al. "The Casual Links between Foreign Direct Investment and Economic Growth in Pakistan" European Journal of Business and Economics, Volume 6, 2012, at 20, online: <<http://economics.journals.cz/documents/Vol6/07%20Najid%20Ahmad.pdf>>

- **Foreign Direct Investment**

According to the OCED, Foreign Direct Investment (FDI) is a category of investment reflecting the objective of a lasting interest by a resident enterprise in one economy (direct investor) in an enterprise (direct investment enterprise) that is resident in an economy other than that of the direct investor.⁵

- **Business**

In terms of the ICA, a business exists when an undertaking or an enterprise is capable of generating revenue and is carried on in anticipation of profit. There are guidelines to determine whether a business exists under the Minister of Industry yet primarily it is a fact-specific determination.⁶

- **Market**

A market is defined in two ways: in terms of products sold in a relevant market and a geographical area of the market.⁷ In a product market, one is to analyse the goods being sold and then all their relevant substitutes in the market. Substitutability depends on the products' competitive characteristics meaning if the price of product no.1 is increased would the buyers look towards product no. 2 as a substitute of no.1, in terms of similar characteristics?⁸

Geographic market is the minimum area in which a single producer of the relevant product could impose a small but significant, non-transitory increase in price.⁹ Transportation costs need to be analysed in a geographic market, in relation to the product

⁵ "Benchmark Definition of Foreign Direct Investment" Organization for Economic Cooperation and Development (OECD). 4th Edition, (2008)

⁶ ICA- Investment Canada Act R.S.C., 1985 C.28, S.2

⁷ Trebilcock et al, "The Law and Economics of Canadian Competition Policy" University of Toronto Press, (2002) at 70 [Trebilcock]

⁸ *ibid.*

⁹ *ibid* at 71

prices. A single firm may also operate in different geographic markets.¹⁰ If the cost were a fraction of the price, then it would be considered as the same geographic market.

- **Civil law**

The Civil Law system is based on the old Roman Laws established by the Emperor Justinian.¹¹ Within this legal system, the core principles are codified and used as the primary source of law.¹² The system focuses primarily on the wording of statutes and treats court cases as secondary sources of the law. This system is usually an inquisitorial one where the judges are not bound by previous cases and are trained to do their own research regarding the case.¹³

- **Common law**

The Common Law system is originally known as the English Legal System based on the unwritten laws of England. The laws are established by the decisions of courts in relation to precedents or prior cases.¹⁴ Statutes and cases are seen to be primary sources of law with the basic principle being that like cases are to be treated alike.¹⁵ The court is bound by previous decisions provided that the decisions have a bearing on the current case and the decisions are binding on the level of court. The system unlike Civil Law is an adversarial one, where two parties argue opposite sides of a case in front of a judge.¹⁶

¹⁰ *ibid.*

¹¹ “The Common Law and Civil Law Traditions” The Robbins Collection, School of Law (Boalt Hall) university of California, Berkeley, at 1 online:

<<http://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html>>

¹² *ibid.*

¹³ James G. Apple & Robert P. Deyling, “A Primer on the Civil-Law System” Federal Judicial Center, at 37 [Apple] online:

<[http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/\\$file/CivilLaw.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf)>

¹⁴ “Legal Systems” Legal Information Institute, Cornell University Law School, online:

<http://www.law.cornell.edu/wex/legal_systems>

¹⁵ *ibid.*

¹⁶ Apple *supra* note 13 at 1

- **Cartel**

A formal understanding between corporations or individuals to monitor distribution, control prices and share technical expertise to reduce competition in a market.¹⁷ Usually their sole purpose is to maximize profits. Cartels are prohibited as they go against the purpose of the Competition Act and cause a damaging effect on the economy.¹⁸ They can remove a general incentive to innovate and operate efficiently. Cartels can be in the form of bid rigging, price fixing, restrictions and market sharing.¹⁹

6. Background

Different businesses under a particular sector, within the same market, need to be maintained in order for them to compete for a greater market share. Competition Law is primarily brought about as a regulator for fair competitive behaviour between business activities of the same sector.²⁰ Encouraging competition in such a way is for the benefit of the consumer. With greater competition comes greater choice, driving corporations to innovate and create better products that feed a healthier economy.²¹ The law incorporates elements, such as private anti-competitive practices and government measures that affect the state of competition in markets, such as, trade barriers, barriers to foreign direct investment, and licensing requirements (amongst others). These can influence the extent of competitive pressures in markets and so are suitable concerns of competition policy.²²

¹⁷ “Cartels-What you need to know-A Guide for Businesses” ACCC Infocentre, at 2

¹⁸ “Cartels and the Competition Act 1998” Office of Fair Trading (2005) at 1, online: <http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_mini_guides/oft435.pdf>

¹⁹ *ibid* at 3

²⁰ “The Importance of Competition Policy” Office of Fair Trading, The Times 100, online: <<http://businesscasestudies.co.uk/office-of-fair-trading/the-importance-of-competition-policy/the-purpose-of-competition-policy.html#axzz2Zpv9zdXW>>

²¹ K J Cseres, “The Controversies of the Consumer Welfare Standard” The Competition Law Review, Volume 3 Issue 2, March 2007, at 127 online: <<http://www.clarf.org/CompLRev/Issues/Vol3Issue2Art1Cseres.pdf>>

²² What is the Relationship between Competition Law and Policy and Economic Development?, Simon J. Evenett University of Oxford, 15 March 2005

7. Economic foundations of competition law

"While many objectives have been ascribed to competition policy during the past hundred years, certain major themes stand out. The most common of these objectives cited are the maintenance of the competitive process or of free competition, or the protection or promotion of effective competition. These are seen as synonymous with striking down or preventing unreasonable restraints on competition. Associated objectives are freedom to trade, freedom of choice, and access to markets."²³

Competition policy is strongly based on economic concepts and it is evident when efficient delivery of the product is in question, whether potential rivals are excluded from the market, or a prospective merger is to enhance or diminish the economic performance.²⁴ Defined below are basic economic concepts that are to be reflected on in the subsequent chapters.

- **Perfect competition**

In this condition everyone has perfect information and is free to enter or exit the market on the basis of their wish.²⁵ In this regard, the consumer is sovereign; it is not the producer who defines the market price, he is a price-taker. In order for there to be perfect competition, the supplies bought by a buyer and the supplies sold by a seller would be so small in comparison to the total quantity traded, that there would be no effect on the market price.²⁶

No one can make positive economic profits under perfect competition, as someone else would enter the market and sell the product at a lesser price and better quality. The fact

²³ World Bank-OECD 1997, page 2

²⁴ Trebilcock *supra* note 7 at 37

²⁵ "Perfect competition" Economics online, online:

<http://www.economicsonline.co.uk/Business_economics/Perfect_competition.html>

²⁶ "Price Theory Lecture 2: Supply & Demand" California State University, at 2 online:

<<http://www.csun.edu/~dgdw61315/PTlect2y.pdf>>

that this market has free entry and exit portrays the easy accessibility for all and this in turn becomes a threat to all as well.

- **Monopoly paradigm**

A monopoly exists when there is only one seller to produce and sell a particular kind of product in the market.²⁷ As monopolists have no competition, they are allowed to abuse their powers and price their products at whatever price they wish.²⁸ Monopolistic competition occurs when a market consists of small businesses, fixed costs and low barriers to entry and the economic model determines the differentiated products.²⁹

- **Oligopoly**

Oligopoly occurs when a small number of producers and suppliers are interdependent and have an understanding to work together and stay in the market.³⁰ All sellers in an oligopoly need to take into account what their rivals are doing in order to relate their own strategies to others.³¹ When one company decides to increase its price, all other will follow. This in turn creates difficulty for other corporations to enter the market. Either the business agreements are created for co-operation or a monopoly price is set. Businesses can also use the oligopoly understanding for their own gain, by knowing competitors' intentions and future actions. The prices set are lower than the monopoly price and the short-term gain is greater than the long-term loss of the agreement.

Oligopolistic practices either benefit from maintaining prices much higher than costs for many years or can result into intense price competition throughout the years.³²

²⁷ "Monopoly" Department of Economics, Ohio-State University, at 1 online:
<<http://www.econ.ohio-state.edu/jpeck/H200/EconH200L12.pdf>>

²⁸ "Monopoly power" Economics Online, online:
<http://www.economicsonline.co.uk/Market_failures/Monopoly_power.html>

²⁹ Trebilcock *supra* note 7 at 50

³⁰ "Oligopoly" Economics Online, Online:
<http://www.economicsonline.co.uk/Business_economics/Oligopoly.html>

³¹ "Oligopoly", *Economicae*, University of North Carolina, online:
<http://www.unc.edu/depts/econ/byrns_web/Economicae/oligopoly.html>

³² F.M Scherer and David Ross, *Industrial Market Structure and Economic Performance* (Boston; Houghton Mifflin, 1990), 199

- **Market power**

Market power occurs when businesses can price their product above the competitive levels and profit from it.³³ Market power revolves around the concentration of the market and the barriers of entry to the market.³⁴ The higher the concentration level, the easier it is to practice market power. Likewise, the greater the hold of the market, the harder it is for other corporations to enter the market-. As described by by William Landes and Richard Posner, market power occurs when there is an increase in a business' market share, decrease in the market elasticity of demand, and a decrease in the supply elasticity of non-merging firms.³⁵ A low demand will indicate that there are less substitutes of the particular product or service and, similarly, a low supply of products that cannot be substituted will mean that the demand for this particular product or service will increase. Therefore, market power will occur if these factors are present with a particular business having a high market share.

- **Market Failure**

Market failure occurs in an economy when the market outcomes result in inefficiency of the system.³⁶ This situation is a call for rational government intervention and that is when competition law is usually introduced in the economy.³⁷

³³ Patrick Massey, "Market Definition and Market Power in Competition Analysis: Some Practical Issues" *The Economic and Social Review*, Vol. 31, No. 4, October, 2000, at 310

³⁴ Kai Hüschelrath & Kathrin Müller, "Market Power, Efficiencies, and Entry Evidence from an Airline Merger" Centre for European Economic Research, Discussion Paper No. 12-070 at 5-6

³⁵ Landes and Posner, "Market Power in Antitrust Cases", *Harvard Law Review*, Vol. 94 no. 5, (1981) pp 937-996

³⁶ "Glossary of Statistical Terms: Market Failure", *Glossary of Industrial Organisation Economics and Competition Law*, compiled by R. S. Khemani and D. M. Shapiro, commissioned by the Directorate for Financial, Fiscal and Enterprise Affairs, OECD, 1993, online: <<http://stats.oecd.org/glossary/detail.asp?ID=3254>>

³⁷ *ibid.*

8. Advantages and disadvantages of competition law

(a) Advantages:

Competition law and policy has been encouraged as an element of an interrelated reform package aimed at promoting economic and social development.³⁸ These reforms include market-opening measures of foreign investment, privatization and sector-specific regulatory reforms. By increased reliance on market forces for development, the policy aims towards public interest of promoting and maintaining competition in the markets. Trade liberalization and globalization in this era have increased foreign direct investment for an environment of economic growth. Therefore, anticompetitive practices have expanded to an internationally broader scope.³⁹

Competition policy and trade liberalisation promote efficiency, consumer welfare, growth and development⁴⁰ and this is done through reduction of government-imposed barriers to international commerce.⁴¹ The central function of the WTO is to promote equality of competitive opportunities for countries in the world trading systems.

³⁸ Comments made by the representatives of Mexico, Kenya and Turkey in introducing their national legislation (summarized in M/3, paragraphs 43, 44 and 45, respectively), contributions by Peru (W/36) and Brazil (W/93), and general observations by the representatives of Brazil and the European Community and its member States, reported in M/3, paragraph 29.

³⁹ Comments of the representative of the European Community and its member States, reported in M/3, paragraph 22.

⁴⁰ Comments by the representatives of the European Community and its member States, Japan, Mexico, Turkey, Singapore, India, Nigeria and Norway, reported in M/3, paragraph 4. A contribution to the Group by Hong Kong, China (document W/26, paragraph 8) observes that "Modern economic research on the competitive advantage of nations suggests that open markets, liberal legal framework rules and a sound competition policy play a key role in fostering economic growth, innovation and continuous upgrading of productivity and product quality. In this regard, trade liberalization and competition policies foster development and economic growth by limiting protectionist abuses of both government and private market power. They reinforce one another and result in a more efficient use of resources".

⁴¹ In this regard, the submission of the United States addressing the General Interaction Between Trade and Competition Policy (document W/66). The submission notes, nonetheless, that there is an important overlap between trade and competition policy in that competition policy can also address government-imposed barriers to the operation of market forces through the medium of advocacy activities.

- **Promoting an efficient allocation of resources**

The fundamental connection between a policy and a developmental process in the economy is the fact that competition policy and competitive markets bring about the goal of enhanced economic efficiency in the market, both in the static and dynamic sense.⁴² Competition promotes efficiency ensuring that businesses produce at the lowest attainable costs, providing incentives for businesses to undertake research and development (R&D) and to quickly introduce new products and production methods into the marketplace.⁴³ When competition is encouraged in an economy the primary goal is to have numerous corporations under one market, selling the same types of products. In order to compete with each other and survive in the market, the corporations need to appeal to their consumers by lowering their prices. The lower the prices, the greater positive consumer reaction.

- **Protecting the welfare of consumers**

Consumer welfare is important and adequate legislative and policy framework is required to protect consumers from anticompetitive practices that raise prices and reduce output.⁴⁴ Quality of the products will be greatly scrutinized when there is competition in the market. The option of choice will result in greater efficiency within businesses, as they would strive to provide the best quality for the lowest price. Quality can be evaluated in terms of better products, better after-sales customer service, technical support or friendlier service.

⁴² The contributions of Hong Kong, China (W/26 and 53), Singapore (W/28), New Zealand (W/30 and 81), ASEAN WTO Members (W/33), the United States (W/35), Turkey (W/40), Pakistan (W/41), Canada (W/42), the European Community and its member States (W/45), Korea (W/56) and Japan (W/68). Static efficiency refers to the optimum utilisation of a society's existing resources to meet consumer wants ("allocative efficiency"), at the lowest possible cost ("productive efficiency"). Dynamic efficiency, which is posited by some economists to be even more important than static efficiency, relates to the optimal introduction of new products, more efficient production processes and superior organizational structures over time. For elaboration, see UNCTAD (1997b) and OECD (1991).

⁴³ UNCTAD (1997b), OECD (1991) and Khemani and Dutz (1995).

⁴⁴ Remarks of the representative of the US, reported in M/4, paragraph 32.

- **Preventing excessive concentration levels and resulting structural rigidities**

Competition policy prevents market concentration and associated detrimental effects that include extensive inefficiencies, structural integrity and non-adaptability to external shocks.⁴⁵ If a competition policy is not implemented at the right time, in the early stage of economic development, it can cause costly industrial restructuring at a later stage.⁴⁶

- **Addressing anti-competitive practices of businesses (including multinational enterprises) that have a trade dimension**

International trade is benefited by competition policy, particularly practices affecting market access for imports. These include:

‘domestic import cartels, international cartels that allocated national markets among participating firms, exclusionary abuses of a dominant position, the unreasonable obstruction of parallel imports, control over importation facilities, vertical market restraints that foreclose markets to foreign competitors, certain private standard-setting activities and other anti-competitive practices of industry associations’.⁴⁷

Also, practices affecting international markets, where different countries are affected in largely the same way are benefited as well: these include international cartels, and also some instances of mergers and abuses of a dominant position affecting international

⁴⁵ The contributions of Korea and Japan to the debate on the relationship of trade and competition policy to development and economic growth that took place in the Group's meeting on 16-17 September (documents W/56 and 52, respectively).

⁴⁶ The contribution by Korea indicates that: "if competition policy had been introduced earlier, Korea's economic development would have been achieved in a more balanced and sound manner. At the early stage of development, the negative structural effects of market concentration and the distortions of the market structure were largely overlooked. As a consequence, Korea is now confronting the very difficult task of industrial restructuring. If competition policy had been introduced before the market structure was distorted, such tasks could have been avoided". See document W/56, paragraph 13.

⁴⁷ M/4, paragraph 23.

markets.⁴⁸ Practices having a differential impact on the national markets of countries benefit as well: these are⁴⁹ export cartels and situations in which mergers are benign or even beneficial in one market, but have detrimental effects in other markets.⁵⁰

- **Increasing an economy's ability to attract foreign investment and to maximise the benefits of such investment**

It is crucial that all countries are encouraged to adopt competition policies⁵¹ and bring about enhanced co-operation between national competition authorities when addressing such practices.⁵² A transparent and effective competition policy is important for increasing an economy's ability to attract foreign investment and to maximize the benefits of such investment.⁵³ Competition policy can bring about solutions that are transparent, principle based, and widely accepted internationally. Investor confidence is increased and so is the propensity to invest. When competition increases in the markets, host countries are benefited as well by encouraging participating businesses in constructing advanced production facilities, undertaking appropriate training programmes, and by blocking the exploitation of consumers.⁵⁴

⁴⁸ M/4, paragraph 29.

⁴⁹ M/4, paragraph 22. The observer from the World Bank agreed that this was a useful analytical framework.

⁵⁰ M/4, paragraph 31.

⁵¹ The comments of the representatives of the European Community and its member States, and the United States, reported in M/4, paragraphs 39 and 40.

⁵² Comments by the representatives of the European Community and its member States, Turkey, Brazil, Morocco and Tunisia, reported in M/3, paragraph 35.

⁵³ Points made by the representatives of the European Community and its member States and several other Members at the meeting of 27-28 November, and reported at M/3, paragraphs 21 and 22. The role of competition policy is a factor that can enhance both the magnitude and the benefits of foreign direct investment is a central theme in UNCTAD (1997a).

⁵⁴ These points are elaborated in UNCTAD (1997a) and (1997b) and OECD (1991). See also comments of the representative of the European Community and its member States, reported in M/3, paragraph 22.

FDI liberalization heightens the contestability of markets providing greater efficiency and freedom for firms in pursuing their interests in the market. This process needs to be completed with the introduction of competition laws in the economy.⁵⁵

- **Reinforcing the benefits of privatization and regulatory reform initiatives**

With the aid of competition law guidelines, the benefits of privatization and deregulation programmes are easily identified.⁵⁶ No changes will occur unless appropriate measures are taken to prevent monopolistic market structures, as privatization can still change a public monopoly to a private one. Likewise, deregulation has no effect if it is not subject to the alternative discipline of competition law. Efficiency and innovation are products of competition; businessmen strive harder to cater the best products and services for their customers.

- **Establishing an institutional focal point for the advocacy of pro-competitive policy reforms and a competition culture**

Competition advocacy is used as a mechanism for promoting competition, in both developing and developed economies.⁵⁷ These activities include application of competition principles in the design or application of governmental policies and measures, by eliminating unnecessary regulation and the adopting of the least anti-competitive means of achieving various policy objectives. It is emphasised that the

⁵⁵ The Report recognizes that competition and efficiency are not the only objectives that are relevant to public policy formulation in developing countries.

⁵⁶ The discussion reported in M/3, paragraph 21, comments of the representatives of Argentina, Canada and the Dominican Republic, reported in M/4, paragraphs 26, 27 and 63, respectively, and the submissions of the United States and the European Community and its member States to the meeting of 27-28 July, 1998 addressing the subject of the Impact of State Monopolies, Regulatory Policies and Exclusive Privileges on Competition and International Trade. This point is also emphasized in OECD (1997).

⁵⁷ Part IV(c), *infra*, and contributions cited therein. In document W/67, the United States observes that "Advocacy is likely the single most important role of a competition authority in a country undergoing the transition to market institutions".

existence of a competition law coupled with a dynamic enforcement policy greatly facilitates effective competition advocacy work. A track record of effective enforcement activity develops both the credibility and the expertise of the responsible agency.⁵⁸

(b) **Disadvantages:**⁵⁹

- **Too narrow**

The Economic circumstances for each country differ and so the impact of businesses on competition cannot be pre-judged. Even though the main provisions are generally the same and need to be counteracted, economic efficiency or market competition is not always clear. There are individual sectors that would not be analysed by competition laws.

(i) Collusive agreements are entered into for the benefit of economies of scale or strengthening quality of service albeit anticompetitive. They can enhance efficiency and should not be deterred by the narrowness of competition policy.

(ii) The government's job is to favour competition, not newcomers. Therefore if the market is accessible the market forces will determine who is capable enough to enter the market. Restricting undertakings or business dealings in an excessive manner through law, could cause potential competition to be left out or too much unnecessary competition to be introduced.

- **Creates uncertainty**

Uncertainties for market participants are created where a generalised law is not capable of pinpointing sectors of concern. Competition laws would need to cater to all types of

⁵⁸ Related remarks by the representatives of Argentina, Brazil and Canada, summarized in document M/4, paragraphs 68-70.

⁵⁹ Government Response to Consumer Council's Report Entitled "Competition Policy: The Key to Hong Kong's Future Economic Success", Trade & Industry Bureau the Government of the Hong Kong special administrative government, November 1997

activities and sectors and permit an investigation into the intention and effects of all the relevant commercial activity before deciding on the appropriate sanctions. Identifying all possible sectors of concern would be impractical.

- **Problems with implementation and enforcement**

It is important to take things step by step rather than implementing competition law drastically without adequate enforcement mechanisms to ensure compliance with any new rules of competition. The competition authorities would require expertise and large organisations for enforcement efforts. Therefore it is important that government bodies are open to distributing resources and capital accordingly.

- **Compromises free and open trade principles**

A counter effect can also occur when restricting certain forms of business activity as free trade policy and eventually competitiveness can be undermined. It is essential to monitor the practices of different sectors; and consider sector-specific legislative changes, if necessary, to deal with anti-competitive problems.

The 1997 World Investment Report identifies the following possible examples of post-entry competition issues relating to foreign direct investment (FDI)⁶⁰:

Ancillary agreements restraining competition

FDI can be accompanied by subordinate agreements that could involve restriction of competition, even though the initial agreement of the FDI was approved at the time of entry. For example, international franchisers can force local franchisees to source certain inputs from specific sources they control, justifying it with quality.

⁶⁰ UNCTAD (1997a), pp. 203-208.

Secondary effects of competitive entry through FDI

Competition authorities have a constant job of scrutinising market situations in order to prevent foreign affiliates from jeopardising competition in the economy and hindering entry for competitors.

Cross-border technology alliances

There is a ‘grey area’ that competition law faces when agreements are made with unaffiliated businesses, involving agreements that limit the freedom of the parties in various ways.

- **Possible adverse effects of competition policy on international competitiveness**

Competition policy is only an element in the development process and for benefits of competition sufficient supply capability must be present in the economy.⁶¹ Monopolies set up to prevent exploitation of natural resources can have a large impact in the development process and increase the tension among competition policy objectives.⁶²

It is important to increase rates of investment in developing countries to achieve fast growth of productivity and higher living standards.⁶³ High rates of investment need profits in order to maintain the private sector’s propensity to invest. This in turn can lead to the questioning of too much competition in the system. “Competition would be too much if it leads to price wars, sharp falls in profits, all of which are likely to diminish the corporate desire to invest.”⁶⁴

⁶¹ Comments by the representatives of Thailand, speaking on behalf of ASEAN WTO Members, and Korea, reported in M/3, paragraph 25 and M/4, paragraph 65, respectively. In a related vein, UNCTAD (1997b) points out that, in the extreme case of a natural monopoly, economies of scale and scope involved and the size of sunk costs make production by one firm the most efficient solution.

⁶² Comments by the representative of Thailand, speaking on behalf of ASEAN WTO Members, reported in M/3, paragraphs 25.

⁶³ Ajit Singh, Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions, G-24 Discussion Paper Series, United Nations Conference of Trade and Development (2002), page 19

⁶⁴ *ibid.*

Competition law restricts the freedom to contract as well. When parties have the liberty to contract on their own terms, it means the society will not interfere with the exercise of power.⁶⁵ Although ideally, the law protects the public against the concept of abuse of contractual freedom, it can nevertheless limit the parties from contracting on beneficial terms that are recognized by the law as harmful.⁶⁶

However, vigorous economic performance and competition law consists of direct foreign investments. Correct enforcement of competition law improves the attractiveness of an economy as a location for foreign investment and is essential to maximize the advantages that flow from such investments.⁶⁷

By discussing the advantages and disadvantages of competition law at the outset, it will be easier to understand the scope of the law of different jurisdictions, discussed in the subsequent chapters. Economically examined, the advantages of the law outweigh the disadvantages. Especially under emerging markets, the growing economies need to prosper with the right guidance for the ideal economic framework. The law has been well established in developed nations and therefore it needs to be implemented in the emerging market economies.

In the next section, my focus will shift from general competition law and economic definitions to definitions of developed and developing nation, the history of competition law within the respective countries and general economic factors present in developing nations that may pose as deterrence towards proper law enforcement.

⁶⁵ Friedrich Kessler, "Contracts of Adhesion-Some Thoughts About Freedom of Contract" Yale Law School
Yale Law School Legal Scholarship Repository, Columbia Law Review, Hein Online , 43 Colum. L. Rev. 629 19431717171717171717, at 640 online:
http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3728&context=fss_papers

⁶⁶ Richard Stone, "The Modern Law of Contract" 8th ed. Routledge Cavendish, at 523

⁶⁷ Simon J. Evenett, "What is the Relationship between Competition Law and Policy and Economic Development?" University of Oxford, 15 March 2005

9. Economic development of Developed nations

It is important to understand the basic definitions of developed and developing nations and to recognize the history of competition law in order to have a comprehensive grasp on the thesis for the sequential chapters. Just in the same way, the economic factors of emerging markets will also be determined as well.

According to Nielsen,⁶⁸ no one definition can be used to define what the difference is between a developed and developing nation. “This could suggest that a developing and developed country dichotomy is too restrictive and that a classification system with more than two categories could better capture the diversity in development outcomes across countries.”⁶⁹

In the overview article on Developmental Economics called “In the New Palgrave: A Dictionary of Economics”, Bell (1989) used “pioneers” and “latecomers” as an organizing framework.⁷⁰ In this article, he defined newly independent countries as the latecomers – catching up to the rich countries – the pioneers.⁷¹ The scope of the definition later expanded to understanding not only the large income differences across countries, but also inter-country diversities in terms of social outcomes, culture, production structures, etc.⁷² It is argued by Sen that development increases freedom by removing “unfreedoms” such as hunger and tyranny that result in little choice and opportunity for citizens.⁷³ This humanistic approach to development is what encourages one to explore the constituents of acceptable minimum living conditions.⁷⁴ The World Bank established a global poverty line for which internationally comparable poverty rates can be estimated.⁷⁵ The OECD states, “economically more advanced nations should co-operate

⁶⁸ Lyne Nielsen, IMF working paper-Classification of Countries based on their level of development: How it is done and how it could be done- 2011 International Monetary Fund at 3 [Nielsen] online: <http://www.imf.org/external/pubs/ft/wp/2011/wp1131.pdf>

⁶⁹ *ibid.*

⁷⁰ *ibid* at 5

⁷¹ *ibid.*

⁷² *ibid.*

⁷³ Amartya Sen, Development as Freedom, Amartya Sen (1999) at 33

⁷⁴ *ibid.* at 33

⁷⁵ In 1993 the Bank estimated that 1.3 billion were below a poverty line of PPP US\$1.08 per day, as stated in the World Development Report 2000/2001. In 2000, the Millennium Declaration was

in assisting to the best of their ability the countries in process of economic development.”⁷⁶

According to the International Monetary Fund, advanced economies compose 65.8% of global nominal GDP and 52.1% of global GDP (PPP) in 2010.⁷⁷ A country is classified as developed country if it meets the following criteria.

- Income per capita: countries with high gross domestic product (GDP) per capita would thus be described as developed countries.
- Industrialization: countries in which the tertiary and quaternary sectors⁷⁸ of industry dominate would thus be described as developed.
- Human Development Index (HDI): which combines an economic measure, national income, and indices for life expectancy and education have become prominent. This criterion would define developed countries as those with a very high HDI rating.⁷⁹

However, many anomalies exist when determining "developed" status by whichever measure is used.

Canada and the US fall in the definition of developed nations, classified under pioneer countries that pose as a model of economic development and production. Likewise, ever since the EU has been created, it has proved to introduce “freedoms by removing

introduced by the UN General Assembly, which included a reference to the global policy intent “to halve, by the year 2015, the proportion of the world’s people whose income is less than one dollar a day,”⁷⁵ (from 1990) and this then became part of the UN Secretariat’s first Millennium.

⁷⁶ Nielsen *supra* note 68 at 4

⁷⁷ International Monetary Fund (IMF). GDP data, September 2011.

⁷⁸ Tertiary sector is the third economic sector, known as the service industry. This is where knowledge is offered to improve productivity and performance- it is the production of services. The Quaternary sector is the fourth economic sector that is a part of the tertiary sector. It offers knowledge as well for information, consultation, education, research and development and financial planning.

⁷⁹ Abed El-Azez Safi, Foreign Direct Investment in the Arab world: an Analysis of Flows and an Evaluation of Country, Specific Business Environment, University of Trento Faculty of Economics and Management, Master In International Management, at 27 [Abed El-Azez]

unfreedoms” in different European countries and uniting them as a strong force, exceeding acceptable minimum living conditions. This benchmark of a “developed economy” that has been defined above is an important guideline to understand the gap between the different countries (developed and developing) and the UAE in order to amalgamate economic factors with the competition law and the differing approaches of the countries towards this law. It is essential to comprehend the economy in relation to its business setup requirements, restriction of foreign trade and investments on certain industries and laws that are applied in the process. That will be examined in the next chapter.

10. History of Competition law in Developed nations

The main objective of implementing competition law is to secure the economically efficient use of resources.⁸⁰ It is for consumers to gain the maximum possible consumer surplus, benefitting the society as a whole- more money saved meaning more spending power in the future.

The concept of discrediting monopolies and gearing towards a more competitive market is not a recent concept; it has been encouraged in England since 1623.⁸¹ “All Monopolies . . . are altogether contrary to the Laws of this Realm, and so are and shall be utterly void and of none effect and in no wise to be put into use or execution.”⁸²

In Canada, competition law was implemented in the legal system during a period of economic growth.⁸³ A Select Committee of Parliament found evidence of price-fixing, agreements in “sugar, groceries, biscuits and confectionary, coal, binder, twine,

⁸⁰ R.Shyam Khemani, United Nations Conference On Trade and Development Application of Competition Law: Exemptions and Exceptions (LECG, Europe), New York and Geneva, 2000, UNCTAD/DITC/CLP/Misc.25 at 7 online: http://unctad.org/en/Docs/ditcclpmisc25_en.pdf [Shyam]

⁸¹ English Statute of Monopolies of 1623, 21 Jac. 1, c. 3

⁸² *ibid.*

⁸³ Competition Policy in Canada Past and Future Backgrounder for Canadian Competition Policy Preparing for the Future at 2 online: <http://www.apeccp.org.tw/doc/Canada/Policy/1c.pdf>

agricultural implements, stoves, egg-dealers, fire insurance, coffin makers, etc.”⁸⁴ In 1888, discussions arose to introduce provisions to prohibit combines that discriminated against third parties, restricted competition, enhanced prices or restrained trade. It became law in 1889, under the name of Canadian Competition Act.⁸⁵

The Canadian Competition Act⁸⁶ is one of the oldest in the western world. However, it was never a central aspect in the legal or economic system of Canada.⁸⁷ It was later aimed at anti-competitive behaviour of increasing prices, restricting production and keeping others from entering the same market as well. Trade associations were seen to conduct illegal activities such as, carrying out anti-competitive conduct or price-fixing.⁸⁸ Canadian competition law has evolved throughout the years by deliberately picking and choosing elements from European and the US law to develop according to its own domestic needs.

The Sherman Anti-trust Act was introduced in 1890 during the launch of the steamboat and steam railways. There was a promising outlook of a single internal, free trade economy in the US. Yet, although free trade was promoted, having unprecedented guidelines, there was no set standard that corporations followed and a full exploitation of America’s transcontinental market opportunities occurred.⁸⁹ The growth of the railroad industry welcomed corrupt practices, unhindered by government regulation. Railroaders would gain profits using unethical method to get results.⁹⁰ The starting point, therefore, was the railroad industry. The U.S introduced the Interstate Commerce Act⁹¹, and based

⁸⁴ C. Green, “Canadian Competition Policy at a Crossroads” *Canadian Public Policy / Analyse de Politiques*, Vol. 7, No. 3 (Summer, 1981), at 418-432, Published by: University of Toronto Press on behalf of Canadian Public Policy, Article Stable URL:

<http://www.jstor.org.proxy2.lib.uwo.ca/stable/3549640>

⁸⁵ R.S.C, 1985, c. C-34

⁸⁶ *ibid.*

⁸⁷ David J. Gerber, “Global Competition: law, markets, and globalization” oxford university press (2010) at 258 [David J. Gerber]

⁸⁸ Yves Beriault & Oliver Borgers, “Overview of Canadian antitrust law” McCarthy Tétrault LLP, Canada Overview, at 77 online: http://www.mccarthy.ca/pubs/antitrust_overview.pdf

⁸⁹ AP U.S. History, Study Guide and Review, Aligned with Bailey’s American Pageant- 13th edition, at 120 online:

<http://mrssciorilli.wikispaces.com/file/view/AP+US+Study+Guide+and+Review.pdf>

⁹⁰ Elizabeth Israels Perry & Karen Manners Smith, “The Gilded Age & the Progressive Era (1877-1917)” Oxford University Press 2006 at 329

⁹¹ Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379, approved 1887-02-04

on those preliminary guidelines, created the Sherman act 1890⁹² for a strong competition law, that later adopted and extended to all industries.⁹³

The Competition Law of the European Union was introduced within European countries on a much bigger scale, in the Treaty of Rome in 1957. It establishes a single union-wide market eliminating divisions of national territories, where this jurisdictional-based regime revolves around the application, elaboration and implementation of a single idea. That idea expands the traditional jurisdictional principle that authorizes a state to regulate conduct on its territory by regulating conduct that occurs outside its territory where that conduct has particular effects within its territory.⁹⁴ Additionally, the EU aims to promote economic efficiency, and efficient allocation of resources and innovation amongst the member states to increase combined economic development and eventually prevent another World War from occurring.

The US has played a major role in influencing the development of EU competition law but the EU's enforcement of its own terms of institutions, ideas and attitude for decades is what distinguishes EU from the US. Many times the ideas for interpretation of community law are derived from solutions through the American courts.⁹⁵ However there is a substantial difference between the two legal systems that needs to be taken into consideration. "...with the result that not every problem confronting one of the two systems finds a counterpart in the other legal system."⁹⁶

The economic situation of a country is a major factor in implementing competition law as the law is interrelated with economics. When the law aims to protect competition and efficiency in a country, it is directly regulating foreign and national business activity of the country. The function of the law then affects the economic instability of the economy

⁹² Sherman Act, July 2, 1890, ch. 647, 26 Stat. 209, 15 U.S.C. §§ 1-7

⁹³ World Trade Report 2007, (WTO) at 35 online:

http://www.wto.org/english/res_e/booksp_e/anrep_e/wtr07-2b_e.pdf

⁹⁴ David J. Gerber, "Two Forms of Modernization in European Competition Law" Fordham International Law Journal, Volume 31, Issue 5 2007 Article 8, at 1237 online:

<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2116&context=ilj>

⁹⁵ Advocate General Kirschner in Tetra Pak Rausing SA v Commission case T-51/89 [1991] 4 CMLR 334 at 343-4

⁹⁶ *ibid.*

and therefore it is important to understand the economic position of the country at the time the law was introduced to enforce it in the system.

Canada introduced competition law during the time of widespread economic growth in the country. The U.S followed Canada's footsteps by introducing government regulation to scrutinize primarily the railroad industry and all other industries that were adopting the free trade economic concept. After the Second World War, competition law played a central role in uniting the European countries. The common market was made to create interdependence between states of Europe.⁹⁷ Economies of different countries were becoming more stable and needed this law to strengthen their domestic industries. By analyzing these three economies it can be inferred that competition law centralizes in an economy that is in the process of economic growth, globalization, liberalization and a free trade economic outlook in the country. Once implemented the law has evolved throughout the years to cater to changing economic needs. In the same way, UAE is in the process of economic boom and scrutiny in the form of law is necessary in the country.

11. Economic Framework of Emerging Markets

In the developing world, a failure of the economic system occurs when a decent standard of living to most of the humans in the relevant jurisdiction is not delivered.⁹⁸ This appears to be traceable in significant part when there is a presence of decentralized, unregulated markets, and especially anti-competitive markets.⁹⁹ While many motivations have driven the development of competition policy around the world and over time, the prime support for competition policy today (among economists at least) comes from our belief that competitive markets are the best guarantors of efficiency and generators of

⁹⁷ M. Horspool, M. Humphreys, "European Union Law" 6th ed. Oxford University Press 2010 at sections 14.6-14.11 [Horspool]

⁹⁸ Thomas W. Ross, "Canadian Competition Policy: Progress and Prospects" 2004, 37, no.2, The Canadian journal of Economics, pp 243 at 245

<<http://www.jstor.org.proxy2.lib.uwo.ca/stable/3696146>>

⁹⁹ Dr. Ernst-Ulrich Petersmann, "Human rights and liberalisation of markets: the social responsibility of governments to make market competition and social rights mutually consistent", Council of Europe, (October 2002), at para 4

wealth.¹⁰⁰ Thus, competition is seen as a means to an end - that end is efficiency. Under the process of competition policy adoption, developing countries have enacted new laws, growing the number of antitrust systems to over ninety.¹⁰¹

In an era of modernity, developing nations are keen towards achieving economic stability.¹⁰² As stated by Kovacic: “the modern progression toward market processes in nations once committed to comprehensive central economic planning is one of the most extraordinary events of our time”.¹⁰³ In order to reduce uncertainty, law has been used economically to facilitate prediction in the system.¹⁰⁴ In 2004, during the accession of eight countries in central and Eastern Europe to the EU, the transition countries group was combined with the developing countries group in order to generate a new emerging and developing group.¹⁰⁵ As stated by Stiglitz, economic liberalization is still seen as the strategy of choice for advancing growth, in spite of enormous uncertainty and upheaval in the transition from planning to markets.¹⁰⁶

12. What were the economic changes brought about?

One of the principal impediments of developing nations is that there is a performance gap between the implementation of the law and enforcement. To profit from liberalization, trade and investment policies should only be practiced by developing countries in relation to their needs and possibilities.¹⁰⁷

¹⁰⁰ *ibid.* at 254

¹⁰¹ William E. Kovacic, “Developing Competition Policy in Transition Economies: Milestones in 2000” 4 *International Antitrust Bull.* 40, at 41 (2000) [Kovacic]

¹⁰² Robin Broad, “Global Backlash: Citizens Initiatives For A Just World Economy” Rowman and Littlefield Publishers, Inc., 2002

¹⁰³ Kovacic *supra* note 101 at 265

¹⁰⁴ Michal S. Gal, “Imported Antitrust, Review of Competition Policy for Small Market Economies” Stanford Law School, John M. Olin Program in Law and Economics Working Paper No. 281 (2004), at 21 [Gal]

¹⁰⁵ Nielsen *supra* note 68 at 17

¹⁰⁶ Joseph E. Stiglitz, “Capital Market Liberalization and Exchange Rate Regimes: Risk without Reward, *Annals of the American Academy of Political and Social Science, Exchange Rate Regimes and Capital Flows Vol. 579* (2002) at 220

¹⁰⁷ Alejandro de la Pena, “Making the Doha Round Responsive to the Developing Countries” Cancun Trade and Development Symposium, September (2003)

The difficulty with borrowing a law is that the outcomes would not be certain, and individuals cannot foresee the changes that will be brought about, as the law is not tuned to specifics in line with the relevant economy.¹⁰⁸ This could lead to the possibility that countries are more likely to reject such a proposal, even if the change is to improve overall welfare of the country. Due to their attitude towards change, they are ill prepared for the new rule.

It can be inferred that the decision to implement competition law in many developing nations was decided before it was fully assessed.¹⁰⁹ It was mentioned in a recent document of Organization for Economic Cooperation and Development (OECD) that an inference can be made behind the motivations of adopting competition policy.¹¹⁰ The policy is implemented mainly as a result of outside agencies pressures (bilateral, multilateral, advisers, etc.) instead of internal policy reforms.¹¹¹ One of the strongest agencies to encourage competition law in developing nations is the World Trade Organization.¹¹² As stated by Martin Khor, by undergoing pressures of these agencies, “developing countries would have to establish national competition laws and policies that are inappropriate for their conditions.”¹¹³

The fundamental notion behind competition law is a very sensitive one. No one would venture to go against antimonopoly economies, or discourage economic efficiency. Consultant reports therefore all recommend competition policy, highlighting the standard arguments: the growth in economic efficiency that competition law would bring about, the concentrated sectors that are visible through structural measures, the progress in

¹⁰⁸ Gal *supra* note 104 at 22

¹⁰⁹ A.E Rodriguez & Ashok Menon, “The Limits of Competition Policy: The Shortcomings of Antitrust in Developing and Reforming Economies” 43 International Competition Law Series, Kluwer Law International BV (2010), at 35 [Rodriguez]

¹¹⁰ Rijit Sengupta & Cornelius Dube, “Competition Policy Enforcement Experiences from Developing Countries and Implications for Investment” OECD Global Forum on International Investment VII (2008) at 4 [Sengupta]

¹¹¹ *ibid.*

¹¹² Competition Policy and WTO, ActionAid, at 3 online:

<http://www.actionaid.org.uk/sites/default/files/doc_lib/48_1_competition_policy_wto.pdf>

¹¹³ Martin Khor, “The Post-Doha Agenda and the Future of the Trade System” Third World Network, The WTO, at para 12 online: <<http://twinside.org.sg/title/mkadb.htm>>

productivity of domestic industry and the benefits of lower prices that consumers will receive.¹¹⁴

Yet even the consultants overlook several issues, such as failing to avoid the real-world constraints or the transaction costs that are not visible in a hypothetical example.¹¹⁵ The magnitude of an unintended consequence is much higher than expected and in turn results in a “chilling behaviour”¹¹⁶ from the corporations.¹¹⁷ There’s an automatic assumption that competition agencies act in their best behaviour with the best interests of society at heart. As stated by A.E Rodriguez and Ashok Menon, there is a presumption that the enforcement agency would act as a “bulwark against the tyranny of monopolies.”¹¹⁸ The self-evident logic of the advocates aimed at benefiting consumers would definitely “engender massive popular support for the agency ensuring its success”.¹¹⁹

A problem with small market economies is that one cannot find great competition. This can be due to technological considerations or the size of the market, therefore domestic concentration reflects anticompetitive behaviour.¹²⁰ The inward- looking policies adversely affect the structure, conduct and performance of the national economic system. As said by Professor Gal, “competition policy in any country must be sensitive to the economic character of the particular product and geographic market in question.”¹²¹

In Eastern Africa for example, government intervention occurred in various forms. There was restrictive licensing of businesses, tight import regulations and state monopolies in state exports. There was a control on exporting commodities such as, cocoa, cotton, palm

¹¹⁴ Rodriguez, *supra* note 109 at 36

¹¹⁵ *ibid* at 28

¹¹⁶ This is a concept used by Ashok Menon and A.E. Rodriguez meaning that parties and businesses get discouraged from complying with competition law policies if the results of doing so are different to what was expected and intended. This fluctuation can occur due to real-world constraints that the law possibly does not lay out. The companies then refrain themselves from carrying out further compliance procedures.

¹¹⁷ *ibid* at 29

¹¹⁸ *ibid* at 36

¹¹⁹ *ibid* at 37

¹²⁰ *ibid*.

¹²¹ Gal *supra* note 104 at 9

oil and groundnuts.¹²² The Western culture influenced agricultural marketing boards, which invariably offered farmers less than the market prices for their crops. The administrative apparatus was such that powerful interest groups benefited from disruptive measures while impoverishing the great mass of the people.¹²³ As said by George Ayittey, describing the 1950s and 1960s African period.¹²⁴

“The activist role of the state, as an engine of economic development, was also girded by the prevailing orthodoxy and circumstances in the 1950s and 1960s. First, it was widely believed that the enormous and urgent problems of development could not be solved by private enterprise alone and that governments must abandon their traditional caretaker and regulatory functions and move into an area of active participation in the productive sector. This encouraged governments to establish state enterprises to go into actual production, ministries of agriculture into actual agriculture production, and ministries of mines into actual mineral exploitation”.¹²⁵

The role of competition law has increased worldwide in recent years and has incorporated a newfound status quo in the various jurisdictions.¹²⁶ Developing countries are introducing the law to prove that their economies are strong and capable enough of handling the law.¹²⁷ When agents of developed countries assess the economy, rarely will the host country reject the implementation of the law. And of course, the law has positive effects. Yet if not incorporated properly in line with the country’s specifics, it can render itself useless. In the next second chapter, I will analyze the different competition laws in different developing countries, particularly, India, South Africa and Brazil.

India and South Africa have had close trade and business ties with the UAE in the past

¹²² Rodriguez *supra* note 109 at 123

¹²³ Doug Bandow, “The First World’s Misbegotten Legacy to the Third World” in *The Revolution in Development Economics*, ed. James A. Dorn, Steve H. Hanke & Alan A. Walters (Washington, D.C.: Cato Institute, 1998), at 213.

¹²⁴ Rodriguez *supra* note 109 at 124

¹²⁵ George B.N. Ayittey, “Africa Unchained” New York: Macmillan, (2005) at 66.

¹²⁶ Gal *supra* note 104 at 4

¹²⁷ Pande Radja Silalahi, “Urgency of Competition Law” Japan Fair Trade Commission, online: <<http://www.jftc.go.jp/eacpf/04/pprs.pdf>>

and present making them useful for industry-specific comparisons affected by competition law. Brazil follows the same civil law legal system as the UAE and therefore further comparisons can be drawn. All three emerging markets also have had colonial pasts and now have maintained democratic setups that can contrast with the absolute monarchy in UAE. A case can then be made regarding the benefits of competition law in an emerging economy as well as the limited scope of it that exists in UAE in its present form and what future changes will provide for a greater role.

The next three chapters will focus on seven different countries and their economic levels in a two-tier comparison approach of developed and developing nations, to understand the eventual scope of competition law in the UAE.

Chapter 2

Competition Law in Developed Nations

Introduction

Countries such as the US, Canada and the UK are developed nations and have adopted their own competition policies. Canada and the United States of America have a Competition Law¹²⁸ and Anti-trust law¹²⁹ respectively, whereas the UK joined the European Union in 1972 and now follows the EU competition law.¹³⁰ Competition law is a law that regulates the market power of corporations and individuals, where a “market failure” has occurred under the competitive process.¹³¹ It prohibits corporations to enter into agreements restrictive of competition; such as a cartel-like collusion for price fixing and businesses, which merge to subvert the general competitive environment. It is a law that looks at the economic impact of sellers and customers¹³².

In the introductory chapter I discussed Canada, US and European Union as examples of the developed world. I will use this information to understand competition law in these countries, the reasons for implementing the law and the evolution of the law, how these economies have matured over the years in light of the existing law and what positive and negatives effects the law has brought about in the economy. Competition law of developed nations is the guideline for all emerging markets and will be the baseline for my thesis.¹³³

¹²⁸ Canadian Competition Act (R.S.C., 1985, c. C-34)

¹²⁹ Sherman Act, July 2, 1890, ch. 647, 26 Stat. 209, 15 U.S.C. §§ 1–7

¹³⁰ Horspool *supra* note 97 at section 14.6-14.11

¹³¹ Barry Rodger and Angus Macculloch, “Competition Law and policy in the EC and UK” 4th ed. Rutledge Cavendish, 2009, at 1 [Rodger]

¹³² *ibid.* at 2

¹³³ UNCTAD, “Competition Policy for Development: A Report on UNCTAD’s Capacity Building and Technical Assistance Programme in Competition Law and Policy” New York & Geneva 2004 at 1, online: <<http://r0.unctad.org/en/subsites/cpolicy/index.htm>>

In this modern era of globalization, competition law of developed nations is an encouraged model for emerging markets. It plays a pivotal role in a developed economy by increasing foreign investment, consumer welfare and efficiency in the country.¹³⁴ Focusing on Canada, the US and the EU, I will analyze the business culture and trends that encouraged the development of competition law, the foreign investment activities and present monopolistic industries. The frameworks of competition law along with the local and international business dynamics serve as a comparison with those in the UAE. All will be done in order to assess the role competition law can play in the U.A.E in light of the prevalent economic structure and the industries where the law is or is not applicable.

1. Foreign Investments

Analyzing foreign investments in a developed nation is necessary because these investments create the conditions of competition and eliminate the monopolistic approach in an economy. Competition law, in order to be effective, needs to regulate industries to ensure fair-play leading to consumer welfare and economic growth. Foreign investments further enhance the competitive process as well as the economic benefit. Developed economies serve as a benchmark for aspirant countries; by analyzing their economic and liberal frameworks in relation to foreign-investments it will be easier to compare the similarities and shortcomings between nations and eventually the United Arab Emirates – the case in question.

Foreign direct investment (FDI) has the ability to increase productivity in a market, introduce new technology and increase investment in the domestic economy.¹³⁵ The partnerships between local and foreign investments and hiring of local workers trained by foreign businesses enhances the productivity of domestic businesses and eventually benefits consumers through lower priced goods and services, greater choice and better access to new technology. As said by Leonardo Bartolini and Allan Drazen, those

¹³⁴ World Trade Organisation, “Working Group on the Interaction, between Trade and Competition Policy” Synthesis Paper on the Relationship of Trade and Competition Policy to Development and Economic Growth, Note by the Secretariat, September 1998 at 1

¹³⁵ Foreign Direct Investment for Development Maximising Benefits, “Minimising Costs” OECD, Organisation for Economic Co-operation and Development (2002) at 5

countries that removed the restrictions on capital-flows, encountered increases in foreign investments from private sources.¹³⁶

The governmental policies of a country are a big factor as “restrictive regimes discourage capital inflows, whereas more open regimes encourage capital inflows since investors are more willing to invest in a country that allows them to be able to withdraw their investments in the future.”¹³⁷

Juann Hung and colleagues assessed that foreign competition increases the productivity of domestic manufacturing firms due to lower priced imports.¹³⁸ Foreign competition through trade “... gives importing countries products that manufacturers in other lands and can produce more economically in exchange for items made by less costly producers in the exporting countries.”¹³⁹ Instead of restricting trade, the right response of developed nations, therefore is to “innovate more rapidly, developing ever-better and cheaper products.”¹⁴⁰ The transfer of or production of technology and selling of tradable goods has a positive effect on domestic business’ innovative activity in terms of realized process and product innovation, and this innovation occurs when there is an increased foreign investment in the country.¹⁴¹

The policies that restrict foreign business activity eventually harm the majority of economic participants and impede the development of a healthy and adaptable economy, even if they are placed to protect certain domestic interests. Competition law aims to encourage the opposite, while balancing the protection of domestic activities as well.

¹³⁶ Bartolini, Leonardo & Allan Drazen, “Capital-Account Liberalization as a Signal” (1997), *American Economic Review* 87(1) at 138-54

¹³⁷ Harischandra et al, “The Benefits of Foreign Business Activity in Canada”, Fraser Institute, Fraser alert, Nov. 2007, at 5 [Harischandra]

¹³⁸ Matt Salomon et al, “International Trade and US Productivity” *Research in International Business and Finance* 18 (2004) at 1-25.

¹³⁹ Baumol et al, “Good Capitalism, Bad Capitalism, and the Economics of Growth and Prosperity” Yale University Press New Haven & London, (2007), at 254

¹⁴⁰ *ibid.*

¹⁴¹ Irene Bertschek, “Product and Process Innovation as a Response to Increasing Imports and Foreign Direct Investment” *The Journal of Industrial Economics*, Vol. 43, No. 4 (Dec., 1995), Wiley, at pp. 341-357, online: <<http://www.jstor.org/stable/2950548>>

Canada

In relation to the definition proposed by the I.M.F above, Canada's GDP per capita in 2012 was 42,734 in U.S. dollars.¹⁴² Canada is the 10th largest country in terms of tertiary output (1,283 billion dollars)¹⁴³ with a "very high" Human Development Index.¹⁴⁴ It was ranked at 11th place in the world at 0.911 in 2012.¹⁴⁵ These statistics make a strong case for Canada to be labeled as a developed nation.

The 1989 Canada-United States Free Trade Agreement (CUFTA) and 1994 North America Free Trade Agreement (NAFTA) recognized that in order to achieve full benefits of reduced barriers to trade in goods and services, a hospitable and secure investment climate is necessary in the economy.¹⁴⁶ Yet one of the main issues for a foreign entity to carry out business in Canada is determining whether the business should be directly in Canada as a Canadian branch of its principal business or the corporation should create a separate Canadian entity for the business.¹⁴⁷ Apart from that, prospective foreign investors in Canada have to face a number of factors that challenge the idea of investing such as, Canadian customs documentation, bilingual labeling, packaging requirements, International Traffic in Arms Regulations (ITAR) and Canadian federal and provincial sales tax accounting.¹⁴⁸

Similarly, foreign direct investment and foreign competition in Canada is largely restricted by legislation and heavily controlled under the telecommunications, transport,

¹⁴²International Monetary Fund, "World Economic and Financial Surveys" World Economic Outlook Database, online:

<<http://www.imf.org/external/pubs/ft/weo/2013/01/weodata/index.aspx>>

¹⁴³ The twenty largest countries by tertiary output in 2013, according to the IMF and CIA

¹⁴⁴ "The Rise of the South: Human Progress in a Diverse World" Human Development Report 2013, United Nations Development Programme, at 16 online:

<http://hdr.undp.org/en/media/HDR2013_EN_Summary.pdf>

¹⁴⁵ *ibid.*

¹⁴⁶ "Investment Climate in Canada" U.S. Commercial Service, U.S. department of Commerce, May 2012, at 1 online:

<<http://export.gov/canada/doingbusinessincanada/investingincanada/index.asp>>

¹⁴⁷ "Doing business in Canada 2012", Finding Opportunities and Avoiding Pitfalls, McCarthy

Tétrault, (2012) at 7 online: <http://www.mccarthy.ca/pubs/doing_business_in_canada_2012.pdf>

¹⁴⁸ Business Environment in Canada, "Doing Business in Canada 2012", U.S. Commercial Service Canada, (2012) at 1

banking and financial sectors.¹⁴⁹ According to the OECD, Canada has some of the greatest restrictions on foreign business activity among industrialized countries,¹⁵⁰ (apart from Iceland, Mexico, Australia and Austria). Canada ranks 25 out of 29 countries in terms of openness to foreign business. It has been suggested by the OECD Economic Surveys Canada that in order to increase competition and efficiency, it is important that Canada lifts restrictions on foreign businesses in heavily regulated sectors such as airlines, telecommunications, and broadcasting.¹⁵¹ Only when restrictions are removed can Canada engage in a competitive growth potential.

In Canada, industries that are affected by restrictions on FDI and foreign ownership represent approximately 16.5% of total GDP for 2006. “In other words, 1 out of every 6 dollars of economic activity in Canada is sheltered from foreign businesses”.¹⁵²

Statistics Canada found that foreign firms are more productive than domestic firms as from the 1.7 percentage point increase in annual labour productivity between 1980-1990 and 1990-1999, 1.1 percentage points were contributed by foreign multinational corporations and 0.6 percentage points were from domestic corporations.¹⁵³ Also, domestic corporations result in more productivity when foreign ones account for a larger share of total employment in the industry, implying that 10 percentage point increase in the share of foreign businesses is associated with a 0.3 to 0.5 percentage point increase in the annual labour productivity growth of domestic ones.¹⁵⁴ It was affirmed by Frances Van Loo that FDI resulted in positive effects on Canadian investment “\$1 increase in FDI resulted in a \$1.43 increase in total Canadian investment.”¹⁵⁵ This additional increase in investment, above the initial one, occurs when economic activity is increased by FDI

¹⁴⁹ Harischandra *supra* note 137 at 4

¹⁵⁰ Koyama, Takeshi & Stephen Golub “OECD’s FDI Regulatory Restrictiveness Index: Revision and Extension to More Economies” Working Papers No. 525. OECD Economics Department. Paris: OECD (2006), at 7

¹⁵¹ *ibid* at pg. 14

¹⁵² Harischandra, *supra* note 137 at 1

¹⁵³ Baldwin, John R. & Wulong Gu, “Global Links: Multinationals, Foreign Ownership and Productivity Growth in Canadian Manufacturing” The Canadian Economy in Transition Series Research Paper, Ottawa: Statistics Canada, (2005) at 26

¹⁵⁴ *ibid* at 29

¹⁵⁵ Frances Van Loo, “The Effect of Foreign Direct Investment on Investment in Canada” The Review of Economics and Statistics, (1977) 59(4) at 474-481 [Van Loo]

stipulating further investments by domestic firms.¹⁵⁶

When analyzing foreign and Canadian corporations using manufacturing data of 1986, Steven Globerman, John Ries, and Ilan Vertinsky compared the economic performance (productivity and wages).¹⁵⁷ They gathered that worker productivity was substantially higher in foreign businesses and they tended to pay higher wages to their employees, in relation to their higher productivity.¹⁵⁸ They emphasized that foreign investment improves efficiency and income levels in Canada.¹⁵⁹

It was ascertained by Sourafel Girma and his colleagues that labour productivity in foreign businesses in Canada was almost 10 percent higher than in domestic businesses.¹⁶⁰ Overall firm productivity of foreign businesses was higher by 5 percent as well. Because of this productivity gap, foreign businesses rather than domestic ones, pay 5 percent more in wages.¹⁶¹

The Banking industry is highly regulated in Canada. As said in the Porter Commission Report, “a high degree of Canadian ownership of financial institutions is in itself healthy and desirable, and that the balance of advantage is against foreign control of Canadian banks.”¹⁶² The industry is still dominated by domestic banks and trust corporations, accounting for 80.0% of the real value of services in 2004.¹⁶³ Yet foreign banks in Canada increase competitiveness of a country’s banking system. Greater service in the financial sector means an increase in the efficiency of service provision, the quality of

¹⁵⁶ *ibid.*

¹⁵⁷ Steven Globerman, John C. Ries & Ilan Vertinsky, “The Economic Performance of Foreign Affiliates in Canada” (1994) *Canadian Journal of Economics* 27 at 143-56.

¹⁵⁸ *ibid* at 144

¹⁵⁹ *ibid*

¹⁶⁰ Girma, Sourafel & Katherine Wakelin, “Regional Underdevelopment: Is FDI the Solution?” A Semi parametric Analysis, CEPR Discussion Paper No. 2995. London: Centre for Economic Policy Research (2001) at 21

¹⁶¹ *ibid* at 22

¹⁶² B. J. Arnold, “Restrictions on Foreign Investment in Canadian Financial Institutions” (1970), *The University of Toronto Law Journal*, University of Toronto press, Vol.20 No. 2 at PP. 196-235, online: <<http://www.jstor.org.proxy2.lib.uwo.ca/stable/824866>>

¹⁶³ Christine Hinchley, “Analysis in Brief, Foreign Banks in the Canadian Market”, Industrial Organization and Finance Division, Statistics Canada, Catalogue no. 11-621-MIE, No. 041 at 8, online: <<http://publications.gc.ca/collections/Collection/Statcan/11-621-M/11-621-MIE2006041.pdf?>>

financial services and the degree of innovation in the sector.¹⁶⁴ Greater foreign bank presence and limited restrictions on the activities of banks have increased the competitiveness of the banking sector.¹⁶⁵

The chart below (Table 1) shows the sectors in Canada that limit foreign investment and Foreign Direct Investment. Compiled by North American Industry Classification System (NAICS) in 2006 and calculations carried out under Statistics Canada, it can be observed that the metal ore and mining sector, air transportation sector, telecommunications sector and finance sector are all restricted from both types of investments.¹⁶⁶

Table 1: Industries Affected by Restrictions on Foreign Direct Investment or Competition, by the North American Industry Classification System [NAICS], 2006 (millions of dollars, in 1997 \$)

NAICS code	Industry	Limit on foreign ownership?	Limit on FDI?	GDP (2006), in 1997\$	% of total GDP
21	Mining and oil and gas extraction		Yes	40,173	3.7%
21229 ¹	Other metal ore mining	Yes	Yes	680	0.1%
2211	Electric power generation, transmission and distribution			22,867	2.1%
481	Air transportation	Yes	Yes	4,716	0.4%
486	Pipeline transportation		Yes	5,093	0.5%
511 ²	Publishing industries		Yes	9,020	0.8%
512 ³	Motion picture and sound recording industries		Yes	2,051	0.2%
5131	Radio and television broadcasting		Yes	2,694	0.2%
5132	Pay TV, specialty TV, and program distribution		Yes	2,287	0.2%
5133	Telecommunications	Yes	Yes	26,650	2.4%
52 ⁴	Finance and insurance	Yes	Yes	66,551	6.0%
	Total, all industries			1,100,363	16.5%

Notes

¹Includes uranium-radium-vanadium ore mining (NAICS 212291).

²Includes newspapers, periodical, book, and directory publishers (NAICS 5111), and software publishers (NAICS 5112).

³Includes motion picture and video production, distribution, exhibition, and post production services (under NAICS 5121), and record production and distribution, music publishers, and sound recording studios (NAICS 5122).

⁴Although only financial services (banks and insurance companies) are affected by restrictions, this is a rough estimate of their impact on GDP since NAICS 52 also includes monetary authorities—central banks (NAICS 521). However, since the central bank is not subject to any restrictions, its impact is negligible in this calculation.

Source: Statistics Canada (2007); calculations by the authors.

¹⁶⁴ Claessens et al, “What Drives Bank Competition? Some International Evidence” (2003) *Journal of Money Credit and Banking*, 36(3) at 563

¹⁶⁵ *ibid* at 565

¹⁶⁶ Harischandra *supra* note 137 at 3

In relation to limiting foreign investment in the telecommunications sector, a bill (C-38) was recently passed on April 2012 to remove restrictions of foreign investment by the parliament of Canada. Before the amendments took place, non-Canadians were barred from holding more than 20% of the voting shares of a Canadian telecommunications carrier and 33.3% of voting shares of the carrier's parent corporation. In 2010, the revenue of the telecommunications market was CAD\$41.7 billion.¹⁶⁷ After the passing of the bill, non-Canadian corporations are now allowed to start up or obtain telecommunication carriers that hold less than a 10% share of total Canadian telecommunications services revenue, determined by Canadian Radio-television and Telecommunications Commission (CRTC), prospectively increasing overall revenues in the sector.¹⁶⁸ The competition law of Canada applies to foreign investment in every sector in Canada. This is due to the stated purpose of the ICA: to promote foreign investment in Canada, while ensuring that foreign investment contributes to economic growth and employment opportunities in Canada.¹⁶⁹

The Competition Act of Canada, a federal statute, applies to all sectors of the Canadian economy.¹⁷⁰ For example, the pharmaceutical industry in Canada is a competitive industry. Generic manufacturers of pharmaceuticals take several factors of competition into consideration such as the timing of market entry, patent challenges, pricing, and the length of the product line.¹⁷¹ Globalization has changed the dynamics of the pharmaceutical industry, as well. In the 1990's, there were 2 dominant firms (Apotex and Novopharm) in the domestic market accounting for 72.8% of the market. In 2006,

¹⁶⁷ Communications Monitoring Report, Canadian Radio-television and Telecommunications Commission, Catalogue No. BC9-9/2011E-PDF July 2011, at 1, online: <<http://www.crtc.gc.ca/eng/publications/reports/policymonitoring/2011/cmr2011.pdf>>

¹⁶⁸ Bram D. Abramson et al, "Canadian Government Relaxes Telecom Foreign Ownership Restrictions and Sets Rules for 700 MHz Spectrum Auction" May 4, 2012, McCarthy Tétrault, online: <http://www.mccarthy.ca/article_detail.aspx?id=5862>

¹⁶⁹ Lawson A W Hunter & Ashley M Weber, "A Guide to Navigating Canada's Foreign Ownership Laws for New Investors" Antitrust and National Security, Competition Law International, January 2012, at 37, online:

<<http://www.stikeman.com/2011/images/core/ForeignOwnership.pdf>>

¹⁷⁰ Canadian Generic Drug Sector Study, Competition Bureau Canada, October 2007, at 7, online: <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competition%20Bureau%20Generic%20Drug%20Sector%20Study.pdf/\\$FILE/Competition%20Bureau%20Generic%20Drug%20Sector%20Study.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competition%20Bureau%20Generic%20Drug%20Sector%20Study.pdf/$FILE/Competition%20Bureau%20Generic%20Drug%20Sector%20Study.pdf)>

¹⁷¹ *ibid* at 15

although these two companies were still considered large, the top four businesses still accounted for less than 72%, meaning competition had drastically increased.¹⁷² “Competitive markets are responsible for delivering many of the products and services on which our health system relies,” said by the competition bureau of Canada.¹⁷³ In the UAE, the pharmaceutical sector is exempted under competition law.¹⁷⁴ By analyzing the benefits of the competitive healthcare environment of Canada, a framework for the potential scope of competition law of the UAE in the equivalent industries may be assessed.

The Canadian economy has been fairly stable throughout the years. It was the first country ever to introduce competition law as a statute.¹⁷⁵ In 1889 when competition law was pioneered in Canada, the country was on an economic growth spurt. The main objective of the time period was to regulate the economic expansion. At present being a highly developed economy, Canada oddly remains an example that, encourages competition (regulated thus by its competition law), but discourages foreign investments in key sectors; therefore in essence, true competition along with consumer choice and industrial growth in these sectors cannot be evaluated or realized. This is paralleled and further elaborated when analyzing the United Arab Emirates as there are key industries that are government-controlled and discourage foreign investment. Below, I will discuss in further detail, the economic situation of the Canada at the time the law was incorporated in the legal system.

The U.S

“In a global economy, the United States faces increasing competition for the jobs and industries of the future. Taking steps to ensure that we remain the destination of choice for investors around the world will help us win that competition and bring prosperity to our people. Consistent with our national security and while ensuring a level playing field

¹⁷² *ibid* at 20

¹⁷³ *ibid* at 3

¹⁷⁴ Federal Law no. 4 of 2012, Article 4(1)

¹⁷⁵ Shyam *supra* note 80 at 11

for American investors, we will do just that.”- President Barack Obama.¹⁷⁶ This quote portrays the encouraging mindset of the domestic population towards the benefits of foreign investment and competition in the country.

The U.S is a highly developed nation according to the criteria of the IMF. GDP per capita of the U.S in 2012 was 49,922 U.S dollars.¹⁷⁷ The U.S tertiary sector is ranked number 1 in the world with a figure of 12,941 billion dollars.¹⁷⁸ The HDI of the country was also in the lead in 2012 with a value of 0.937. It is considered as “very high human development”.¹⁷⁹

The business environment in the US is much different to that of Canada. As the US poses little restrictions and low barriers to foreign direct investment and follows an “open economy” concept.¹⁸⁰ US-based agents or distributors can be assigned to market the goods and services as well. Foreign businesses can either conduct business activity independently or in a “joint venture” with a US firm. Joint ventures can either be formed by two businesses each contributing capital to a newly created corporation or the foreign and the US businesses enter into a general partnership agreement and operate the joint venture in a partnership.¹⁸¹

When starting a business with a branch office, there are no legal formalities that one needs to go through other than qualifying to do business. However, the liabilities created by the activities of the branch office will be shared amongst the assets of the parent foreign corporation. If one chooses to operate a subsidiary corporation under the US state

¹⁷⁶ Eliza, “White House Touts Growing Foreign Direct Investment In The U.S” abc news, Jun 20, 2011, [Eliza] online: <<http://abcnews.go.com/blogs/politics/2011/06/white-house-touts-growing-foreign-direct-investment-in-the-us/>>

¹⁷⁷ “World Economic and Financial Surveys”, International Monetary Fund, World Economic Outlook Database, online:

<<http://www.imf.org/external/pubs/ft/weo/2013/01/weodata/index.aspx>>

¹⁷⁸ The twenty largest countries by tertiary output in 2013, according to the IMF and CIA

¹⁷⁹ Human Development Report 2013, The Rise of the South: Human Progress in a Diverse World, United Nations Development Programme, at 16 online:

<http://hdr.undp.org/en/media/HDR2013_EN_Summary.pdf>

¹⁸⁰ Eliza, *supra* note 176

¹⁸¹ Michael J. Trevelline, “Establishing a Foreign business presence” Law office of Michael J. Trevelline, online: <<http://www.mjtlegal.com/aop/dc-international-trade-law/establishing-foreign-business/>>

laws, only the assets of the US subsidiary are placed at risk. A corporation's officers, directors, and shareholders are not liable for the corporation's debt. The use of a separate subsidiary will aid the clarification of the separate US and foreign country taxation.¹⁸²

In 2010, the U.S. FDI totalled \$194 billion USD and 84% of FDI in the U.S came through eight countries: Switzerland, the United Kingdom, Japan, France, Germany, Luxembourg, the Netherlands, and Canada.¹⁸³

Investors are motivated to invest in countries where the returns are higher than at home. In the 1980's, the annual appreciation of the U.S. stock market's annual figures (over 15 percent not counting dividends); exceeded only among the major Western industrial countries by the Japanese stock market's rise of nearly 20 percent.¹⁸⁴ In comparison, the stock market increased by 5 percent in Canada, 11 percent in France, 12 percent in Germany, 14 percent in Italy, and 12 percent in the United Kingdom.¹⁸⁵

The cumulative amount of foreign direct investment in the US on a historical cost basis rose from \$2.26 trillion USD in 2010 to about \$2.55 trillion USD in 2011.¹⁸⁶ In 2011, the United Kingdom was the largest foreign direct investor in the U.S. economy with over \$441 billion invested, the second-largest foreign direct investor was Japan with about \$289 billion in investments. Following the Japanese were the Dutch (\$240 billion USD), the Germans (\$215 billion), the Swiss (\$212 billion USD), the Canadians (\$211 billion USD), the French (\$199 billion USD) and Luxembourg (\$190 billion USD).¹⁸⁷

India is gradually becoming a growing investor in the U.S. The Indian investment contributes to the growth and vibrancy of the American economy and employment in the

¹⁸² *ibid.*

¹⁸³ David Payne & Fenwick Yu, "Foreign Direct Investment in the United States" U.S. Department of Commerce, Economics and Statistics Administration, June 13, 2011, at 1 online: <<http://www.esa.doc.gov/sites/default/files/reports/documents/fdiesaisssuebriefno2061411final.pdf>>

¹⁸⁴ Mack Ott, "Foreign Investment in the United States" Library of Economics and Liberty, [Ott] online: <<http://www.econlib.org/library/Enc1/ForeignInvestmentintheUnitedStates.html>>

¹⁸⁵ *ibid.*

¹⁸⁶ Michael V. Seitzinger, "Foreign investment in the United States: Major Federal statutory Restrictions" Congressional Research Service January 26, 2009, at 1, online: <http://www.au.af.mil/au/awc/awcgate/crs/r133103.pdf> [Seitzinger]

¹⁸⁷ *ibid* at 3

country. Investment capital throughout the last 10 years grew at a rate of 53% annually, reaching an estimated \$4.4 billion USD in 2009.¹⁸⁸ Similarly, all emerging markets are either on business terms or treaty terms with the US, and will be looked at in more detail in the next chapter.

Examples of American-Indian ties include the following.

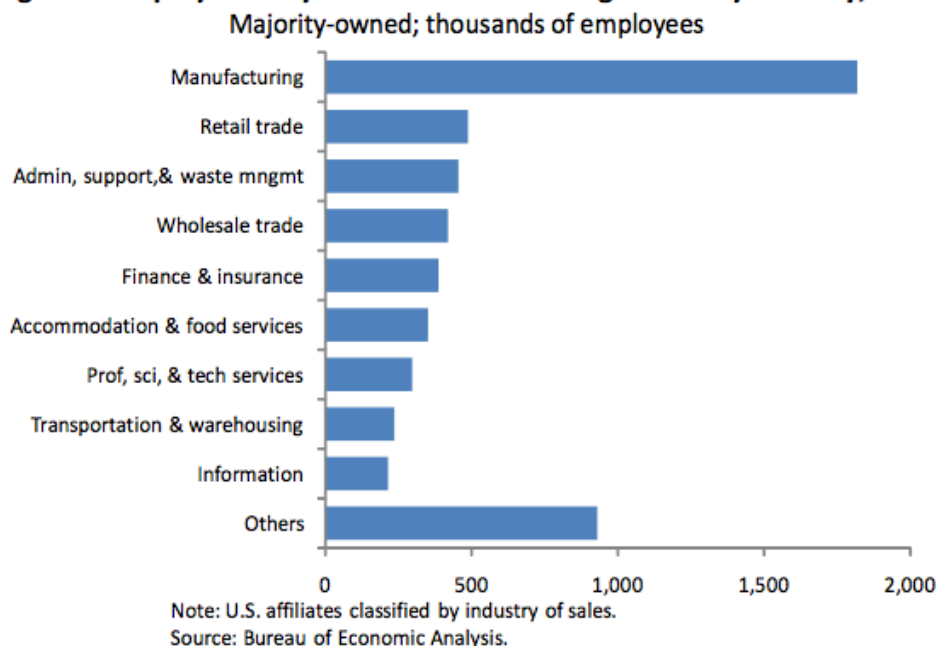
- The Essar Group invested over \$1.6 billion USD in the declining Minnesota Steel Industries and now employs over 7,200 people in almost a dozen states.
- The Tata Group has invested more than \$3 billion USD in the U.S. and now employs nearly 19,000 throughout the country.
- Jubilant Organosys Total Capital invested \$246 million USD in the U.S. and now employs nearly 900 employees throughout the country.
- Wockhardt, a pharmaceutical company, acquired Morton Grove for \$37 million USD. The deal preserved the jobs of all 200 original Morton Grove employees.
- Crompton Greaves, an subsidiary of the Indian conglomerate Avantha Group, has invested and partnered on a \$20 million USD to launch a Center for Intelligent Power with the University of Albany. The deal will create 100 high-tech jobs in upstate New York.

Being a magnet for foreign investment, the U.S has managed to expand its economy and open its doors to international investors, offering ease of business with fewer governmental and bureaucratic roadblocks. A burgeoning market Competition law (introduced in the country in 1890 during a period of economic growth and development) has been expanded as a guideline for regulating businesses and foreign investments. Yet in spite of it, there exist dominant monopolies in the US today, such as Google (accused

¹⁸⁸ “U.S.-India Economic and Trade Relationship: Indian Investment in the U.S” Whitehouse Government Documents, at 1, online:
http://www.whitehouse.gov/sites/default/files/rss_viewer/fact_sheet_indian_investment_us.pdf

of abusing its dominant position) and Microsoft¹⁸⁹ (the European Commission complained that Microsoft was not supplying essential interoperability information, abusing its dominant position) and U.S. steel (accused of being a monopoly in 1920, yet it was held that corporation did not restrain competition).¹⁹⁰

Figure 3: Employment by U.S. Affiliates of Foreign Firms by Industry, 2008



The chart above, compiled by the Bureau of Economic Analysis, portrays the different sectors in the US and their employment impact in the country. The manufacturing sector has the highest employment by US affiliates of foreign corporations in 2008. The productivity of US manufacturing businesses was increased through transfer of technology under a FDI and approximately 14 percent of the productivity growth in the

¹⁸⁹ Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 124 S.Ct. 2466, U.S., (2004).

¹⁹⁰ United States v. United States Steel Corp. - 251 U.S. 417 (1920)

US manufacturing corporations between 1987 and 1996 could be attributed to such technology transfers.¹⁹¹

By signing the US-Canada Open Skies Agreement in 1995 consumers gained benefits as just a year after the agreement was signed, 59 routes were created to allow greater access for Canadian passengers to the US air traffic hubs and out-bound international flights.¹⁹² The share of total travelers choosing Canadian carriers increased as well- from 40 percent in 1993 to 44 percent in 1997.¹⁹³

The government encourages foreign investment because it increases capital, equipment, infrastructure, copyrights, trademarks and goodwill in the host country.¹⁹⁴ Labour productivity, income, employment and GDP are increased when the quantity and quality is raised in the country due to the foreign competition. It is a common misconception to believe that foreigners will obtain control of the US economy and use the control to their advantage.¹⁹⁵ The U.S economy has fluctuated throughout the years yet has still managed to be one of the strongest in the world.

Over the last 25 years, the US has adopted a policy of deregulation. Regulation has been eliminated in most of the previously regulated sectors in order to introduce competition to the greatest extent possible.¹⁹⁶ An economic report of the President of the US estimated that deregulation within the three industries in the US: airlines, motor carriers, and railroads, has in return, increased U.S. GDP by about ½ percent each year.¹⁹⁷ The US Supreme Court has described anti-trust laws as a “comprehensive charter of economic

¹⁹¹ Wolfgang Keller & Stephen Yeaple, “International Trade, and Productivity Growth: Firm-Level Evidence from the United States” Multinational Enterprises, NBER Working Paper No. 9504. (2003). Cambridge, MA: National Bureau of Economic Research at 1

¹⁹² Sangita Dubey & Francois Gendron, “The US-Canada Open Skies Agreement: Three Years Later” Travel Log (1999). 18(3) at 1-9.

¹⁹³ Ibid at 6

¹⁹⁴ Ott, *supra* note 184

¹⁹⁵ *ibid.*

¹⁹⁶ Stuart M. Chemtob, “The Role of Competition Agencies in Regulated Sectors” department of Justice May 2007, at 2, [Chemtob] online:

<<http://www.justice.gov/atr/public/speeches/225219.pdf>>

¹⁹⁷ “Economic Report of the President” Transmitted to the Congress February 2002, United States Government Printing Office Washington: 2002 (Feb. 2002) at p.63, online:

<http://www.presidency.ucsb.edu/economic_reports/2002.pdf>

liberty”.¹⁹⁸ Regulated sectors in the US, by contrast, are a bigger target for the antitrust enforcement agencies to investigate and take enforcement action against any anticompetitive conduct in that sector.¹⁹⁹ For example the telecommunications sector of the US needs to abide by the *Sherman Act* 1890²⁰⁰ and the *Telecommunications Act* of 1996.²⁰¹ A provision of the *Telecommunications Act* says that the act must not “modify, impair, or supersede the applicability of any of the antitrust laws.”²⁰² In 2010, the U.S. Telecommunications Industry created \$985 billion USD in revenues.²⁰³

Greater foreign investment can also create unnatural giants and dominance in the markets if not properly regulated by anti-monopoly laws.²⁰⁴ The US, with its long enforced competition-law coupled with an aggressive policy for broader foreign investment has become an engine for innovation, growth and end-consumer advantage. Competition law in line with the US will be discussed further in the next subsection.

The European Union

As calculated above, the IMF definition of developed nations can be applied to the European Union to determine whether the sum of European economies can be labeled as a collective economically developed society. The combined GDP per capita of the EU in

¹⁹⁸ *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4-5 (1958).

¹⁹⁹ Chemtob *supra* note 196 at 4

²⁰⁰ Sherman Act ch. 647, 26 Stat. 209, 15 U.S.C. § 1–7

²⁰¹ 47 U.S.C. §152

²⁰² *ibid.*

²⁰³ Pablo Prieto-Muñoz, “Wireless Telecommunication Industry Overview”, Columbia Graduate Consulting Club, February 13, 2012, COLUMBIA UNIVERSITY, at 5, online: <http://www.columbia.edu/cu/consultingclub/Resources/Telecommunications_Pablo_PrietoMunoz.pdf>

²⁰⁴ Rui Moura & Rosa Forte, “The Effects of Foreign Direct Investment on the Host Country Economic Growth” Growth - Theory and Empirical Evidence, n. 390, Nov. 2010 n. 390, Nov. 2010 and FEP working papers Research Work in FEP working papers Progress at 9, online: <http://www.fep.up.pt/investigacao/workingpapers/10.11.02_wp390.pdf>

2012 was \$32, 518 USD.²⁰⁵ The collective tertiary industry of the EU amounted to \$12, 662 billion USD, second after the U.S industry.²⁰⁶ The HDI of the top ten European countries consist of seven countries that are part of the EU; only Switzerland, Iceland and Norway are not. These countries come under the “very high human development” heading.²⁰⁷ According to the definition, those countries that are assigned the “very high” status are considered as developed nations.

When starting a business in the EU, much like all other countries, one needs to deal with carrying out construction permits procedures, getting electricity, registering property, obtaining credit, protecting investors, paying taxes, enforcing contracts and trading across border requirements.²⁰⁸ In terms of setting up small and medium enterprises, each country has its own conditions and grants that it provides, apart from the EU regulations.²⁰⁹ Under Article 34-36 TFEU, the EU has removed the obstacles of imports and exports and businessmen are now free to transport and sell goods throughout all member states.²¹⁰ Since different countries have different national technical rules, the EU has adopted harmonizing measures for products that have high-risks- e.g. pharmaceuticals, vehicles, toys, chemicals, electrical and mechanical equipment and medical devices.²¹¹ EU Directives of committees define the requirements that need to be

²⁰⁵ “World Economic and Financial Surveys” International Monetary Fund World Economic Outlook Database, online:

<<http://www.imf.org/external/pubs/ft/weo/2013/01/weodata/index.aspx>>

²⁰⁶ The twenty largest countries by tertiary output in 2013, according to the IMF and CIA

²⁰⁷ “The Rise of the South: Human Progress in a Diverse World” Human Development Report 2013, United Nations Development Programme at 16, online:

<http://hdr.undp.org/en/media/HDR2013_EN_Summary.pdf>

²⁰⁸ “Foreign Direct Investment in the European Union Tokyo”, (15 July 2010), EU-Japan Centre for Industrial Cooperation, at 4-77 [EU-Japan] online: <http://www.eu-japan.eu/sites/eu-japan.eu/files/fdi_eu_guide.pdf>

²⁰⁹ *ibid* at 9-71

²¹⁰ Treaty of the Functioning of Europe, Official Journal of the European Union, at 83/61 online:

<<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF>>

²¹¹ European standards Harmonized standards, online:

<http://ec.europa.eu/enterprise/policies/european-standards/harmonised-standards/index_en.htm>

met for all manufacturers as technical specifications.²¹² The harmonized standards of all sectors²¹³ are then provided in the Official Journal of the European Union (OJEU).²¹⁴

In the EU, FDI is considered as a key to promoting development and economic social growth as it facilitates growth, promotes technical innovation, accelerates enterprise restructuring and provides capital account relief.²¹⁵ International rules on FDI improve business climate by increasing legal certainty for investors and by reducing the perceived risk to invest. There is a need for recognition of interdependence between trade and FDI.²¹⁶ This occurred simultaneously with the process of transition from socialism to capitalism and the amalgamation of the Central and Eastern European countries (CEEC) into the world economy through trade and capital flows.²¹⁷

The levels of FDI increase in the prospective member states when they announce admission to the EU as the accession of EU offers opportunities relocating production to several EU countries.²¹⁸ Potential investors perceive reduced risks from member states since meeting the requirements for admission involves external validation of quality of economic management and institutional development. Also, the EU promises implicit guarantees with respect to future macroeconomic stability through membership.²¹⁹

After the recent financial and economic crisis of 2009, recovery in FDI flows in the EU began to show in 2011. For the first time in four years, outward flows increased by 154%.

²¹² European Committee for Standardization (CEN), the European Committee for Electrotechnical Standardization (CENELEC) and the European Telecommunications Standards Institute (ETSI) set out the standards

²¹³ Chemicals, Conformity assessment and management systems, construction, Consumers and workers protection, Energy efficiency, Electric and electronic engineering, Healthcare engineering, Measuring technology, Mechanical engineering and means of transport, Services, sustainability

²¹⁴ Official Journal of European Community, <http://www.ojec.com>

²¹⁵ European Bank for Reconstruction and Development (EBRD), Transition Report. EBRD, London 2002, at 22

²¹⁶ EU-Japan *supra* note 208 at 6

²¹⁷ Francesca Di Mauro, "The effects of economic integration on FDI flows: an empirical analysis and comparison with trade" Center for European Policy Studies, Brussels, (1999) Document paper No. at 134.

²¹⁸ Alan A. Bevana & Saul Estrin "The determinants of foreign direct investment into European transition economies" 24 August 2004, journal of Comparative Economics 32 (2004) at 779

²¹⁹ *ibid* at 779

Inward flows also doubled by 117% from the previous year.²²⁰ By the end of 2010, the EU had the biggest share of 34% of inward stocks in North America and the US accounted for 28% of the total inward stocks.²²¹

In terms of air transport, the European Commission estimated that by removing restrictions on competition in the transatlantic airline industry, significant benefits were noticed.²²² Under the EU-US aviation, all commercial restrictions were removed and was estimated that passenger traffic would increase annually by 9 to 24 percent in total transatlantic travel and by 5 to 14 percent in intra-EU travel.²²³ The increase in competition and lower fares would benefit consumers as well- total consumer benefit ranging from €5.1 billion to €5.2 billion annually.²²⁴ Even the industries directly related to the airline industry, such as suppliers, would experience increased output between €3.6 billion to €8.1 billion a year.

The European Union implemented competition laws in 1957 in order to further promote the basic principal of unity of the union. A law to control business activities among the states and direct the collective economy towards prosperity was necessary under a growing community. The assumption was that enhancing competition in the union, both foreign and domestic, would bring about communal prosperity and harmonization. The economy in relation to competition law is elaborated in the next heading.

²²⁰Foreign Direct Investment Statistics, Eurostat, European Commission, online: <http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Foreign_direct_investment_statistics>

²²¹ *ibid.*

²²² Reitzes, et al. "The Economic Impact of a EU-US Open Aviation Area" Report Prepared for the European Commission, (2002) at 5-16

²²³ *ibid* at 6-1

²²⁴ *ibid* at viiii

	Outward	Inward
Total	3662.1	2658.1
Agriculture, hunting and fishing	3.0	2.2
Mining and quarrying	233.6	59.2
Manufacturing	821.5	537.5
Food products, beverages and tobacco products	113.8	71.8
Textiles and wood activities	30.4	16.3
Petroleum, chemical, pharmaceutical products	319.8	216.2
Metal and machinery products	224.6	175.9
Vehicles and other transport equipment	58.0	18.4
Electricity, gas, steam and air conditioning	56.0	17.1
Water supply; sewerage, waste management	4.4	2.5
Construction	16.7	8.9
Services	2087.1	1672.1
Trade; repairs of motor vehicles and motorcycles	133.7	123.4
Transportation and storage	49.1	30.9
Accommodation and food service activities	22.2	13.1
Information and communication	108.7	76.7
Financial and insurance activities	1387.8	1054.8
Real estate activities	40.0	43.9
Professional, scientific and technical activities	295.4	243.0
Other services	50.2	86.3
Activities not allocated	409.1	329.0
Other	30.6	29.6

Source: Eurostat (online data code: bop_fdi_pos_r2)

The chart above, collated by the European Commission (Eurostat), shows the different sectors under EU control and its respective inward and outward flow of foreign investment. The sector with the highest inward and outward flow of foreign investment is the services sector.²²⁵

The European Union aims to encourage the competitiveness of the European economy in an increasingly competitive world. By strengthening economic and social cohesion between the Member States the EU reduces certain inequalities through its policies.²²⁶ A report prepared for the Commission in 1994 said that postal operators in Member States had not made any significant progress since 1990 in the standardization of dimensions and weights, where they had not been subject to competition.²²⁷ It had been illustrated

²²⁵ Foreign Direct Investment Statistics, Eurostat, European Commission, online: <http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Foreign_direct_investment_statistics>

²²⁶ EU Competition Law Rules Applicable to Antitrust Enforcement, Volume 2: Sector specific rules, Competition Handbooks, Brussels 2011, at 89, online: <http://ec.europa.eu/competition/antitrust/legislation/handbook_vol_2.pdf>

²²⁷ *ibid* at 97

that where member states were granted special or exclusive rights, postal operators let the quality of the service decline. They omitted to take necessary steps to improve service quality.²²⁸ Therefore universal, community-wide postal service was implemented to ensure the provision of high-quality service to all at prices everyone can afford. In 1997, the European Parliament and the Council introduced common rules for developing the postal sector and opening up the markets in a controlled way under directive, 97/67/EC.²²⁹ In 2007, the overall turnover was EUR 60 billion, amounting to 0.5% of the total GDP of the EU.²³⁰

Canada, the US and the EU are all developed and stable economies. By understanding the basic objectives of the nations' economic enforcements, and the implementation of foreign investment, competition laws are used as a regulatory mechanism to create a balanced economic framework. That framework is geared towards a rapidly changing society with objectives of regulating economic growth in the country. In the next section, the focus will switch towards a deeper insight on competition law in relation to the developed nations discussed above.

2. Evolution of the law over the years

Competition law in general has shifted towards a more economic layout throughout the years. The central goal is directed towards "consumer welfare"; a more neoclassical economic concept rather than cases.²³¹ "The assumption embodied in the "more economic approach movement" is, however, that neoclassical economics itself provides the norms and goals for European competition law and that it also furnishes the principal methods for applying those norms."²³² Economic analysis used for predictions has been a main function in the law. Involving economics within the law as a primary aspect was a more

²²⁸ *ibid.*

²²⁹ *ibid* at 90

²³⁰ Postal Statistics, European Commission, Eurostat, November 2009, online: <http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Postal_statistics>

²³¹ Robert Bork, "The Antitrust Paradox: A Policy at war with itself" New York: Basic books (1978), at 81-89

²³² David J. Gerber, *supra* note 87 at 142

US based approach that was gradually adopted by the EU during the 1980s. Economists and American lawyers such as Barry Hawk openly criticized the European system, saying that a form-based approach, meaning focusing primarily on a provision to vertical agreements was inappropriate because the effects of such agreements depended on specific circumstances. What was necessary, they argued, was an effects based approach in which there were no, or few, legal conclusions to be drawn from the form of an agreement. Legal conclusions could only be drawn when the factual circumstances had been analyzed from an economist's perspective.²³³ Other fundamental aspects that the EU has taken from the US include the prominence of private enforcement, the increase of fines on cartels and antitrust leniency programs for cartel “whistleblowers”.²³⁴

David J. Gerber believes that the goals of competition law should be examined more narrowly, as they are too vague and unpredictable. He stresses that the law should act as a guideline for corporations, rather than being over enforced due to its ambiguity.²³⁵

There are still numerous monopolies in the world that are government-controlled, acceptable to the public, or too large to be questioned. As mentioned above, countries have their own thresholds of restrictions on foreign influence and activity and each government sets its own barriers. There are various sectors in different developed countries that still encourage their monopolistic frameworks.

Examples of major monopolies include:

- Canada Post²³⁶
- OPEC²³⁷
- Monsanto
- Luxottica²³⁸

²³³ *ibid.*

²³⁴ Rodger *supra* note 131 at 2

²³⁵ David J. Gerber, *supra* note 87 at 143

²³⁶ Douglas K. Adie, The mail monopoly analysing Canadian postal service, The Economics of the Service sector Canada, Fraser Institute (1990) at 1

²³⁷ R. James Woolsey, “Destroying Oil's Monopoly and OPEC's Cartel” Geopolitics of Energy march 2012, United States Energy Security Council, online: <<http://www.usesc.org/JRWGeopoliticsofEnergy0312.pdf>>

- Quanta²³⁹
- Wal-Mart²⁴⁰

Pertinent to the evolution of the law there have been particular court battles, in which huge monopolies have broken up and dominance has been mitigated. Below I mention specific cases that have become a highlight for competition and anti-trust legislation and enforcement.

Commissioner of Competition v. Air Canada²⁴¹

The commission of competition filed a notice of application against Air Canada alleging abuse of a dominant position, on March 5, 2001.²⁴² This was pursuant to s. 79 of the Competition Act²⁴³ and the Regulations Respecting Anti-competitive act of Persons Operating a Domestic Service.²⁴⁴ It said that between April 2000 and March 2001, the entry of WestJet Airlines Ltd. ("WestJet") and CanJet Airlines ("CanJet") on seven central and Atlantic Canada routes was reciprocated by Air Canada through an increase of its capacity and decrease of fares.²⁴⁵ This did not cover the cost of operating the flights on such affected routes and so a violation of paragraphs 1(a) and 1(b) of the Canadian Aviation Regulations was present.²⁴⁶ Paragraphs 1(a) and 1(b) of the airline regulations

²³⁸ Dean Crutchfield, "Luxottica Sees Itself As King, Raising Questions About Brand Authenticity" Forbes, online: <<http://www.forbes.com/sites/deancrutchfield/2012/11/27/luxottica-sees-itself-as-king-raising-questions-about-brand-authenticity/>>

²³⁹ Quanta Computer, Inc. v. LG Electronics, Inc., 553 U.S. 617(2008)

²⁴⁰ Brian P. Simpson, "Two Theories of Monopoly and Competition: Implications and Applications" National University, Journal of Applied Business and Economics vol.11 (2), online: <<http://www.na-businesspress.com/jabe/jabe112/simpsonweb.pdf>>

²⁴¹ Commissioner of Competition v. Air Canada, 2003 CACT 13 [Air Canada]

²⁴² *ibid.*

²⁴³ Competition Act, R.S.C. 1985, c. C-34

²⁴⁴ The Regulations Respecting Anti-competitive Acts of Persons Operating a Domestic Service, SOR/2000-324

²⁴⁵ Air Canada *supra* note 241

²⁴⁶ Canadian Aviation Regulations, [Aviation Regulations], online: <<http://www.tc.gc.ca/eng/civilaviation/regserv/cars/menu.htm>>

recommended an objective "avoidable cost test" for evaluating whether a dominant carrier's response to a new, or existing but smaller competitor is an anti-competitive act.²⁴⁷

The European Commissioner argued that anti-competitive intent could be inferred through Airline Regulations. A dominant carrier who is operating below avoidable cost is subject only to the possibility of legitimate business justification for the conduct.²⁴⁸

As said by the commissioner and WestJet, if Air Canada were to not operate the flights in question, the variable costs and fixed specific costs would be avoided. In WestJet's perspective, by Air Canada adding capacity, all costs would be avoidable.²⁴⁹ Air Canada was held guilty of carrying out anti-competitive acts.

This case is instructive in foreign relations. While the case was a collective victory for the smaller competitors on a domestic level, the ramifications were affected globally. An example of this is the recent Canada-UAE tie regarding aviation rights. An illustration of the protectionist culture that has been maintained by the Canadian transportation industry was highlighted when Canada denied the UAE airline Emirates the access to increased landing rights in 2010, causing friction between the two countries.²⁵⁰

Standard Oil Co. of New Jersey v. United States²⁵¹

In this case the Supreme Court of the US found Standard Oil Co. guilty of monopolizing the petroleum industry. The company used its size and power to challenge its competitors in many anti-competitive ways, such as underpricing and threatening suppliers and distributors who did business with competitors.

²⁴⁷ Air Canada *supra* note 241

²⁴⁸ *ibid.*

²⁴⁹ *ibid.*

²⁵⁰ "Consumers' Association urges Ottawa to open skies to Emirates Airways" CBC News, June 16, 2009, online: <<http://www.cbc.ca/news/story/2009/06/16/consumers-association-air-canada-emirates-airways.html>>

²⁵¹ *Standard Oil Co. of New Jersey v United States*, 221 U.S.1 (1911)

By 1870, 10% of the United State’s refined oil was being produced by Standard Oil.²⁵² The corporation eventually expanded resulting in reduced price for the consumer.²⁵³ The competitiveness of Standard Oil forced competition to sell out and face bankruptcy until Standard Oil controlled most of the refining capacity of the US. By 1890, Standard Oil controlled 88 percent of the refined oil flows in the United States. Due to its pervasive dominance of the oil market, the state of Ohio sued the Standard Oil Trust. Following the case, the Standard Oil of Ohio was separated from the parent Standard Oil Trust but was nonetheless under its control.²⁵⁴ The trust company then registered itself as a holding company in the state of New Jersey to form the Standard Oil Co. of New Jersey (SOCNJ) controlling 41 different companies, which were parent companies of hundreds of others.²⁵⁵ In 1904, Standard controlled 91 percent of production and 85 percent of final sales.²⁵⁶ Almost 20 years after its enactment, the Standard Oil Co. was taken to court under the Sherman Act 1890 for monopolization activities under section 2 of the act. Section 2 is reproduced below.

Section 2 of the Sherman Act 1890 states that “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.”

²⁵² Dudley Dillard, “Economic Development of the North Atlantic Community” (Englewoods Cliffs, N.J.: Prentice-Hall, 1967), at pp. 409-410

²⁵³ Reisman George, “Capitalism: A Treatise on Economics” (Jameson Books, 1990), at pp. 407-408

²⁵⁴ Daniel Yergin, The prize: The Epic Quest for Oil, Money, and Power, New York: Simon & Schuster (1991) at 96-98

²⁵⁵ *ibid.*

²⁵⁶ Elliot Jones, The Trust Problem in the United States, Macmillan company, New York (1921) at 58-59

The word "person" in § 2 of the act referred to a corporation as well as an individual.²⁵⁷ The words "any part" in § 2 of the Sherman Act 1890 included geographically any part of the US and also any of the classes of things forming a part of interstate or foreign commerce.²⁵⁸ The words "to monopolize" and "monopolize" used in § 2 of the act reached every act bringing about the prohibited result. Freedom to contract was defined as the essence of freedom from undue restraint on the right to contract.²⁵⁹

Standard oil was an anti-monopoly floodgate of the time, as major companies were later affected by the decision such as Exxon, Amaco, Mobil, Chevron, Standard of California and American Tobacco. The federal government was encouraged to oversee marketplace economies in order to determine when trusts restrict competition and restrain trade.²⁶⁰ A case such as Standard Oil in the present United Arab Emirates would undoubtedly forever change the oil dynamics of the country and the region.

AstraZeneca v. European Commission²⁶¹

AstraZeneca adopted two strategies to protect its bestselling anti-ulcer drug, Losec, against the loss of profits from generic competition and parallel trade.²⁶² The company extended the national patent on the product and it modified the tablet form, yet the competitors could still not produce the older version of the tablet as the laws of the time

²⁵⁷ Standard Oil Co. of New Jersey v. United States () 100 U.S. 1173 Fed. Rep. 177 modified and affirmed. Cornell University Law School, Legal Information Institute online: <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0221_0001_ZS.html>

²⁵⁸ *ibid.*

²⁵⁹ *ibid.*

²⁶⁰ Bruce Bingham, "Antitrust and the Oil Monopoly: The Standard Oil Cases, 1890-1911" Westport, CT: Greenwood Press, 1979 at 296

²⁶¹ AstraZeneca v. Commission, C-457/10 P, December 2012, online: <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=131490&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=106284>>

²⁶² Covington and Burling LLP, Judgement of the Court of justice in AstraZeneca v. Commission, December 10, 2012, E-Alert-Life Sciences at 1, online:

<http://www.cov.com/files/Publication/72d71017-2469-42c5-a0be-c0e337f493e7/Presentation/PublicationAttachment/4310a1ad-8868-4258-8ffb-c5c7f8937d7b/Judgment_of_the_Court_of_Justice_in_AstraZeneca_v_Commission.pdf>

did not allow a copied version of the product and could not rely on the test and data already carried out by AstraZeneca.²⁶³

In June 2005, the EU commission confirmed that AstraZeneca held a dominant position and was abusing it by engaging in IP and regulatory strategies. By 2010, the General Court issued a fine of €60 million.²⁶⁴

Accordingly, this case is the perfect example of a globalized competition policy system of today. It proves that national laws are now connected on a global scale and activities of large businesses are affected worldwide. Although competition law is implemented nationally, it unites countries on a common ground. These implications are bound to affect the UAE as well and with the latest competition law implemented, future business in UAE is to be ensured a level playing field for national and international interests.

A liberalized society caters towards an environment for growth. Developed nations are leading the standards for greater scrutiny and regulation. The benefit to developing nations, specifically the UAE, is that they can adapt according to their needs, to a better-regulated economic model that are globally acceptable and locally beneficial.

3. Current Competition Law

The focus of my thesis is on two main provisions of the law:

- (i) anti-competitive agreements between competitors; and
- (ii) abuse of dominant position

I am focusing on these two provisions of the law because they are the basics of competition law. Only when a country amends its framework based on these two

²⁶³ *ibid* at 2

²⁶⁴ *ibid.*

headings, will it be able to handle mergers and acquisitions, business dealings and the other provisions of the law.²⁶⁵

Anti-competitive agreements are prohibited under competition law as they revolve around decisions between businessmen that prevent, distort or restrict competition within the common market. This provision falls under section 90 of the Canadian Competition Act 1889,²⁶⁶ Art. 101 TFEU under the EU law, and section 1 of the Sherman Act 1890²⁶⁷ under the US antitrust model.

When a company has a dominant market share, it is considered to have a dominant position in the market. Companies can take advantage of the fact and abuse their market power. The abuse of dominance provision focuses on penalizing businesses that abuse their position. In Canada, the provision falls under s. 79 of Canadian Competition Act 1889²⁶⁸, in the EU under Art. 102 TFEU and in the US under s. 2 of the Sherman Act 1890²⁶⁹. The same provision has different approaches in the US and the EU. In the US, it is referred to as a monopoly and in the EU, it is known as an abuse of dominant position. The US Supreme Court said, “monopoly power is the power to control prices or exclude competition.”²⁷⁰ Alternatively, in the European Union, the European Court of Justice said, “dominant position” corresponds to “a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers.”²⁷¹

²⁶⁵ Other provisions that are not being discussed in the thesis include (as per the wording of Canadian Competition Act (R.S.C., 1985, c. C-34)): Mergers and Acquisitions, Refusal to Deal, Price Maintenance, Exclusive Dealing, Tied Selling, and Market Restriction, Delivered Pricing, Specialized Agreements, Deceptive Marketing Practices.

²⁶⁶ Canadian Competition Act, RSC 1985, c C-34, Canadian Legal Information Institute- Online: <<http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-34/latest/rsc-1985-c-c-34.html>>

[CCA]

²⁶⁷ Sherman Act ch. 647, 26 Stat. 209, 15 U.S.C. § 1–7

²⁶⁸ Air Canada *supra* note 241

²⁶⁹ Aviation Regulations *supra* note 246

²⁷⁰ U.S. v. E.I. du Pont de Nemours & Co, 351 U.S. 377, 391 (1956).

²⁷¹ Michelin v. Commission Case 322/81, [1983] ECR 3461 § 30.

In the following two subheadings, I will examine the different definitions for “anti-competitive agreements” and “abuse of dominant position” provisions under the Canadian, the EU and the US legislation. With this analysis, I will then examine whether there is a link between the wording of the specific provisions of each country and economic standards of that jurisdiction.

(a) Anti-Competitive Agreements between Competitors

Canadian competition law²⁷²

Below, the relevant section is copied exactly as it appears in the actual statute

90.1 (1) If, on application by the Commissioner, the Tribunal finds that an agreement or arrangement — whether existing or proposed — between persons two or more of whom are competitors prevents or lessens, or is likely to prevent or lessen, competition substantially in a market, the Tribunal may make an order

- (a) Prohibiting any person — whether or not a party to the agreement or arrangement — from doing anything under the agreement or arrangement; or
- (b) Requiring any person — whether or not a party to the agreement or arrangement — with the consent of that person and the Commissioner, to take any other action.

Factors to be considered

(2) In deciding whether to make the finding referred to in subsection (1), the Tribunal may have regard to the following factors:

- (a) The extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the agreement or arrangement;
- (b) The extent to which acceptable substitutes for products supplied by the parties to the agreement or arrangement are or are likely to be available;

²⁷² CCA *supra* note 266

- (c) Any barriers to entry into the market, including
 - (i) Tariff and non-tariff barriers to international trade,
 - (ii) Interprovincial barriers to trade, and
 - (iii) Regulatory control over entry;
- (d) Any effect of the agreement or arrangement on the barriers referred to in paragraph (c);
- (e) The extent to which effective competition remains or would remain in the market;
- (f) Any removal of a vigorous and effective competitor that resulted from the agreement or arrangement, or any likelihood that the agreement or arrangement will or would result in the removal of such a competitor;
- (g) The nature and extent of change and innovation in any relevant market; and
- (h) Any other factor that is relevant to competition in the market that is or would be affected by the agreement or arrangement.

The ambiguities in the wording of current Canadian competition law are a possible cause for variable interpretations on a case-by-case basis. For example, under s. 90.1(2), sentences with words such as “the extent” or “likely” or “nature of change” or “any other factor”, can be open to differing meaning and interpretation depending on the case.

Under EU law, **Article 101 TFEU** provides the following.

1. The following shall be prohibited as incompatible with the common market: 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 common market, and in particular those which:
 - a. Directly or indirectly fix purchase or selling prices or any other trading conditions;

- b. Limit or control production, markets, technical development, or investment;
- c. Share markets or sources of supply;
- d. Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- e. Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which by their nature or according to commercial usage have no conclusion with the subject of such contracts.

The EU takes a more blunt and strict approach in the wording of the provisions with the beginning of the article clearly stating, “the following shall be prohibited” with a subsequent exhaustive list. By prohibiting the “prevention, restriction or distortion of competition within the common market”, the article states its objective while leaving room for interpretation with respect to the scope of the prohibited activity.

Under US antitrust law, section 1 of the Sherman Act of 1890 states the following.

“Every 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. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 USD if a corporation, or, if any other person, \$1,000,000 USD, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.”²⁷³

The US statute uses different language from Canada and the EU. Words such as “illegality” or “conspiracy” lean towards the same meaning as the provisions of other jurisdictions, but they’re different words and could potentially be interpreted differently.

²⁷³ Sherman Act, July 2, 1890, ch. 647, 26 Stat. 209, 15 U.S.C. § 1–7

The consequence of non-compliance is also set out in the same provision, but is not present in the statutes of the other two jurisdictions.

I will carry out the same analysis in the next chapter with the developing countries. This will be done in order to examine whether there is a difference in wording amongst the different developing nations and also between the developed and developing nations. By understanding the difference I can further scrutinize UAE competition law and understand whether the wording is suitable for its economy.

(b) Abuse of Dominant Position

I have discussed the abuse of dominant position provision because monopolies in various sectors have been a fact of life in the UAE in the past as well as the present. That is due to the economic framework of the country where the largest corporations of the country are either government controlled or are family businesses.²⁷⁴ By evaluating this provision through statutes of different jurisdictions, one can have more insight on the approach that needs to be taken for the UAE's provision.

Canadian Competition Policy focuses on abuse of dominant position and the prohibition attached to it. Section 79(1)²⁷⁵ of the Competition Act provides the following.

79(1) where, on application by the Commissioner, the Tribunal finds that:

- (a) One or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
- (b) That person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

²⁷⁴ Howard L. Stovall, "Arab Commercial Laws- Into the future" (2000) 34 int'l Law. 839, 840

²⁷⁵ CCA *supra* note 266

(c) The practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

The tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

The Competition Bureau's Enforcement Guidelines on the Abuse of Dominance Provisions provide that, "The abuse provisions establish the bounds of competitive behaviour in order to damage or eliminate competitors so as to maintain entrench or enhance their market power,"²⁷⁶

Joint Dominance is brought about when two or more firms jointly control the relevant market. The provisions of s. 79 can be incorporated for more than one entity as 79(1) (a) says "one or more persons." The firms can be engaged in anti-competitive behaviour even if there is no evidence of coordination between them- Competition Bureau draft updated guidelines.²⁷⁷

Definition of "*anti-competitive act*"²⁷⁸

- **78. (1)** For the purposes of section 79, "*anti-competitive act*", without restricting the generality of the term, includes any of the following acts:
 - (a) Squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;
 - (b) Acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

²⁷⁶Competitive Bureau, Enforcement Guidelines in the Abuse of Dominance Provisions at s. 13.

²⁷⁷ Updated Enforcement Guidelines on the Abuse of Dominance Provisions (2009), at s.s. 3.2.1.

(d)

²⁷⁸ CCA *supra* note 266

- (c) Freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
- (d) Use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;
- (e) Pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;
- (f) Buying up of products to prevent the erosion of existing price levels;
- (g) Adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;
- (h) Requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and
- (i) Selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.
- (j) And (k) [Repealed, 2009, c. 2, s. 427]

Under the EU law, **Article 102 TFEU** says the following.

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

- a) Directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions;
- b) Limiting production, markets or technical development to the prejudice of consumers;

- c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which by their nature or according to commercial usage, have no connection with the subject of such contracts.

Section. 2 of the Sherman Act 1890 condemns monopolization that is interpreted to require:

- “the possession of monopoly power in the relevant market; and
- the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior business product, business acumen, or historic accident.”²⁷⁹

In the US one can be guilty of “attempted monopolization” as well, meaning the corporation has not gained monopoly status but has been carrying out all business activity to provide evidence for it. Yet there must be a “dangerous probability” within a specific market and there must be proof of intent for an allegation of attempted monopolization.²⁸⁰

The new competition act of Canada 1986 substituted criminal proceedings of monopoly with civil ones and introduced a Competition Tribunal.²⁸¹ The burden of proof for criminal intent is “beyond reasonable doubt” which was too onerous for the Crown.²⁸² Only fifteen prosecutions²⁸³ and one conviction existed since 1910. “The law was not sufficiently certain to guide the behaviour of businessmen and the decision of judges.”²⁸⁴

²⁷⁹ United states v. Grinnell Corp., 384 US 563 AT 570-1 (2000)

²⁸⁰ Spectrum Sports, Inc. V. McQuillan, 113 S. Ct. 884 (1993).

²⁸¹ Gordon Kaiser, Competition Law of Canada ss 101.(7) at 21-23 (1989)

²⁸² Richard P Lewis, “Canadian Monopolies Law: Director of Investigation and Research v. NutraSweet Co.” (1992) 25 Cornell Int’l L.J. 472 at 438 [Lewis]

²⁸³ W.T Stanbury, “The New Competition Act and Competition Tribunal Act: Not with a Bang but with a Whimper”, 12 CAN. BUS L.J. 2., (1986-87) at 29

²⁸⁴ Roger L. Martin and Brad Martin, “Abuse of Dominance or Abuse of Reason?” 8 Canadian, Competition Policy REC. 61 (1987) at 61

The first case to come under competition law as a civil issue of abuse of dominant position in Canada was *Director of Investigation and Research v NutraSweet*.²⁸⁵ It involved alleged anticompetitive practices of NutraSweet Company (NSC) after its Canadian aspartame patent expired in 1987. The NSC produces aspartame, an artificial sweetener used in diet drinks, chewing gum and low calorie food. NSC made Ninety five percent of aspartame sold in Canada at the time. When analyzing the contract terms, the director found an exclusive- supply relationship between NSC and its customers. It was argued that this would restrict entry for potential and existing competitors. The case was prosecuted under s. 77 “exclusive dealing and tied selling” and s. 79 “anti-competitive acts”.

In line with the wording of s. 79, substantial or complete control of “a class of species of business” and substantial lessening of competition in a “market”, it was important to define whether aspartame constituted a separate market or was part of a broader class of sweeteners.²⁸⁶ It was held that aspartame cannot be substituted and so had a market of its own. Tribunal concluded that aspartame’s only competition from other sweeteners came about from “very weak” evidence of indirect competition with caloric sweeteners, and “some” direct competition with other high-intensity sweeteners.

The absence of Canadian precedent forced the Canadian tribunal to look to the US and EU monopolization cases.²⁸⁷ “Although the wording of Article 86 of the Treaty of Rome and Section 2 of the Sherman Act differ substantially from section 79 of the Act, they deal with similar problems in a similar commercial context and in light of similar legal concepts.”²⁸⁸ By relying on the EU and US cases in interpreting s. 79, the tribunal filled a vacuum in Canadian monopoly jurisprudence.²⁸⁹ However, the Tribunal’s use of other

²⁸⁵ *Director of Investigation and Research v. NutraSweet* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.) [NutraSweet].

²⁸⁶ *ibid* at 12

²⁸⁷ Lewis, *supra* note 282 at 443

²⁸⁸ NutraSweet, NO. CT-89/2, written argument by the Director of Investigation and Research public version at 10

²⁸⁹ *ibid.*

jurisdictions to such a great extent altered the shape of Canada's "abuse of dominant position" provision. Section 79 now reflects its EU and US predecessors.²⁹⁰

- **Product Market**

The basic principle in the US law of monopolization is that there must be a definition of the relevant markets.²⁹¹ The product market can be determined through a "reasonable interchangeability" test by cross-elasticity of demand between products.²⁹² The willingness of a consumer to change between different products when a change in relative products occurs is referred to as cross-elasticity of demand. A high elasticity of demand means that the products are of the same market.²⁹³ *Brown Shoe Co. v United States* modified the market and increased the reach of the Sherman Act by using "submarkets" to define the product markets.²⁹⁴ This was determined by "examining such practical indicia as industry²⁹⁵ or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors." In the case of *Borden*, factors such as convenience, storage, capabilities, taste, the presence of chemical additives and decorative uses were used to determine the difference between fresh lemons and processed lemon juice.²⁹⁶ It was concluded, "considering price, use and quality, fresh lemons were not reasonably interchangeable with processed lemon juice."

The EU also depends on substitutability and price elasticity to define product markets.²⁹⁷ In the case of *United Brands*, it was held that particular characteristics of bananas such as, appearance, taste, softness, seedless-ness, easy handling, and constant level of production

²⁹⁰ Lewis, *supra* note 282 at 444

²⁹¹ *Berkey Photo, INC. v. Eastman Kodak co.*, 603 F. 2d 263, 268 (2nd Cir. 1979)

²⁹² Lewis, *supra* note 282 at 447

²⁹³ *United States v. E.I Du Pont de Nemours and co.*, 351 U.S. (1956) at 394-404

²⁹⁴ *Brown Shoe Co. v. United States* 370 U.S. 294 (1962)

²⁹⁵ *ibid.*

²⁹⁶ *Borden, inc. v. F.T.C.*, 674 F. 2d 498 (6th Cir. 1982)

²⁹⁷ Lewis, *supra* note 282 at 449

limit the interchangeability with other fruit.²⁹⁸ Small price variations that occur affirmed that “a very large number of consumers having a constant need for bananas are not noticeably or appreciably enticed away from” the fruit by market fluctuations therefore, “the banana market is a market which is sufficiently distinct from the other fresh fruit market.” So within certain commodities market such as fruits, submarkets can exist (banana market) where if “sufficiently distinct in commercial reality” - a supplier which dominates it can have the power to exclude competition or control prices.”²⁹⁹ In the case of *Michelin*, the retreading industry did not weaken a dominant position because Michelin was able to “influence the conditions in which competition may be exerted... and conduct itself to a large extent without having to take account of that competition and without suffering any adverse effects as a result of its attitude.”³⁰⁰

Initially the tribunal defined the product market in terms of substitutability, much in the same way as the EU and US. The particular reliance on non-substitutability resembles the US analysis in *Borden* and EU court in *United Brands*. The tribunal related its findings to the EU by bringing in lifestyle into comparison of aspartame as well.

- **Geographic markets**

In the case of *NutraSweet*, the tribunal defined geographic market as “an area sufficiently insulated from price pressures emanating from other areas so that its unique characteristics can result in its prices differing significantly for any period of time from those in other areas.”³⁰¹ Canada was considered as the geographic market of aspartame because the price of aspartame differed around the world, Canada being treated differently in terms of volume and price between NSC and Coca-Cola and Pepsi.³⁰²

²⁹⁸ *United Brands v. commission case 27/76*, 1978 E.C.R., 207, 270 (1978) 1 C.M.L.R. 429, 481. [United Brands]

²⁹⁹ Commission Decision 87/500 of July 29 1987

³⁰⁰ *Nederlandsche Banden-Industrie Michelin N.V. v. commission*, case 322/81 1983 E.C.R 3461, 3508, (1985) 1 C.M.L.R. 282, 325.

³⁰¹ *NutraSweet supra* note 285

³⁰² *Lewis, supra* note 282 at 451

Under the US legislation, geographic market is defined by concentrating on price differences. As stated by the Federal Trade Commission: “As a general proposition, an area is a separate geographic market if the change in the price of the product in that area does not, within a relevant period of time, induce substantial changes in the quality of the product sold in other areas.”³⁰³ The EU legislation says that the market overall is defined by the geographic market, “where the conditions of competition are sufficiently homogeneous for the effect of the economic power of undertaking concerned to be able to be evaluated.”³⁰⁴

The analysis of the Canadian tribunal mirrored the EU and US by considering the geographic market as a second component to market definition. Like the US, the Canadian tribunal used price as a determining factor of geographic market. Similar to the US and EU, it defined geographic market within the limits of the country and did not expand to a worldwide market (EU ranging towards its premises, but following the same underlying concept).

- **Control**

In Canada, in the case of *NutraSweet*, the tribunal agreed with NSC’s argument that *control* meant market power, specifically, “the ability to set prices over competitive levels for a considerable period.”³⁰⁵ Factors such as barriers to entry and market share vary between cases and therefore were not used as a definite determining aspect. In this particular case, barriers to entry were high and market share constituted to 95% in Canada. The tribunal held that “class or species of business” in s. 79 was synonymous to market power meaning the product market.³⁰⁶ After the case, it was agreed by the tribunal and director, the control element was so large that the boundaries of “substantial” needed to be explored more.³⁰⁷

³⁰³ Statement of federal trade commission concerning horizontal mergers, reprinted in 42 Antitrust & Trade Reg. Rep. (BNA) S-12 (special sup. June 17 1982)

³⁰⁴ United Brands *supra* note 298

³⁰⁵ NutraSweet *supra* note 285

³⁰⁶ *ibid* at 55-56

³⁰⁷ Lewis, *supra* note 282 at 454

In *Cellophane*, in the US, market power was defined as “the ability to control prices or exclude competition,” meaning market power allows a firm to raise prices without losing business.³⁰⁸ Market share in the US would lead to a monopoly where a predominant share of the market is held. Barriers to entry occur where “a firm with high market share may be able to exert market power in the short run, but substantial market power can persist only if there are significant and continuing barriers to entry.”³⁰⁹ It was held in *Borden* that monopoly power was present due to barriers of entry, hence the 95% market share.³¹⁰

In the EU, market power is defined as a dominant position- “position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave independently from competitors and consumers”.³¹¹ In *United Brands*, although forty-five percent is not a dominant position in terms of market share, the barriers to entry and other factors determined it to have market power.³¹²

The tribunal used basic American and EU standards of control. Basic factors under the banner of barriers to entry include size, experience, market position, patent portfolios, and the economies of scale.

- **Anticompetitive acts**

In the case of *NutraSweet*, a “practice” was defined as a combination of individual anticompetitive acts.³¹³ To determine the element of anticompetitive acts in *NutraSweet*, the tribunal set out five exhaustive factors, abuse of governmental reporting requirements, contractual exclusion of potential competitors, use of contract terms associated with exclusivity, selling below cost and use of the U.S. patent to foreclose competition that

³⁰⁸ Robert Pitofsky, “New Definitions of Relevant Market and the Assault on Antitrust” 90 COLUM. L. REV. 1805, (1990) at 1806

³⁰⁹ Oahu gas, 838 F. 2d at 366.

³¹⁰ Borden *supra* note 104 at 511-12

³¹¹ United Brands *supra* note 298 at 486-487

³¹² Lewis, *supra* note 282 at 458

³¹³ NutraSweet *supra* note 285

needed to be satisfied.³¹⁴ The tribunal held that “an anticompetitive act must be performed for a purpose, and evidence of this purpose is a necessary ingredient.”³¹⁵ Purpose was to be determined through intent.

In the US, exclusive supply contracts between corporations that are in a dominant position are considered anticompetitive.³¹⁶ It is illegal because it tends to destroy competition, even if in the hands of a smaller firm it would be harmless. However determination of illegality is based on the specific case of the contracting parties.³¹⁷

The EU recognizes exclusive contracts much in the same way.³¹⁸ The case, *Hoffman –La Roche*, said that exclusive contracts are “incompatible with the objective of undistorted competition within the common market.” They are designed to restrict the purchaser in his possible choices of sources of supply and to deny other producers access to the market.³¹⁹

In comparison to the EU and US models, the tribunal modified the word “practice” in s. 79(1)(b), bringing it closer to the US and EU law, monopoly and abuse respectively.

Overall, in interpreting the statute in *NutraSweet*, the tribunal related “class or species of business” with “market” and “control” with the ability to exercise “market power”. It minimized the s. 79(1)(b) requirement of practice with anticompetitive acts, made s.78’s list non-exhaustive, and diminished the importance of s. 79(1)(c) requirements of substantial lessening of competition.

In all three jurisdictions, abuse of dominant position provision is defined differently. In Canada, “one or more person has to be in substantial or complete control”. In Canada a dominant position is not a numerical figure but the “power to exclude others from the relevant market”. In the EU, “abuse by one or more undertakings of a dominant position”

³¹⁴ *ibid* at 59

³¹⁵ *ibid* at 57

³¹⁶ Lewis, *supra* note 282 at 467

³¹⁷ *Barry Wright Corp v. ITT Grinnell Corp.* 724 F. 2d 277, 230 (1st Cir. 1983)

³¹⁸ Lewis, *supra* note 282 at 469

³¹⁹ *Hoffman-La Roche v commission*, Case 85/76 1979 E.C.R. 461,539, (1979) 3 C.M.L.R 211, 289

shall be incompatible. There is no offence in having a dominant status; it is the abuse of that status which is considered incompatible. “Abuse” consists of an exhaustive list in the statute. The US condemns the “possession of monopoly power”. The US definition consists of the highest standard of abuse of dominant position, which is a “monopoly”- where no other competition is present.

	CANADA	EUROPEAN UNION	UNITED STATES
Anti-competitive agreements	Prevent/ lessens competition	Prevention/ restriction/ distortion of competition	Contract, combination in the form of trust or otherwise... in restraint of trade
Abuse of Dominant position	One or more persons substantially or completely control... Result in anti-competitive acts	Dominant position in common market or substantial part	Possession of monopoly power.
Differences	Canadian provision more lenient -Gives a non-exhaustive list and factors to consider when evaluating the circumstances that could fall under the	-EU has higher standards-the provision does not consider lessening of competition. -The provision sets out an exhaustive list making it more	U.S. focuses on illegality not on prohibition. A different wording to law. More litigation oriented. “Courts will take a quick look to determine whether the strict

	<p>provision.</p> <p>-Looks at foreign investment, barriers to entry, substitute of the product (analyzes the market as a whole before making a decision)</p> <p>-Consent of the party in question is necessary in order to take any alternative action.</p>	<p>restrictive, yet definitive.</p> <p>-Block exemptions also have an exhaustive list.</p> <p>-If the provision is not applicable, Art. 103 TFEU states an exhaustive list for the reasons for it.</p>	<p>rule per se, will apply, as opposed to a more lenient rule of reason³²⁰.</p>
Jurisdiction	Focus on only Canada	Market is referred to 27 European countries	Focus is only on the United States of America
Circumstances at the time law introduced	When created, it was not an active law, “it was never a central aspect in the legal or economic system of Canada” ³²¹ .	When created, focus on breaking trade barriers (free movement of goods), recovering and reforming of Europe, therefore need of strict provision.	More economics-based approach, free movement of goods comes from commerce clause in the US constitution.

³²⁰ Broadcast Music inc. v. Columbia Broadcasting System 441 U.S. 1, (1979)

³²¹ David J. Gerber, *supra* note 87 at 258

4. Effects of Competition Law

No matter how strong the laws are on paper, they are ineffective if they are not enforced in the system. The gap between paper and action for competition law has been vast, since many countries would adopt the law to keep up with the reformative trend yet would not fully enforce the law. In recent years, however, the competition law authority budgets have been increasing notably resulting in increased enforcement activities. For example, in the UK the Office of Fair Trading budget increased by 21 million pounds between 1999- 2002, an increase of 80% of their overall budget.³²² In Japan, the Fair Trade Commission staff increased from 129 in 1990 to 220 in 2000 and surcharge issuance orders against cartels increased by 300%.³²³ If the market is seen to be important, then protecting it from distortion should be a high priority. Competition law is seen to be essential and a necessary companion to the market under this idea.

With the increase of global pressure and influences in the world, competition law is seen as a symbol of global membership. The law signifies sophistication of the economy and governance systems when a country adopts it.³²⁴ Virtually all developed countries have competition law and claim to have it enforced in the system. Developing countries have also been encouraged to adopt a competition policy in order to gain a higher economic and political status nationally and internationally. For example, the OECD was traditionally created for developing countries. Korea gained membership in 1998 and the government was acclaimed for this accomplishment.³²⁵

The pressure at times has been more direct as well. For example the World Bank during the 1990s strongly urged the loan recipients to adopt competition policies in order to

³²² The office of Fair Trading: Progress in Protecting Consumer Interests, National Audit Office UK 2003- London, HSMO (2003) at 9, online: <<http://www.nao.org.uk/wp-content/uploads/2003/03/0203430.pdf>>

³²³ Stuart M. Chemtob, "Special counsel for international trade" antitrust division of the US Department of Justice, speech at the conference on competition policy in the global trading system, antitrust deterrence in the United States and Japan June 23, 2000- Washington DC at 17 <<http://www.usdoj.gov/atr/public/speeches/5076.htm>>

³²⁴ David J. Gerber *supra* note 87 at 88

³²⁵ William Witherell, "Korea in the OECD: Realizing the Promise" director for financial, fiscal and enterprise affairs at the OECD, (2001), (speech at the second Korea OECD conference, Seoul, Korea 13-14 Dec 2001) at 7 online: <<http://www.oecd.org/dataoecd/36/0/2698284.pdf>>

receive loans from the bank. During the Asian Debt Crisis in late 1990s, countries like Indonesia and Korea adopted the law just so they could be eligible for the much-needed loans at the time³²⁶. Numerous developed countries have encouraged other countries to adopt and enforce the law. At times it is for the intention of solidifying acceptance of the market in countries where there was a greater skepticism of market principles³²⁷. If a country pressures another to adopt the law, as a result of the efforts, the pressuring country often also receives a benefit for itself, such as accessing the market of the pressured country for their products. Many developing countries however, complain that this method is used to dominate their national markets. The US forced Japan to strictly follow its competition policies in the early 1990s so the US could improve access for its corporations in the Japanese market and reduce the balance of payment deficit to Japan. They called it a Strategic Development Initiative (SDI). Under this title, the US attacked the distribution agreements that restricted the opportunities for Japanese distributors to sell US goods³²⁸.

A number of advantages of competition law are set below. They will be the vital “comparing factors” with all other chapters.³²⁹

(a) Promoting an efficient allocation of resources

Over the last twenty years of Canadian competition law enforcement, competition intensity has increased amongst Canadian businessmen.³³⁰ Major corporations such as Air Canada and Canada Post are being scrutinized for an economic change. This impact has

³²⁶ Seung Wha Chang, “The Role of Law in Economic Development and Adjustment Process: The Case of Korea” (2000) 34 international law 267, at 282.

³²⁷ David J. Gerber *supra* note 87 at 88

³²⁸ *ibid* at 88

³²⁹ World Trade Organisation, Working Group on the Interaction, between Trade and Competition Policy, Synthesis paper on the Relationship of Trade and Competition Policy to Development and Economic Growth, Note by the Secretariat, 18 September 1998 at 9(a)

³³⁰ Lawson A.W. Hunter, Pierre-Luc Hébert & David Krause “The Competition Act: 20 Years of Taking the Economy in Stride 2006” Annual Fall Conference on Competition Law, Jan. 2006 at 1

affected proposals of businesses efficiency in their particular markets.³³¹ The US centers around economics and aims at competition and efficiency.³³² The EU focuses on competitive opportunities for small and medium-sized businesses, raising the economic level of worse-off nations, and promoting fairness.³³³

(b) Protecting the welfare of consumers

Amendments of competition law are a sign of constant improvement towards enforcement of the law. From a criminal burden of proof to civil in 1986, then changes in 2009, Canadian law is evolving gradually. Likewise, the Anti-trust law of the US was introduced in 1890. It is divided into three different statues: the Sherman Act of 1890³³⁴, the Clayton Act and Federal Trade Commission Act both of 1914.³³⁵ The EU competition law was set out in the Treaty of Rome in 1957. The European commission later created the National Competition Authority, for member states to have greater enforcement accessibilities, and the European Competition Network to control the NCAs in different member states. Numerous laws infer greater protection of consumer welfare as cases can be directed to different laws.³³⁶

(c) Preventing excessive concentration levels and resulting structural rigidities

As said by the Canadian competition bureau, “competition law enforcement without supporting policies and institutions to promote competition is insufficient to realize the

³³¹ Report of the Advisory Panel on Efficiencies, Submitted to Sheridan Scott, Commissioner of Competition August 2005, at 33 online: <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/FinalPanelReportEfficiencies_e.pdf/\\$file/FinalPanelReportEfficiencies_e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/FinalPanelReportEfficiencies_e.pdf/$file/FinalPanelReportEfficiencies_e.pdf)>

³³² Eleanor M. Fox, “US and EU competition law: A comparison” Institute for International Economics, at 340, online: <http://www.iie.com/publications/chapters_preview/56/10ie1664.pdf>

³³³ *ibid* at 340

³³⁴ ch. 647, 26 Stat. 209, 15 U.S.C. § 1–7

³³⁵ Rodger *supra* note 131 at 21

³³⁶ “European Competition Network”, European Commission, EUROPA, online: <http://ec.europa.eu/competition/ecn/index_en.html>

economic benefits of competitive markets or innovative and efficient businesses”.³³⁷ Before the Sherman Act was implemented, “increasing output and overcapacity intensified competition and drove down prices. Indeed, the resulting decline of prices in manufactured goods characterized the economies of the US and the nations of Western Europe from the mid-1870’s to the end of the century.”³³⁸ Competition law of the EU was introduced at the when World War Two had recently ended. Trade barriers were removed to promote unity and economic development between European countries.

(d) Addressing anti-competitive practices of enterprises (including multinational enterprises) that have a trade dimension

Imports in Canada have significantly increased since 1986, when the civil burden of proof of competition law was introduced - from just above \$10,000 million Canadian dollars in 1986 to \$40,834.50 million Canadian dollars in 2013.³³⁹ Major Canadian imports include machinery and equipment, motor vehicles and parts, electronics, chemicals, electricity and durable consumer goods. Imports in the US have increased from \$52277 million USD to \$227697 million USD in 2013. Main imports of the US include, Industrial Supplies (32 percent of total imports) with crude oil alone accounting for half of this category. Others include: Capital Goods (24 percent); Automotive vehicles, parts, and engines (13 percent); Consumer Goods (12 percent) and Foods, Feeds, and Beverages (5 percent).

(e) Increasing an economy’s ability to attract foreign investment and to maximise the benefits of such investment

For the maximum results of foreign investments and independence of authority, the Competition Bureau Canada said that, “we therefore recommend the separation of

³³⁷ Archived - 9. Driving Change: A Canadian Competitiveness Council, Compete to Win: Final Report June 2008, online: <<http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/00065.html>>

³³⁸ Massimo Motta, “Competition policy: Theory and practice” Cambridge University Press (2004), at 3

³³⁹ Trading Economics, Canada Imports, online: <<http://www.tradingeconomics.com/canada/imports>>

enforcement from the advocacy and review function. The administration and enforcement of competition law should remain exclusively with the Competition Bureau. These two sides of competition policy demand different skills and orientation.”³⁴⁰ The US follows a liberal policy allowing foreigners to invest in all of American business and real estate. This provides greater jobs, economic stability and globalization that restrict isolation in the country.³⁴¹ Being one of the world’s biggest investors, the EU considers FDI as key in promoting development and economic and social growth. The international rules on FDI contribute to refining the business climate and increasing legal certainty for investors.³⁴²

(f) Reinforcing the benefits of privatization and regulatory reform initiatives

“Most privatizations in Canada occurred in the 10-year period from the mid-1980s to the mid-1990s, and while many of the remaining candidates are both politically and economically problematic, the Harper government has signalled its renewed interest in more privatizations.”³⁴³ It was stated by Kosar, an analyst in American National Government that “Private sector firms tend to be self-directing and profit-seeking; government agencies tend to be process-oriented and pursue the multiple and sometimes conflicting goals assigned to them by Congress and the President.”³⁴⁴ Changes in the EU have been brought about as well, in terms of privatization. “Germany sold several assets, including successive tranches of Deutsche Telekom. Spain and Portugal have been eager privatizers: the former completed its sale of Iberia, the national flag carrier, last year. In

³⁴⁰ Archived - 9. Driving Change: A Canadian Competitiveness Council, Compete to Win: Final Report June 2008, online: <<http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/00065.html>>

³⁴¹ Seitzinger *supra* note 186 at 1

³⁴² Foreign Direct Investment in the European Union, EU-Japan Centre for Industrial Cooperation, Tokyo, 15 July 2010, at 6

³⁴³ Anthony E. Boardman & Aidan R. Vining, “A Review and Assessment of Privatization In Canada” Volume 5, Issue 4, January 2012, university of Calgary, at 1 online: <<http://www.policyschool.ucalgary.ca/sites/default/files/research/boardman-vining-privatization.pdf>>

³⁴⁴ Kevin R. Kosar, Privatization and Federal Government: an introduction, CRS Report for Congress, December 28, 2006 at 8

Britain, companies in public ownership accounted for 12% of GDP in 1979, but only around 2% by 1997, when Tony Blair took office.”³⁴⁵

(g) Establishing an institutional focal point for the advocacy of pro-competitive policy reforms and a competition culture

This subheading looks at the governmental efforts of adopting competition laws. What other policies have been adopted or what other authoritative bodies encourage similar provisions that result in an ease of implementation of competition law in the system.

Apart from the Canadian Competition Act, there is a Competition Tribunal and the Competition Bureau in Canada to oversee anti-competitive acts in the country.³⁴⁶ Canada influenced the development of ICN the (International Competition Network) project. The Chairman of the Canadian Competition Commission, Konrad Von Finkenstein and his staff generated support for this initiative even though many thought this project would be influenced by and oriented around the US.³⁴⁷ There are numerous authorities that influence the US antitrust law; the Sherman Act, Clayton Act, Federal Trade Commission Act, Federal Trade commission and US Department of Justice. In the EU, there are various agencies such as, the European Commission and European Court of Justice and NCA’s and ECA’s that influence competition policy.

In all jurisdictions, if people do not comply with competition law, they will have to face a penalty.³⁴⁸ The courts will look at the law of the country where the litigation is initiated,

³⁴⁵ Coming home to roost, In most of Europe, privatization has been more about raising money than promoting enterprise, June 27th 2002, The Economist, online:

<<http://www.economist.com/node/1200637>>

³⁴⁶ Departments and agencies, Government of Canada, online:

<<http://www.canada.gc.ca/depts/major/depind-eng.html> >

³⁴⁷ Eleanor M. Fox & Merit E. Janow, “A Report on the Second Annual Conference of the International Competition Network” at 1 online:

<<http://www.internationalcompetitionnetwork.org/uploads/library/doc557.pdf>>

³⁴⁸ OFT’s guidance as to the appropriate amount of a penalty, OFT423, September 2012, Crown copyright 2012, Office of Fair Trading, online:

<http://www.ofg.gov.uk/shared_ofg/business_leaflets/ca98_guidelines/ofg423.pdf>

in order to determine whether the contract will be cancelled or undone. Damages or injunctions can be enforced on the company as well.³⁴⁹

5. Negative Effects

Some forces that encourage competition law can in turn, limit its development as well, undermining its effectiveness. David J. Gerber calls this the “scissors paradox”, as the forces of globalization often cut against and across from each other. He describes five aspects under this heading.³⁵⁰

Firstly, it is not only enough that the law is created; it needs to be implemented as well and deter harmful conduct. Officials have greater problems and limited capacity of identifying this behaviour or other countries’ intentions as the scale is larger.³⁵¹ Cartel agreements are discreetly made for this reason and are rarely pointed out. Only when officials have been affected by these agreements or notice the pattern of price changes and other market factors, will they carry out further investigation.³⁵² On a global market scale, this investigation becomes harder.

Secondly, on an international scale, if one is to discover some agreement carried out, there is a lack of data access that prevents one from inspecting further.³⁵³ International jurisdictional principles do not let agents of other countries enter their country in order to gather data, without permission, unless they have agreed on the benefits. “The larger the potential market, the stronger the incentives are to comply with that state’s regulatory or court orders”.³⁵⁴ The threat of a penalty or fine do not necessarily make the businesses want to change their ways since if they’re not present in the state and have few assets within that country, the courts cannot take effective enforcement measures against the businesses.

³⁴⁹ *ibid* at 1

³⁵⁰ David J. Gerber *supra* note 87 at 89

³⁵¹ *ibid* at 89

³⁵² *ibid* at 90

³⁵³ *ibid* at 90

³⁵⁴ *ibid* at 90

Also, many countries conducting business together or investing in other countries can have the risk of conflict between applications of the rules of competition law.³⁵⁵ This is due to the fact that all countries involved will want to take action to deter the conduct, and would as a result magnify the intensity and the consequences.

Problems of competition law are usually made public, as it is a public-oriented law.³⁵⁶ Once the matter becomes public, it can lead to greater economic and political consequences³⁵⁷. For example, if a corporation is a major player in the market, by its actions being public its reputation can decrease. This can affect the stock market and the whole economic dynamics. Such issues can negatively affect numerous jobs, economic health of entire sectors of the economy and prospects of political parties.

Lastly, compliance costs can also be an issue.³⁵⁸ When national authorities increase their efforts to cut anti-competitive behaviour, they increase the compliance costs for the businesses as well, and even customers indirectly. This could be reflected in countless forms and deadlines, pre-merger notifications or through the fees of lawyers, economists and accountants.³⁵⁹

One of the biggest recent examples is the merger between GE (General Electrics) and Honeywell in July 2001. Both corporations were US based, and had numerous activities and subsidiaries around the world. Even though the US antitrust authorities approved the merger, the European Commission rejected it.³⁶⁰ If the merger had been successful, it would have been the largest industrial merger in history³⁶¹. The intention of the merger was to benefit from efficiencies and competitive advantages. Yet the European

³⁵⁵ *ibid* at 91

³⁵⁶ *ibid* at 92

³⁵⁷ *ibid.*

³⁵⁸ *ibid* at 93

³⁵⁹ *ibid* at 94

³⁶⁰ General Electric Co. v. Commission, Case T-210/01, (CFI Dec. 14, 2005) online: <<http://curia.europa.eu/juris/showPdf.jsf?jsessionid=9ea7d2dc30dbcf8028e072ad415a9b77f5fdf65d085e.e34KaxiLc3qMb40Rch0SaxuKbxb0?docid=64000&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=565681>>

³⁶¹ Fox, Eleanor M. "GE/Honeywell: The US merger that Europe stopped – A story of the Politics of Convergence" (July 2007) Upenn Journals at 457 online: <[https://www.law.upenn.edu/journals/jil/articles/volume23/issue3/Fox23U.Pa.J.Int'lEcon.L.457\(2002\).pdf](https://www.law.upenn.edu/journals/jil/articles/volume23/issue3/Fox23U.Pa.J.Int'lEcon.L.457(2002).pdf)>

commission believed it would create a strong dominant position, forcing other competitors to go out of business.³⁶² Negotiations between the European commission and GE resulted in public media coverage to the US and EU confrontations, as the EU did not let the merger take place.

“Despite the veneer of certainty suggested by the scientific method of economics, there continues to be a large degree of potential error in antitrust enforcement, and such errors may result in substantial economic costs.”³⁶³ There is uncertainty in the antitrust enforcement process. The framework of ‘error-costs’ suggests that the antitrust ‘case-selection tests, filters or appraisals’ that identify binary outcomes are incorrectly done.

Errors can be costly, and so when an antitrust inquiry is taking place it demands attention. Resources are diverted away from production and used as a managerial distraction. Not to forget, investigation and litigation can be expensive. Many bring forth a “chilling behaviour” in which corporations avoid certain behaviour or method that could be seen to be anticompetitive even if it is not, in order to avoid defending a costly lawsuit. It then deprives the consumers and market of the possible pro-competitive benefits. As judge Posner says in his “Pragmatic Manifesto:” the consequences of the law are often unknown, so that feedback is impossible. Hence the justification of legal decisions- the demonstration that a judicial decision has been proved correct- is often impossible³⁶⁴.

As said by Dosi and Egidi, uncertainty not only is brought about from incomplete sets of information necessary for antitrust decisions, but also from “the inability of the agents to recognize and interpret the relevant information, even when available.”³⁶⁵ Two people can interpret the same signal differently depending on their training, experience, data availability, cognitive ability and the complexity of the metric being gauged. This is

³⁶² Gotz Drauz, “Unbundling GE/Honeywell: The Assessment of Conglomerate Mergers Under the EC Competition Law” *Fordham international Law Journal*, Volume 24 Issue 4, 2001, Article 1 at 885

³⁶³ Ken Heyer, “A world of Uncertainty: Economics and the Globalization of Antitrust” *Antitrust Law Journal* 73 (2005) at 375-422 [Heyer]

³⁶⁴ Leslie Basil Curzon, “Jurisprudence” 3rd edition London: Routledge-Cavendish, (2002) at 124

³⁶⁵ G. Dosi & M. Egidi, “Substantive and Procedural Uncertainty: An Exploration of Economic Behaviours in Changing Environments” *Journal of Evolutionary Economics*, Springer vol. 1(2), (1991) at 145-146

mainly due to the different national antitrust regimes that have varying competences in a range of two categories: errors of construction and errors of deployment of metrics. The former is a data gathering process that assembles relevant classification metrics and the latter arises from natural differences that exist across firms.

A.E Rodriguez and Ashok Menon have asserted that competition advocacy (when competition agencies advertise to carry out the role of providing competition for the benefit of consumers) is an institutional function that is misunderstood.³⁶⁶ Competition agencies market solutions aimed to negate state activities that at times negatively affect consumers. The concept of competition advocacy works more in theory than in practice as the agencies give out false hopes and sugarcoat the truth. Also, the only tool competition agencies use is law enforcement as they use it to criticize government activities that are distortionary and efficiency reducing.³⁶⁷

In a small economy, competition from foreign sources can be an effective substitute for preventing rivalry between domestic producers and disciplining market power.³⁶⁸ Minimum government barriers are necessary to sustain economic development even with private anti-competitive conduct.³⁶⁹ Trade liberalisation cannot be a guarantee of competition in every circumstance as there can be impeding factors affecting the enforcement. A large number of markets are not subject to effective discipline from imports, as they remain local in nature.³⁷⁰ A host government, through licensing requirements or regulations, can effect competition even if trade barriers have been removed.³⁷¹ Also, anti-competitive practices of firms can affect the discipline of imports

³⁶⁶ Rodriguez *supra* note 109 at 159

³⁶⁷ *ibid* at 160

³⁶⁸ Comments of the representative of Singapore, reported in M/3, paragraph 48.

³⁶⁹ For example, one of the contributions of the European Community and its member States notes that "Trade and investment liberalization have an important contribution to make in tackling anti-competitive practices, since such practices are more difficult to sustain in the absence of government barriers to entry". See document W/45, at section 1.1.

³⁷⁰ Comments of the representative of the European Community and its member States, reported in M/4, at paragraph 44.

³⁷¹ Khemani R. Shyam & Mark Dutz, "The instruments of Competition Policy and their Relevance for Economic Development" C. Frischtak (ed.) *Regulatory Policies and Reform: A comparative analysis*, Washington D.C.: The World Bank (1995).

exercising a market power.³⁷² Factors that are inclined to facilitate such anti-competitive practices include high market concentration levels, inelastic demand (reflecting a lack of substitutes), the prior existence of a cartel, and control by a dominant enterprise of scarce facilities, necessary for imports to occur. Therefore, effective national competition policies are fundamental to guarantee that the process towards external liberalization and efficient economic development is not evaded by anti-competitive practices.³⁷³

Conclusion

Competition laws of Canada, the US and the EU have come a long way and it has taken years of formulation and interpretation to reach our present. The economies of these countries have been affected by numerous world conflicts and economic depressions but the inherent need for economic prosperity and globalization has led the countries to further economic investments and competition law has remained a vital part of that growth. With its inception as an authoritative measure for good conduct in the laissez-faire economics of the 19th century to being a flexible yet formidable global design for the ever-increasing international trade competition law continues to assist the developed world to prosperity.

This chapter identified the foundation of competition policy through different developed jurisdictions. By analyzing the process and effects of competition law in Canada, the US and the EU, a standard is established that every developing nation, including the UAE, is striving to reach. In the subsequent chapters I will compare emerging markets, particularly India, South Africa and Brazil with the developed nations. The economic differences in structure and industry among the nations can be of analysis and comparison to that of United Arab Emirates – the case in question.

³⁷² The contributions by the United States, the European Community and its member States, and Canada to the fourth meeting of the Group, and the discussion summarized in M/4, at paragraphs 23-24.

³⁷³ Comments reported in M/4, at paragraph 26.

This chapter emphasized the need for a liberalized economic and governmental framework of jurisdictions to gain maximum efficiency and consumer welfare from competition. However, the concrete restrictions of the recently introduced competition law of UAE propose otherwise.

“Actions of federal and local governments and any state owned establishments are excluded from the application of the competition law....³⁷⁴ Small and Medium Establishments (SME) are excluded from competition law...³⁷⁵ important sectors that are exempted from the scope of competition law...telecommunications, financial services, cultural activities (readable, audio and visual), pharmaceuticals, utilities, waste disposal, transportation, oil and gas, and postal service.”³⁷⁶

These limiting provisions limit the potential scope of competition law in UAE and the impact of the law on a globalized scale.

³⁷⁴ UAE Federal Competition Law (Federal Law No. (4) of 2012)

Article 4(2)

³⁷⁵ *ibid* at article 4(3)

³⁷⁶ UAE Federal Competition Law (Federal Law No. (4) of 2012)

Article 4(1)

Chapter 3

Competition Law in Developing Nations

Introduction

When focusing on competition law in developing countries, the basic template used is that of developed nations; rarely will an emerging market introduce a new ‘tailor-made’ solution. According to Professor Gal, roughly 100 nations already have, or are in the process of adopting, antitrust laws.³⁷⁷ The United Nations Commission for Trade and Development (UNCTAD) has taken initiatives to implement several projects on assisting the design and implementation of competition policies in young and developing countries.³⁷⁸

In this chapter I will be analyzing the competition law framework of different developing countries that are also emerging market economies. The research gathered will be the evaluation between the economic factors and legal structures of different nations and a comparison between developed and developing nations.

1. Economic Factors of Developing Nations

In comparing developing economies to developed ones, the differing economic, political and social factors influence the general function of the economy. Similar to the developed nations, it is important to gain governmental approval when starting a business, opening factories, exportation and importation of goods and services and all other aspects of

³⁷⁷ Gal *supra* note 104 at 4

³⁷⁸ UNCTAD, Competition Policy for Development: A Report on UNCTAD’s Capacity Building and Technical Assistance Programme in Competition Law and Policy, New York & Geneva (2004) at 1, online: <<http://r0.unctad.org/en/subsites/cpolicy/index.htm>>

business activity.³⁷⁹ The difference can arise in the procedural measures, lack of transparency in the system and perhaps the willingness of the government. If there is no freedom to initiate business activities or carry out business transactions, no real competition can take place.³⁸⁰ In order for a competitive market to flourish, relative freedom to enter a market is necessary. During the economic era of Soviet Republics, through numerous mechanisms, including tariffs, permits, import licenses, export drawbacks, foreign exchange controls and the institution of official prices, imports were either barred or restricted.³⁸¹ As Tanzi said in 1998, government regulation and authorization in economic business activity triggers anticompetitive behaviour, as the government is more prone to abuse its powers and encourage state monopolies.³⁸² Even though countries, in general, follow the same antitrust guidelines when promoting objectives of efficiency, the differing factors that need to be taken into consideration are substantive law and enforcement standards, in order to correspond to the individual economic issues of local agents, and legal systems.

A lack of transparency within a system summons anticompetitive behaviour as behind “closed doors” government officials and businessmen can have a reciprocal understanding of reduced costs of trading and transaction. This informal relationship ensuring discretion and stability of continued interests works for the benefit of both parties, resulting in a distortion of competition. Governments have the ability to impose artificial rents³⁸³ on imported goods by restricting or increasing the value of the license needed for the goods, in order to protect domestic industries.³⁸⁴ The government regulations that are introduced to restrict entry, pricing and trade lead to curbing new

³⁷⁹ Effective Policies for Small Business, A Guide for the Policy Review Process, and Strategic Plans for Micro, Small and Medium Enterprise Development, OECD, (2004) at 25-27, online: <http://www.unido.org/fileadmin/media/documents/pdf/Business_Environment/15hvhghso.pdf.pdf>

³⁸⁰ Francisco Marcos, Do developing countries need Competition Laws and Policy? Instituto de Empresa Business School, Madrid, Spain (2006) at 5

³⁸¹ Rodriguez *supra* note 109 at 123

³⁸² Vito Tanzi, Corruption Around the World: Causes, Consequences, Scope and Cures, IMF Staff papers, 45, no. 4 (1998) at 559-594

³⁸³ Artificial rents means the government can draw out fake payments on foreign firms in order to safeguard the domestic industries and vested interests. (Paolo Mauro, Why worry about corruption? Economic Issues 6, International Monetary Fund, (1997) at 4)

³⁸⁴ Rodriguez, *supra* note 109 at 118

business development and ultimately distort the competitive process.³⁸⁵ Where a strong culture of rent-seeking³⁸⁶ or weak and corrupt systems of public administration is present in the country, competition policy systems can be challenged by well-established political and economic interests, to safeguard the existing distribution of wealth and privilege in society, going against the purpose of the law itself.³⁸⁷ In transition economies where competition agencies lack adequate expertise and physical resources, there are greater chances of faulty enforcement.³⁸⁸

Various interest groups thus may emerge as lobbyists to influence the state and its activities. As powerful emissaries, they control efficiency, flexibility or resilience in the system. They are the determining factor of antitrust policy in reforming economies. ‘Who you know’ becomes more significant than ‘what you know’. Lobbying and rent-seeking groups³⁸⁹ are not restricted to just developing countries; they are present in western economies as well. Yet their influence varies on the basis of economic constraints.³⁹⁰ As said by Robert Higgs, a regime of uncertainty emerges when there is an unpredictable state of nature in state actions and the lack of policy continuity creates an atmosphere of uncertainty.³⁹¹ The class of investing corporations abstains from investing domestically, and if they do, it is on a much smaller scale, which results in limited exposure. Abating these potential losses derived from the nature of the state and its policy direction are paramount for any economic success.³⁹²

All countries, whether developed or developing, impose the need for initial governmental

³⁸⁵ Kovacic, *supra* note 101 at 282

³⁸⁶ Rent-seeking activity occurs when government lobbyists are hired to disregard public policy in order to benefit their companies and rid their competitors. (Paolo Mauro, Why worry about corruption? Economic Issues 6, International Monetary Fund, (1997) at 4)

³⁸⁷ Robert D. Willig, Anti- Monopoly Policies and Institutions, in *The Emergence of Market Economies in Eastern Europe* (2001) at 187

³⁸⁸ *ibid* at 187

³⁸⁹ Lobbying groups are those that influence government decisions and lobby either for or against them. Rent-seeking groups attempt to obtain economic rent through the social or political environment in which economic activities occur. (Andrew Bounds and Marine Formentinie in Brussels, EU lobbyists face tougher Regulation, Financial Times, August 18, 2007)

³⁹⁰ Rodriguez, *supra* note 109 at 122

³⁹¹ Robert Higgs, ‘Regime uncertainty: Why the Great Depression Lasted so Long and Why Prosperity Resumed After the War’, 1 no. 4 *The Independent Review* 561 (1997) at 561-590 [Higgs]

³⁹² Rodriguez, *supra* note 109 at 125

approvals when starting a business. The difference occurs in the attitude towards encouraging new businesses to set up and welcoming foreign investment. Foreign investment in the EU and US is encouraged for the purpose of economic prosperity. Although Canada is more conservative in that way, there is no lack of transparency in the system. The government authorities are the controlling body, they decide the limits of restrictions and publish them, there is no visible lobbying involved. If there were, competition law would not be enforced, as it is – same goes for the EU and US economies.

Regime uncertainty as described by Riggs brings about inefficient human and physical capital investments, compared to the competitive structure required to succeed under the new ‘liberalized’ rules.³⁹³ When an investment takes place it is an initiative of one party and reciprocation of the other. If circumstances are uncertain then the other party will not have the visible assurance to give to the first party for initial investment. ‘Other things equal, the more credible the assurance, the higher is the value of the investment’,³⁹⁴ hence the increase in investment and ‘open economies’ in developing nations.

Foreign direct investment and foreign interest are encouraged because foreign corporate presence leads to improved trade linkages nationally and internationally.³⁹⁵ FDI has a beneficial direct effect on domestic enterprises, local businesses and markets to encourage business-friendly environments and facilitate the efficient allocation of investment. Incentives of foreign investment lead to a more efficient spatial distribution of capital and attract investment in underdeveloped regions.³⁹⁶

This chapter will focus on three specific developing countries: India, South Africa and Brazil. As I mentioned in the introduction chapter, India and South Africa have had close business ties with the UAE for quite some time and Brazil follows the same civil law

³⁹³ Higgs, *supra* note 391 at 583

³⁹⁴ Benjamin Klein, Transaction Cost Determinants of ‘Unfair’ Contractual Arrangements, *American Economics Review Papers and Proceedings* 92 (1980) at 356

³⁹⁵ Hans Christiansen, Directorate for Financial, Fiscal and Enterprise Affairs, working papers on International Investment, 1 Incentives-based Competition for Foreign Direct Investment: The Case of Brazil, OECD (2003) at 2,

<<http://www.oecd.org/daf/inv/investmentfordevelopment/2500995.pdf>>

³⁹⁶ *ibid.*

system as the UAE. Most importantly, all three countries have a colonial past that reflects the UAE's monarchical status of today. This will help in determining an economic framework for the possible democratic future of the UAE.

India

A foreign business can be set up in India under the Companies Act 1956 as a joint venture or a wholly owned subsidiary by individuals wanting to do business.³⁹⁷ The company can have a liaison office or branch office, which can undertake activities permitted under the Foreign Exchange Management Regulations 2000. Foreign Direct Investments can either occur through an Automatic Route or a Government Route. The former does not need a prior approval from Government or Reserve Bank of India. The latter requires prior approval of the government considered by the Foreign Investment Promotion Board (FIPB), Department of Economic Affairs and Ministry of Finance.³⁹⁸

In recent years³⁹⁹ there has been an increase in foreign investments due to the relaxation of rules and regulations by the Indian government.⁴⁰⁰ In 2005, Indian Central government realized the economic prosperity that FDI incorporates and so it made a crucial amendment to some of the governing laws allowing 100 percent FDI in sectors. One such sector is the construction business in India.⁴⁰¹ These reforms have opened the economy, made it more competitive, and empowered the states for greater economic management responsibility.

FDI is prohibited, through the Government Route or Automatic Route, under sectors such as Atomic Energy, Lottery Business, Gambling and Betting. Also, the agricultural

³⁹⁷ Setting up Business in India by Foreign Companies, Consulate General of India Toronto, at 1, online: <<http://www.cgitoronto.ca/Commerce/Setting%20up%20Company%20in%20India.pdf>>

³⁹⁸ Reserve Bank of India, Foreign investments in India, online: <<http://www.rbi.org.in/scripts/faqview.aspx?id=26>>

³⁹⁹ India was under the British rule from around 1858 to 1947 under the authority of East India Company that was the principal company for trade. 1947 independence of India created two new countries, Pakistan and later Bangladesh.

⁴⁰⁰ About Foreign Direct Investment in India: Invest in Land, <<http://www.fdi.in/>>

⁴⁰¹ *ibid.*

industry, (excluding Floriculture, Horticulture, Development of seeds, Animal Husbandry, Pisciculture and cultivation of vegetables, mushrooms, etc.) is restricted from FDI. Housing and real estate, trading in Transferable Development Rights and the Manufacturing of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes are all prohibited from FDI in India.⁴⁰²

Although the country has widened its economic development sources, the approved budget is more than the actual investment. In April 1991-1998, \$54,268 million USD was approved whereas the actual portion used was only \$11,806 million USD- 21.7 percent.⁴⁰³ Factors that affect foreign investment are:⁴⁰⁴

- Restrictive FDI regime
- Lack of clear cut and transparent sectorial policies
- High tariff rates by international standards
- Lack of decision-making authority with the state governments
- Limited scale of export processing zones
- No liberalization in exit barriers
- Stringent labour laws
- Financial sector reforms
- High corporate tax rates

*Belaire Owner's Association v DLF limited and Huda*⁴⁰⁵

This case is a perfect example of an abuse of dominant position situation where the competition commission intervened to stop the anti-competitive practices of a company. When substantial competition is not present in a particular industry, companies in power can abuse their authority for profits. The real estate sector in India is the second largest

⁴⁰² Anjali Prasad, Consolidated FDI Policy, Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India, (2013) at 39, online:

<http://dipp.nic.in/English/Policies/FDI_Circular_01_2013.pdf>

⁴⁰³ Nirupam Bajpai & Jeffrey D. Sachs, Foreign Direct Investment in India: Issues and Problems Development Discussion Papers, No. 759 Harvard Institute for International Development, Harvard University (2000) at 2

⁴⁰⁴ *ibid.*

⁴⁰⁵ *Belaire Owner's Association v. DLF limited and Huda* 2011 CompLR 0239 (CCI) no. 19

sector providing employment, (first is agriculture) and plays a significant role in shaping the infrastructure. It is also a sector under which FDI is exempted. In this case, the informant (Belaire Owners Association) alleged that DLF Ltd. abused its dominant position and inflicted several unfair and arbitrary terms of contract on the apartment allottees of the Group Housing Complex, “the Belaire”.⁴⁰⁶

Instead of 19 floors, DLF constructed 29 floors on each of the five buildings. DLF conferred the exclusive right on itself to reject any Apartment Buyers Agreement without providing any reason for doing so. DLF was not bound to refund the money, although in case of non-payment the allottee was to become the direct sufferer. DLF had around 33% of the consideration in its pocket before the construction started.⁴⁰⁷ The corporation was fined Rs. 6.3 billion for abusing its dominant position.

Belaire abused its powers by harassing their clients and imposing unfair demands, only because they did not have competition to maintain market balance. In comparison, the real estate sector of the UAE is amongst the few that is open to foreign investment and the cause for much boom and bust.⁴⁰⁸ By having competition law as a regulatory law under this sector, competition would be sustained and in the future, corporations such as Belaire would not be able to demand unrealistic and detrimental policies. Overall, increased FDI escalates competition and therefore competition law is necessary to govern the conduct between competitors under the sector. This is what the UAE should aim to reach.

⁴⁰⁶ *ibid.*

⁴⁰⁷ Kirti Dashora, A Review of the Competition Issues in the Real Estate Sector: An Analysis of the Position Post DLF Case Gujarat National Law University (GNLU), (2012), online: <<http://www.cci.gov.in/images/media/ResearchReports/A%20Review%20Of%20The%20Competition%20Issues%20In%20The%20Real%20Estate%20Sector%20An%20Analysis%20Of%20The%20Position%20Post%20DLF%20Case..pdf>>

⁴⁰⁸ B. Rajesh Kumar, Abhas Agarwal and Rajat Khullar, Real Estate and Construction Sector in the UAE: Growth Strategies, HEC Montreal, (2010) at 3 online: <<http://library.imtdubai.ac.ae/Faculty%20Publication/Dr.rajesh/Real%20Estate%20and%20Construction%20Sector%20in%20the%20UAE.pdf>>

The energy sector in India- electricity, oil and gas sector- promotes competition for better access and reliability in the sector.⁴⁰⁹ The Electricity Act (EA 2003) was enacted in 2003, containing several competition enhancing provisions such as: de-licensed generation, freedom to undertake captive generation, recognition of trading as an independent activity, open access in transmission at the outset and in distribution in phases, unbundling of SEBs, multiple distribution licensees in a supply area and mandatory setting up of State Electricity Regulatory Commissions (SERCs).⁴¹⁰ Within two years, the volume of electricity traded as a percentage of electricity generated increased marginally from 2.0% in 2003-04 to 2.5% in 2005-06.⁴¹¹

In 1979, the Oil & Gas sector initiated private participation in the upstream segment as the Government issued licenses in a few potential oil-bearing areas. Private investments in Exploration and Production (E&P) segment, till March 2005, have been around three times that of the investments made by the Public Sector Undertakings (PSUs).⁴¹² It is believed by the Indian government that competition in energy markets is likely to ensure maximum efficiency gains and send appropriate pricing signals that align consumption with production.⁴¹³

As seen in the preceding example, effective competition is a force for efficiency and change in a sector is drastic with positive prospects. However, the newly enacted competition law of the UAE does not apply to the energy sector. The energy oil and gas sectors are government controlled with limited scope of the law, for an industry that comprises more than 50% of the country's exports.⁴¹⁴

⁴⁰⁹ Dr. S.K.Sarkar, Competition in India's Energy Sector (Electricity, Oil & Gas and Coal), The Energy and Resources Institute (TERI) March 15, 2007 at 5 [Sarkar], online: <http://www.competition-commission-india.nic.in/work_Shop/March14-15_2007/3.%20TERI%20Presentation%20-%20March%2015,%202007.pdf>

⁴¹⁰ Sumit Malik et al, Competition in India's Energy Sector, New Delhi: The Energy and Resources Institute, Final Report June 2007, Report No 2005RP30 at ES.2 xvi, [Malik] online:http://www.cci.gov.in/images/media/completed/5teri_20080508111155.pdf

⁴¹¹ Sarkar *supra* note 409 at 19

⁴¹² Malik *supra* note 410 at ES.2 xvii,

⁴¹³ *ibid* at 24

⁴¹⁴ Learn More About: Trade in United Arab Emirates, The Observatory of Economic Complexity, Massachusetts Institute of Technology, online: <http://atlas.media.mit.edu/country/are/>

South Africa

The South African government promotes foreign investment by attempting to create a reliable environment.⁴¹⁵ In South Africa, on the basis of public interest, the governmental bodies may involve themselves in foreign investment transactions. This can be done through a public interest test authorized by certain legislations that govern certain industries. For example, the Companies Act 2008⁴¹⁶, the Competition Act 1998⁴¹⁷, the Banks Act 1990⁴¹⁸, the Electronic Communications Act 2005⁴¹⁹, the Air Services Licensing Act 1990⁴²⁰, Insurance: the Short-term Insurance Act 1998⁴²¹ and the Long-term Insurance Act 1998⁴²², the Minerals and Petroleum Resource Development Act 2002⁴²³ and other related legislation.⁴²⁴

Until 1994, non-whites were discriminated against in South Africa.⁴²⁵ Initiatives have been carried out for empowerment of black persons including increase in ownership, employment equity and preferential procurement. The Black Economic Empowerment programme was established to promote the integration of black people into the South African economy and in 2004, it was crystallized in legislation under the Broad Based Black Economic Empowerment Act.⁴²⁶

⁴¹⁵ Oliver Borgers, Mergers, National Interest & National Security in 24 Jurisdictions Worldwide, Foreign Investment Review Getting the Deal Through, Baker & McKenzie, (2013) at 101, [Borgers]

⁴¹⁶ Act no. 71 of 2008

⁴¹⁷ Act no. 89 of 1998

⁴¹⁸ Act no. 94 of 1990

⁴¹⁹ Act no. 36 of 2005

⁴²⁰ Act no. 115 of 1990

⁴²¹ Act no. 53 of 1998

⁴²² Act no. 52 of 1998

⁴²³ Act no. 28 of 2002

⁴²⁴ Borgers, *supra* note 415 at 102

⁴²⁵ Doing Business in South Africa, UHY, (2012), at 4, online: <<http://www.uhy.com/wp-content/uploads/Doing-Business-in-South-Africa.pdf>>

⁴²⁶ Broad-Based Black Economic Empowerment Act, 2003. 53 Vol. 463 Cape Town (2003) at 4

After ending the apartheid period and encouraging black participation, South Africa began to initiate foreign business activity.⁴²⁷ There is no requirement of permits when starting a business, as the government's Macroeconomic Strategy for Growth, Employment and Redistribution (GEAR) is based on promoting the free market and financial and fiscal discipline, aiming at economic growth and development.⁴²⁸

There are no restrictions on foreign ownership except in the banking, insurance and broadcasting industries.⁴²⁹ In 2011, FDI inflows increased by four times from 2010, from \$1.2 billion USD to \$5.8 billion USD, this has been due to mergers and acquisitions that have taken place. In 2011, Wal-Mart acquired a 51% stake in the local chain Massmart for \$ 2.4 billion USD.⁴³⁰ In 2009, international giant Vodaphone purchased a further 15% of shares in Vodacom, the largest mobile service provider in South Africa for \$2.4 billion USD, from its joint venture partner Telkom, South Africa's telecommunications utility. Recently, the telecommunications industry was liberalized by the removal of Telkom's fixed line monopoly.⁴³¹ After the removal, Telkom was registered as a public limited liability company under the SA Companies Act. As part of a privatization process aimed at liberalizing the telecommunications sector, Telkom was listed on both the JSE Securities Exchange and the New York Stock Exchange in March 2003.⁴³² It was granted a five-year exclusivity period until May 2002, during which it had to prepare for a competitive environment and had to achieve certain rollout targets (Telkom, 2003). By liberalizing the telecommunications sector, South Africa increased the competition and profits in the market.

⁴²⁷ Albert Wöcke and Linda Sing, Inward FDI in South Africa and its policy context, Vale Columbia Center on Sustainable International Investment, (2013), at 2 online: <http://www.vcc.columbia.edu/files/vale/documents/South_Africa_IFDI_-_May_8_2013_-_FINAL.pdf>

⁴²⁸ *ibid* at 4

⁴²⁹ *ibid.*

⁴³⁰ Tiisetso Motsoeneng & Wendell Roelf, Wal-Mart wins final go-ahead for Massmart deal, Mar 9, (2012), online:

<<http://www.reuters.com/article/2012/03/09/us-massmart-walmart-idUSBRE8280KH20120309>>

⁴³¹ N.M. Theron & W.H. Boshoff, Vertical Integration in South African Telecommunications: A Competition Analysis, Department of Economics, University of Stellenbosch at 1

⁴³² *ibid* at 3

Presently, Vodacom is the dominant name in mobile broadband (3G) market in South Africa holding a 90% market share. However, as 3G technology is in greater demand, competition is increasing.⁴³³

In 1999, the number of professionals specializing in competition law in private law firms was 18. By 2004, this figure grew to 63 and by 2009 it more than doubled to 158.⁴³⁴ It is important to the South African government that the waste management industry in South Africa complies with the competition law of the country. Companies such as Packaging Council of SA, Collect-a-Can, The Glass Recycling Company, Plastics SA, PETCO, Polystyrene Council, Paper Recycling Association of SA, and Tetra-Pak, all have based their objectives around competition law to gain improvement and growth in the sector.⁴³⁵ Under the waste management industry in South Africa, there are estimated 200–220 plastics recycling manufacturers, employing approximately 4,800 people and creating over 35,000 indirect jobs, with an annual payroll of R250-million.⁴³⁶

Compared to the case in question, waste management is another industry not applicable by competition law in the UAE. The telecommunications sector in the UAE was heavily monopolized by the government controlled Emirates Telecommunications Corporation as well.⁴³⁷ However, in February 2007, this monopoly was effectively ended with the creation of another federal telecommunications company called Emirates Integrated Telecom (DU) that changed this to a duopoly. Both the companies however, are government controlled and exempted from competition law as well as FDI's.

⁴³³ *ibid* at 18

⁴³⁴ Shan Ramburuth & Norman Manoim, Ten years of enforcement by the South African competition authorities, unleashing Rivalry 1999 – 2009, Competition Commission South Africa and Competition Tribunal South Africa (2009) at 3, online:

<<http://www.comptrib.co.za/assets/Uploads/Reports/unleashing-rivalry.pdf>>

⁴³⁵ Packing and Paper Industry Waste Management Plan, Packing Council of South Africa, August 2011 at 26, online: <<http://www.pacsa.co.za/pictures/pdfs/IndWMP.pdf>>

⁴³⁶ Vincent Makinta & Nomonde Madubula, Making Solid Waste Management in South Africa Sustainable, Financial and Fiscal Commission Policy Brief, 6/ 2012 at 2

⁴³⁷ The Report Dubai 2007, Oxford Business Group, at 194

Brazil

Foreign direct investment in Brazil is visible through foreign capital and through holding of shares and quotas. In order to start these investments, an Electronic Declaratory Registration needs to be made.⁴³⁸

In 2011, the Central Bank of Brazil announced that around \$65 billion USD entered the country through foreign direct investment, equivalent to 2.6% of GDP. Brazil is the fourth largest destination for FDI in the world, according to the Brazilian Society of Transnational Corporation and Economic Globalization (Sobeet).⁴³⁹

Participation of foreign capital is restricted in health services, postal and telegraph services, the aerospace sector and undertakings involved in the development of nuclear energy in Brazil.⁴⁴⁰ The government also prohibits foreign investment in administration of newspapers, magazines and other publications and radio and television networks.⁴⁴¹ Brazilians must indirectly or directly control at least 70% of the broadcasting and newspaper businesses.⁴⁴² However, there are no restrictions on electric power companies, custom terminals, highway dams, and banking sector and insurance sector.⁴⁴³

In 2004, Microsoft created LARS (Large Account Resellers) for substantial corporate customers.⁴⁴⁴ These LARs were restricted to a geographical area and the distributors would be served with the Microsoft software depending on the Microsoft requirements. This practice was held to be unlawful as it restricted the distribution of the Microsoft

⁴³⁸ Contract and acquisitions, Direct Foreign Investments, online:
<http://www.brasil.gov.br/para/invest/contracts-and-acquisitions/direct-foreign-investment/br_model1?set_language=en>

⁴³⁹ *ibid.*

⁴⁴⁰ Foreign Capital, Restrictions on foreign investment, Brazil Government.br online:
<http://www.brasil.gov.br/para/invest/foreign-capital/restrictions-on-foreign-investment/br_model1?set_language=en>

⁴⁴¹ *ibid.*

⁴⁴² Restrictions on Foreign Investment, Brazil Government,
<<http://www.brasil.gov.br/para/invest/foreign-capital/restrictions-on-foreign-investment/print>>

⁴⁴³ 2012 Investment Climate Statement, Bureau of Economic and Business Affairs, June 2012,
online: <http://www.state.gov/e/eb/rls/othr/ics/2012/191115.htm>

⁴⁴⁴ Competition Law and policy in Latin America- peer reviews of Argentina, Brazil, Chile, Mexico and Peru, Inter-American Development Bank, OECD, at 78 online:
<<http://www.oecd.org/countries/peru/37976647.pdf>>

brand software and associated computing services. Only one firm, TBA, in the Brazilian geographic area satisfied the LRA requirements and therefore Microsoft attested that TBA was the sole authorized company to sell the Microsoft software to all federal agencies. The procedures of the federal authority were waived to follow TBA guidelines. In CADE's view, Microsoft's decision to give sole power to TBA was unlawful. CADE established that a decision to create an exclusive distributor required Microsoft to establish maximum resale prices or otherwise ameliorate the inefficient "double monopoly" effect that would otherwise arise.⁴⁴⁵

Although there has been an increase in liberalization since the 1990s, there are still many countries in Africa, Asia and the Middle East in which governments run major economic businesses and favour monopoly profits.⁴⁴⁶ As said by professor Gal, 'with increased international trade and deepening economic interdependence has come pressure for harmonization and coordination of competition policy'.⁴⁴⁷ The private sector increases the pressure of proposed transactions, possible inconsistent standards and policies in related matters.⁴⁴⁸

In Brazil, the competition law applies to all sectors with the aid of the competition authority and other regulatory agencies.⁴⁴⁹ Under the electricity industry, a regulatory agency was created in 1997 to oversee privatization and liberalization of the industry (Agência Nacional de Energia Elétrica – ANEEL).⁴⁵⁰ ANEEL overlooks competition in the wholesale market, permitting distributors and large consumers to contract directly with generators.⁴⁵¹ It is essential that the UAE considers the Brazilian approach to competition law and allows competition law to expand its scope as Brazil is a strong emerging market.

⁴⁴⁵ *ibid.*

⁴⁴⁶ *ibid.*

⁴⁴⁷ Gal, *supra* note 104 at 13

⁴⁴⁸ *ibid.*

⁴⁴⁹ Claudio Considera & Kélvia Albuquerque, The Relationship Between Competition Policy and Regulation in the Brazilian Economy, SEAE/MF Documento de Trabalho no 10, August 2001, at

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⁴⁵⁰ *ibid* at 9

⁴⁵¹ *ibid* at 10

After analyzing the economic framework of these three different emerging markets, in the next subsection I will examine why competition law is necessary in the first place, what effect competition law has on developing countries and how that differs from developed nations in the previous chapter.

2. Why was it necessary to implement competition law?

Emerging markets are seen to be fast-growing economies with low to middle per capita income. These countries consist of 80% of the world population and 20% of the world economies.⁴⁵² These emerging markets could also be set to be the emerging competitors of the emerged markets. A report published in 2003 by the Goldman Sachs said that Brazil's, China's, India's and Russia's economies merged could be larger than the G-6 (United States, Japan, United Kingdom, Germany, France and Italy). That is why it is important to assess competition law in developing nations in line with the modern globalized era. Once the reasons behind the implementation are pointed out, it will be easier to assess the economic stability of the UAE and whether the country is ready to handle the law.

The main objective of liberalization was to improve competitiveness by increasing production for growth and efficiency. Customers would benefit by receiving better quality, greater choices and lower prices. Without competition privatizing a monopoly would have no effect on the market, therefore there was a need to contest the market power abuses and anticompetitive practices of cartels, monopolies and protectionist threats. That has been the basic goal for developed nations as well. The US poses minimum restrictions on FDI and foreign business setups.⁴⁵³ Even though foreign development is heavily controlled in Canada in specific industries,⁴⁵⁴ this concept is

⁴⁵² Antoine W. VanAgtmael, International Finance Corporation of the World Bank, (1981)

⁴⁵³ White House Touts Growing Foreign Direct Investment In The U.S., abc News, online: <<http://abcnews.go.com/blogs/politics/2011/06/white-house-touts-growing-foreign-direct-investment-in-the-us/>>

⁴⁵⁴ Harischandra *supra* note 137 at 2

gradually changing. Said by Statistics Canada, that foreign firms tend to be more productive than domestic firms.⁴⁵⁵

In order to be 'eligible' for competition, policy consultants carry out an initial assessment to determine the usefulness of the law in the country.⁴⁵⁶ This was encouraged in the 1990's as it brought about liberalizing reforms within developing nations, changing the rules of the game.⁴⁵⁷ Deregulation, privatization, free trade and openness to foreign investment all were seen as central components of liberalization⁴⁵⁸. By removing obstacles to imports, trade liberalization proposes an effective means for disciplining domestic producers of tradable goods, specifically in smaller economies.⁴⁵⁹

Adopting competition policies in emerging markets has been carried out relatively faster than other laws because of the easily available generalized templates from established economies⁴⁶⁰ coupled with encouragement from the OECD and UNCTAD.⁴⁶¹ Once the law has been implemented in the system, there are training sessions and briefings held for handling the law, such as characterization of relevant markets, construction of concentration indicators, analysis of entry, procedural and policy issues, etc.⁴⁶² Western experts are hired by USAID or other developmental agencies to understand the need for competition law in a particular jurisdiction.⁴⁶³ They visit the respective country for one or two weeks and manage interviews with potential stakeholders under all governmental and antitrust processes. The consultants educate the people in the advantages and disadvantages of the law, giving examples of the US and EU, in order to encourage the

⁴⁵⁵ Baldwin, John R. & Wulong Gu, Global Links: Multinationals, Foreign Ownership and Productivity Growth in Canadian Manufacturing, The Canadian Economy in Transition Series Research Paper, Ottawa: Statistics Canada (2005), at 7

⁴⁵⁶ *ibid.*

⁴⁵⁷ Rodriguez *supra* note 109 at 121

⁴⁵⁸ Roman Wacziarg & Karen Horn Welch, Trade Liberalization and Growth: New Evidence, No. 1826, Stanford GSB (2003), at 20

⁴⁵⁹ Robert D. Cooter, Market Modernization of Law: Economic Development Through Decentralized Law, in Economic Dimensions in International Law, Cambridge University Press, (1998) at 276

⁴⁶⁰ Nine Steensma, Competition Law from a Developmental perspective, The impacting of competition law regimes or dynamic efficiency, University of Maastricht 2005, at 29

⁴⁶¹ *ibid.*

⁴⁶² Rodriguez, *supra* note 109 at 26

⁴⁶³ Federal Trade Commission, A Positive Agenda for Consumers: The FTC years in Review (2003), at 31 online: <<http://www.ftc.gov/reports/aba/gpra2003.pdf>>

countries to adopt the popular law.⁴⁶⁴ ‘Western advisors sometimes have pressed transition governments to adopt close replicas of competition laws typically found in mature market economies’.⁴⁶⁵ However, when transferring the structured template to an emerging market economy, it often fails to meet the distinct objectives of the country. Issues of relevance, appropriateness and impact of antitrust are never thought over.⁴⁶⁶

Developing economies have the advantage of the developed nations’ templates and they are encouraged to use them as well. When competition law was introduced in Canada, the EU, and the US, these economies were also developing and they did not have the accessibility of generalized templates available, hence the constant evolution of the law throughout the years. For example, when Canada had its first court proceeding of an abuse of dominant position case, it referred to the US and EU for precedent.⁴⁶⁷ Developing nations can use support options for better understanding and effective implementation of competition law likewise.

Competition law provides security for domestic firms. In developing nations, the threat of foreign competition prevents numerous sectors from loosening trade barriers.⁴⁶⁸ Therefore, competition law is applied to ensure that firms do not behave collusively and no exploitation of market power occurs. Developing countries should use the opportunities offered by the WTO, to apply a pro-active, broad-based competition policy stance while promoting their own interests and seeking all the leverage they can to expand their place in the world markets.

It is beneficial to include information on the competition policy applied by governments in order to strengthen the WTO’s transparency mandate. Trade policy and competition

⁴⁶⁴ Juan Antonio and Rivière Martí, Competition Policy in Latin America: A New Area of Interest for the European Union, EC Competition Policy Newsletter, Spring 1997 online:

<http://ec.europa.eu/competition/speeches/text/sp1997_014_en.html>

⁴⁶⁵ John Fingleton et al, Competition Policy and the Transformation of Central Europe (1996) at 54–57

⁴⁶⁶ Rodriguez, *supra* note 109 at 83

⁴⁶⁷ Director of Investigation and Research v NutraSweet (1990), 32 C.P.R. (3d) 1 (Comp. Trib.)

⁴⁶⁸ Bernard Hoekman & Peter Holmes, Competition Policy, Developing Countries and the WTO, World Bank and CEPR, University of Sussex and College of Europe, Bruges (1999), at 21 [Hoekman]

analysts promote transparency institutions and competition agencies, arguing that public information on the costs and benefits of government policies is required for countervailing rent-seeking activities.⁴⁶⁹

When analyzing general aims of competition law in a country, it is important to align them with the general characteristics of competition law for inclusion in the WTO.⁴⁷⁰ The law should fit the objectives of the WTO as conceptions of a community play a major role.⁴⁷¹ Recently, The EU argued that all WTO members must adopt and enforce competition laws.⁴⁷² In line with this, the US authorities acknowledged that there is a need for international cooperation as well.⁴⁷³

To sum up, competition law is necessary to remove the barriers of emerging markets in developing countries and increase economic growth. The law provides security for domestic industries against foreign intervention. Therefore the purpose of the law is the same, for developing and developed countries. The difference arises in the execution of the law, which depends on how much importance is given to the law in the legal and economic system.

3. Competition law in different economies

Various competition law systems in different countries are modified on the basis of importance and impact. All economies fluctuate in terms of context, goals, norms, methods and institutions and the largest characteristics visible are the ‘thinness of competition law experience and the uncertainty about its roles and future’⁴⁷⁴. In the newer

⁴⁶⁹ Finger, J. Michael, Incorporating the Gains from Trade into Policy, *World Economy* (1982) 5 at 367-77

⁴⁷⁰ David J. Gerber, *Competition Law and the WTO: Rethinking the Relationship*, (2007), Chicago-Kent College of Law, at 283 [Gerber] online:

<http://works.bepress.com/cgi/viewcontent.cgi?article=1075&context=david_gerber>

⁴⁷¹ *ibid.*

⁴⁷² Hoekman *supra* note 469 at 3

⁴⁷³ Joel Klein, No Monopoly on Antitrust, *Financial Times*, February 13, 1998, at 24.

⁴⁷⁴ David J. Gerber *supra* note 87 at 262

economies, competition law has a minimal role in the economic matters and has only recently been encouraged therefore the impact of the law will be gradual.⁴⁷⁵

Countries differ in terms of economic contexts due to their size, and the incentives for competition officials- whether they want to invest their time and effort in the economy.⁴⁷⁶ Their openness towards a new approach is important, as that is the determining factor for how the law will affect the society. If, for example, trade barriers are kept high, it will be relatively harder for countries to adopt a competition policy effectively, than one that has low trade barriers among different countries.⁴⁷⁷ UAE trade barriers are relatively low, as in relation to enabling trade it was leading the Middle East and North Asian region in the 19th position worldwide in 2012.⁴⁷⁸ However, exemptions under UAE's competition law 2012 state otherwise.⁴⁷⁹

Economic development is scrutinized in terms of the goods and their sources in the market, the opportunities for small and medium-sized businesses, the availability of finances and the general level of education in the country. In respect to these factors, the law either cannot fully cater to the country's needs, if it is a borrowed law, or it is modified to fit the economic structure of the country. Whichever way it is done, it will be difficult for the country to incorporate this law and measure against a global economic level.⁴⁸⁰ Small and Medium enterprises are exempted from the UAE's competition law; therefore an unfair opportunity towards corporations and consumers can be inferred.⁴⁸¹

Competition law is politically influenced as it is governed and funded by government officials or assigned agencies. In some countries, those in control would have the urge to invest in competition law and train others while using resources wisely. In other countries (possibly the small, less developed countries) however, there is limited capacity and

⁴⁷⁵ *ibid.*

⁴⁷⁶ David *supra* note 96 at 263

⁴⁷⁷ David, *supra* note 96 at 276

⁴⁷⁸ Robert Z. Lawrence et al, The Global Enabling Trade Report 2012, Reducing Supply Chain Barriers, World Economic Forum, (2012) at 26, online;

<http://www3.weforum.org/docs/GETR/2012/GlobalEnablingTrade_Report.pdf>

⁴⁷⁹ Competition Law, Federal Law No. (4) of 2012 [UAE competition law]

⁴⁸⁰ David, *supra* note 96 at 261

⁴⁸¹ UAE competition law *supra* note 479 at article 4(3)

resources and as a consequence businessmen receive less support by the bureaucrats for independent decision-making. The government may not be positively responsive for private interests and investing either. The competition policy authority can act as a catalyst for debate about the appropriate choice of strategies for promoting growth and the right responsibility of government intervention in the economy.⁴⁸² There are countries which rather than having controlled bureaucrats, genuinely don't have the resources or political power to maintain the law.⁴⁸³ Democratic governmental systems make a difference as well, as officials will be more willing to understand consumer interests and encourage businesses to multiply and compete. Joseph Stiglitz said, 'Strong competition policy is not just a luxury to be enjoyed by rich countries, but a real necessity for those striving to create democratic market economies.'⁴⁸⁴ Although the UAE's sheikhdom has no plans on creating a western style democratic setup at the moment, the country is economically vibrant.⁴⁸⁵ Widely acknowledged as one of the wealthiest countries in the world,⁴⁸⁶ it can provide any resources needed for efficient enforcement of the law. Therefore, it all comes down to the importance of the law in the country.

In general, competition law addresses monopolies, cartels, dominant position cautions and merger guidelines. What differs is the threshold of certain issues and how the courts interpret a certain provision. The UAE does not refer to precedents in cases as it follows a civil law system. Therefore, it is more likely to interpret provisions on an individual basis, which can cause more uncertainty.⁴⁸⁷ Yet, this uncertainty can be addressed by the availability of an effective enforcement strategy by the government.

⁴⁸² Charles Cadwell, Implementing Legal Reform in Transition Economies, Institutions and Economic Development at 251, 260

⁴⁸³ David, *supra* note 96 at 262

⁴⁸⁴ Joseph E. Stiglitz, "Information and the change in the Paradigm in Economics" Columbia Business School, Columbia University (2001)

⁴⁸⁵ Taxation in the United Arab Emirates, Galadari and Associates, at 2, online: <http://www.galadarilaw.com/uploads/brochures/172113_tax.pdf>

⁴⁸⁶ Issac John, Qatar, UAE among top 10 richest countries, 26 February 2012, Khaleej Times, online:

<http://www.khaleejtimes.com/DisplayArticle11.asp?xfile=data/theuae/2012/February/theuae_February730.xml§ion=theuae>

⁴⁸⁷ Andrew Tarbuck & Chris Lester, Dubai's Legal System creating a Legal and Regulatory Framework for a Modern Society, Motivate Publishing, at 8 online:

<http://www.lw.com/upload/pubContent/_pdf/pub2787_1.pdf>

Methods and institutions affect the competition law in countries.⁴⁸⁸ Factors under this heading include distribution of authority, the degree of power involved, the independence of the institutions and the implementation of law.⁴⁸⁹ When a single agency handles the case, it is to analyze every process, from initiating to enforcing the law.⁴⁹⁰ Under such a system, it is the sole discretion of the agency to approach the case and the law. If the courts are involved, mostly administrative issues are looked at.⁴⁹¹ Private agencies provide an in-depth perspective on competition cases such as in the US but that brings about a different outcome.⁴⁹² Generally in competition cases, factors such as access, control and interpretation of data are focused on but the outlook and analysis from private agencies can be resourceful when determining a case.⁴⁹³ The developed nations have set up several competition authorities in their respective economies. For example, as mentioned in the previous chapter, Canada has a Competition Tribunal and a Competition Bureau to overlook anti-competitive acts in the country.⁴⁹⁴ There are large worldwide agencies that overlook competition law as well such as the European Competition Authorities⁴⁹⁵, United Nations Conference on Trade And Development,⁴⁹⁶ World Trade Organization⁴⁹⁷ and International Competition Network.⁴⁹⁸

In this chapter, for further comparison, I have chosen to analyze three different developing nations. I will be examining Brazilian competition law because it is a rapidly growing emerging market and it follows the civil law system like the UAE. South African competition law is unique because it revolves around the society's economic particularities and caters to the country's needs. I have also chosen to interpret Indian competition law because the country follows a common law legal system and it is a

⁴⁸⁸ David *supra* note 96 at 265

⁴⁸⁹ *ibid* at 266

⁴⁹⁰ *ibid* at 265

⁴⁹¹ *ibid* at 266

⁴⁹² *ibid.*

⁴⁹³ *ibid.*

⁴⁹⁴ Government of Canada, Departments and agencies, online:

<<http://www.canada.gc.ca/depts/major/depind-eng.html>>

⁴⁹⁵ European Competition Authorities, Mergers and alliances in Civil Aviation, EUROPA,

<http://ec.europa.eu/competition/publications/eca/report_air_traffic.pdf>

⁴⁹⁶ UNCTAD, online: <<http://unctad.org/en/Pages/Home.aspx>>

⁴⁹⁷ WTO, online: <<http://www.wto.org/>>

⁴⁹⁸ ICN, online: <<http://www.internationalcompetitionnetwork.org/>>

growing economy with a fairly older law, meaning a more refined law.

India

India had a colonial past in which there were no competition laws. When independence was given in 1947, the economy changed to a command-and-control one by the Indian government.⁴⁹⁹ Yet since the government controlled most activities, competition law had little room to be accommodated. The first form of competition law was introduced as the Monopolies and Restrictive Trade Practices Act 1969⁵⁰⁰, (MRTP) with the objective of reducing market incidences of monopolistic and restrictive trade practices to avoid excessive concentration of economic power.⁵⁰¹

In India, competition law became necessary as the private sector economy was growing.⁵⁰² The first competition law enacted in India did not cater to certain anti-competitive behaviour such as cartelization, bid rigging and predatory pricing.⁵⁰³ This was seen as a gateway for carrying out anticompetitive activities in India, those that were not recognized under the law. On this basis, judicial precedents were set as well and in order to change them, a new statute needed to be enacted. The process under MRTP was slow as the commission was bound to follow the Indian Code of Civil procedure 1908⁵⁰⁴ when determining a decision. By the end of the twentieth century, globalization and

⁴⁹⁹Srishti Dutt, Competition Law in India, US & UK: A Comparative Analysis, Internship Report- (November 2012), National Law University Delhi [Dutt] at 7 online:

<http://www.cci.gov.in/images/media/ResearchReports/Competition%20Law%20in%20India%20US%20%20UK_A%20Comparative%20Analysis.pdf>

⁵⁰⁰ Monopolies and Restrictive Trade Practices Act 1969, Act 59 of 1969

⁵⁰¹The Monopolies and Restrictive Trade Practices act 1969, Universal Law Publishing co. Pvt. Ltd., 1969, at 23 Online:

<http://www.mca.gov.in/Ministry/actsbills/pdf/The_Monopolies_and_Restrictive_Trade_Practices_Act_1969.pdf>

⁵⁰² Why India Adopted a New Competition law, CUTS international (2006), online:

<<http://www.cuts-international.org/pdf/wiancl.pdf>>

⁵⁰³ Pradeep S. Mehta, A functional Competition Policy for India, CUTS international Jaipur, 2006 at 66

⁵⁰⁴ Indian Code of Civil procedures 1908, Act no. 5 of 1908

privatization was encouraged worldwide, and that is what motivated changes in India.⁵⁰⁵ In October 1999, a committee was established, known as the High Level Committee on Competition Policy and Competition Law, to introduce a new competition law.⁵⁰⁶ The committee studied modern competition laws and the views of academics, and practitioners to come up with Competition Act of 2002 (later amended in 2007).⁵⁰⁷

India's new competition law 2003, lays out three main objectives, 1) increase competition advocacy; 2) restrain anticompetitive agreements and abuse of dominance; 3) include combinations regulation.⁵⁰⁸ In 2002, the Indian economy became more liberal when it removed controls on competition in the markets. This was a gateway for introducing competition in the country.⁵⁰⁹ The act outlined specific criteria to assess whether a practice has an adverse effect on competition, as the MRTP was ambiguous on this regard. The new act mandated that the Competition Commission of India (CCI) would not be bound by the Code of Civil procedure 1908, and was to regulate its own procedure, and the CCI was allowed to consult experts from relevant fields to assist in conduct of inquiry.⁵¹⁰ India's competition authorities are budget-constrained and understaffed and permission needs to be granted by the government to incur expenditure beyond certain limits.⁵¹¹

The India Competition Act 2002⁵¹² was enacted to ensure scrutiny by the government for any agreements between corporations that have an 'appreciable adverse effect on competition'.⁵¹³ This standard is similar to the US, where the statute is believed to

⁵⁰⁵ Corporate and allied laws, Globalisation and Competition: The Role of a Professional, The Chartered Accountant (2007) at 1453 online: <<http://220.227.161.86/96911452-1461.pdf>>

⁵⁰⁶ Dutt, *supra* note 502

⁵⁰⁷ *ibid.*

⁵⁰⁸ Pradeep S. Mehta, The Evolution of Competition Laws and their Enforcement: A political Economy Perspective, Routledge (2012) at 18 [Pradeep]

⁵⁰⁹ India Competition Act 2002, No. 12 of 2003, online: <[competition commission of India New Delhi, http://www.cci.gov.in/images/media/competition_act/act2002.pdf](http://www.cci.gov.in/images/media/competition_act/act2002.pdf)>

⁵¹⁰ *ibid.*

⁵¹¹ Pradeep *supra* note 511 at 81

⁵¹² India Competition Act 2002, No. 12 of 2003, online: <[competition commission of India New Delhi, http://www.cci.gov.in/images/media/competition_act/act2002.pdf](http://www.cci.gov.in/images/media/competition_act/act2002.pdf)>

⁵¹³ *ibid.*

analyze the ‘substantial lessening of competition’⁵¹⁴ and the EU, which prohibits mergers that ‘significantly impede effective competition...in particular as a result of the creation or strengthening of a dominant position’.⁵¹⁵

The Act makes a clear distinction between horizontal and vertical agreements at different levels of manufacturing or distribution and has adopted the rule of reason⁵¹⁶ aspect, which requires proof of anti-competitive effect.⁵¹⁷

South Africa

During 1948-1994, the right-wing Nationalist government governed South Africa. The markets were highly concentrated with low levels of consumer choice, high prices of basic commodities, a poorly developed small-medium enterprise sector and low levels of productivity.⁵¹⁸ One of the elements of South Africa’s peaceful revolution over the last decade was reform of its competition policy institutions.⁵¹⁹

The Regulation of Monopolistic Conditions Act 1955⁵²⁰ was the first step towards competition policy that was administered by the Board of Trade and Industries.⁵²¹ This Act proved to have no credible enforcement and the Board was often ignored by the Ministers of Industry.⁵²² Amendments were offered yet rendered unsuccessful. After this Act, to address the problems of the previous act, the Maintenance and Promotion of

⁵¹⁴ The Sherman Antitrust Act, July 2, 1890, ch. 647, 26 Stat. 209, 15 U.S.C. §§ 1–7)

⁵¹⁵ EU competition law, Art. 102 TFEU

⁵¹⁶ Introduced in the case, *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911) In any action under the antitrust laws, or under any State law similar to the antitrust laws, the conduct of—(1) any person in making or performing a contract to carry out a joint venture, or (2) a standards development organization while engaged in a standards development activity, shall not be deemed illegal per se; such conduct shall be judged on the basis of its reasonableness (15 USC SS 4302 Rule of Reason Standard, <http://www.law.cornell.edu/uscode/text/15/4302>)

⁵¹⁷ Pradeep, *supra* note 511 at 107

⁵¹⁸ *ibid*

⁵¹⁹ Competition law and policy in South Africa, an OECD peer review, Emerging economies transition, (May 2003) at 7 [Competition law and Policy in South Africa]

⁵²⁰ Regulation of Monopolistic Conditions Act 1955, Act no. 24 of 1955

⁵²¹ Competition Commission South Africa- About us, online: <<http://www.compcom.co.za/about-us/>>

⁵²² Pradeep, *supra* note 511 at 163

Competition Act 1979 was introduced and a Competition Board was implemented to administer the Act.⁵²³ The problem of negligent implementation was still not resolved as the two decades thereafter were concentrated on economic power in South Africa.⁵²⁴

Before 1994, policy and law were characterized by considerations based on apartheid.⁵²⁵ The law and politics both were geared to maintain the immense concentration of economic power along racial lines. Competition laws were not encouraged and were only influential to the point of general recommendations to politicians. Only when the Afrikan National Congress stepped in power in 1994, was the apartheid concept abolished⁵²⁶. Competition law was used as a tool for equality and employment opportunities after 1994, to foster social justice and economic growth.⁵²⁷ One of the fundamental objectives of competition policy in South Africa is ‘the need to balance economic efficiency with socio-economic equity and development.’⁵²⁸

When establishing the new law, four major problems were identified. The previous law allowed high levels of horizontal market concentrations, it did not consider vertical agreements, there were no pre-notification measures for mergers and acquisitions, and anti-competitive conduct was not prohibited.⁵²⁹ On 20 May 1998, the new Competition Act was passed, prohibiting vertical and horizontal agreements and abuse of dominance and giving greater powers to competition agency.⁵³⁰ The new law defined objectives as well that were to be enforced by agencies. The Reconstruction and Development program promised to ‘introduce strict anti-trust legislation to create a more competitive and dynamic business environment.’⁵³¹

⁵²³ *ibid* at 161

⁵²⁴ *ibid* at 168

⁵²⁵ Apartheid was a concept exclusively created in Afrikaans where the Nationalist government segregated the majority blacks from the minority whites, and the whites’ superiority was upheld.

⁵²⁶ Johannes Fedderke & Charles Simkins, Economic Growth in South Africa Since the Late Nineteenth Century working paper 138, (2009) at 27

⁵²⁷ Competition law and policy in South Africa, *supra* note 522

⁵²⁸ *ibid.*

⁵²⁹ Pradeep, *supra* note 511 at 163

⁵³⁰ Competition law and policy in South Africa, *supra* note 522

⁵³¹ *ibid.*

Brazil

After claiming independence from Portugal in 1822, Brazil had the lowest GDP per capita of any new colony.⁵³² Starting from the early twentieth century Brazil started evolving and from 1913-1980, it grew faster than any other country in the Western Hemisphere.⁵³³ The growth was halted when Brazil defaulted on its foreign debt in 1983.⁵³⁴ In 1989, Fernando Collor, the first democratically elected president of the country adopted an international trade regime and privatized many state operations ‘opening Brazil to the outside world and unshackling the economy’.⁵³⁵ His successor brought about the ‘Real Plan’⁵³⁶ to fix the continuing inflation. Further state enterprises were privatized by Mr. Cardoso. Brazil’s economy became open towards global competition and liberal economic policies.⁵³⁷ The Real Plan increased economic stability as Brazilian and multinational corporations poured in huge amount of money for technology and new equipment.⁵³⁸

Brazil is a strong economy because of four reasons; developing infrastructure, reducing poverty and inequality, increased openness to the world and institutional reform.⁵³⁹

Infrastructure

- Brazil has focused its new money on building strong infrastructures and has created the ‘Growth Acceleration Plan’.⁵⁴⁰ This is an umbrella term for all the

⁵³² Sean Williams, Why Is Brazil an Emerging Market Economy?, The University of IOWA Center for International Finance and Development, April 2011, at 4 [Williams] online: <<http://ebook.law.uiowa.edu/ebook/sites/default/files/Brazil%20-%20Sean-1.pdf>>

⁵³³ U.S. Relations With Brazil, Bureau of Western Hemisphere Affairs, Fact Sheet, U.S. Department of State: Diplomacy in Action, August 15, 2012

⁵³⁴ *ibid.*

⁵³⁵ Economist ‘Since the election campaign, the consequences of this political and ideological change for Brazilian trade policy were not long in coming’ Dec. 7, 1999 at 7

⁵³⁶ Also known as the ‘Plano Real’

⁵³⁷ Mónica Hirst, The United States and Brazil: the long road of unmet expectations, New York: Routledge, (2005), at 73-108.

⁵³⁸ Sweta Chhachharia, Doing Business In Brazil: The Road Ahead, IBS Research Center, Kolkata at 2

⁵³⁹ Williams, *supra* note 535 at 11

⁵⁴⁰ PAC2, Ministerio do Palnejamento, online: <<http://www.pac.gov.br>>

various projects throughout the country. Its main goal is to improve the poor infrastructure and expand economic potential in poor areas- this would include building roads and homes, improving the sewage, water, sanitation and electrical systems.⁵⁴¹

Reducing poverty and inequality

- Brazil has tried to reduce poverty through its well-known ‘BolsaFamilia’ program (family scholarship program), with the help of the World Bank benefitting eleven million families.⁵⁴² In this program, families get a fixed amount of money each month on the condition that they send their children to school and have regular check-ups so the future generation of the country is healthy educated and independent.⁵⁴³

Increased openness to the world

- In terms of the country’s interaction with the world, Brazil has lowered its import tariffs and modernized its import system for greater foreign investment.⁵⁴⁴ Brazil gives foreign companies the same treatment as national companies and allows foreign investors to take their profits back to their home countries. The Sao Paulo stock exchange is the fourth largest in the world and the largest in Latin America.⁵⁴⁵

Institutional reform

- There has been an improvement in governmental institutions and systems as well for greater efficiency to nationals and foreigners.⁵⁴⁶ Brazilian industry and government began to focus more towards international trade law and practice as

⁵⁴¹ The World Bank, Brazil Overview online:

<<http://www.worldbank.org/en/country/brazil/overview>>

⁵⁴² Bolsa Família Program, Decree n° 5.209, de 17 de setembro de 2004

⁵⁴³ *ibid.*

⁵⁴⁴ Ronald J. Gilson et al, Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the U.S., and the EU, ECGI Working Paper Series in Law, 149 (2010) at 11

⁵⁴⁵ Williams, *supra* note 535 at 14

⁵⁴⁶ Marcus Faro de Castro and Maria Izabel Valladão de Carvalho, Globalization and Recent Political Transitions in Brazil, International Political Science Review, Vol. 24, No. 4 (Oct., 2003), at 465-490, Sage Publications, Ltd, online:

<<http://www.jstor.org.proxy2.lib.uwo.ca/stable/1601633>>

Brazil's policies shifted to greater open-market and export-oriented substitutes, accompanied by superior international legal assurances under the new WTO judicialized system.⁵⁴⁷ The judicial system of the country was also amended in the 2006 constitution amendment. From 2007 onwards, the decisions of the Supreme Court of the country now have precedential value, meaning decisions are binding over lower courts, something that is uncommon for a civil law system. The country's GDP (\$2.2 trillion USD) is the highest in Latin America as of 2012.⁵⁴⁸

The first attempt at implementing a competition policy was in 1962 and a national competition authority was established - Conselho Administrativo de Defesa Economica (CADE).⁵⁴⁹ The constitution of 1988 recognized the role of the private sector and trade liberalization.⁵⁵⁰ The formal competition law was established in 1994, it decreased state intervention and introduced three major changes; it gave more power to CADE, it gave a greater degree of autonomy to CADE, and it introduced merger control.⁵⁵¹ 'The new law invigorated CADE, making it an independent agency, and introduced merger control.'⁵⁵²

There was a need for competition policy in Brazil because the increase of trade liberalization, which decreased the tariff rate, caused more interaction with the world outside of Brazil.⁵⁵³ Trade and development policies were drastically changed in Latin America during the 1990's from the 'import substitution industrialization' policies of the 1960s and 1970s to a more 'export-oriented', trade liberalizing alternatives.⁵⁵⁴ Federal Law no. 8031/90 incorporated privatization by reducing state intervention. There was a

⁵⁴⁷ Gregory Shaffer et al, *Winning at the WTO: The Development of a Trade Policy Community within Brazil*, (2008), Flasco Argentina, at 10 online: <<http://rrii.flacso.org.ar/web/wp-content/uploads/2010/10/doc14.pdf>>

⁵⁴⁸ The World Bank, *Brazil Overview* online:

<<http://www.worldbank.org/en/country/brazil/overview>>

⁵⁴⁹ *Competition Law and Policy in Brazil- A Peer Review*, (2010) OECD, IDB at 10, online: <<http://www.oecd.org/daf/competition/45154362.pdf>> [competition law...Brazil]

⁵⁵⁰ *Constitution of the Federative Republic of Brazil*, 3rd ed. Chamber of deputies, online: <http://bd.camara.gov.br/bd/bitstream/handle/bdcamara/1344/constituicao_ingles_3ed.pdf>

⁵⁵¹ Gesner Oliveira & Thomas Fujiwara, *Competition Policy In Developing Economies: The Case Of Brazil- Northwestern Journal of International Law & Business*, (2006) 26, 3 ProQuest at 619

⁵⁵² *Competition Law...Brazil*, *supra* note 552 at 10

⁵⁵³ *ibid* at 9

⁵⁵⁴ Kathryn Sikkink, "Ideas and Institutions: Developmentalism in Brazil and Argentina", Ithaca and London: Cornell University Press, (1991) at 75-79

need to regulate privatization in order to control private monopolies. Competition law in general was being introduced throughout different countries and the international environment encouraged the importance of policy.⁵⁵⁵

Brazil follows the civil law system and has its own established competition policy, which contains 93 articles - LAW No. 8884/94.⁵⁵⁶ It was first introduced in 1994, yet was amended in November 2011 the ('New Law'- Law No. 12529/11). Article 1 says the antitrust measures of 'constitutional principles as free enterprise and open competition, the social role of property, consumer protection, and restraint of abuses of economic power.'⁵⁵⁷

(a) Anti-competitive agreements

It is important to understand the wording of the distinct competition laws of India, South Africa and Brazil, in order to further compare the law with the competition law of the UAE.

India⁵⁵⁸

3. (1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

⁵⁵⁵ Flávio M. Rabelo & Flávio C. Vasconcelos, Corporate Governance in Brazil *Journal of Business Ethics*, Vol. 37, No. 3, Corporate Governance Reforms in Developing Countries (May, 2002), Springer at 321-335, online: <www.jstor.org.proxy2.lib.uwo.ca/stable/25074757>

⁵⁵⁶ Brazilian Antitrust Law, No. 8884 Of 1994, Official Gazette of the Federal Executive, June 13, 1994

⁵⁵⁷ *ibid*

⁵⁵⁸ The Competition Act, 2002-No. 12 OF 2003

(2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void.

(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—

(a) Directly or indirectly determines purchase or sale prices;

(b) Limits or controls production, supply, markets, technical development, investment or provision of services;

(c) Shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) Directly or indirectly results in bid rigging or collusive bidding,

Shall be presumed to have an appreciable adverse effect on competition:

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

Under the anticompetitive agreements provision, the competition law of India is extremely detailed. ‘No enterprise or association of enterprises or person or association of persons’ properly clarifies all who can be questioned under the law. By stating ‘production, supply, distribution, storage, acquisition or control’ the provision provides a thorough, yet limited action of non-compliance. The act also gives room for parties’ justification. If the action or agreement brings about

efficiency in the market, then it is allowed and will be excused. Therefore the act will only be effective to the point where the authorities believe the actions to be detrimental to the market.

South Africa⁵⁵⁹

Purpose of Act

1. The purpose of this act is to promote and maintain competition in the Republic in order-
 - (a) To promote the efficiency, adaptability and development of the economy
 - (b) To provide consumers with competitive prices and product choices:
 - (c) To promote employment and advance the social and economic welfare of South African
 - (d) To expand opportunities for South African participation in world markets and
 - (e) Recognize the role of foreign competition in the Republic;
 - (f) To ensure that small and medium-sized enter-prizes have an equitable opportunity to participate in the economy: and
 - (g) To promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

Restrictive horizontal practices prohibited

4. (1) 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 it has the effect of substantially preventing or lessening competition in a market, unless a part to the agreement, concerted practice or decision can prove that any technological, efficiency or other pro-competitive, gain resulting from it outweighs that effect; or

⁵⁵⁹ Competition Act, Act no. 89, 1998, Government Gazette, 30 October 1998

(b) It involves any of the following restrictive horizontal practices:

- (i) Directly or indirectly fixing a purchase or selling price or any other trading condition;
- (ii) dividing markets by allocating customers, suppliers, territories or specific types of good

Restrictive vertical practices prohibited

5(1) An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive, gain resulting from that agreement outweighs that effect.

Abuse of dominance prohibited

The competition law of South Africa revolves around the purpose of the law, ‘promote and maintain competition.’ It focuses on agreements and actions ‘preventing and lessening’ competition. The law is structured differently as it breaks down anti-competitive provision in two parts; horizontal and vertical agreements. It is relatively detailed yet s.5 (1) says ‘substantially’ and measuring ‘substantially’ can be difficult, therefore inviting room for ambiguity.

Brazil⁵⁶⁰

Article 20.

Notwithstanding malicious intent, any act in any way intended or otherwise able to

⁵⁶⁰ Brazilian Antitrust Law, No. 8884 Of 1994, Official Gazette of the Federal Executive, June 13, 1994

produce the effects listed below, even if any such effects are not achieved, shall be deemed a violation of the economic order:

- I - to limit, restrain or in any way injure open competition or free enterprise;
- II - to control a relevant market of a certain product or service;
- III - to increase profits on a discretionary basis; and
- IV - to abuse one's market control.

Paragraph 1. Achievement of market control as a result of competitive efficiency does not entail an occurrence of the illicit act provided for in item II above.

Paragraph 2. Market control occurs when a company or group of companies controls a substantial share of a relevant market as supplier, agent, purchaser or financier of a product, service or related technology.

Paragraph 3. The dominant position mentioned in the preceding paragraph is presumed when a company or group of companies controls twenty percent (20%) of the relevant market; this percentage is subject to change by CADE for specific sectors of the economy.

Competition law of Brazil requires the alleged party to have the intention of carrying out anti-competitive activities through an exhaustive list. There are three main paragraphs that describe the possible anti-competitive effects, under paragraph three, dominant position is defined and that paragraph is to be referred to the initial exhaustive list provided above. The law structure is different to the competition law of other jurisdictions. This can be due to the fact that Brazil follows the civil law system.

(b) Abuse of Dominant position**India**

4. [(1)No enterprise or group] shall abuse its dominant position.]

(2) There shall be an abuse of dominant position [under sub-section (1), if an enterprise or a group].—

(a) Directly or indirectly, imposes unfair or discriminatory—

(i) Condition in purchase or sale of goods or service; or

(ii) Price in purchase or sale (including predatory price) of goods or service.

(a) "**Dominant position**" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

(i) Operate independently of competitive forces prevailing in the relevant market; or

(ii) Affect its competitors or consumers or the relevant market in its favour.

I believe that specifying a threshold or an arithmetical figure for defining dominance may either result in real offenders escaping litigation. ‘There is no single objective market share criterion that can be blindly used as a test of dominance. The act seeks to ensure that only when dominance is clearly established can abuse of dominance be alleged.’⁵⁶¹

The abuse of dominant position provision in the competition law of India is concise and descriptive with an exhaustive list provided. For a developing nation, it is important that

⁵⁶¹ Pradeep *supra* note 507 at 89

the law does not leave room for ambiguity, as under economic growth, the law should be authoritative and provide a guideline for the system. As I said above, there is no set test for abuse of dominant position: this could cause a predicament as limiting the provision to a test would bring about definition in the law. The lack of a test gives leeway to the authority to perhaps impose forced abuse or contrastingly a leniency for a particular influential company- the very element it tries to prevent.

South Africa

8. It is prohibited for a dominant firm to-

- (a) Charge an excessive price to the detriment of consumers;
- (b) refuse to give a competitor access to an essential facility when it is economically feasible to do so:
- (c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive, gain; or
- (d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive, gains which outweigh the anti-competitive effect of its act:
 - (i) requiring or inducing a supplier or customer to not deal with a competitor;
 - (ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible:
 - (iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract or forcing a buyer to accept a condition unrelated to the object of a contract;
 - (iv) selling goods or services below their marginal or average variable cost; or
 - (v) buying up a scarce supply of intermediate goods or resources required by a competitor,

South African competition law provides a comprehensive exhaustive list for ways to abuse a dominant position. It is essential to have a straightforward detailed law for authority because of the recent governmental change of 1994 in South African economy.

Amendments were brought about to the competition law 1994 in Brazil and those are present in No 10.149/2000.⁵⁶² Under the new law, four aspects of improvement for antitrust agencies were brought about.⁵⁶³ A leniency program was established, criteria to establish personal jurisdiction over foreign enterprises was defined, there was an increase in available powers and instruments of investigation and the procedural fee for examining particular acts was raised.

Brazilian competition law is different from the conventional layout of competition laws as understood above and therefore the concept of ‘borrowed law’, previously discussed, can be challenged here as one could question whether the US and EU models of competition policy are relevant for enforcement in developing nations. In one aspect the developed nations have a lot to offer to the emerging markets, their experience and solid framework can be seen as a guideline, yet when adopting the same policies under different economic stabilities can be rather difficult. It is often argued that since developing countries have worked under controlled regimes throughout, with low levels of economic activity, liberalization should not be imposed as market forces should naturally evolve into the economic system of a country.

Unlike Canada and America, most developing countries emerged from a centrally planned economic system under the control of the government, that had little or no private sector, but once they broke free from this system, the next step was to introduce competition policies to have the market growing. For example, there is little history of competition or consumer advocacy in Tanzania, and only a few firms can be accommodated in its small markets. Many countries in eastern Europe such as Poland, Czech Republic and Hungary, consist of a past where first the economy was a more

⁵⁶² Brazil 2000: Changes to competition laws and policies, proposed or adopted, OECD (2000) at 1 online: <<http://www.oecd.org/brazil/39553616.pdf>>

⁵⁶³ *ibid* at 1

market-oriented one, that then underwent a centrally planned phase, and finally the re-emerged as a market economy. There are countries, such as India, that have gone through a period of colonization, that transferred to a phase of planned economy and finally undertook reforms to open up markets.

	INDIA	SOUTH AFRICA	BRAZIL
Anti-competitive agreements	Production, supply, distribution, storage, acquisition or control...adverse affect	Promote and maintain competition, restrictive horizontal and vertical practices prohibited...preventing or lessening competition	Produce effects ...even if not achieved...violation of economic order
Abuse of Dominant position	Prohibited acts, exhaustive list broken into another exhaustive list	Abuse if...unfair or discriminatory, condition or price of goods and services	Abuse ones market control...Typically 20% of relevant market
Differences	Act looks at exhausted criteria of agreements.- production, supply, acquisition, control. S.3 (a)- (d) defines criteria of adverse	Provision written out in opposite way from most laws. Defines an exhaustive list of how competition is promoted. Detailed-horizontal and vertical	Does not consist of a separate provision of abuse of dominant position. Article 20 paragraph 3 consists of 'abuse of dominant

	affect. A very detailed law, no space for interpretation. Violation needs to fall under stated criteria.	agreements, conveniently with preventive measures in the same provision.	position' restriction in line with anti-competitive agreements. Concise law. Centralizes on economics in the law- 'violation of economic order'.
Jurisdiction	Focus on India	Focus on South Africa only.	Focus on Brazil
Circumstances at the time law introduced	Globalization, change in economy, discussions for competition law started right after 1947 independence.	Change in economic and political outlook- open economy and liberalization approach- equality between white and black people promoted.	Globalization encouraged, economic advantages in greater focus.

In all three countries, the focus is growth and change. It can be inferred that competition law is a catalyst of deregulation and liberalization. Therefore the intention behind the strict rules with exhaustive lists in the law is of fast growth of the economy. Stricter rules mean greater encouragement for enforcement of competition law. It is important to assess the advantages of competition law in line with the developing countries discussed above.

4. The Effects of Competition Law

There are numerous advantages that competition law brings in an economy. Consumers and suppliers themselves will be the beneficiaries of the policy. Consumers will benefit from lower prices, more choice and availability of products and services.⁵⁶⁴ As the market accommodates new competitors, existing corporations will need to be more efficient to maintain a market share by not only better organizational set-ups but by investing in creative and innovative solutions for the consumer.⁵⁶⁵ Investment in research and development of new products and new manufacturing techniques can be vital for continued growth and survival for a company.⁵⁶⁶ The list below provides the same advantages that I described in the first chapter but tailored for developing nations.⁵⁶⁷

(a) Promoting an efficient allocation of resources

India aims to promote access to third parties for essential facilities on reasonable fair terms, in order to ensure effective competition.⁵⁶⁸ One of the primary objectives of South African Competition law is to ‘maximize consumer welfare by efficiently allocating resources, whilst furthermore incorporating amongst its goals the furthering of certain socio-economic objectives’.⁵⁶⁹ Competition policy’s framework was outlined in the ANC’s Reconstruction and Development Program (RDP) and its macro-economic strategy for Growth, Employment and Redistribution (GEAR). The framework promised to introduce anti-competitive legislation and exploitation of consumers, ‘to systematically discourage the system of pyramids where they lead to over-concentration of economic

⁵⁶⁴ Implementing Competition Policy in Developing Countries. An Extract from “Promoting Pro-Poor Growth- Private Sector Development”, Development Assistance Committee (DAC), OECD (2006), at 38 online: <<http://www.oecd.org/dataoecd/24/45/36563626.pdf>>

⁵⁶⁵ *ibid* at 38

⁵⁶⁶ *ibid*.

⁵⁶⁷ World Trade Organisation, Working Group on the Interaction, between Trade and Competition Policy, Synthesis paper on the Relationship of Trade and Competition Policy to Development and Economic Growth, Note by the Secretariat, 18 September 1998 at 9(a)

⁵⁶⁸ Sengupta *supra* note 110 at 8

⁵⁶⁹ Kim Kampel, The Role of South African Competition Law in Supporting SMEs: Can David really take on Goliath? Competition Tribunal, June 2003, at 1, online: <<http://www.comptrib.co.za/assets/Uploads/Speeches/kim.pdf>>

power and interlocking directorships.’⁵⁷⁰ Brazilian competition law was promoted in terms of economics by relation to the interdependent nature of economic activities conducted and the promotion of allocative efficiency in different markets⁵⁷¹.

(b) Protecting the welfare of consumers

Indian company laws now are to develop a clear-cut competition regime and policy makers such as the Planning Commission are geared to improve the law. A working group of experts on National Competition Policy for India has also been created.⁵⁷² In South Africa, competition law has been evolving and so have its institutions. A primary difference between the independent Commission and the old Competition Board secretariat is that commission has more resources, and more staff. The Department of Trade and Industry is responsible for both the commission and the tribunal, but the Board of Tariffs and Trade (BTT) handles the formal role of competition policy and international trade.⁵⁷³ Article 170 of Brazilian competition law says that ‘the “economic order” of Brazil will be “founded on the appreciation of the value of human work and on free enterprise,” and will operate with “due regard” for certain principles, including “free competition,” “the social role of property,” “consumer protection,” and “private property”.’ Complementing the competition law, Brazil implemented The Consumer Defence Code.⁵⁷⁴ It allows consumers to file complaints and seek damages.

(c) Preventing excessive concentration levels and resulting structural rigidities

Indian competition law was introduced at the time when modernization of Indian industry was more competitive and reforms were leading towards virtual abolition of industrial

⁵⁷⁰ Eric Burgeat, Competition Law and Policy in South Africa, An OECD peer review, 2003, at 15 online: <<http://www.oecd.org/daf/competition/prosecutionandlawenforcement/2958714.pdf>>

[Burgeat]

⁵⁷¹ Shyam *supra* note 80 at 7

⁵⁷² Sengupta *supra* note 110 at 13

⁵⁷³ Burgeat *supra* note 573

⁵⁷⁴ The Consumer Defence Code, Law 8078

licensing requirements. Promoting domestic competition, facilitating allocation of resources through the market mechanism, encouraging entry and investment, achieving better capacity use and economically viable scales of production were the primary aims.⁵⁷⁵ South African competition law was introduced when economic changes were rapidly visible, with a democratic government newly implemented and apartheid abolished.⁵⁷⁶ Brazil introduced competition law during mid-1990s when the country was transitioning into a market-based economy. The 'Real Plan' was introduced and privatization, liberalization and deregulation were encouraged.⁵⁷⁷

(d) Addressing anti-competitive practices of enterprises (including multinational enterprises) that have a trade dimension

Indian imports increased from less than 500 billion INR in 2002, from the inception of the law in India to 2281.15 billion INR in 2013. India is heavily dependent on coal and foreign oil imports for its energy needs. Other imported products include machinery, gems, fertilizers and chemicals.⁵⁷⁸ In South Africa, imports have increased from around 1000 million ZAR in 1998, to 80454.30 million ZAR in April 2013. South Africa's main imports are: fuel (24 percent of total imports), motor vehicles (10 percent), electronics (3 percent), pharmaceuticals (2 percent), food and scientific instruments.⁵⁷⁹ Imports in Brazil increased from less than 2500 million USD in 1994 to 21626.20 million USD in April 2013.⁵⁸⁰ Brazil's main imports include raw materials and intermediate goods (45 percent

⁵⁷⁵ Pradeep S Mehta and Manish Agarwal, Time for a Functional Competition Policy and Law in India Mainstreaming competition principles into policy and legal framework is pro-development, CUTS international, January 2006, at 1 online: <<http://www.cuts-international.org/pdf/compol.pdf>> [Agarwal]

⁵⁷⁶ Johannes Fedderke & Charles Simkins, Economic Growth in South Africa since the late nineteenth century, no. 138 (2009) at 12, online: <http://www.econrsa.org/system/files/publications/working_papers/wp138.pdf>

⁵⁷⁷ Bernard J. Phillips & Carlos M. Jarque, Competition Law in Brazil,, A Peer Review, 2010, OECD at 13 [Phillips]

⁵⁷⁸ Trading Economics, India Imports, online: <<http://www.tradingeconomics.com/india/imports>>

⁵⁷⁹ Trading Economics, South Africa Imports, online: <<http://www.tradingeconomics.com/south-africa/imports>>

⁵⁸⁰ Trading Economics, Brazil Imports, online: <<http://www.tradingeconomics.com/brazil/imports>>

of total exports), capital goods (22 percent), consumption durables (10 percent), oil (6 percent) and motor vehicles (4 percent).⁵⁸¹

(e) Increasing an economy's ability to attract foreign investment and to maximise the benefits of such investment

India has implemented a process of economic reforms and has been recognized as an investment hotspot in its respective region. A strong economy of implementing competition policies is anticipated, and the national government is working towards further strengthening India's ability to attract investment.⁵⁸² Foreign investment has increased in South Africa in last five years, as Massmart was Wal-Mart's biggest acquisition since 1999 and provided a platform for expansion in the rest of Africa.⁵⁸³ The Brazilian Competition policy System (BCPS) does not discriminate between proceedings of foreign and domestic corporations, taking into account its analyses and the impact of international trade.⁵⁸⁴

(f) Reinforcing the benefits of privatization and regulatory reform initiatives

India emphasized an independent sectorial regulation as essential for building confidence among private investors to assure that their interests were protected. It was believed by Mr. Agarwal that unregulated privatization meant that monopolies that were public would turn into private ones, especially in sectors where natural monopolies or limited competition existed.⁵⁸⁵ The water industry of South Africa was privatized in 1998 for

⁵⁸¹ *ibid.*

⁵⁸² Sengupta *supra* note 110 at 8

⁵⁸³ Africa by numbers, Assessing market attractiveness in Africa, Growing Beyond, Ernest and Young, (2012), online: <<http://emergingmarkets.ey.com/wp-content/uploads/downloads/2012/11/Ernst-Young-Africa-by-Numbers-2012.pdf>>

⁵⁸⁴ Phillips *supra* note 580 at 50

⁵⁸⁵ Agarwal *supra* note 578 at 12

efficiency of the industry.⁵⁸⁶ In Brazil, the Secretariat of Economic Monitoring (SEAE) plays an active role in competition advocacy to other parts of government and to regulators. This includes conducting technical analysis of price changes, “expressing its opinion” on regulatory decisions and privatization of state-controlled companies, “monitoring the development of sectors and programmes,” “represent[ing] the Ministry of Finance in inter-ministerial activities,” and “fostering co-ordination with public sector entities, the private sector and nongovernmental organizations” that are also involved in these tasks.⁵⁸⁷

(g) Establishing an institutional focal point for the advocacy of pro-competitive policy reforms and a competition culture

The Centre for Competition, Investment & Economic Regulation (CUTS) under OECD recognizes certain factors that developing nations face and therefore outlines the potential for change to enhance investment and growth in the economy. These include policy induced barriers (government regulations, policies affecting market processes and competition, protectionist approach), absence of competitive neutrality, nexus between government and big firms, poorly evolved ‘business environment’, effects of Multinational Enterprises (MNEs), in the guise of ‘public interest’ and inter-institution relationships.⁵⁸⁸

An effective Competition Policy may lead to positive welfare effects, as intensifying competition would result in costs savings, weeding out inefficient firms, larger market shares for more cost-efficient firms and higher entry in the market by new firms.⁵⁸⁹

⁵⁸⁶ Beatrice Conradie et al, Competition Policy and Privatization in the South African Water Industry, Development Policy Research Unit University of Cape Town No 01/45 August 2001, at 9, online: <<http://www.dpru.uct.ac.za/sites/default/files/sites/default/files/DPRU%20WP01-045.pdf>>

⁵⁸⁷ Decree No. 1849/1996, now Decree No. 6531/2008, Art. 12.

⁵⁸⁸ Sengupta *supra* note 110 at 9

⁵⁸⁹ Philippe Aghion & Mark Schankerman, On the Welfare Effects and Political Economy of Competition-Enhancing Policies 114 *The Economic Journal* 800 (2004) at 801

5. Obstacles to Global Competition Law Development

Antitrust enforcement, notwithstanding many dramatic advances over the past quarter century, remains a highly imprecise enterprise.⁵⁹⁰ Even when governments and law enforcement officials are committed, with mergers and acquisitions on a global scale, lines are drawn between jurisdictions that make it increasingly challenging for effective enforcement. Each case would represent multiple interests within a certain market and, more often than not, any verdict would have global ramifications on corporations and industries with substantial economic costs.⁵⁹¹

The law is generic in terms of its provisions, yet the goals of the law contrast among countries. Therefore, Anna Julia Jatar, superintendent of Venezuela, wanted to ‘domesticate antitrust’ in order to suit the economic framework of the countries. Smaller economies that consist of less complex and less extensive markets have a larger influence on the state activities. Business is carried out amongst businessmen in a manner of convenience and long-standing, stable relationships. These relationships are either formed by self-interest, or through a defensive act to protect own businesses, or even by the uncertainty and unpredictability of dealing with a continuously changing state, as uncertainty threatens profit, value of assets and the survival of the group.⁵⁹²

Policies can be geared to promote an intra-jurisdictional economic welfare at the expense of extra-jurisdictional factors and forces. Such policies can seem to create an anti-competitive environment and a standard test for anti-competitiveness can give a false positive or a false negative result. False positive occurs when the company in question does not have any anticompetitive behaviour but the court has ruled it to have such behavior. The test defines the practice as problematic but, through the circumstances of the case, it is not. False negative occurs when the company is carrying out anticompetitive behavior, but the test has not detected it as there is no such ‘precedence’ for the situation.⁵⁹³ Errors are detrimental to the companies and testing bodies as the managerial

⁵⁹⁰ Heyer *supra* note 363 at 375-422

⁵⁹¹ *ibid.*

⁵⁹² Rodriguez, *supra* note 109 at 117

⁵⁹³ Rodriguez *supra* note 109 at 43

attention is shifted from production aspects to the issue at hand with added resources and money involved. Other companies get discouraged from the potential threat of error and their approach to adopting competition law becomes what is known as ‘chilling behaviour’.⁵⁹⁴ Taking necessary precautions to avoid such an attitude is crucial for emerging markets, as they cannot give up such paths to potential success in the economy.⁵⁹⁵

Godek uses a silk tie as a metaphor for antitrust policies in developing nations and states, ‘Exporting antitrust [...] is like giving a silk tie to a starving man. It is superfluous; a starving man has much more immediate needs. And if the tie is knotted too tightly, he will not be able to eat what little there is available to him.’⁵⁹⁶ Linking this to the advantage discussed above (preventing excessive concentration levels and resulting structural rigidities), it is evident that emerging markets are in need of a competition policy. They have reached the point where policies and economies are changing towards a greater democratic and liberalized environment. Although some developing countries are not in need of a competition policy yet, for some rapidly growing developing nations, this is the perfect time.

A competition law under an established institutional system in a stable government of a high-income country has little resemblance in terms of development with a small country of limited economic resources, weak institutions and potentially significant interference from both domestic and foreign sources.⁵⁹⁷ When adopting a competition policy in a transitional economy, it is important to understand the correct approach and manner to implement the law. Western countries and multinational donors have been persistent with numerous resources to advise countries of centralized economic and political systems about legal reforms designed to promote economic and political liberalization, since mid-1980.⁵⁹⁸ Previous soviet countries of central and Eastern Europe have been provided with greater assistance.

⁵⁹⁴ *ibid* at 28

⁵⁹⁵ *ibid* at 43

⁵⁹⁶ P. Godek “One U.S. Export Eastern Europe Does not need” (1992) 15 regulation at 22

⁵⁹⁷ *ibid*.

⁵⁹⁸ World Bank, *Assessing Aid: What Works, What Doesn’t, and Why* (1998).

A.E Rodrigues and Ashok Menon argue that the developing countries do not have passions for social control of industry or antimonopoly movements within market economies similar to the American one.⁵⁹⁹ However, comparing the American economic evolution to the developing world is unfair and presumptive. During the American civil war, Americans at the time believed that the economic system was expanding and changing at the expense of the workers, farmers and laborers. Antitrust policy, as argued by professor DiLorenzo, was seen as a political response by the government to all the farmers and businessmen who were opposed to the change.⁶⁰⁰ In emerging economies, this aspect is lacking and the foundation of the economic system may not be able to implement the law to its full capabilities.⁶⁰¹

The economic situation of the country at the time the law will be introduced needs to be recognized. Once that is intact, the differences in scope and relevance will all automatically adjust towards the country's conditions they are targeting.⁶⁰²

The effective solution would be to carefully compare the competition policy programs to other departments and programs within the country so they complement each other, rather than comparing the law with other nations. Comparative performance assessment helps us to understand the basics and detailed determinations of the greatest deficiencies of the law.⁶⁰³

Conclusion

Competition laws of India, South Africa and Brazil have only recently been implemented in their respective legal systems and were introduced at a time of economic growth. It can be inferred that if competition law is introduced in a developing nation there are prospects of growth in the economy, or a case for significant change towards liberalization. The law

⁵⁹⁹ Rodrigues *supra* note 109 at 23

⁶⁰⁰ Thomas J. DiLorenzo, The Antitrust Economists' Paradox, Austrian Economics Newsletter, Summer 1991 at 7

⁶⁰¹ *ibid* at 43

⁶⁰² *ibid.*

⁶⁰³ *ibid.*

is derived from detailed competition laws of the developed nations. Although the templates used of developed nations for developing nations focus on similar substances, the fluctuating economic level can affect the maintenance of the law in the nations. However, there is still time for evolution of the law and the economies undergo progress every year.

Indian-UAE ties have increased since 2002, and it can be reasoned that this is through the application of competition policy in India that renders economic growth with an open economy concept.⁶⁰⁴ Agreements between the two countries⁶⁰⁵ reflect the bilateral ties between the two countries.⁶⁰⁶

India-UAE trade that was valued at \$180 million USD per annum in the 1970s reached \$67 billion USD during 2010-2011.⁶⁰⁷ India imports numerous items from the UAE such as petroleum and petroleum products, precious metals, stones, gems & jewelry, minerals, chemicals, wood & wood products. In terms of oil trade, UAE was the fifth largest import source of crude oil for India in 2011-12 with imports of 15.79 MMT of crude oil.⁶⁰⁸

In relation to FDI, UAE is the tenth biggest investor in India.⁶⁰⁹ Total FDI from the UAE to India is estimated to be \$2.2 billion USD till date. The UAE's investments in India are concentrated in mainly five sectors including, Energy (19.1%), Services (9.3%), Programming (7.8%), Construction (6.8%), and, Tourism and Hotels (5.6%).⁶¹⁰

⁶⁰⁴ Ministry of External Affairs, Government of India, August 2012 at 1 online:
<<http://www.mea.gov.in/Portal/ForeignRelation/uae-august-2012.pdf>>

⁶⁰⁵ MoU on Defence Cooperation was brought about in 2003 and MoU on Manpower Sourcing in 2006. A revised MoU on Manpower Sourcing, MoU on Political Consultations, Agreement on Transfer of Sentenced Persons and Agreement on Security Cooperation, were all introduced in 2011. Agreement on Customs Cooperation and Protocol to streamline admission of Indian contract workers by way of an electronic contract registration and validation system agreement both were introduced in 2012. A Protocol to amend the India-UAE Double Taxation Avoidance Agreement was also introduced in April 2012.

⁶⁰⁶ *ibid* at 1

⁶⁰⁷ *ibid* at 2

⁶⁰⁸ *ibid* at 2

⁶⁰⁹ *ibid* at 3

⁶¹⁰ *ibid*.

Ever since the new government in South Africa took power in 1994, South African ties with the UAE have increased.⁶¹¹ Bilateral Trade grew from R68,7 Million in 1992 to R13,1 Billion in 2011.⁶¹² The UAE is South Africa's 21st largest export market and its sixth highest supplier of oil.⁶¹³ With the implementation of competition law in 1998, trade and foreign involvement has increased.

In relation to foreign investment, the UAE is the 24th largest investor in South Africa, and has invested a total of R1.07 billion since 2003, representing 0.25% of total capital investment. Likewise, South Africa is the 19th largest investor in the UAE, having invested R3.33 billion since 2003.⁶¹⁴

Bilateral relations between the UAE and Brazil are increasing as Brazil exported almost \$1 billion USD worth of goods to the UAE in the first five months of 2012, a rise of 47 per cent from the same period the previous year.⁶¹⁵ The total direct investments from the Gulf into Brazil reached roughly \$4-\$5 billion USD, according to Sidney Alves Costa, Middle East director of ApexBrasil, the Brazilian Trade and Investment Promotion Agency.⁶¹⁶ Recently Abu Dhabi announced a deal of \$2 billion USD- an acquisition of a stake in Brazil's EBX group by Abu Dhabi state investment fund Mubadala in 2012.⁶¹⁷ Although agreements between the UAE for Brazil are newer than other countries, the economic changes in Brazil are a product of liberalization towards foreign intervention, regulated under competition law.

⁶¹¹ Alvin R. Cabral, South Africa to maintain strong ties with UAE, 17 September 2011, online: <http://www.khaleejtimes.com/DisplayArticleNew.asp?col=§ion=business&xfile=data/business/2011/September/business_September227.xml>

⁶¹² Fanus Schoeman, South African Consulate General Dubai, United Arab Emirates, online: <<http://www.dirco.gov.za/dubai/>>

⁶¹³ Ministry of External Affairs, Government of India, August 2012 online: <<http://www.mea.gov.in/Portal/ForeignRelation/uae-august-2012.pdf>>

⁶¹⁴ Dr. Rob Davies, South African Government Information, Department of Trade and Industry, 14 Nov 2011, online:

<<http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=23210&tid=48988>>

⁶¹⁵ Neil Churchill, UAE And Brazil Trade Rising, Gulf Business, June 25, 2012, online:

<<http://gulfbusiness.com/2012/06/uae-and-brazil-trade-rising/#.Uc76bz5euFc>>

⁶¹⁶ Aarti Nagraj, Brazil Aims To Multiply Investments From UAE, Gulf Business, May 23 2012, online:

<http://gulfbusiness.com/2013/05/brazil-aims-to-multiply-investments-from-uae/#.Uc76iD5euFc>

⁶¹⁷ *ibid.*

These developing nations have adopted liberalized policies and expanded their scope of foreign investment. Although their ties with the UAE have become stronger in recent years, presumably because of the competition law regulations, it is important that the UAE reciprocates with an approach of encouraged trading. The increased foreign activity in the country demands greater scrutiny of laws, under the economic and legal system of the UAE.

This chapter identifies the foundation of competition policy in different developing jurisdictions. By analyzing the process and effects of competition law in the discussed countries, I believe these developing countries are aiming to reach a goal of well-established competition policies, much like the pioneering countries of competition law. In the next chapter, the economic differences in structure and industry among the developed and developing nations examined will be analyzed and compared to that of United Arab Emirates.

Chapter 4

Competition Law of the U.A.E

Introduction

Antoine Van Agtmael first used the phrase ‘emerging markets’ (or ‘rapidly industrializing markets’) when he was referring to growing economies.⁶¹⁸ The United Arab Emirates falls under the category of an emerging market. The UAE is a federation of absolute monarchies in the Arab world.⁶¹⁹ The term ‘Arab world’ refers to Arab speaking nations and it consists of 22 countries and territories of the Arab League. It stretches from the Atlantic Ocean in the west to the Arabian Sea in the East and from the Mediterranean Sea in the north to the Horn of Africa and the Indian Ocean in the Southwest.⁶²⁰ ‘The Arab League’s nominal GDP annual growth rate (-11% with current price) and (1.8% with fixed price) the current value price of GDP is \$1.700 trillion USD with \$5,159 USD average per capita.’⁶²¹

In this chapter I will be analyzing the economic and legal system of the UAE in comparison to the developed and developing nations discussed in the previous two chapters. The comparison will be based on the specific sectors of the economy, the wording of the law and foreign intervention within the country. In this chapter I will determine the extent of encouraged foreign investment in the country and what possible future lies for competition law.

⁶¹⁸ Cavusgil et al, “Doing Business in Emerging markets” 2nd ed. SAGE 2013 at 3

⁶¹⁹ Abed El-Azez *supra* note 79 at 10

⁶²⁰ Earl L. Sullivan & Jacqueline S Ismael eds, “The contemporary study of the Arab world” University of Alberta Press, 1991

⁶²¹ “Joint Arab Economic Report 2010” Arab Fund for economic & Social Development, (In Arabic Language), League of Arab States, 2010 at 21

1. History

The United Arab Emirates includes seven emirates - Abu Dhabi (capital city), Dubai, Sharjah, Ajman, Ras Al Khaimah, Umm Al Qaiwan and Fujairah.⁶²² The history of the UAE was built on an understanding among the emirates and British colonizers under a General Treaty of Peace in 1820.⁶²³ This agreement legitimized the sheikhdom that was bestowed with recognition over settlements and allied tribes.⁶²⁴ The interests were geared 'towards all groups and communities within the state.'⁶²⁵

By the early 20th century, Arab nationalists and immigrants simultaneously augmented in size in the country. The immigrants were invited to act as educators and enhance the Arab culture- an outside perception on nationalist society⁶²⁶. An open door policy was gradually emerging,

Zayed bin- Sultan was an important personality in bringing about economic stability and growth in Abu Dhabi in 1966. He recognized the importance of the merchant class as drivers of the economy and noted the potential volatility of ostracizing the sizable immigrant population.⁶²⁷ UAE celebrates national day on December 2nd each year marking the end of British Protectorate Treaties on December 1st, 1971 and formal independence of the country.⁶²⁸ It is also celebrated because that day unity was brought

⁶²² His Highness Sheikh Mohammed Bin Rashid Al Maktoum, "Seven Emirates" online:

<<http://www.sheikhmohammed.com/vgn-ext-templating/v/index.jsp?vgnextoid=7dbb4c8631cb4110VgnVCM100000b0140a0aRCRD>>

⁶²³ Saeeda Khatoun, "Liberalization & Democratization in United Arab Emirates" at 2 online: <<http://ssrn.com/abstract=753205> or <http://dx.doi.org/10.2139/ssrn.753205>>

⁶²⁴ J.E. Peterson, "Britain and State Formation in the Gulf: The Case of Abu Dhabi and Shaikh Zayid bin Khalifah" National Center for Documentation & Research • Abu Dhabi, UAE, (2008) at 207 [J.E. Peterson]

⁶²⁵ Davidson 2007, at 882

⁶²⁶ Sturm et al, the Gulf cooperation council countries economic structures, Recent Developments and Role in the Global Economy, Occasional Paper Series, No. 92 / July 2008, European central bank, Eurosystem, at 18, online: <<http://www.ecb.int/pub/pdf/scpops/ecbocp92.pdf>> [Strum]

⁶²⁷ Paul Pulido & Caroline Pham, Contract and Negotiation: Minority Influence and Economic Development in the United Arab Emirates, Claremont Graduate University, Western Political Science Association 2011 Annual Meeting Paper (2011) at 22 [Pulido]

⁶²⁸ J.E. Peterson *supra* note 628 at 208

about among the seven different emirates that created the United Arab Emirates.⁶²⁹

2. UAE General Economy

The FTSE index breaks down stock market indices according to their development level; accordingly the UAE is a *secondary emerging country*; a group, which also includes Chile, China, Columbia, Egypt, India, Indonesia, Morocco, Pakistan, Peru, the Philippines, Russia, and Thailand.⁶³⁰

The UAE is part of a council known as the Gulf Corporation Council (GCC), founded in 1981.⁶³¹

*Being Fully aware of their mutual bonds of special relations, common characteristics, and similar systems founded on the Creed of Islam, and based on their faith in the common destiny that links their peoples... the [Gulf] Corporation council [was formed to] effect coordination, integration and interconnection between member states in all fields...[including c]ommerce, customs and communications and legislation and administrative affairs.*⁶³²

It is a political and economic union among six distinct Arab countries; namely, Bahrain, Kuwait, Qatar, Saudi Arabia, United Arab Emirates and Oman.⁶³³ The goal of the GCC is to facilitate foreign investment amongst member states⁶³⁴ and create a common currency that is pegged to the U.S dollar.⁶³⁵ In 2011, Jordan and Morocco were invited to join as

⁶²⁹ "UAE National Day" Dubai eGovernment, (2000-2012) online:

<<http://www.uaenationalday.ae/en/Pages/default.aspx>>

⁶³⁰ FTSE- 2002, Cavusgil et al, "Doing Business in Emerging markets" 2nd ed. SAGE 2013 at 3

⁶³¹ Ugo Fasano & Rishi Goyal, "Emerging Strains in GCC Labor Markets" Middle East and Central Asia Department, International Monetary Fund working paper (April 2004) at 3 [Fasano]

⁶³² John A. Sandwick, "The Gulf Corporation Council: Modernization and Stability in an Independent World 1987", Corporation Council Charter, at art. 1

⁶³³ Secretariat General, "The Cooperation Council for the Arab States of the Gulf" GCC, Website, online: <<http://www.gcc-sg.org/eng/>>

⁶³⁴ Gulf Leaders Pledge Economic Unity at GCC Summit, Al-Bawaba, Dec. 23, 2003.

⁶³⁵ John H. Donboli & Farnaz Kashefi, Doing Business in the Middle East: A primer for the U.S. Companies, 38 Cornell international L.J (2005) 413, at 414 [Donboli]

well.⁶³⁶ The GCC's common concern has now become the respective countries' collective goal for economic reforms,⁶³⁷ as the notion that free trade in goods and services results in faster economic growth.⁶³⁸ 'From 54% in 2006 to 60% in 2010, during the past few years the GCC countries have become the highest receiver of Foreign Direct Investments (FDI) in the world, showing economic stability and development in the region.'⁶³⁹ GCC has also become America's fifth largest trading partner and exports to these six nations make it the largest market in the Near East and North Africa for the United States.⁶⁴⁰

Since its inception, UAE has maintained a stable regime and economic liberalization without political pre-requisites for economic growth.⁶⁴¹ This is due to the fact that the political elites handle political decisions of the country and have allowed flexibility for economic reform.⁶⁴² Liberalization focuses 'less about improving the rights and mobility of all individuals living within the borders and more about appearing to be an effective and efficient government'.⁶⁴³ There is no central or federal development plan for the emirates: each emirate has its own economic objectives and is responsible for its own industrial development policy.⁶⁴⁴

The country's strategic location serves 120 shipping lines and links 85 airlines to over 130 global destinations. There are no impositions on exchange controls, quotas or trade barriers for international trade and grow by 11% each year since 1988. UAE's financial and monetary stability facilitates banking and implements pro-business and economic policies. 'Dubai's deliberate policy of investing heavily in transport, telecommunications,

⁶³⁶ Asma Alsharif, "Gulf bloc to consider Jordan, Morocco membership" Reuters.com, 10 May 2011, online: Reuters < <http://www.reuters.com/article/2011/05/10/gulf-jordan-morocco-idAFLDE7492I020110510>>

⁶³⁷ Ugo Fasano & Zubair Iqbal, GCC Countries face Fundamental Choices as they head for Monetary Union, 39 IMF FIN. & DEV. Q. Dec 2002, online: <www.imf.org/external/pubs/ft/fandd/2002/12/fasano.htm>

⁶³⁸ Sebastian Edwards, "Capital Mobility, Capital Controls and Globalization in the Twenty First Century" 579 ANNALS (2002) at 261

⁶³⁹ Abed El-Azez *supra* note 79 at 37

⁶⁴⁰ Donboli *supra* note 639 at 427

⁶⁴¹ Pulido *supra* note 631 at 1

⁶⁴² *ibid.*

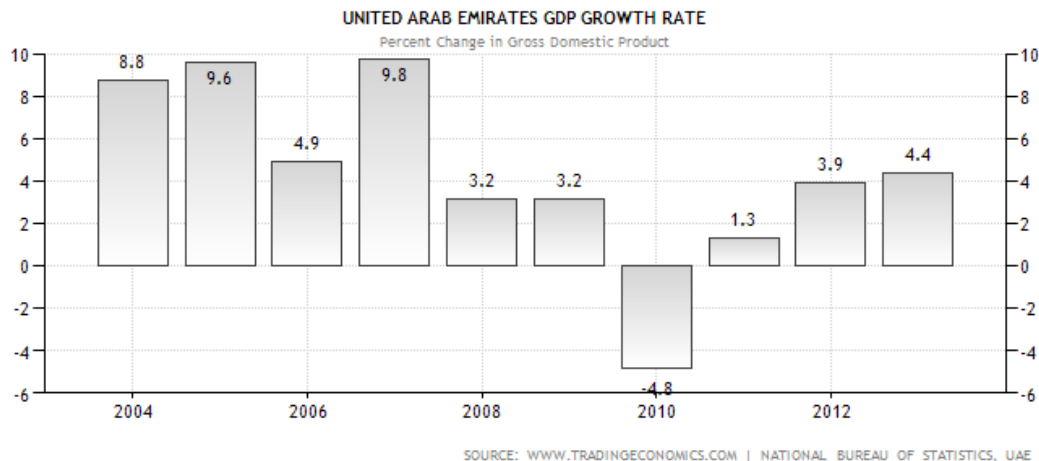
⁶⁴³ *ibid* at 20

⁶⁴⁴ "Doing Business in the United Arab Emirates" Latham and Watkins, January 2011, at 1, online: < http://www.lw.com/upload/pubContent/_pdf/pub2783_1.PDF>

energy and industrial infrastructure has enabled it to have one of the best infrastructure facilities in the world.⁶⁴⁵

GDP

The United Arab Emirates is one of the most developed countries in the Arab Gulf and has one of the world's highest GDP per capita. The Gross Domestic Product (GDP) in the United Arab Emirates expanded 4.90 percent in 2012 from the previous year. Historically, from 2000 until 2012, the United Arab Emirates GDP Growth Rate averaged 4.7 Percent reaching an all time high of 9.8 Percent in December of 2006 and a record low of -4.8 Percent in December of 2009, stated by the National Bureau of Statistics, UAE.⁶⁴⁶



Oil & Gas

Oil in the UAE is a major commodity for economic growth. Oil explorations began in the 1930's while still under the British rule and in 1949, rights to the offshore waters were

⁶⁴⁵ Government of Dubai, "Dubai Economy", 2000-2013, online:
<<http://www.dubai.ae/en/aboutdubai/Pages/DubaiEconomy.aspx>> [Dubai Economy]

⁶⁴⁶ Trading Economics, United Arab Emirates GDP Growth Rate, online:
<<http://www.tradingeconomics.com/united-arab-emirates/gdp-growth>>

claimed.⁶⁴⁷ It was not until 1958 when the UAE first discovered oil in the offshore field of Umm Shaif. However oil wealth was only deployed after 1966, beginning the transformation of the UAE to its modern state and it was nationalized in 1971 under Abu Dhabi National Oil Company (ADNOC). In 2007, the UAE had an estimated 97.8 billion barrels of proven oil reserves, Abu Dhabi owning 95% of it, along with significant natural gas reserves.⁶⁴⁸

Abu Dhabi ranks 5th in the world in oil and gas reserves, and relative to the number of its citizens, it ranks 2nd only to Kuwait. The large leap from being one of the least developed countries to one of the strongest developing countries is solely credited to the discovery of oil in the country.⁶⁴⁹ In 2010, oil contribution towards the country's GDP was 49.7%, increasing sustainable development.⁶⁵⁰

The UAE is one of the top ten countries to export oil.⁶⁵¹ The government handles the initial production of crude oil, and the refining is undertaken by private foreign activity. The gross share of the government in relation to the annual production of crude oil in 2006 was 54% in the UAE. It is predicted that the UAE will produce gas up until 22nd century.⁶⁵²

The oil price boom in the UAE caused a sharp increase in the demand for labour to build the economy and led the country to adopt an open door policy for foreign workers.⁶⁵³ The shortage in local skilled labour attracts foreign labour and keeps the labour costs down.⁶⁵⁴ The expected earnings are higher than the home countries for expatriate workers and that

⁶⁴⁷ Oil and Natural Gas History, Environmental Atlas of Abu Dhabi Emirate, Environment Agency, Abu Dhabi (AGEDI) online:
<<http://www.environmentalatlas.ae/naturalCapital/oilAndNaturalGasHistory>>

⁶⁴⁸ Oil and Natural Gas Economy, Environmental Atlas of Abu Dhabi Emirate, Environment Agency, Abu Dhabi (AGEDI) online:
<<http://www.environmentalatlas.ae/naturalCapital/oilAndNaturalGasHistory>>

⁶⁴⁹ Mohamed Shihab, Economic Development in the UAE, United Arab Emirates: A New Perspective, (2001) at 249 online:
http://www.uaeinteract.com/uaeint_misc/pdf/perspectives/12.pdf

⁶⁵⁰ Non-oil input to Abu Dhabi GDP Growing, UAE Ineract, 20/11/2011, online:
<http://www.uaeinteract.com/docs/Non-oil_input_to_Abu_Dhabi_GDP_growing/47420.htm>

⁶⁵¹ Sturm *supra* note 630 at 12

⁶⁵² *ibid* at 13

⁶⁵³ Fasano *supra* note 635 at 6

⁶⁵⁴ *ibid.*

is why they are attracted to the UAE and the GCC.⁶⁵⁵

Foreign Direct Investment

Different laws, such as the Federal Commercial Companies Law 8, the United Arab Emirates Commercial Agencies Law, the Federal Industry Law, and the Government Tenders Law govern foreign investment in the UAE.⁶⁵⁶ The UAE provides 100% ownership of business in free trade zone areas, with no taxes needed to be paid.⁶⁵⁷ Currently, Foreign Direct Investments (FDI)⁶⁵⁸ is one of the most attractive tools of international business for large investments in foreign countries.⁶⁵⁹ Foreign investment in the UAE has increased immensely in the last 20 years. 'FDI into the United Arab Emirates has grown on average by 29% annually since 2003, with a total of 1,632 FDI projects and resulting in the creation of more than 267,000 jobs.'⁶⁶⁰ The end of 2009 introduced corporate law amendments under Federal law no. 8, in order to reduce the cost of a business setup. This reflects the government's efforts to boost the investment environment and lift the country's standard as a highly competitive market.⁶⁶¹ 'The decree limits bureaucratic procedures so that investors are not obliged to possess a bank certificate in order to set up a private business in the country, thereby speeding up the entire process.'⁶⁶²

Foreign investment reached more than \$10 billion USD (Dh36.73bn) in the UAE in 2011, making it the number one destination for foreign direct investment (FDI) projects in the

⁶⁵⁵ Donboli *supra* note 639 at 420

⁶⁵⁶ Foreign Investment in the UAE, Rak Free Trade zone, online:

<<http://www.rakftz.com/ar/article/business-in-uae/direct-investment-uae.html>>

⁶⁵⁷ "Foreign Direct Investment Report, 2009" Economic & Social Commission for Western Asia (ESCWA), New York: United Nations. (2009) at 8

⁶⁵⁸ According to the OCED, the meaning of an FDI is: 'category of investment that reflects the objective of establishing a lasting interest by a resident enterprise in one economy (direct investor) in an enterprise (direct investment enterprise) that is resident in an economy other than that of the direct investor'

⁶⁵⁹ Abed El-Azez *supra* note 79 at 56

⁶⁶⁰ FDI Markets, "The Shape of Things to Come: The FDI Outlook for 2009 and Performance Analysis for 2008". 2009, Constitutional Amendment No. 1 of 2003, 10 Jan 2004.

⁶⁶¹ Abed El- Aziz *supra* note 79 at 60

⁶⁶² *ibid.*

Middle East and Africa.⁶⁶³ Policies focus greater on globalization. In 2010 World Bank Doing Business reports confirm this by saying that domestic laws of the country are catering to foreign companies and increasing the foreign investment in the Arab world.⁶⁶⁴ About 80% of the Arab world FDI in 2010, was concentrated on six gulf countries: Saudi Arabia 42%, Egypt 10%, Qatar 8%, Lebanon 7%, UAE 6% and Libyan Arab Jamahiriya 6%.⁶⁶⁵

Economic Diversity

The successful implementation of human development policy in the UAE, in relation to industrialization, is a surprise to a country that has successfully used income from its huge natural resources for its long-term development over a very short period.⁶⁶⁶ Apart from the oil sector, the UAE has diversified its economic strengths.⁶⁶⁷ Tourism is a large market in the country, finance has a major role since the establishment of the Dubai International Financial Centre. Transport has increased as well, making the country a trading hub. Dubai's private sector has invested highly in real estate such as hotels, residential and commercial properties, recreational and leisure facilities. External factors such as, excellent infrastructural facilities, low crime, clean environment, tolerance and cultural diversity, cosmopolitan life style, modern public administration, availability of a wide range of consumer goods and services, mild winters and clean, palm fringed beaches attract tourists.⁶⁶⁸ Tourism contributes 11.6% of Dubai's GDP and is rising: tourists in the UAE increased 6.6% from 2009 to 2010, to over 940 million.⁶⁶⁹

⁶⁶³ Tom Arnold, "Foreign investment tops \$10bn in UAE", The National, April 18, 2012, online: <<http://www.thenational.ae/business/economy/foreign-investment-tops-10bn-in-uae>>

⁶⁶⁴ Abed El-Azez *supra* note 79 at 2

⁶⁶⁵ *ibid* at 2

⁶⁶⁶ *ibid* at 258

⁶⁶⁷ Haryoprato et al, "The Dubai Tourism Cluster: From the Desert to the Dream" *Microeconomics of Competitiveness* 6 May 2011 at 6

⁶⁶⁸ Dubai Economy *supra* note 649

⁶⁶⁹ B Rajesh Kumar, "Tourism in Dubai" *Middle East Journal of Business - Volume 7 Issue 1*, at 15 online: <<http://library.imtdubai.ac.ae/Faculty%20Publication/Dr.rajesh/tourism>>

Business environment

In order to carry out business activity in the Arab world, some factors need to be taken into consideration⁶⁷⁰. These include issues of starting a business, dealing with construction permits, getting electricity, registering property, getting credit, protecting investors, paying taxes, trading across borders, enforcing contracts and resolving insolvency.⁶⁷¹

To start a foreign business, the UAE requires a minimum capital of is \$84,000 USD.⁶⁷² An LLC can be formed by two people and cannot be managed by more than five people with the necessity of fulfilling the minimum capital requirement.⁶⁷³ Joint ventures are undertaken to reduce risks and share control in a particular business activity. In the UAE joint ventures do not need to be registered and all have to do business under the name of the UAE national partner.⁶⁷⁴

One of the biggest issues of doing business in the Middle East is of transparency.⁶⁷⁵ Most of the large industries are state run and those that are privatized are family controlled.⁶⁷⁶ Due to this, there is a considerable reluctance to disclose the financial and commercial information of those operations, even when it comes to government tenders and contract negotiations.⁶⁷⁷ Foreign investors have to use local sales agents, distributors and sponsors in order for agents to gain compensation even if the foreign employer is not successful in the venture. These dealer protection laws also allow agents to grant exclusive rights to

⁶⁷⁰ Doing Business in the United Arab Emirates: 2012 Country Commercial Guide for U.S. Companies, US commercial service, United States of America Department of Commerce (2012) at 3 online:

<http://export.gov/unitedarabemirates/build/groups/public/@eg_ae/documents/webcontent/eg_ae_052507.pdf>

⁶⁷¹ *ibid.*

⁶⁷² Ian Ayres & Jonathan R. Macey, Institutional and Evolutionary failure and Economic development in the Middle East, 30 Yale J. Int'l L. 397, (2005) at 404

⁶⁷³ Lisa Middlekauff, "To Capitalize on a Burgeoning Market-Issues to Consider before Doing Business in the Middle East" 7 Rich. J. Global L. & Bus. 165 (2008) at 168 [Middlekauff]

⁶⁷⁴ info prod research uae

⁶⁷⁵ Howard L. Stovall, "Arab Commercial Laws- Into the future" Vol. 34 No. 3, International Lawyer (2000) 839, at 840

⁶⁷⁶ *ibid* at 841

⁶⁷⁷ *ibid.*

import particular products and block a foreign supplier's import of the product.⁶⁷⁸ 'This is likely the result of a system that involves mixed signals, changing policies, broad discretion, and unwritten conditions that are unknown to many foreigners.'⁶⁷⁹

Foreigners are permitted 49% shares of a limited liability company in the emirates, the remaining 51% are with a local Emirati, and 100% shares of corporations, branches and representative offices and Free Zone Enterprises (FZE) in the free trade zone area.⁶⁸⁰ Companies in the zone are not required to file for municipal trade licenses or file articles of incorporation, and only one shareholder is required to start in FZE.⁶⁸¹ Companies here can also open branches without having a sponsorship of a local agent. There is a corporate tax exemption for fifteen years and nominal customs duties in the free trade zone area.⁶⁸²

The distinction made between the free zones and onshore United Arab Emirates has created an impediment for greater FDI involvement as it creates two separate business environments. However, the reasoning behind these restrictions is that UAE nationals are a minority in the UAE population and the United Arab Emirates is a major capital exporter. Thus, by affording them a share in their country's market, the restrictions are aimed at guaranteeing and safeguarding the economic interests of UAE nationals.⁶⁸³

Transparency remains a key difference in a developed and developing economy. This fact is present in the oil rich Middle East that lacks the necessary governmental checks and balances, being absolute monarchies.⁶⁸⁴ Governmental and bureaucratic transparencies are necessary prerequisites for market competition in any country relying

⁶⁷⁸ *ibid* at 842

⁶⁷⁹ *idid*.

⁶⁸⁰ Dubai Economy *supra* note 649

⁶⁸¹ Walter H. Diamond & Dorothy B. Diamond, "3 Tax Havens of the World" UAE political and Economic stability (2003)

⁶⁸² *ibid*.

⁶⁸³ Pier Terblanche, Company & Commercial - United Arab Emirates, Globe Business Publishing Ltd, June 15 2009, at 1 online:

<http://www.taylorwessing.com/uploads/tx_siruplawyermanagement/Taylor_Wessing_Company_UAE_June_15_2009.pdf>

⁶⁸⁴ Dr. Nasser Saïdi, "Corporate Governance in MENA Countries: Improving Transparency and Disclosure" The Second Middle East and North Africa Regional Corporate Governance Forum, The Lebanese Transparency Association, June 3-5 2004, at 82, online:

<http://www.ifc.org/wps/wcm/connect/b508b10048a7e753ab1fef6060ad5911/Transparency_and_Disclosure.pdf?MOD=AJPERES>

on competition law for regulation. As mentioned before, when public information regarding costs and benefits of government policies is present, it is a factor to countervail any rent-seeking activities.⁶⁸⁵ An economy in transition is best suited to engage in effective competition, which not only nurtures growth but also unveils market realities that form a basis for forecasting business trends and devising general economic policies and goals.⁶⁸⁶ It is important for the government to encourage competition law, by not just handling competition related issues, but promoting economic policies that broaden the law's reach.

3. Legal System of the UAE

Today, the majority of Middle Eastern countries⁶⁸⁷, including the UAE, maintain two separate bodies of law- sharia law and a civil law system.⁶⁸⁸ Arab constitutions serve as a means of expressing national sovereignty, proclaiming ideology, and identifying and legitimizing lines of authority.⁶⁸⁹ In the view of the UAE government, the concept of sharia law is reflected as a conglomeration of divine laws and principles revealed by god and eternally recorded in the holy Quran. Therefore, governments only have administrative and organizational authority in matters that the Quran does not address, which is where the civil law system comes into place.⁶⁹⁰ 'Currently, most Islamic states feature a dichotomy between the "secular" courts which have jurisdiction over commercial and civil disputes (particularly those involving foreigners) and "Shari'a"

⁶⁸⁵ Finger, J. Michael, "Incorporating the Gains from Trade into Policy" World Economy (1982) 5 at 367-77,

⁶⁸⁶ Ajit Singh & Rahul Dhumale, "Competition Policy, Development and Developing Countries" Trade-Related Agenda, Development and Equity (T.R.A.D.E.), Working Papers, November 1999 at 9

⁶⁸⁷ There is no concrete list of Middle Eastern countries; it is based on political and cultural association. These countries are; Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, United Arab Emirates, Iran, Iraq, Sudan, Isreal, Egypt, Jordan, Lebanon and Palestine- with the occasional inclusion of Morocco, Somalia, Pakistan, Yemen, Afghanistan and Turkey [IATA Middle East]

⁶⁸⁸ H.S. Shaaban, "Commercial Transactions in the Middle East: what law governs?" 31 Law & Policy International Business. (1990) 157 at 160 [Shaaban]

⁶⁸⁹ Nathan J. Brown, Constitutions in a non-constitutional World: Arab Basic Law and the Prospects for Accountable Government (2002) at 11

⁶⁹⁰ *ibid* at 166

courts which have jurisdiction over family law and civil disputes strictly affecting national citizens.⁶⁹¹

Apart from the Sharia law and the Federal Civil and commercial codes that are followed in the UAE, the setup of the recent financial hub, Dubai International Financial Centre (DIFC), introduces a new parallel legal system, that is common law based and consisting of an independent judicial system.⁶⁹² Although it is independently controlled, when matters are transferred to the national courts it is important that they be 'appropriate for enforcement',⁶⁹³ meaning they comply with the local laws and customs of the country. In relation to the free zones area formed in Dubai, the ruler of Dubai promulgated the law of DIFC, No. 9 of 2004.⁶⁹⁴ Under the DIFC's judicial system, court of first instance has jurisdiction over

*"(a) Civil or commercial cases and disputes involving the Centre or any of the Centres Bodies or any of the Centres Establishments; (b) civil or commercial cases and disputes arising from or related to a contract that has been executed or a transaction that has been concluded, in whole or in part, in the Centre or an incident that has occurred in the Centre; (c) objections filed against decisions made by the Centres Bodies, which are subject to objection in accordance with the Centres Laws and Regulations; (d) any application over which the Courts have jurisdiction in accordance with the Centres Laws and Regulations."*⁶⁹⁵

DIFC is however dependent on the federal system of courts financially and therefore it can be argued that the protectionist rule of law can influence the independent DIFC

⁶⁹¹ J.N.D Anderson, *Modern Trends in Islam: Legal Reform and Modernization in the Middle East*, in *Islamic Law and Legal Theory* at 549

⁶⁹² Press Release, "HH Sheikh Mohammed Bin Rashid Issues Decree Appointing New Deputy Chief Justice at Dubai's DIFC Courts" DIFC Courts, 4 July 2013, online: <http://difccourts.complinet.com/en/display/display_viewall.html?rbid=2725&element_id=3576&element_id=3576&print=1&print=1>
⁶⁹³ *ibid.*

⁶⁹⁴ Law no. 9 of 2004, In respect of The Dubai International Financial Centre, online: <http://www.difc.ae/sites/default/files/Dubai%20Law%20no%209%20English%20and%20Arabic_0.pdf>

⁶⁹⁵ Alejandro Carballo, "The Law of the Dubai International Financial Centre: Common Law Oasis or Mirage within the UAE?" *Arab Law Quarterly*, vol. 21, no. 1 (2007) at 91-104, online: <<http://www.jstor.org.proxy2.lib.uwo.ca/stable/27650574>>

system. The system is designed to attract foreign investors, who might be skeptical about local protectionism, slow local courts, proceedings conducted in Arabic, or application of the Shari'a law if no provision is contained in the UAE Commercial or Civil Codes. It also reinforces the efforts to promote and safeguard the independence of the DIFC parallel legal system.⁶⁹⁶ Competition law of the UAE is a federal code that comes under the civil law system of the country.

The free trade zones in UAE are a major aspect of the country's economy.⁶⁹⁷ The first- Jebel Ali Free Trade Zone- created in 1992, and all others that follow, have independent legal character and are not required to abide by the domestic rules of corporate governance and operation.⁶⁹⁸

Whether it is the Sharia' courts or the secular courts, there is no concept of binding precedent in the country.⁶⁹⁹ Even though past decisions of a court are referred to as a basis of reference or influence to decisions, it is not mandatory to follow the decision.⁷⁰⁰ With a fluctuating legal framework and uncertainty of court proceedings, businesses are discouraged to carry out activities while weighing the risk and reward analysis.⁷⁰¹

Globalization is a process where free flow of ideas, people, goods, services and capital leads to the amalgamation of economies and societies.⁷⁰² The homogenized concept of globalized markets between developed and developing countries does not always fit well with the local culture. 'Islamic Middle Eastern nations have reformed their Islamic Legal systems to varying degrees since the early seeds of globalization were planted with the influx of Western trade and exchange in the early nineteenth century.'⁷⁰³ European commercial codes and procedures were welcomed in order to fill the void in Islamic trade

⁶⁹⁶ *ibid.*

⁶⁹⁷ Haryoprato et al, "The Dubai Tourism Cluster: From the Desert to the Dream" Microeconomics of Competitiveness 6 May 2011, at 16

⁶⁹⁸ Walter H. Diamond and Dorothy B. Diamond, 3 tax havens of the world, UAE political and Economic stability 2003

⁶⁹⁹ Shaaban *supra* note 692 at 165

⁷⁰⁰ *ibid.*

⁷⁰¹ Middlekauff *supra* note 677 at 175

⁷⁰² Habibullah Khan & Omar Bashir, "The Impact of Globalization on Islamic Countries: A Brief Assessment" U21Global Working Paper Series, No. 001/2010, December 2010 at 1

⁷⁰³ Donboli *supra* note 639 at 420

and finance laws.⁷⁰⁴ The World Bank proposes that globalization can reduce poverty.

“Globalization generally reduces poverty because more integrated economies tend to grow faster and this growth is usually widely diffused. As low-income countries break into global markets for manufactures and services, poor people can move from the vulnerability of grinding rural poverty to better jobs, often in towns or cities. In addition to this structural relocation, integration raises productivity job by job⁷⁰⁵”

With the introduction of competition law in UAE’s economy, the society is gradually globalizing towards an international market. The competition law layout is a borrowed template that focuses on standard concepts and with the UAE setting out similar provisions, enforcement of the law becomes easier globally. Therefore facilitating globalization and prosperity in the system. As said by the World Bank, an increase of globalization will reciprocally reduce poverty. Globalized standards of quality would cause the growth of job markets and opportunities for rural workers to work better jobs in the flourished cities of the UAE.

From all the countries discussed in the previous chapter, the closest legal system to the UAE is Brazil as they both follow civil law systems. The rest are based on common law traits. Even though all prove to have successful implementation of competition law in the system, civil law jurisdictions do not rely on precedents and therefore in the case of the UAE this can be problematic. The UAE has incorporated three parallel legal systems simultaneously. The management of cases among the different systems can discourage effective enforcement of competition law. This is something that needs to be taken into consideration for gradual growth of the law. At this point, having no cases or precedents to refer to in the UAE, it is important to analyze the current competition law of the UAE and its specific wordings.

⁷⁰⁴ George N. Sfeir, *Modernization of the law in the Arab States: An investigation into Current Civil, Criminal and Constitutional Law in the Arab World* 1998 at 26-27

⁷⁰⁵ World Bank, *Globalization, Growth, and Poverty: Building an Inclusive World Economy* (World Bank Policy Research Report), January 2002, at 1

4. UAE Competition Law

The competition law of UAE came into force on February 23rd 2013, under the Federal law no. 4 of 2012.⁷⁰⁶ An ongoing six-month probationary period was provided under the law, where companies were exempted from penalties for non-compliance and were allowed to amend their business structures for compatibility of competition law.⁷⁰⁷ That included reviewing existing and new agreements and training staff to ensure compliance policies are in place. Prior to this law, competition compliant provisions were scattered amongst various laws, such as the UAE commercial code and the UAE consumer protection law and regulations.⁷⁰⁸ The aim of the law is:

‘the protection and enhancement of competition and the combat of monopoly practices ... [in particular through] keeping a competitive market governed by the market mechanisms in accordance with the economic freedom principle through banning restrictive agreements, banning the business and actions that lead to the abuse of a dominant position, controlling the operations of economic concentration and avoiding all that may prejudice, limit or prevent competition.’⁷⁰⁹

The overall principal competition regulator is the UAE Ministry of economy that will scrutinize all competition related activity.⁷¹⁰ The implementing regulations are still to be introduced and will present a more detailed procedure for the law.⁷¹¹ The UAE cabinet has been set up to effectively implement competition law in the system and the

⁷⁰⁶ New Federal Competition Law in the UAE, Clifford Chance, 18 December 2012, online: <http://www.cliffordchance.com/publicationviews/publications/2012/12/a_federal_competitionlawintheuae.html>

⁷⁰⁷ Client Alert, “How New UAE Competition Law Will Impact Business” Latham & Watkins Litigation Department, 30 April 2013, Number 1512 [Latham & Watkins]

⁷⁰⁸ Gordon Blanke MCI Arb, “United Arab Emirates-The New UAE Competition Law: Is It Arbitratable Or Is It Not Arbitratable - That Is The Question” Habib Al Mulla & Company, 10 April 2013, Mondaq connecting knowledge and people, online: <http://www.mondaq.com/x/232136/Arbitration+Dispute+Resolution/The+New+UAE+Competition+Law+Is+It+Arbitratable+Or+Is+It+Not+Arbitratable+That+Is+The+Question>

⁷⁰⁹ Federal Law no. 4 of 2012, Article 2

⁷¹⁰ Peter Sullivan et al, “New UAE Antitrust Legislation in Force from February 23, 2013 -Six-Month Grace Period Before Enforcement” Gibson Dunn, 2013 Gibson, Dunn & Crutcher LLP January 18, 2013 at 3 [Peter Sullivan]

⁷¹¹ Latham & Watkins *supra* note 711

implementing regulations. A Competition Regulation Committee⁷¹² will also be a framework where policy and legislation will be proposed for the protection of competition, considering issues, making recommendations on exempting restrictive agreements or dominant market practices and preparing annual reports.⁷¹³

5. Scope of Competition Law in the UAE

Restrictions on foreign investment

Foreign investment cements the economic gap between developed and developing nations. That is what the UAE needs to consider. The government of the UAE restricts foreign investment in trading companies, agency companies, service sectors, insurance industries, distributions services and quasi-state monopolies such as telecommunications.⁷¹⁴ By limiting production to just domestic firms, the scope of competition decreases and growth eventually becomes stagnant. The reason why competition law is incorporated in a legal and economic system is to regulate competition in the market. Hence, this law should pose as a gateway for encouraging foreign investment in the country rather than further defining the existing restrictions.

In relation to the countries discussed in the previous chapters, foreign investment invites mixed responses in different countries yet overall it is encouraged on the basis of competition. Foreign investment in Canada is relatively more restricted than the EU and US as the latter encourage FDIs and diversity in the markets. These varying economic approaches of developed countries all however still consist of successful implementations of competition law. It can be inferred that the wording of the laws varies because different countries have a different approach to competition. The more detailed and concise the law is, the greater the confidence in welcoming foreign investment in different sectors. Canadian competition law is more vague in its wording than the EU and US, as examined

⁷¹² Federal Law no. 4 of 2012, Article 12

⁷¹³ *ibid* at article 13

⁷¹⁴ Foreign Investment, "Accessing Middle East Growth: Business Opportunities in the Arabian Peninsula and Iran, Department of Foreign Affairs and Trade (2000) at 89

in chapter 1. Developing countries' environments are different from those in developed countries, as foreign investment is promoted for economic growth, but it is also restricted in many aspects because of the lack of economic and legal sophistication in the country. Hence competition law is a promotional tool adopted by developing countries to provide economic and legal stability when welcoming foreign interest. The wordings are precise in their own protection and ease of scrutiny. Apart from foreign investment, competition law is restricted in various sectors in the UAE as well. If interference of the law is not allowed in these areas, the competition law could be rendered useless. Competition law in relation to the UAE will be analyzed in more detail below.

It is important to have the freedom of entering the market in order for a competitive market to flourish.⁷¹⁵ By not having an adequate competition law system implemented in the UAE, the so-called 'lobbyists' of the country, as mentioned in the second chapter, may harm the legal and economic culture of the country.⁷¹⁶ Privatization of businesses has resulted in greater benefits for developed countries. As discussed in the previous chapter, numerous Canadian, EU and US corporations have been eliminating nationalization to gain competitive methods in the economy. Privatization is encouraged because it promotes higher allocative and productive efficiency; it strengthens the role of the private sector in the economy; it improves the public sector's financial health; and it liberates resources for allocation in other important areas of government activity.⁷¹⁷

Industries exempted under competition law

The actions of federal and local governments and any state controlled establishments are excluded from the application of the competition law.⁷¹⁸ The law however, does not specify what level of government activity is excluded. Additionally, Small and Medium

⁷¹⁵ Francisco Marcos, "Do developing countries need Competition Laws and Policy?" Instituto de Empresa Business School, Madrid Spain, (2006) at 5

⁷¹⁶ Rodríguez *supra* note 109 at 122

⁷¹⁷ Eytan Sheshinski & Luis F. López-Calva, "Privatization and Its Benefits: Theory and Evidence" CES ifo Economic Studies, Vol. 49, 3/2003, 429 at 430

⁷¹⁸ Federal Law no. 4 of 2012, Article 4(2)

Establishments (SME) are excluded from competition law as well.⁷¹⁹ The term SME has not been defined yet and is open for interpretation.

There are several important sectors that are exempted from the scope of competition law. These include, telecommunications, financial services, cultural activities (readable, audio and visual), pharmaceuticals, utilities, waste disposal, transportation, oil and gas, and the postal service.⁷²⁰ Such exemptions are a major concern of law enforcement and can negatively affect the economy.

Scope of application

The ministry has defined a relevant market by the substitutability of a commodity, service or a group of products or services based on price, characteristic and use, or whose alternatives may be chosen to meet the consumer's need in any specific geographical area. The definition needs elaboration as a clear definition is necessary for corporations to understand what they have done wrong.⁷²¹

The competition law prohibits restrictive agreements⁷²². These include price fixing, bid rigging, dividing markets, allocating customers, precluding or impeding entry into a business, refusal of purchases from or supplies to another corporation, limiting the free flow of goods or services in a relevant market, limiting the terms of sale or purchases, or prohibiting and limiting production, development, distribution, marketing or other investments⁷²³.

The competition law prohibits the use of a dominant position to restrict competition.⁷²⁴

⁷¹⁹ Federal Law no. 4 of 2012, Article 4(3)

⁷²⁰ Federal Law no. 4 of 2012, Article 4(1)

⁷²¹ Jawad Ali et al, "New Competition Regulation in the United Arab Emirates Considerations for Commercial Practices and Transactions" Middle East and Islamic Finance Practice Group, King and Spalding client alert, January 6, 2013 [Jawad Ali] online:

<<http://www.kslaw.com/imageserver/KSPublic/library/publication/ca010613.pdf>>

⁷²² Federal Law no. 4 of 2012, Article 5

⁷²³ *ibid.*

⁷²⁴ Federal Law no. 4 of 2012, Article 6

These could include imposing resale price terms, predatory pricing, discriminatory pricing, refusing to deal, compelling others not to deal, restricting supply, conditioning the sale of goods or services on the purchase of another good or service, disseminating false information about products or prices and artificially increasing or decreasing quantities in a market.⁷²⁵

Corporations can apply for an exemption under the competition law.⁷²⁶ This is done through the Ministry of Economy, as they have to demonstrate that their practices enhance economic development and improve competition. The approximate time for applications is ninety days.⁷²⁷

The OECD promotes a trend to introduce greater competition into regulated sectors.⁷²⁸ Numerous countries have embarked in recent years on ambitious programmes aiming to narrow the scope of economic regulation and ensuring that regulations better serve public interests, known as “regulatory reform”.⁷²⁹ Regulations could impede innovation or create unnecessary barriers to trade, investment, and economic efficiency and protect sectors or activities unnecessarily from competition.⁷³⁰ Therefore, one of the principal objectives of reducing regulation is to broaden the scope for private markets and allocate resources to improve the general economic efficiency.

- **Telecommunications**

The UAE telecommunications sector consists of two integrated telecommunications operators, Emirates Telecommunications Corporation (Etisalat) and Emirates Integrated

⁷²⁵ *ibid.*

⁷²⁶ Peter Sullivan *supra* note 710 at 2

⁷²⁷ *ibid.*

⁷²⁸ The Relationship between Competition and Regulatory Authorities – Executive Summary and Background Note, OECD Journal of Competition Law & Policy, Volume 1, no 3, 1999, at 169-219.

⁷²⁹ *ibid* at 3

⁷³⁰ *ibid.*

Telecommunications Company PJSC (Du).⁷³¹ In 2010, the telecommunications sector generated AED 3.2 billion in Fixed Telephony Service, AED 18.4 billion in Mobile Services and AED 2.7 billion in Internet services.⁷³² The telecommunications industry makes up 5.3% of the country's total GDP.⁷³³ It needs to be realized that when numerous firms are involved in a particular sector and competition law is a regulator of that conduct, the consumer as well as the companies benefit and the economy grows as a whole. Competition law of the UAE does not scrutinize the telecommunications sector. In South Africa, the telecommunications sector was liberalized recently from the fixed line monopoly of Telkom. Being a signatory to the WTO Agreement on Basic Telecommunications, South Africa is therefore committed not only to gradual liberalization of its market, but also an acceptance of principles of how competition should be governed.⁷³⁴ In 2010, the total income of the South African telecommunications sector was R281 051 million: it was the largest contributor to the total country income.⁷³⁵ In Canada, as I said in chapter 1, a bill was passed to remove restrictions on foreign investment in the telecommunications sector: this approach increased the overall revenue and further promoted the scope of competition law in the sector.⁷³⁶ In the US, the Telecommunications Act says that all conduct needs to abide by the Sherman Act.⁷³⁷ Although the UAE has taken liberalization measures to change the existing monopoly of Etisalat to a duopoly, both the companies are government controlled.⁷³⁸ If competition

⁷³¹ UAE Telecommunications Sector Developments and Indicators, 2007-2010, 2nd Annual Sector Review, Telecommunications Regulation Authority, May 2011, at 7

⁷³² *ibid* at 6

⁷³³ *ibid* at 8

⁷³⁴ James Hodge, "Liberalizing Communication Services in South Africa" Trade and Industrial Policy Secretariat (TIPS) at 4

⁷³⁵ Pali Lehohla & Statistician, "General, Post and telecommunications industry 2010" Statistics South Africa, Report No. 75-01-01 (2010) at 1, online:

<http://www.statssa.gov.za/publications/Report-75-01-01/Report-75-01-012010.pdf>

⁷³⁶ Bram D. Abramson et al, "Canadian Government Relaxes Telecom Foreign Ownership Restrictions and Sets Rules for 700 MHz Spectrum Auction" May 4, 2012, McCarthy Tétrault, online: < http://www.mccarthy.ca/article_detail.aspx?id=5862>, Lawson A W Hunter & Ashley M Weber, "A Guide to Navigating Canada's Foreign Ownership Laws for New Investors" Antitrust and National Security, Competition Law International, January 2012, at 37, online: <<http://www.stikeman.com/2011/images/core/ForeignOwnership.pdf>>

⁷³⁷ Sherman Act, 47 U.S.C. §152

⁷³⁸ Triska Hamid, "Investors balk at UAE royalty fees for Etisalat and du", The National, online: <<http://www.thenational.ae/business/industry-insights/telecoms/investors-balk-at-uae-royalty-fees-for-etisalat-and-du>>

law cannot assess the activities of both companies then perhaps behind the scene understandings and agreements could in fact modify a duopoly into a ‘larger monopoly’. As I said in chapter 2, without competition even if a company were privatized, it would have no effect on the market. One of the reasons of privatization is to increase competition and gain efficiency in the market. The telecommunications sector of the UAE is an extremely large and successful industry of the Middle East and having no scrutiny under the law, the potential GDP figures can be affected.

Financial services

There were approximately 463 establishments in the financial sector of the UAE as of 2007.⁷³⁹ In 2011-12, after the global financial crisis, Dubai was in an estimated \$60 billion USD of debt.⁷⁴⁰ Now, more than ever, new approaches towards handling the sector are important. In 2011, the financial sector contributed 65% of the non-oil sector.⁷⁴¹ If competition law is restricted under the specific industries that are also the main sectors of the economy, it means that there is no intention of allowing or encouraging foreign investment in the country under those sectors, since foreign investment without competition law guidelines would be difficult to conduct. By restricting competition law in the financial sector, the UAE cannot become a financial hub for the region.⁷⁴² As analyzed in chapter 1, the particular sectors that do not allow foreign investment in Canada approximately represent 16.5% of the total GDP (2006).⁷⁴³ When 1 out of every 6 dollars of economic activity in Canada is sheltered from foreign businesses, that is 1/6 of the total revenue that is not getting the exposure it needs to multiply. Calculated by Frances van Loo, a 50% profit of Canadian investment over every \$1 of FDI proves

⁷³⁹ “Survey of Financial Services Sector Bulletin – Dubai” Dubai Statistics Center, (2007) at 8

⁷⁴⁰ Gabriel Sensenbrenner et al, “United Arab Emirates: Selected Issues and Statistical Appendix 2011” International Monetary Fund, Report No. 11/112, (2011) at 6

⁷⁴¹ Mohamad Moabi, GCC Economic Insight, QNB, 2012, at 15, online:

<http://www.qnb.com.qa/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1355478588574&ssbinary=true>

⁷⁴² Rima Ali Al Mashni, “Dubai Chamber promotes Dubai's financial hub status in Lisbon”

AMEINFO, May 06 - 2013 , online: <<http://www.ameinfo.com/dubai-chamber-promotes-dubais-financial-hub-340440>>

⁷⁴³ Harischandra, *supra* note 137 at 1

foreign investment to be extremely beneficial for the efficiency of the economy.⁷⁴⁴ In relation to the UAE for example, the financial sector is exempted from the scope of UAE competition law. Statistics Canada argued that foreign banks in a country increase competitiveness, efficiency, the quality and the degree of the service provided.⁷⁴⁵ If the scope of competition law were to expand, the basic elements of the banking sector in the UAE would automatically improve. Even if there are other laws to regulate foreign activity apart from competition law, the standard provisions of competition law are the determining factors of competition in the market and eventual growth in the economy.

The banking sector in India was moderately liberalized in the past, yet between 1992-1997, measures were taken to significantly relax the provisions in the industry.⁷⁴⁶ This was done to achieve three main objectives: to loosen external constraints, strengthen the banking sector and implement an institutional framework to oversee the functioning to result in profitability and efficiency.⁷⁴⁷ Since 1993 the Reserve Bank of India (RBI), which is the regulating body of the banking system, allows entry of private sector banks in order to increase competition.⁷⁴⁸ FDI limits have been raised as well, starting from 20% initially to 49% in 2001 and 74% by 2005.⁷⁴⁹ There are many positive outcomes that have been brought about through liberalization. Profits and competition among private and public banks have increased, which has resulted in overall efficiency in the country. RBI issued diversified guidelines for the private sector banks, in 2004 to ensure better capitalization, and fair and transparent processes.⁷⁵⁰ By liberalizing the banking sector and allowing competition, it is evident that the profits and benefits received are higher than in an economy that does not. It is important that the UAE amends its ways to

⁷⁴⁴ Van Loo *supra* note 155 at 474-481.

⁷⁴⁵ Christine Hinchley, "Analysis in Brief, Foreign Banks in the Canadian Market" Industrial Organization and Finance Division, Statistics Canada, Catalogue no. 11-621-MIE, No. 041 at 8, online: <<http://publications.gc.ca/collections/Collection/Statcan/11-621-M/11-621-MIE2006041.pdf?>>

⁷⁴⁶ Rupa Chanda & Pralok Gupta, "Service Sector Liberalisation in India: Key Lessons and Challenges" Economic Diplomacy Programme, Occasional paper no. 88 August 2011 at 15 [Chanda]

⁷⁴⁷ "Trade in Financial Services: India's Opportunities and Constraints", Working Paper. 152, New Delhi: ICRIER, 2005 at 78, online: <<http://www.icrier.org/pdf/wp152.pdf>>

⁷⁴⁸ *ibid* at 30

⁷⁴⁹ Chanda *supra* note 750 at 15

⁷⁵⁰ *ibid* at 17

incorporate the liberalized attitudes of other developing countries such as India. By allowing the financial sector to be scrutinized under competition law, it is possible that the present debt of Dubai could be removed faster with firmer regulations for foreign intervention and for faster growth in the economy.

- **Health care & Pharmaceuticals**

The pharmaceutical market of the UAE is one of the most developed markets in the Middle East, with a strong healthcare infrastructure and the highest per-capita medicine expenditure in the Middle East. In 2010, Dubai Imports of pharmaceutical products rose from AED 800 million in 2003 to AED 3 billion.⁷⁵¹ The total value of the market was estimated to be \$1.6 billion USD in 2012, growing around 3% (\$1.5 billion USD) from 2011.⁷⁵² In the EU, AstraZeneca was held guilty of abuse of dominant position and was fined €60 million.⁷⁵³ This case encourages enforcement efforts for all pharmaceutical companies in the EU. In 2010, the healthcare sector, including pharmaceutical industry, accounted for 9% to the total GDP in the EU.⁷⁵⁴ If 9%, for example, were to be excluded from the scope of competition law in the EU, then around 1/10 of the GDP would be affected adversely. Competition in Canada under the pharmaceutical sector is highly encouraged as the healthcare system relies on the competitive markets, delivering the main products and services in the sector today.⁷⁵⁵ Likewise, the Dubai pharmaceutical

⁷⁵¹ “UAE Pharmaceutical Industry Set to Benefit from Lifestyle Changes” Dubai Chamber, July 2013, online: <<https://www.dubaichamber.com/news/uae-pharmaceutical-industry-set-to-benefit-from-lifestyle-changes>>

⁷⁵² “UAE Likely to Retain its Ranking as the Second Largest Pharmaceutical Market-Report” UAE Interact, 04/2013, online:

<http://www.uaeinteract.com/docs/UAE_likely_to_retain_its_ranking_as_the_second_largest_pharmaceutical_market_report/54325.htm>

⁷⁵³ AstraZeneca v. Commission, C-457/10 P, December 2012, online:

<<http://curia.europa.eu/juris/document/document.jsf?text=&docid=131490&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=106284>>

⁷⁵⁴ Pharmaceuticals & Health Services, European Commission, online:

<http://ec.europa.eu/competition/sectors/pharmaceuticals/overview_en.html>

⁷⁵⁵ “Canadian Generic Drug Sector Study” Competition Bureau Canada, October 2007, at 3,

online: <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competition%20Bureau%20Generic%20Drug%20Sector%20Study.pdf/\\$FILE/Competition%20Bureau%20Generic%20Drug%20Sector%20Study.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competition%20Bureau%20Generic%20Drug%20Sector%20Study.pdf/$FILE/Competition%20Bureau%20Generic%20Drug%20Sector%20Study.pdf)>

market has experienced a strong growth in pharmaceutical trade. In the UAE, the healthcare sector made up 3.7 percent of the total GDP in 2010.⁷⁵⁶ Since 2003, imports of pharmaceutical products have risen from Dh800 million to Dh3 billion in 2010 while exports too have risen from Dh100 million to Dh400 million over the same period.⁷⁵⁷ Having no scrutiny of competition law under the pharmaceutical sector, growth is not regulated. That is 1.6 billion USD that is beyond the reach of competition law regulation.

- **Utilities**

The “Water and Electricity” sector experienced a rapid growth after the establishment of the Abu Dhabi Water and Electricity Authority (ADWEA) in March 1998, a public supervisory body responsible for implementing government policy of water and electricity sector in the country.⁷⁵⁸ In 2011, the total electricity production by companies was 46,367 GWH, an increase of 82 percent since 2005 (3,116 GWH) transferred to Northern Emirates.⁷⁵⁹ The country’s investment in water projects increased, ever since the country’s unity in 1971. In 2008, investment in local water projects increased by 20% from \$11.62 billion USD in 2007 to \$14 billion USD, with the number of water production and desalination plants rising from 39 to 55 in the country over the same period.⁷⁶⁰

The OECD said that Competition is encouraged, because it motivates innovation and efficiency under competitive activities, it provides the consumer with a wider set of alternatives, enhances product differentiation and better satisfaction of consumer demand

⁷⁵⁶ “SANA, Healthcare Market: UAE” SANA Enterprise Solution (2013) at 4

⁷⁵⁷ *ibid.*

⁷⁵⁸ “Energy & Environment Statistics 2011” Statistics Centre- Abu Dhabi, November 2011, at 3, online:

<[http://www.scad.ae/SCADDocuments/Energy%20and%20Environment%20Statistics%20English2011%20\(1\).pdf](http://www.scad.ae/SCADDocuments/Energy%20and%20Environment%20Statistics%20English2011%20(1).pdf)>

⁷⁵⁹ *ibid.*

⁷⁶⁰ “Water, Energy, Technology and Environment Exhibition (WETEX)” Italian Trade Commission, UAE Market report March 2011, at 7, online:

<<http://www.ice.gov.it/paes/asia/emirati/upload/159/WETEX,%20March%202011.pdf>>

and limits the scope for regulation, allowing more efficient, targeted regulation.⁷⁶¹ In Brazil, 60% of distribution assets have been privatized in the electricity industry, in order to gain the benefits of competition within the utilities industry.⁷⁶² Even though the utilities sector is still partially regulated, it is an important objective for Brazilian authorities to have the regulation criteria in line with the aim of promoting competition.⁷⁶³ A regulatory agency was created in 1997, to oversee privatization and liberalization in the electricity sector (ANEEL) and plans for further competition are being undertaken.⁷⁶⁴ The electricity act of India is specifically designed to cater to the growing demand for competition in the market.⁷⁶⁵ Two years after the enactment, the electricity traded increased drastically.⁷⁶⁶ The utilities sector in the UAE exempts competition law from its assessing non-compliance, whereas other countries are encouraging privatization of corporations for the sole purpose of competition in the country. The UAE discourages competition by restricting competition regulation in the country. For example, \$14 billion USD under the water sector, in the UAE is exempted from competition law, meaning the money could possibly be gained through anti-competitive agreements that could have a detrimental effect on the economy and globally, but there is no regulating authority to analyze that.

- **Oil and Gas**

The UAE had the sixth largest natural reserves of oil in 2011 with 97.8 billion barrels, 9.5% of global proven crude oil reserves. At the current rate of utilization, these reserves are estimated to last more than 100 years.⁷⁶⁷ ADNOC, the national oil company of Abu

⁷⁶¹ “Restructuring Public Utilities for Competition” Competition and Regulatory Reform, OECD 2001, at 10, online: <<http://www.oecd.org/regreform/sectors/19635977.pdf>>

⁷⁶² *ibid* at 67

⁷⁶³ Mario Possas et al, “Regulating Competition in Oligopoly: The Case of Telecommunications in Brazil” Institute of Economics, Federal University of Rio de Janeiro, Brazil, at 3, online: <http://www.ie.ufrj.br/grc/pdfs/regulating_competition_in_oligopoly.pdf>

⁷⁶⁴ Claudio Considera & Kélvia Albuquerque, “The Relationship Between Competition Policy and Regulation in the Brazilian Economy” SEAE/MF Documento de Trabalho no 10, August 2001, at 10

⁷⁶⁵ Malik *supra* note 411 at ES.2 xvi

⁷⁶⁶ Sarkar *supra* note 410 at 19

⁷⁶⁷ *ibid* at 5

Dhabi is 100% state controlled.⁷⁶⁸ The economy of the UAE is hugely affected by the oil and gas sector and therefore it is important to scrutinize this industry. In 2011 the value of oil and gas exports in Abu Dhabi alone were AED 393.4 million.⁷⁶⁹ In the case of Standard Oil⁷⁷⁰ in the US, the largest oil company of the country was guilty of monopolization. Antitrust law was used as a mechanism to restore competition in the country and prioritize consumer benefits. The decision affected many other monopolies in the country as well. In the same way, competition law is essential under the oil and gas sector in the UAE for inspection and dismantling of monopolies. If the competition law cannot be used, not only will the UAE residents be robbed of potential market prices, but there would be abuse of dominant positions and unfair agreements that can have a negative impact on the economy as well. In India, the oil and gas sector has recently encouraged private participation, as the Indian government believes that competition results in efficiency of consumption and production.⁷⁷¹ The oil and gas sector in the UAE is nationally controlled and regulated, the industry is neither privatized nor under the scrutiny of competition law, meaning a potential monopoly of oil is set up in the UAE and the government is encouraging it. Even the gas stations that were previously controlled by the government of Dubai (EPPCO and ENOC) – a monopoly in its own right has been taken over by ADNOC, the national oil company of the government of Abu Dhabi.⁷⁷² The government has established a near total dominance of this sector, which forms almost 60% of UAE's total exports.⁷⁷³

⁷⁶⁸ The UAE oil & gas competitive intelligence report, Business Monitor International ltd., 2010 at 6, online: <<http://www.marjanca.ae/files/reports/4-BMI%20UAE%20Oil%20and%20Gas%20Competitive%20Intelligence%20Report%202010-10-01.pdf>>

⁷⁶⁹ Abu Dhabi Emirate: Facts and Figures, Abu Dhabi Government, online: <https://www.abudhabi.ae/egovPoolPortal_WAR/appmanager/ADeGP/Citizen?_nfpb=true&_pageLabel=P3000130241204212839465&lang=en&did=150258>

⁷⁷⁰ Standard Oil Co. of New Jersey v. United States, 221 U.S.1 (1911)

⁷⁷¹ *ibid* at 24

⁷⁷² Abdulla Rasheed, "ADNOC set to take over EPPCO, ENOC petrol stations", GulfNews, July 5, 2011, online Gulfnews: <<http://gulfnews.com/business/oil-gas/adnoc-set-to-take-over-eppco-enoc-petrol-stations-1.833183>>

⁷⁷³ "What does United Arab Emirates Export?" The Observatory of Economic Complexity, MIT-Massachusetts Institute of Technology, (2008), online: <http://atlas.media.mit.edu/explore/tree_map/export/are/all/show/2008/>

- **Waste disposal**

Abu Dhabi has created landfills in the country that meet standard hygienic requirements reaching a total number of ten landfills in 2009.⁷⁷⁴ The total amount of solid waste in the Emirate of Abu Dhabi in 2009 was 5,756 thousand tons according to the estimates of the Centre of Waste Management – Abu Dhabi.⁷⁷⁵ The solid waste-recycling rate, in the same year, was about 23.8% of the total amount of waste.⁷⁷⁶ Likewise, the number of waste management projects in the Emirate of Abu Dhabi increased from 19 plants in 2008 to 21 plants in 2009, of which 10 were dedicated to landfills and 4 plants for converting organic waste into organic fertilizer (compost).⁷⁷⁷ The waste industry of South Africa has been refined to comply with competition law provisions for growth in the sector.⁷⁷⁸ As other developing nations are amending their economic approaches to different sectors it is important that the UAE does the same, and encourages competition law in the waste industry.

- **Transportation**

The Dubai government has planned to direct further funds and resources into transport infrastructure, and public authorities and public projects such as the Roads and Transport Authority (RTA), the Dubai Metro project and the Dubai Ports Authority (DPA).⁷⁷⁹ Dubai Chamber of Commerce & Industry analysis released recently showed a strong potential and positive growth outlook for the UAE's transportation sector.⁷⁸⁰ The major impacts of

⁷⁷⁴ “Waste Statistics in the Emirate of Abu Dhabi 2009” February 2011, Statistics Center-Abu Dhabi, at 6, online: <<http://www.scad.ae/SCADDocuments/Waste%20Statistics%20in%20the%20Emirate%20of%20Abu%20Dhabi%202009.pdf>>

⁷⁷⁵ *ibid* at 7

⁷⁷⁶ *ibid* at 8

⁷⁷⁷ *ibid* at 10

⁷⁷⁸ “Packing and Paper Industry Waste Management Plan” Packing Council of South Africa, August 2011 at 26, online: <<http://www.pacsa.co.za/pictures/pdfs/IndWMP.pdf>>

⁷⁷⁹ “UAE Transport sector shows positive outlook” Dubai Chamber of Commerce and industry, 2013, online: <<http://www.dubaichamber.com/news/uae-transport-sector-shows-positive-outlook>>

⁷⁸⁰ *ibid.*

transport on economic processes can be categorized as; (i) geographic specialization; (ii) increased competition and (iii) increased land value.⁷⁸¹ There was an increase of 11.1% in the number of flights reaching under the UAE aviation sector at 52, 788, as compared to 47, 496 flights in 2008.⁷⁸² In countries like Canada, where competition law assesses transportation, there are penalties and fines carried out to restore a healthy competition environment. In the case of Air Canada,⁷⁸³ examined earlier, the airline abused its dominant position and was held guilty of carrying out anticompetitive acts. By encouraging competition in a sector such as air transport, through an open skies agreement in 1995, 59 extra routes were created to cater to the traffic increase in the US.⁷⁸⁴ Travellers choosing Canadian carriers increased by 40% in 1993 to 44% in 1997 as well. Competition in this case profited both Canada and the US, and competition advantages both participating in the same way. In the US, specific measures were taken in the airline, motor and railroad industries to remove restrictions of foreign investment, which has resulted in an increase of ½ percent GDP each year.⁷⁸⁵ Even in the EU, restrictions for competition were removed and passenger traffic was to increase annually by 9 to 24 percent in total transatlantic travel and by 5 to 14 percent in intra-EU travel.⁷⁸⁶ By restricting competition in the transportation sector, the UAE would be hampering global air transport ties. The air transport sector in the UAE contributes 14.7% of the total GDP of the country, meaning Dhs145 billion annually, as said by the President of Dubai Civil Aviation (Sheikh Ahmad Bin Saeed al Maktoum).⁷⁸⁷ Recently Emirates airlines wanted to expand its landing routes in Canada, but once it was refused, the UAE removed

⁷⁸¹ *ibid.*

⁷⁸² Transportation, UAE Investment Map, Dar Al Tawasel National Est. 2012, online: <<http://www.uaeim.ae/transportation>>

⁷⁸³ Air Canada *supra* note 241

⁷⁸⁴ Sangita Dubey & Francois Gendron, "The US-Canada Open Skies Agreement: Three Years Later" *Travel Log* (1999). 18(3) at 1-9.

⁷⁸⁵ "Economic Report of the President" Transmitted to the Congress February 2002, United States Government Printing Office Washington: 2002 (Feb. 2002) at 63, online: <http://www.presidency.ucsb.edu/economic_reports/2002.pdf>

⁷⁸⁶ Reitzes, et al. "The Economic Impact of a EU-US Open Aviation Area" Report Prepared for the European Commission. (2002) at 5-16

⁷⁸⁷ "Aviation sector contributes more than \$39 billion to UAE's economy", *Al Arabiya*, 13 February 2013, online: <<http://english.alarabiya.net/en/business/aviation-and-transport/2013/03/05/-Aviation-sector-contributes-more-than-39-billion-to-UAE-s-economy-.html>>

on-arrival visas for Canadian citizens in the country. Canada did not want to invite competition to other airport routes of the country, apart from Toronto, and the UAE wanted to expand its service by increasing the routes of its national company (Emirates airline). This friction of monopolistic approaches obstructs the very concept of a globalized competition law and healthy environment, and needs to be refrained. Hence the greater need for scrutiny under competition law in the transport sector of UAE.

- **Postal Service**

Emirates Post is the official postal service of the United Arab Emirates (UAE). The Emirates Post Group Holding was established on 16/09/2007.⁷⁸⁸ The European Commission carried out a research report in which it was discovered that countries that had no competition under the postal service in the EU, had no form of growth since 1990.⁷⁸⁹ To increase the quality of the postal industry, a common, community-wide service was laid out. By introducing competition in the postal industry, the UAE will benefit from growth and efficiency as the country is a strong emerging market and a call for potential positive investment. Competition law however, would need to be implemented for scrutiny under the market.

6. Anti-Competitive Practices

Article 5 of Federal Law no. 4 of 2012- Restrictive Agreements

1- Restrictive agreements between establishments whose subject or aim is violating, reducing or preventing the competition, shall be prohibited, in particular those targeting the following:

⁷⁸⁸ Postal History, Emirates Post Group, online:

<http://www.epg.gov.ae/epweb/_en/info.xhtml?viewing_article=article76>

⁷⁸⁹ EU Competition Law Rules Applicable to Antitrust Enforcement, Volume 2: Sector specific rules, Competition Handbooks, Brussels 2011, at 97, online:

<http://ec.europa.eu/competition/antitrust/legislation/handbook_vol_2.pdf>

- a. Limiting the sale or purchase price of the products and the services, directly or indirectly, by causing an increase, reduction or fixation of the prices to the detriment of competition.
- b. Limiting the conditions of sale, purchase and performance of the service and the like.
- c. Colluding in tenders or bids in auctions and other supply offers.
- d. Freezing or reducing the production, development, distribution and sale operations as well as all the other aspects of investment.
- e. Colluding against buying from a specific establishment (s), selling or in supplying the same, as well as in preventing or obstructing the practice of their activities.
- f. Restricting the free flow of products and services to a specific market or withdraw the same from the said market in order to hide or store them unlawfully, or refrain from dealing with the same or create a sudden abundance of such products and services that lead to trade the same in unreal price.

2- In conformity with the provisions of the aforementioned Federal Law No. 18/1981, restrictive agreements between establishments aiming at violating, reducing or preventing the competition, shall be prohibited in particular those targeting the following:

- a. Dividing the markets or allocating customers depending on their geographical area, distribution centers or customers' type, seasons or periods of time or any other basis that may adversely affect the competition.
- b. Taking measures to hinder the entry of establishments to the market or exclude the same from the said market or obstructing their access to existing agreements and alliances.

3- Except for the paragraph (a) of clause (1) and the paragraph (a) of clause (2), the provisions of this article shall not apply to weak agreements where the overall share of the contracting establishments, does not exceed the percentage of the overall transactions in the relevant market. The cabinet may - upon the proposal of the minister - increase or

decrease this proportion according to the economic situation demands.

7. Article 6 of Federal Law no. 4 of 2012- Abusing a dominant position

1- No establishment enjoying a dominant position in the relevant market, or in an important and influential part thereof, shall be allowed to conduct any acts or works that may lead to an abuse of the position and to the violation or reduction or prevention of the competition, particularly those aiming at the following:

- a. Impose the prices or terms for reselling products and services directly or indirectly.
- b. Sell a product or a service for a price that is lower than its real cost in order to obstruct the entry of the establishments to the market or to exclude them from it, or to expose them to big losses that makes it difficult for them to carry on with their activities
- c. Discriminate between customers of similar contracts without any justification as for the products and services prices or for the terms of their sale or purchase contracts.
- d. Compel a client not to deal with another competing establishment. e- Refuse to deal in part or in whole according to common trading conditions. f- Unjustifiably refrain from buying or selling products or services or restrict or obstruct such dealing in a way that causes prevail of unreal prices.
- f- Suspend the conclusion of a contract or agreement for buying or purchasing products and services unless with the consent to commit to deal with other products and services that are, naturally or by the commercial use thereof, not related to the original subject of the transaction or agreement.
- g- Knowingly spread wrong information concerning the products or prices thereof.
- h- Decrease or increase the available quantities of the product in order to create a virtual shortage or abundance of the goods.

2- The dominant position, previously stated in Clause One of this article, shall be

achieved if the share of any establishment surpasses the proportion of the overall transactions in the market as determined by the Cabinet. The Cabinet may- according to the Minister's proposal- increase or decrease such proportion according to the economic situation conditions.

This newly introduced law is similar to the competition law of the most developed and developing nations as they all refer to a basic template law, analyzing merger control, restrictive agreements and abuse of dominance. It proscribes 'Restrictive agreements between undertakings with the subject or objective to prejudice, limit or prevent competition (including any forms of collusion or cartelistic arrangement, such as bid-rigging, systematic refusals to supply, resale price maintenance schemes, geographic market-sharing practices etc),⁷⁹⁰ 'the abuse of a dominant position that prejudices, limits or prevents competition'⁷⁹¹ and 'economic concentrations that result in the creation or strengthening of a dominant position with a distortive effect on competition in the relevant UAE market.'⁷⁹²

A company's experience of competition law internationally can be beneficial for a new regime where there is limited guidance or case decisions of the law.⁷⁹³ The major factor will be to assess where a dispute will be handled and the laws of which country will apply. A jurisdictional test for commercial practice is carried out to determine where the anticompetitive activities have taken place.⁷⁹⁴

I have created a chart to compare all the different countries that have been discussed in the first two chapters in comparison to the economy of the UAE.

Country	Business/economy	Legal system	Similarities
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⁷⁹⁰ Federal Law no. 4 of 2012, Article 5

⁷⁹¹ *ibid* at article 6

⁷⁹² *ibid* at article 9

⁷⁹³ Jawad Ali *supra* note 725

⁷⁹⁴ *ibid.*

<p>Canada</p> <p>GDP 1,819,081</p> <p>Ranked 11</p>	<p>The economy has always been affected by external circumstances.</p> <p>The US depression affected Canadian economy, the world war two benefited the economy even though Canada was not actively involved in the war.</p>	<p>Follows the common law system. Competition more lenient than other jurisdictions. [Non-exhaustive list provided and consent of the party to violation necessary for any action]</p>	<p>The economy is stable and much larger than the UAE, a comparison is hard to make, yet the stability of the economy and status of competition law in the country is what UAE should try to achieve.</p>
<p>European Union</p> <p>GDP 16,584,007</p> <p>Ranked 1</p>	<p>Strict rules to create concrete laws between European countries, for peace and easier business relations.</p>	<p>Common law system. High standards, exhaustive list of factors present. Restrictive and definitive.</p>	<p>The EU economy is huge, and therefore the strict competition law guidelines should be a focus for all GCC countries, to eventually form the same collective framework.</p>
<p>United States</p> <p>GDP</p>	<p>One of the biggest economies in the world and pioneer</p>	<p>Common law system but litigation oriented.</p>	<p>UAE can relate to the legal system as precedents are not as</p>

15,684,750 Ranked 2	in competition law. The laws are strict yet the business environment is lenient (laissez faire)		important in both economies are not than in other systems. Economy is open to foreign investment; the US system should be an economic and legal goal for UAE.
Brazil GDP 2,395,968 Ranked 7	The economy took on a new approach of democracy and privatization of businesses. The first step for competition law was introduced with trade liberalization in focus.	Civil law system with an extensive exhaustive list	A much more easier economy to match, smaller than those above. An emerging market that is civil law based. It grew from changing economic attitudes overtime and that is what the UAE should accomplish; yet Brazil is a democratic society.
South Africa GDP 384,315 Ranked 29	Competition law was introduced for equality and employment opportunities for economic growth after the	South African legal system is common law based. For major changes, economic institutions of competition law were formed. Exhaustive list provided, layout of the act	South African system consisted of a racial discrimination system, and only when the laws were changed towards equality was competition law a

	abolishment of apartheid.	different- broken down to horizontal and vertical differences.	prominent factor. UAE will always have a class system, as it is not a welfare state and therefore discrimination in the country is more likely- that needs to change.
India GDP 1,824,832 Ranked 10	New approach after claiming independence in 1947. Move from monarchy to democracy.	System still common law based.	Indian law is similar to the British approach. However, the UAE sheikhs have a very projecting role in the government's daily decisions.

List of the countries' GDP and ranking by International Monetary Fund⁷⁹⁵

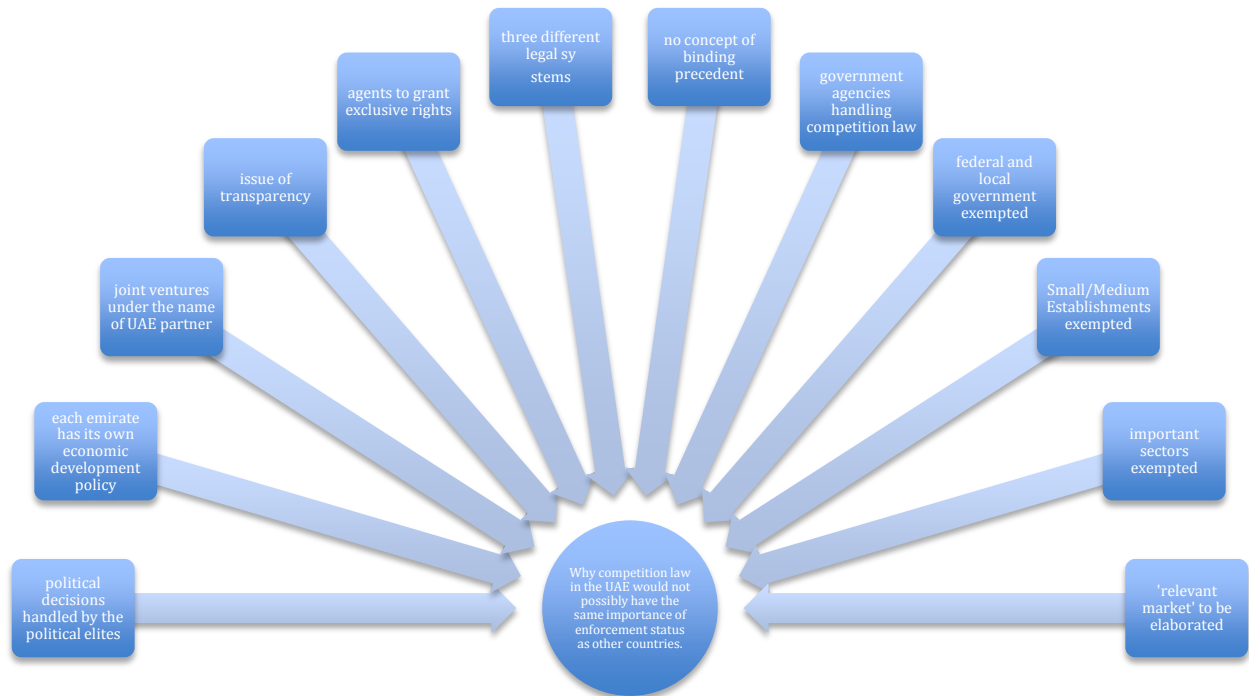
⁷⁹⁵ Report for selected Countries and Subjects, World Economic Outlook Database, April 2013, International Monetary Fund, online:

This chart portrays a comparison of all economies and legal systems of the countries discussed in the previous chapter, in line with the UAE. As a short-term goal, the UAE needs to focus on establishing an economic framework like the developing nations discussed above- Brazil, South Africa and India. All three countries have economic stability and have evolved from a centralized and planned economy, such that of the present UAE. It is therefore evident that the UAE has room to evolve and has model societies to follow. On a long-term basis, the UAE should aim for eventually stabilizing its economy with sustainable growth and development with a view to diversifying its economy from an oil-based to one which caters to multiple industries with room for international investment and competition. The developed nations discussed above have economies with a strong focus on diversity and innovation that drives global trade and, while the UAE may be a vital source of crude oil, it can use its oil revenues to create a multifaceted economy and a model for the region. As a partner within the GCC countries, the UAE should look to emulate the EU economy as a collective goal of prosperity within all other GCC countries. What I have tried to do at this point, to sum up, is compare the UAE with all other countries that I have discussed in the previous chapters. The comparison carried out is on the basis of a general economic level, portraying similarities that can serve as lessons to learn and projections for the future.

8. Effect of competition law in UAE

The diagram below represents all the reason why there is no current scope of competition law in the UAE. I have compiled all the factors under one umbrella heading for easier distinctions and layouts of the UAE economy and government.

98%2C826%2C927%2C542%2C846%2C967%2C299%2C443%2C582%2C917%2C474%2C544%2C754%2C941%2C698&s=NGDPD&grp=0&a=>



From these factors outlined above, it can be inferred that competition policy in the UAE faces many hurdles for successful enforcement. Primarily, the political decisions of the UAE are handled by the political elites meaning the laws and decisions of the country could be biased, as the governmental framework is not democratic. The UAE ministry of economy and UAE cabinet will oversee the competition law of the country along with the competition committee. These government agencies could prejudice the enforcement method of competition law since they will be the ones to assess the non-compliance status, set out the fines and decide the next step of the company or business in question.

Secondly, the large manufacturing corporations in the country are all either state-controlled or are wealthy local family businesses. The local influential businessmen are also present and influential in the governmental and political aspect of the country. There is no separation of control or power between those who run the businesses and those who make the decisions regarding the same business.

Additionally, there is an issue of transparency, as understandings, documents or financial agreements of the businessmen with others are not disclosed. Joint ventures that are not controlled by local Emiratis, but by foreigners, need to have a UAE national as a partner and the business needs to be under the name of the national. Again, one could argue that all activity is linked as those in the top positions have connections.

Furthermore, those foreigners that want to invest or start a business, need to go through a local agent. This agent would be beneficial for the person who hired him in terms of granting exclusive rights to import particular products and allowing him to block a foreign supplier's imports of the products, their actions are against the very concept of competition policy: encouraging competition in the economy.

The legal system of the country does not facilitate the process either. Juggling among sharia law, civil law and common law, the laws that need to be suitable for all three systems could end up not being enforced in any system. The law itself does not have a strong status in the country, as its enforcement is exempted in major establishments and sectors of the country. The government, small and medium sized establishments, telecommunications, financial services, cultural activities (readable, audio and visual), pharmaceuticals, utilities, waste disposal, transportation, oil and gas, and postal service, are all exempted from competition law. SME's are not even defined, so there is no certain criterion of what is excluded under this category. Even the concept of relevant market is not properly defined and therefore can be used to anyone's benefit or expense. Similarly, if proceedings do take place for a case, there is no concept of binding precedent in the country. The government can favour or disfavour anyone it pleases, as older decisions need not be followed.

Countries have global pressure to implement competition law as a form of membership in world market economy.⁷⁹⁶ It can be inferred that the UAE was pressured to implement the law for global recognition. Furthermore, competition law, being a public-oriented law, causes a need for transparency for appropriate enforcement.⁷⁹⁷ The UAE will need to amend its governmental framework to accommodate the law. In South Africa, economic

⁷⁹⁶ David J. Gerber *supra* note 87 at 88

⁷⁹⁷ *ibid* at 92

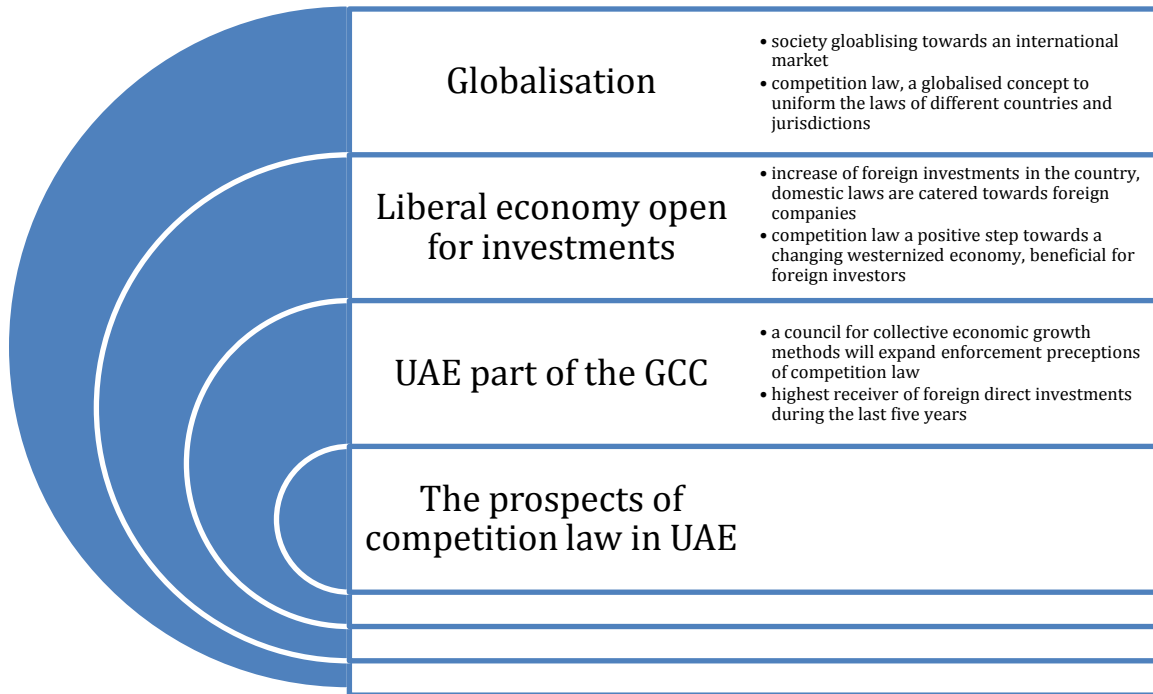
growth is promoted under the government's Macroeconomic Strategy for Growth, Employment and Redistribution (GEAR).⁷⁹⁸ The government encourages foreign investment for greater competition in the country. As said by George Ayittey, 'governments must abandon their traditional caretaker and regulatory functions and move into an area of active participation in the productive sector' in order to accommodate the economic change that foreign investment introduces. When competition law is discouraged in the country, such as the UAE in different sectors, the scope for growth will also detrimentally be affected.

Countries are under the threat that competition in the market will hamper the domestic corporations' stability. Competition law therefore is a security mechanism for domestic corporations so that foreign corporations cannot exploit the country's resources and capital.⁷⁹⁹

On the other hand, the scope of competition law can increase over time as there are early signs of a flexible economy and a strong approach to the law that are open to interpretation. I have created another diagram of factors that could potentially lead to a prominent scope of competition law in the future.

⁷⁹⁸ Albert Wöcke & Linda Sing, "Inward FDI in South Africa and its policy context" (2013), Vale Columbia Center on Sustainable International Investment, at 4 online: <http://www.vcc.columbia.edu/files/vale/documents/South_Africa_IFDI_-_May_8_2013_-_FINAL.pdf>

⁷⁹⁹ Hoekman *supra* note 468 at 21



Conclusion

At present, there is very little scope of competition law in the UAE. Although the law is implemented in the legal and economic system, the major sectors, industries and governmental agreements are exempted from the range of the law.

The developed nations pose as a guideline of liberalization for all developing countries to learn and incorporate the amended approach towards competition law and globalization. Where foreign investment is restricted competition is limited as well. Foreign intervention in other countries has been encouraged because competition law is used as a regulator for balancing activities and agreements of domestic and foreign businesses. The economic structure of a developed nation is what the UAE strives to achieve eventually, as any other developing nation. Yet it is difficult to accomplish this because of the different governmental standards and background of the country at present. The UAE follows a sheikhdom structure, where liberalization becomes harder since the consumers cannot

rely on democracy to voice their needs.

The UAE's economy is relatively like the Brazilian, South African and Indian economies as they are all developing nations with emerging market economies. But when it comes to implementing competition law in the main sectors of the economy, there is a difference present between the different countries. The UAE has a very conservative approach towards competition law. It is evident from the discussed emerging markets that rather than competition posing a threat, it provides the benefit of greater consumer welfare, growth and efficiency in the economy. In our global era, it is important to incorporate and enforce thorough competition provisions within the system to match the pace of other growing economies and control the growth of their own country.

The exempted sectors and activities, the governmental and economic framework of the country all makes one question the reason behind the implementation of the law. Did UAE incorporate competition law to fulfill the purpose and aim of the law or was it due to potential external pressure from pressure groups or countries to present a dummy law and please the people of the country and beyond?

Chapter 5

The verdict and beyond

My thesis makes attempts to understand the scope of competition law in the UAE. Since competition law in the country was introduced in February of 2013, it places the UAE in a unique position to regulate its domestic business environment to foster long-term growth and investment. The history of the law in developed and developing markets serves as a lesson and testament to challenges ahead and the benefits the law brings to consumers and investors alike. A comparative analysis is done on a per industry basis with various economies of the world where certain sectors that have been exempted from the law can avail its full potential and industry growth if they are lifted.

The developed nations' economies- Canada, the US and the EU- are used as pioneering markets of competition law statutes as they are templates for developing nations. In developing nations, my countries of focus were India, South Africa and Brazil, which serve as relevant examples that the UAE can draw parallels from for its present economic environment and for future forecasting. My research focused on foreign direct investment in the countries as a tool to gauge investor confidence in a healthy and competitive business atmosphere. Also the language of statutes of different countries is analyzed to compare and contrast with what is said and what is implemented in real world scenarios. Lastly an understanding of general advantages and disadvantages of the law as well as the governmental and bureaucratic roadblocks prevalent in developing economies are crucial in assessing its larger scope for a specific geographic location.

Competition law – the elephant in the room

At the beginning of the thesis I hypothesized that due to existing exemptions, there is limited scope for competition law in the UAE. The actions of federal and local governments and any state controlled establishments are excluded from the application of the competition law.⁸⁰⁰ Small and Medium Establishments (SME) are excluded from competition law as well.⁸⁰¹ Sectors that are exempted from the scope of competition law include, telecommunications, financial services, cultural activities (readable, audio and visual), pharmaceuticals, utilities, waste disposal, transportation, oil and gas, and postal service.⁸⁰²

According to Harvard-MIT Observatory of economic complexity, the UAE is ranked 66th in terms of economic complexity.⁸⁰³ In 2009 the oil and gas sector comprised more than 85% of UAE' economy and with improved diversification, it still constitutes more than 50% of exports.⁸⁰⁴ The financial sector comprises 65% of the non-oil sector and telecommunications sector maintains a state controlled duopoly.⁸⁰⁵ With major industries and sectors exempted from competition law, the law is rendered insignificant to play a major role in shaping the business environment and the economic future of the country. The benefits of competition law will not be visible, until and unless, the main restrictions are lifted and law is allowed to cover the main sectors of the UAE' economy. Also the UAE needs to shed its image of a *family run business* where major controllers dictate and create unforgiving industry monopolies that essentially leave no room for investment ventures and limit consumer choice.

⁸⁰⁰ Federal Law no. 4 of 2012, Article 4(2)

⁸⁰¹ Federal Law no. 4 of 2012, Article 4(3)

⁸⁰² Federal Law no. 4 of 2012, Article 4(1)

⁸⁰³ Ricardo Hausmann, Cesar Hidalgo, et al. "The Atlas of Economic Complexity" The Observatory of Economic Complexity, Harvard HKS/CDI- MIT Media Lab

⁸⁰⁴ *ibid*, "WTO Trade Statistic 2009", online: <www.stat.wto.org>

⁸⁰⁵ Mohamad Moabi, GCC Economic Insight, QNB, 2012, at 15, online:

<http://www.qnb.com.qa/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1355478588574&ssbinary=true>

Growth and development - UAE at the crossroads

The UAE stands at an important transition in its economic growth. In June of 2013, the New York based Morgan Stanley Capital International (MSCI) elevated the status of the UAE from a start-up market to an emerging market.⁸⁰⁶ This long awaited upgrade places the UAE on the map of emerging markets, which includes countries such as Russia, China, Brazil, Malaysia and Turkey.⁸⁰⁷ The Dubai Financial Market said that the average daily trading value increased 67 per cent to Dh460 million compared to Dh278.2 million in the corresponding period of 2012 providing the boost needed for the status change.⁸⁰⁸ It allows for increased confidence of international investors in the country and according to Peter Gotke, vice-president and head of the GCC Depository Receipts at BNY Mellon there will be a rise of foreign inflows to \$3 Billion USD.⁸⁰⁹

Over the past three decades, the UAE was the largest Arab capital exporter, pumping \$55 billion USD in foreign markets, approximately 31 percent of the total Arab capital outflow.⁸¹⁰ During this period, the UAE had the second largest inflows receiving more than \$85billion USD in foreign direct investment.⁸¹¹

Investment under the power sector of the Gulf Nations is predicted to reach \$250 billion USD in the next five years due to massive development and rapid growth.⁸¹² This will

⁸⁰⁶ Muzaffar Rizvi, MSCI upgrades UAE, Qatar to emerging markets, Khaleej Times, 12 June 2013, online:

<http://www.khaleejtimes.com/biz/inside.asp?section=uaebusiness&xfile=/data/uaebusiness/2013/june/uaebusiness_june161.xml>

⁸⁰⁷ *ibid.*

⁸⁰⁸ Issac John, UAE, Qatar to see \$3 billion inflow surge, Khaleej Times, 10 June 2013, online:

<http://www.khaleejtimes.com/biz/inside.asp?section=uaebusiness&xfile=/data/uaebusiness/2013/june/uaebusiness_june150.xml>

⁸⁰⁹ *ibid.*

⁸¹⁰ Wam, UAE pumps more than \$55b into foreign markets, Khaleej Times, 2 April 2013, online:

<http://www.khaleejtimes.com/biz/inside.asp?section=uaebusiness&xfile=/data/uaebusiness/2013/april/uaebusiness_april31.xml>

⁸¹¹ *ibid.*

⁸¹² Staff Report, Gulf nations' investments in power sector to hit \$250b, Khaleej Times, 15 June 2013, online:

affect the UAE and change the face of the industry. Abu Dhabi's power sector is on top of the regional investment table with eight independent power and water producers in operation along with the introduction of the GCC's first nuclear project.⁸¹³

“Economic diversification and demographics are driving the development of the power and water sectors in Abu Dhabi and the GCC, underlining the fact that the region is not only one of the fastest growing but also holds the most potential of global electricity markets,” - Abdulla Saif Al Nuaimi, director-general of the Abu Dhabi Water and Electricity Authority.⁸¹⁴

In the transportation sector, airline companies from emerging markets are inviting conglomerations and agreements with Etihad Airways, UAE's national carrier, to boost their investment opportunities with international investors and increase growth opportunities.⁸¹⁵ Travel agreements between Etihad Airways, and South African airways have increased to greater traveling rights under the codeshare services reaching out four major destinations: to Cape Town, Durban, East London and Port Elizabeth.⁸¹⁶ Similarly, Etihad Airways has invested 24% in acquisition in Jet Airways India.⁸¹⁷ Ajit Singh, India's Civil Aviation Minister trusts it will lead to increased competition and efficiency in India. He said, “in the wake of Etihad-Jet Airways deal more foreign carriers have shown interest in investing in India's civil aviation sector.”⁸¹⁸

<http://www.khaleejtimes.com/biz/inside.asp?section=uaebusiness&xfile=/data/uaebusiness/2013/june/uaebusiness_june185.xml>

⁸¹³ *ibid.*

⁸¹⁴ *ibid.*

⁸¹⁵ Staff Report, Etihad, SAA enter into codeshare, 10 July 2013, online:

<http://www.khaleejtimes.com/biz/inside.asp?section=uaebusiness&xfile=/data/uaebusiness/2013/july/uaebusiness_july101.xml>

⁸¹⁶ *ibid.*

⁸¹⁷ Issac John, Etihad-Jet deal seen to spur overseas India investments, Khaleej Times, 3 May 2013, online:

<http://www.khaleejtimes.com/biz/inside.asp?section=uaebusiness&xfile=/data/uaebusiness/2013/may/uaebusiness_may61.xml>

⁸¹⁸ *ibid.*

Overall trade between the Arab countries and other emerging markets has increased. Trade exchange in particular with China had increased to \$222.4 billion USD in 2012, an increase of 13.5 since the previous year.⁸¹⁹ Yang Fu-chang, former vice-minister of the Chinese Ministry of Foreign Affairs believes the countries have a complimentary relationship and will only flourish further.⁸²⁰ In the next five years, the Arab investment will expand to the development of petrochemical industries, solar, wind and other Chinese industries.⁸²¹ Positive talks between Spain and the UAE are on going to increase bilateral trade and “extend cooperation on strategic levels of economic activity for mutual benefit.”⁸²² The EU is to be used as a facilitation platform for access to key markets for both countries expressed in a joint statement between Sultan bin Saeed Al Mansouri, UAE Minister of Economy, and Luis de Guindos Jurado, Spain’s Minister of Economy and Competitiveness.⁸²³

“Let the SME sector become a crucial driver in improving the competitiveness of our economies and in the process generating greater investment traffic. The UAE will join hands with Spain on initiatives such as business forums and networking events for innovative UAE and Spanish entrepreneurs on a regular basis.”⁸²⁴

A delegation of 85 business leaders brought by the Brazilian Ministry of Development, Industry and Foreign Trade and headed by Mauricio Borges, president of the Brazilian Trade and Investment Promotion Agency (Apex-Brasil) arrived in the UAE on a mission

⁸¹⁹Wam, Arab states, China trade hits \$222.4b, Khaleej Times, 18 July 2013, online: <http://www.khaleejtimes.com/biz/inside.asp?section=uaebusiness&xfile=/data/uaebusiness/2013/july/uaebusiness_july195.xml>

⁸²⁰ *ibid.*

⁸²¹ *ibid.*

⁸²²Staff Report, UAE, Spain agree to boost economic, trade relations, Khaleej Times, 30 May 2013, online:

<http://www.khaleejtimes.com/biz/inside.asp?section=uaebusiness&xfile=/data/uaebusiness/2013/may/uaebusiness_may519.xml>

⁸²³ *ibid.*

⁸²⁴*ibid*- stated by De Guindos

to attract foreign investors for high-profile projects in Brazil.⁸²⁵ Investment opportunities to Arab investors expanded to transportation concessions, aeronautics, biotechnology, ICT, infrastructure development, tourism, real estate, biofuels, and oil and gas.⁸²⁶

“The Middle East region will play a very important role in Brazil’s mission to attract foreign investments because of Brazil’s excellent track record as a long-term trade and economic partner of various Arab countries, particularly the UAE.”⁸²⁷

Status quo and challenge to change

In line with this development, it is important to reemphasize a middle-eastern market’s hurdle of substantive law structures and enforcement standards when carrying out business activities. There is a lack of transparency prevalent where the corporate environment still constitutes the royal families and prominent citizens as major shareholders -holders in all major businesses and industries. In such an environment, genuine competition becomes limited due to vested interests being served and industry dominance is preferred to mitigate any major shift in corporate policy or strategy that a competitive atmosphere demands. Interest groups are an influential factor as business operates on a “who you know basis” with the power to control the efficiency, flexibility or resilience in the system. Such uncertainty of state is inherent in a non-democratic structure and is tied directly to investor apprehension and sustainable industrial growth.

⁸²⁵Staff Report, Brazil’s \$526b investment plan opens opportunities, Khaleej Times, 3 May 2013, online:

<http://www.khaleejtimes.com/biz/inside.asp?section=uaebusiness&xfile=/data/uaebusiness/2013/may/uaebusiness_may48.xml>

⁸²⁶ *ibid.*

⁸²⁷ *ibid.*

In the UAE, many industries remain state run or are privatized as family conglomerates.⁸²⁸ This business structure influences disclosure of the financial and commercial information of those operations. The influential Emirati businessmen and families work under the government of the country as well and that results in no separation of control or power between those who control the businesses and those who make the decisions or the laws regarding the same businesses. If foreign businesses want to set up in the UAE they need a local businessman as a partner that will hold 51% of the share of the company.⁸²⁹ When the businessmen are the same as government controllers, the main issue of separation of local interests and promotion of competition behavior comes into question.

In addition there is a global pressure on developing countries to implement competition law as a form of membership in world market economy.⁸³⁰ The central function of the WTO is to promote equality of competitive opportunities for countries in the world trading systems. As quoted earlier in chapter three “an increase of international trade and expanding economic interdependence has enforced pressure for harmonization and coordination of competition policy”.⁸³¹

⁸²⁸ Howard L. Stovall, “Arab Commercial Laws- Into the future” Vol. 34 No. 3, International Lawyer (2000) 839, at 841

⁸²⁹ Government of Dubai, “Dubai Economy”, 2000-2013, online: <<http://www.dubai.ae/en/aboutdubai/Pages/DubaiEconomy.aspx>>

⁸³⁰ David J. Gerber *supra* note 87 at 88

⁸³¹ Gal *supra* note 104 at 13

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