Transnational Hardcore Competition Cartels: Criminalization According to Transnational Criminal Law

Loai Eyadat

Thesis submitted to the University of Ottawa
in partial fulfillment of the requirements for the
Doctorate in Philosophy (PhD) in Law

Faculty of Law
Common Law Section
University of Ottawa

© Loai Eyadat, Ottawa, Canada, 2024

Dedication

I want to thank my first teachers, my mother and father, for their endless support and great lessons. My mother, Amal, taught me to chase my goals, and my father, Orsan, led me to be well prepared because there are no shortcuts.

Acknowledgements

A special thanks to my supervisor, Prof. Jennifer Quaid, for leading me through the long and challenging process of writing the thesis and all the prior stages. Her commitment and endless effort were crucial to accomplishing this feat, and I will always remain grateful for her support.

Many thanks to the thesis committee, Prof. Anthony VanDuzer and Prof. Wolfgang Alschner, for providing helpful reading materials and comments throughout the process and teaching me all I know about international economic law.

I am also very grateful for Prof. Joseph Rikhof, who, despite not being part of the thesis committee, was always willing to assist and discuss different aspects of international and transnational criminal law with me and who gave me valuable feedback in this domain.

My deepest gratitude is to two professors I met through my LLM program at Haifa University, Prof. Khalid Ghanayim and Prof. Julian Roberts (Visiting Professor through the Global Law Program), who taught me all I know about criminal law and sentencing and were always there for any consultation or discussion I needed. I will always be grateful for their encouragement while navigating through my PhD journey and for leading me to a safe shore.

I am also very thankful for the generous scholarships I received, which enabled me to focus on my thesis throughout my studies:

- International Doctoral Scholarship 2018–2023
- International Admission Scholarship 2019–2022
- Rule of Law Scholarship for International Graduate Students 2020
- Jacques Frémont Scholarship for International Graduate Students 2020
- BMO Financial Group Graduate Bursaries 2020 & 2022
- Nicole Senécal Doctoral Scholarship in International Law 2021
- Katherine Lippel Special Fund for Graduate Studies 2023

Abstract

This thesis provides a comprehensive discussion of the criminal character of transnational hardcore competition cartels in accordance with a transnational criminal law framework. It examines different sources of international law, including customary law, general principles of law, treaty law, national law, and soft law. It concludes that transnational hardcore competition cartels are transnational crimes with domestic concerns and that they are prohibited and criminalized based on national criminal law. The thesis justifies criminalizing transnational hardcore competition cartels based on well-established criminal law theories, including utilitarianism, legal liberalism, legal moralism, and legal perfectionism. Further discussion focuses on the appropriate type of sanction, whether administrative or criminal. The thesis examines this issue based on two well-established sentencing theories: retributivism and general deterrence. The thesis suggests that the criminal sanction of imprisonment is desirable based on both proportionality grounds, in which the sanction fits the severity of the crime, and practical considerations, in which imprisonment serves as an effective sanction for suppressing those crimes.

Table of Contents

Dedication ii

Acknowledgements iii

Abstract iv

1. Introduction 1

1.1. Research question 2

1.2. Definition and scope of the thesis 5

1.3. Trends and examples of transnational cartels 16

1.4. Aims and contributions of the thesis 22

1.5. Theoretical framework, methodology, and methods 23

1.6. Structure of the thesis 33

2. Chapter 2 Overview of international law 35

2.1. Sovereign states, legitimacy, and international law 35

2.1.1. Rightful membership 37

2.1.2. Rightful conduct 39

2.1.3. Legality in the international domain 41

2.2. Sources of legal rule in international law 42

2.2.1. Treaty law 43

2.2.2. Customary international law 45

2.2.3. General principles of law 47

2.2.4. Soft law 52

2.2.5. National law 53

2.2.6. Other sources 54

2.3. Crimes in international and transnational criminal law 54

2.3.1. International crimes 55

2.3.2. Transnational crimes 57

2.3.2.1. Transnational crimes of international concern 63

2.3.2.2. Transnational crimes of domestic concern 66

3. Chapter 3 Prohibitions against transnational cartels 67

3.1. From the League of Nations to the WTO – Attempts to obtain binding rules 68

3.1.1. The League of Nations' attempt 68

3.1.2. The International Trade Organization's attempt 68

3.1.3. Economic and Social Council of the United Nations' attempt 70

3.1.4. The Draft International Antitrust Code 70
3.1.5. The WTO's attempt 72
3.2. UNCTAD and the UN Set 77
3.2.1. The UN Set 78
3.2.2. Cross-border cartels 82
3.3. The OECD's recommendations 82
3.3.1. Recommendation on hardcore cartels 83
3.3.2. Source of information and potential monitoring center 85
3.4. ICN's recommendations 87
3.4.1. Recommendations on hardcore cartels 89
3.5. Competition rules within trade agreements 90
3.5.1. FTAs and dispute settlement 91
3.6. Regional authorities 92
3.7. National law sources 98
3.7.1. Goals of competition 101
3.7.2. Prohibitions 103
3.7.3. Sanctions 109
3.8. Multilateral enforcement mechanisms 112
3.9. The legal status of transnational cartels 117
4. Chapter 4 The foundations for criminalizing transnational cartels 128
4.1. Criminal law foundations 128
4.1.1. Classifying transnational cartels: International versus transnational crime 128
4.1.2. Criminal responsibility based on national criminal law 130
4.1.3. Overview of national criminal law theories 132
4.1.4. Triple framework for criminalization 147
4.2. Sentencing foundations 149
4.2.1. The need for a sentencing explanation 149
4.2.2. Utilitarian approaches to sanctions 150
4.2.2.1. Rehabilitation 150
4.2.2.2. Incapacitation 151
4.2.2.3. General deterrence 151
4.2.2.4. Specific deterrence 152
4.2.3. Retributivist approaches to sanctions 153

4.2.3.1. Desert theory approach – Deserves to be punished 154
4.2.3.2. Desert theory approach – Eliminate the unfair advantage 154
4.2.3.3. Desert theory approach – Censure and the communicative function of the sanction 155
4.2.4. Considerations for choosing a sentencing approach 157
4.2.4.1. A mix of different sentencing approaches 157
4.2.4.2. A sentencing approach based on criminal law theories 159
5. Chapter 5 Criminalizing transnational cartels 162
5.1. Harm in transnational cartels 162
5.2. Moral wrongfulness in transnational cartels 175
5.2.1. First approach – Hardcore cartels as disobedience 176
5.2.2. Second approach – Hardcore cartels as cheating 181
5.2.3. Third approach – Hardcore cartels as exploitation 186
5.2.4. Fourth approach – Hardcore cartels as stealing and fraud (obtaining something) 187
5.2.5. Fifth approach – Hardcore cartels as deception 194
5.2.6. A common thread – Lack of consent 201
5.3. *Mens rea* in transnational cartels 202
5.4. Criminalizing transnational cartels based on national criminal law 205
5.4.1. Utilitarianism and preventing mischief 205
5.4.2. Legal liberalism and the harm principle 207
5.4.3. Legal moralism and the exploitation principle 213
5.4.4. Legal perfectionism and character 215
5.4.5. Mixed justifications for a criminal prohibition against transnational cartels 217
6. Chapter 6 Punishing transnational cartels 225
6.1. Sanctions against transnational cartels 225
6.2. Defining punishment 226
6.3. Administrative sanctions against transnational cartels 228
6.3.1. What is an administrative sanction? 228
6.3.2. Administrative sanction of a criminal nature 229
6.3.3. Classifying administrative sanctions against transnational cartels as punitive 232
6.3.4. Offenders' rights and procedural safeguards 235
6.3.5. Punishment and securing procedural safeguards 239
7. Chapter 7 Deterrence-based justifications for punishing transnational cartels 242

7.1. Principal feature of general deterrence approaches 243
7.1.1. Proportionality 244
7.1.2. Low probability of detection and enforcement 245
7.2. Determining optimal sanctions based on the law and economics approach 246
7.2.1. Law and economics methodology 246
7.2.2. Optimal sanctions based on law and economics 247
7.2.2.1. The assumption of rationality 253
7.2.2.2. Calculating the relevant factors 255
7.3. Specific considerations when punishing transnational cartels 256
7.3.1. Under-deterrence 256
7.3.2. Over-deterrence 258
7.3.3. General deterrence against transnational cartels 260
7.4. Assessment of deterrence-based justifications of sanctions 263
7.4.1. Sanctions against business 264
7.4.1.1. Monetary sanctions against business 264
7.4.1.1.1. Deterrent effect – Insufficient monetary sanctions 264
7.4.1.1.2. Deterrent effect – Excessive monetary sanctions and negative consequences 265
7.4.1.1.3. Deterrence effect – Targeting the main responsible parties 266
7.4.1.1.4. The deterrence effect – Adjusting the monetary sanction and equal treatment 268
7.4.1.2. Censure, shaming, and the reputational effect against businesses 269
7.4.1.3. Debarment against businesses 271
7.4.2. Sanctions against individuals 271
7.4.2.1. Monetary sanctions against individuals 271
7.4.2.1.1. Efficiency – Considering neglected costs 272
7.4.2.2. Disqualification against individuals 275
7.4.2.3. Imprisonment and criminal record against individuals 275
7.4.2.3.1. The most effective sanction 276
7.4.2.3.2. Efficiency in enforcement 277
7.4.2.3.3. Direct affect 278
7.4.2.3.4. Consensus on the need for imprisonment 279
7.5. Conclusions based on the general deterrence approach 280
7.5.1. Improving detection and enforcement 282
7.5.2. Sanctions against hardcore cartels with low harm and culpability 283

8. Chapter 8 Desert-based justifications for punishing transnational cartels 287
8.1. Principal feature of desert-based approaches – the proportionality principle 287
8.2. Specific considerations for punishing transnational cartels 289
8.2.1. Censure 289
8.2.2. Harm according to global turnover 292
8.3. Assessment of desert-based justifications for sanctions 293
8.3.1. Severity of the crime and proportional sanction 293
8.3.2. Considering a criminal sanction 295
8.3.2.1. The censure's approach 296
8.3.2.2. Censure for mala in se crimes 297
8.3.2.3. Censure and the principle of last resort 298
8.3.3. Considering an administrative sanction with censure and hard treatment 299
9. Chapter 9 Areas for further research 303
10. Chapter 10 Conclusion 312
Bibliography 318

1. Introduction

International competition is one outcome of globalization and is part of international free trade,[1] digital markets,[2] investments, and similar connections between countries.[3] It occurs in an environment of market expansion that extends beyond the jurisdiction's traditional boundaries.[4] Market expansion strengthens international competition,[5] as it allows different businesses from different states to go beyond the limits of their jurisdictions and enter into competition in global markets.[6] Thus, it improves efficiency and enables consumers from different countries to enjoy diverse goods or services at lower prices.[7]

---

[1] Free trade is an established and globally accepted approach that advocates for free, open and competitive markets that contribute to worldwide social welfare and maintain economic stability, see Richard G. Shell "Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization" (1995) 44 Duke Law Journal 829, at 854- 856; Robert D. Anderson, Anna Caroline Müller & Nivedita Sen "Competition Policy in WTO Accessions: Filling in the Blanks in the International Trading System" in Alexei Kireyev & Chiedu Osakwe (eds.) *Trade Multilateralism in the Twenty-First Century* (1st ed. Cambridge University Press, 2017) 299, at 299.

[2] Competition and Markets Authority, G7, 2022 Compendium of Approaches to Improving Competition in Digital Markets (2022), online: https://www.gov.uk/government/publications/2022-compendium-of-approaches-to-improving-competition-in-digital-markets; World Bank, Antitrust and Digital Platforms: An analysis of Global Patterns and Approaches by Competition Authorities, (2021), online: https://documents1.worldbank.org/curated/en/893381632736476155/pdf/Antitrust-and-Digital-Platforms-An-Analysis-of-Global-Patterns-and-Approaches-by-Competition-Authorities.pdf

[3] Organisation for Economic Co-operation and Development (OECD), OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings (2014), at 76, online: https://www.oecd.org/daf/competition/international-coop-competition-2014-recommendation.htm; United Nations Conference on Trade and Development (UNCTAD), Implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices: Note by the UNCTAD secretariat, UNCTAD TD/RBP/CONF.9/3, (2020), at 7, online: https://unctad.org/system/files/official-document/tdrbpconf9d3_en.pdf

[4] World Trade Organization (WTO), Report (2001) of the Working Group on the Interaction between Trade and Competition Policy to the General Council WT/WGTCP/5 (2001), para 96, online: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/WGTCP/5.pdf&Open=True

[5] Anderson, Müller & Sen, Competition Policy in WTO Accessions: Filling in the Blanks in the International Trading System, *supra* note 1, at 300.

[6] Shell, Trade Legalism and International Relations Theory, *supra* note 1, at 854- 855.

[7] World Trade Organization (WTO), Report (1998) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council WT/WGTCP/2 (1998), para 22, online: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/WGTCP/2.pdf&Open=True; Organisation for Economic Co-operation and Development (OECD), Trade and Competition: From Doha to Cancun (2003), at 9, online: https://www.oecd-ilibrary.org/industry-and-services/trade-and-competition_9789264102798-en; Andrew D. Mitchell "Broadening the Vision of Trade Liberalisation International Competition Law and the WTO" (2001) 24:3 World Competition 343, at 344 & 346.

Competition is based on the rivalry among competitors, as each player competes independently for a superior position in the market.[8] The idea at its core is as follows. In the absence of collusion, when different businesses compete for survival in the market, it is more likely to see the benefits associated with competitive markets: the prices will decline to marginal costs, the production process will be effective, and the costs will be minimized; businesses will seek to innovate and will try to attract customers with quality and diverse products and services; finally, businesses will learn from one another and improve their marketing, production, and managerial processes.[9] Competitors, however, sometimes avoid competition pressures by forming collusive agreements that restrain competition and "slow productivity growth, undermine economic efficiency, and hinder poverty reduction."[10] Those agreements, which include price-fixing, output restriction, market allocation, and bid-rigging, can occur internationally and simultaneously affect different markets[11] and are what I call *transnational hardcore competition cartels*.[12]

1.1. Research question

Transnational hardcore competition cartels are a global problem that must be addressed internationally,[13] as they exist in different industries and markets and have cross-border effects.[14]

---

[8] John S. Tyhurst, *Canadian Competition Law and Policy* (Irwin, 2021), at 266- 267.

[9] Robert D. Anderson & William E. Kovacic "Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets" (2009) 18 Public Procurement Law Review 67, at 70.

[10] World Bank, Fixing Markets, Not Prices: Policy Options to Tackle Economic Cartels in Latin America and the Caribbean, (2021), at 6, Online: https://openknowledge.worldbank.org/entities/publication/1456d220-1769-543f-b873-b0102a28ab54

[11] Michal S. Gal "Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and Developing Jurisdictions" (2009) 33 Fordham International Law Journal 1, at 1 & 5; Chris Noonan, *The Emerging Principles of International Competition Law* (Oxford University Press, 2008), at 8- 11.

[12] See further clarification below in subchapter 1.2. "Definition and the scope of the thesis."

[13] Leela Cejnar & Rachel Burgess "The Globalization of Competition Law: Yes or No?" in John Duns, Arlen Duke and Brendan Sweeney (eds.) *Comparative Competition Law* (Elgar Publishing, 2015) 9, at 14; Eleanor M. Fox "International Antitrust and the Doha Dome" (2003) 43 Virginia Journal of International Law 911, at 922.

[14] Organisation for Economic Co-operation and Development (OECD), Review of the 1998 OECD

They are considered harmful to developed and developing markets[15] and are estimated to cause harm amounting to billions of US dollars annually.[16] Based on a report of the OECD, hardcore cartels are estimated to overcharge in the range of 20–30%, with a higher overcharge for transnational hardcore competition cartels.[17] Accordingly, they are sometimes described as a "primary evil of global trade"[18] or the most significant form of global financial fraud.[19]

There is an international acknowledgement that transnational hardcore competition cartels cause significant harm to economies and consumers, undermining the potential benefits of international trade and imposing high welfare costs.[20] Therefore, there is a broad consensus among

---

Recommendation Concerning Effective Action against Hard Core Cartels (2019), at 81, online: https://www.oecd.org/daf/competition/oecd-review-1998-hard-core-cartels-recommendation.pdf; Organisation for Economic Co-operation and Development (OECD), OECD Competition Trends 2020 (2020), at 44, online: http://www.oecd.org/daf/competition/OECD-Competition-Trends-2020.pdf

[15] World Trade Organization (WTO), Report (2003) of the Working Group on the Interaction between Trade and Competition Policy to the General Council, WT/WGTCP/7 (2003), para 42, online: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/WGTCP/7.pdf&Open=True; World Trade Organization (WTO), Report (2002) of the Working Group on the Interaction between Trade and Competition Policy to the General Council, WT/WGTCP/6 (2002), para 50, online: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=43538,12440,10034,1725,42759,51054,41459&CurrentCatalogueIdIndex=4&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True; Margaret Levenstein & Valerie Y. Suslow "Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy" (2004) 71 Antitrust Law Journal 801, at 818.

[16] WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para 49; Peter Whelan, *The Criminalization of European Cartel Enforcement: Theoretical, Legal, and Practical Challenges* (Oxford University Press, 2014), at 91; Simon J. Evenett, Margaret C. Levenstein & Valerie Y. Suslow "International Cartel Enforcement: Lessons from the 1990s" (2001) 24:9 World Economy 1221, at 1224- 1226.

[17] Organisation for Economic Co-operation and Development (OECD), Hard Core Cartels: Third Report on the Implementation of the 1998 Council Recommendation (2005), at 25, Online: https://www.oecd.org/competition/cartels/35863307.pdf

[18] Michal S. Gal "Free Movement of Judgments: Increasing Deterrence of International Cartels through Jurisdictional Reliance" (2010) 51 Virginia Journal of International Law 57, at 58; Organisation for Economic Co-operation and Development (OECD), Criminalisation of Cartels and Bid Rigging Conspiracies: A Focus on Custodial Sentence, DAF/COMP/WP3(2020)1, (2020), at 6, describes hardcore cartels as the "supreme evil," online: https://one.oecd.org/document/DAF/COMP/WP3(2020)1/en/pdf; see also US court describes it as "the supreme evil of antitrust" in *Verizon Communications v. Law Offices of Curtis v. Trinko, LLP,* 540 US 398 (2003), at 408, online: https://supreme.justia.com/cases/federal/us/540/398/

[19] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 91 & 283.

[20] World Trade Organization (WTO), Report (1999) of the Working Group on the Interaction between Trade and Competition Policy to the General Council WT/WGTCP/3 (1999), para 71, online: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/WGTCP/3.pdf&Open=True; OECD, Trade and Competition: From Doha to Cancun, *supra* note 7, at 16; International Competition Network (ICN), Defining

countries and scholars to prohibit these cartels.[21] A dispute exists, however, as to whether the prohibition should be criminal and what sanctions, whether criminal or administrative, to use against them.[22]

This research project answers the following question: What are the justifications for criminalizing transnational hardcore competition cartels according to a transnational criminal law framework? The research addresses this question in three steps that answer the following sub-questions:

(i) Is there an international law rule prohibiting transnational hardcore competition cartels?

(ii) If not, is there a theoretical justification for the criminal prohibition of transnational hardcore competition cartels in national law based on utilitarianism, legal liberalism, legal moralism, and/or legal perfectionism?

Hard Core Cartel Conduct—Effective Institutions, Effective Penalties, Report Prepared by the ICN Working Group on Cartels (2005), at 1-2, online: http://old.internationalcompetitionnetwork.org/uploads/library/doc346.pdf; World Bank, Fixing Markets, Not Prices: Policy Options to Tackle Economic Cartels in Latin America and the Caribbean, *supra* note 10, at 8; Umut Aydin & Tim Büthe "Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits" (2016) 79:4 Law and Contemporary Problems 1, at 191; Michael Okane "Cartel Enforcement: A Product of Globalisation" in Mitsilegas, Valsamis, Peter Alldridge and Leonidas Cheliotis, (eds.) *Globalisation, Criminal Law and Criminal Justice: Theoretical, Comparative and Transnational Perspectives* (Hart Publishing, 2015) 219, at 219; Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 91; Evenett, Levenstein & Suslow, International Cartel Enforcement: Lessons from the 1990s, *supra* note 16, at 1221- 1226.

[21] ICN, Defining Hard Core Cartel Conduct—Effective Institutions, Effective Penalties, *supra* note 20, at 1, 2, 5 & 9- 10; WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para 53, and general discussion para 47- 64; Eleanor M. Fox "Competition Policy: The Comparative Advantage of Developing Countries" (2016) 79:4 Law and Contemporary Problems 69, at 82; Josef Drexl "International Competition Policy after Cancún: Placing a Singapore Issue on the WTO Development Agenda" (2004) 27:3 World Competition 419, at 428; Ariel Ezrachi, & Jiri' Kindl "Cartels as Criminal? The Long Road from Unilateral Enforcement to International Consensus" in Beaton-Wells, Caron & Ariel Ezrachi, (eds.) *Criminalising cartels: critical studies of an international regulatory movement* (Hart Publishing, 2011.) 239, at 240 & 244; Gregory Shaffer, Nathaniel H. Nesbitt & Spencer Weber Waller "Criminalizing Cartels: A Global Trend?" in Arlen Duke, John Duns and Brendan Sweeney, (eds.,) *Comparative Competition Law* (Edgar Elgar, 2015) 301, at 305; Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 90 and the references there; Mitchell, Broadening the Vision of Trade Liberalisation; International Competition Law and the WTO, *supra* note 7, at 343 & 346.

[22] See further discussion in subchapter 3.7. "National law source."

(iii) What sanctions should be imposed in relation to transnational hardcore competition cartels based on general deterrence and retributivism?

1.2. Definition and scope of the thesis

Transnational hardcore competition cartels have two dimensions: the hardcore competition cartel, and the international dimension. The term *hardcore competition cartel* has no formal definition. Different jurisdictions define it using formal statutory terms, competition agency definitions, enforcement decisions, guidelines, speeches, and other informational publications' definitions.[23] Although there are various means of defining and explaining hardcore cartels, a worldwide standard definition is understood for the term.[24] The International Competition Network (ICN) refers to the widespread consensus on defining hardcore competition cartels as including the following elements: (i) an agreement (ii) between competitors (iii) to restrict competition. The four types of hardcore cartel conduct are the following:[25]

1- price-fixing, which can be any agreement among competitors to raise, fix, or maintain a price for a product or service and can include a minimum price, the elimination of discounts, or a formula to calculate a price;

2- output restrictions, which can involve an agreement on production volumes, sales

[23] ICN, Defining Hard Core Cartel Conduct—Effective Institutions, Effective Penalties, *supra* note 20, at 10-11.

[24] ICN, Defining Hard Core Cartel Conduct—Effective Institutions, Effective Penalties, *supra* note 20, at 10-11.

[25] The wording is similar to the original text of the ICN, see ICN, Defining Hard Core Cartel Conduct—Effective Institutions, Effective Penalties, *supra* note 20, at 10; for similar definitions in Canada see Sections 45 and 47 of Competition Act R.S.C., 1985, c. C-34 (last amended on 23 June 2023) (Canada Competition Act), online: https://laws.justice.gc.ca/eng/acts/C-34/index.html; and further clarifications on Competition Bureau Canada, Competitor Collaboration Guidelines, (6 May 2021), at 10, 15- 24, online: https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/competitor-collaboration-guidelines

volumes, or a percentage of market growth;

3- market allocation, which can be an agreement between competitors to divide markets among themselves, as specific customers or types of customers, products, or territories; and

4- bid-rigging, which is an agreement among competitors to rotate winning bids, divide bids, or have one bidder submit an artificially high bid in return for a subcontract or another payoff.

In addition, the Organisation for Economic Co-operation and Development's (OECD) definition based on 2019 OECD recommendations refers to the hardcore cartel thus: [26]

> **Hard core cartels** refers to anticompetitive agreements, concerted practices or arrangements by actual or potential competitors to agree on prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by, for example, allocating customers, suppliers, territories, or lines of commerce. They do not include: (a) agreements, concerted practices, or arrangements that are reasonably related to a legitimate efficiency-enhancing integration of economic activity; (b) agreements, concerted practices or arrangements that might otherwise qualify as hard core cartels, which are directly or indirectly exempted from the coverage of Adherents' competition laws or are mandated in accordance with Adherents' laws.

Hardcore cartels are categorized as "illegal *per se*" or "naked restraints," as they are clearly illegal and there is no need for further examination or proof of actual anti-competitive effect, cause, or likeliness to cause harm to competition with no recognized pro-competitive benefit.[27] This

[26] Organisation for Economic Co-operation and Development (OECD), Recommendation of the Council Concerning Effective Action against Hard Core Cartels (2019), online: https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0452

[27] OECD, Recommendation of the Council Concerning Effective Action against Hard Core Cartels (2019), *supra* note 26, at 3; WTO, Report (1998) of the Working Group on the Interaction Between Trade and Competition Policy, *supra* note 7, para 55; Aydin & Büthe, Competition Law & Policy in Developing Countries, *supra* note 20, at 6; Edward D. Cavanagh "Whatever Happened to Quick Look?" (2017) 29 University of Miami Business Law Review

approach of prohibiting specific conduct as illegal *per se* because it unequivocally restrains competition provides clarity and certainty.[28] Hardcore cartels, however, may be exempted from the coverage of the prohibition. For example, section 45(4) of the Canadian Competition Act exempts ancillary agreements between the same parties not to compete but to benefit competition in other forms of collaboration that make them efficient, such as a joint venture to invest and develop a new product.[29]

Rule of reason

The illegal *per se* category differs from non-hardcore competition restraints that are examined based on the "rule of reason," which could be efficiency-enhancing and may include benefits to the market, such as vertical restraints.[30] *Vertical restraints* are agreements between parties in the supply chain, such as franchise agreements, and may entail potential pro-competitive effects.[31] Accordingly, there is no international consensus to prohibit such conduct *per se*;[32]

39, at 42- 43; Competition Bureau Canada, Competitor Collaboration Guidelines, *supra* note 25, at 14 and footnote 8; Tyhurst, Canadian Competition Law and Policy, *supra* note 8, at 265- 266. It should be mentioned that the previous Canadian Competition law required that the agreement prevents or lessens competition *unduly* before it can be considered a criminal offence, as was broadly discussed in Canada Supreme Cout in *R. v. Nova Scotia Pharmaceutical Society*, 1992 2 SCR 606. However, this requirement has been repealed due to evidential difficulties and enforcement complexity in proving the offence's elements. This led to adopting the "*per se*" approach in proving the competition hardcore criminal offence. See further discussion in Tyhurst, Canadian Competition Law and Policy, *supra* note 8, at 279- 283.

[28] ICN, Defining Hard Core Cartel Conduct—Effective Institutions, Effective Penalties, *supra* note 20, at 14.

[29] Competition Bureau Canada, Competitor Collaboration Guidelines, *supra* note 25, at 22- 24; Those conducts are not criminally prohibited and can be reviewed under section 90.1 to the Canada Competition Act, *supra* note 25.

[30] The rule of reason has developed historically in the US, as Section 1 of the Sherman Antitrust Act 1890, Title 15 to the United States Code (Sherman Act) online: https://uscode.house.gov/browse/prelim@title15/chapter1&edition=prelim, includes a wide definition prohibiting "every… restraint of trade." However, the US Supreme Court interpreted the law as limited to only unreasonable restraints of trade, which should be examined based on the rule of reason. See Cavanagh, Whatever Happened to Quick Look? *supra* note 27, at 42.

[31] See further discussion in Tyhurst, Canadian Competition Law and Policy, *supra* note 8, chapter 8, at 402-448.

[32] ICN, Defining Hard Core Cartel Conduct—Effective Institutions, Effective Penalties, supra note 20, at 14; See also discussion on WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para 55-56.

instead, they are reviewed on a case-by-case basis in light of their potential advantages and disadvantages to the public.[33]

Buyers' cartels

Recently, there has been ongoing discussion about prohibiting buyers' cartels. Such agreements include conduct that is typically recognized as illegal *per se*, such as price-fixing, but this occurs among purchasers, not sellers. This behaviour is prohibited under the law of some jurisdictions, most notably the United States,[34] but countries have no broad consensus against it, as some types of purchaser agreements can benefit the market. Due to the lack of consensus and the fact that countries are still discussing and examining the need to prohibit and sanction buyers' cartels, I do not examine this cartel type in this thesis. I do, however, address these cartels under subchapter 3.7.2. ("Prohibitions") to indicate some disparity among countries regarding their efforts to prohibit different types of anticompetition agreements.

International dimension

This thesis focuses on hardcore competition cartels that have an international dimension. The typical term used to describe hardcore cartels with an international dimension is *international hardcore cartels*, which the OECD defines as follows:[35]

> Cartel agreements are considered to be international when at least two of the companies taking part in the infringement are headquartered in different jurisdictions, regardless of the geographic coverage of the cartel activities.

According to the OECD, global hardcore cartels are international hardcore cartels that

[33] In Canada, those restraints are examined under Part VIII of the Canada Competition Act, *supra* note 25.
[34] United States Department of Justice, Antitrust Division & Federal Trade Commission, Antitrust Guidance for Human Resources Professionals (2016) online: https://www.justice.gov/atr/file/903511/download
[35] OECD, OECD Competition Trends 2020, *supra* note 14, at 32.

operate across more than one continent.[36] John Connor also uses different definitions for hardcore cartels with an international dimension. He refers to international hardcore cartels as those that "have participants from two or more countries." He also refers to global hardcore cartels as those that "operate across multi-continental markets."[37] In another work, he refers to international cartels as:[38]

> a conspiracy in restraint of trade that has or is alleged to have one or more corporate or individual participants with headquarters, residency, or nationality outside the jurisdiction of the investigating antitrust authority; alternatively, cartels with at least two members with different nationalities are international.

I refer to transnational hardcore competition cartels as those hardcore competition cartels from one or more jurisdictions that affect one or more jurisdictions. What characterizes this type of hardcore competition cartel is the involvement of more than one jurisdiction, which requires extending the national criminal law out of the national jurisdiction and conducting an investigation that includes more than one jurisdiction. Although the commonly used term is *international hardcore cartel*, I use the term *transnational hardcore competition cartel* based on the accepted transnational criminal law terminology to describe crimes that have a transnational effect, whether they occur in different jurisdictions or in one jurisdiction but affect other jurisdictions.[39] It is also helpful to distinguish transnational crimes from international crimes, which are recognized by customary international law and have a universal jurisdiction.[40]

---

[36] OECD, OECD Competition Trends 2020, *supra* note 14, at 12 & 33.

[37] John M. Connor "Global Antitrust Prosecutions of International Cartels: Focus on Asia" (2008) 31:4 World Competition 575, at 576.

[38] John M. Connor "The Private International Cartels (PIC) Data Set: Guide and Summary Statistics, 1990-July 2016 (Revised 2nd Edition)" (2016), SSRN, at 3- 4, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2821254

[39] Neil Boister "'Transnational Criminal Law'?" (2003) 14:5 European Journal of International Law 953, at 953- 954, 956, 974- 975; Neil Boister, *An Introduction to Transnational Criminal Law* (2nd ed., Oxford University Press, 2018) at 30, and a comprehensive discussion at his book there; Robert Currie & Joseph Rikhof, *International and Transnational Criminal Law* (3rd ed., Irwin Law Inc., 2020) at 11-12.

[40] I further distinguish transnational cartels from international crimes under subchapters 2.3., 3.9., and 4.1.1.

The term *transnational crimes* was first used[41] by the United Nations in 1975 at the Fifth United Nations Congress on Preventing Crimes and the Treatment of Offenders, where transnational crimes were described as:[42]

> Crimes as business at the national and transnational levels: organized crime, white-collar crime and corruption; This kind of crimes were diagnosed as they might be virtually matters of life and death- since the national welfare and economic development of the whole society might be drastically affected by such criminal conduct as bribery, **price-fixing**, smuggling and currency offence. (emphasis added)

In addition, Neil Boister recognizes anti-competitive conduct as an emerging transnational crime due to its frequency in global markets and the growing tendency of states to criminalize it.[43] Chapter 2 of this thesis discusses the transnational crime category more comprehensively. The discussion of transnational criminal law and use of the term *transnational crimes* is typically associated with money laundering, drug trafficking, and drug cartels. Thus, I refer to the long-term *transnational hardcore competition cartel*. Nonetheless, for practical purposes, I use the term *transnational cartels* in this thesis to refer to *transnational hardcore competition cartels*.

The conduct rather than the doer

The focus of this discussion is on the actions of transnational cartels and not particularly on the doers. The doer can be an individual or an organization, usually a legal entity incorporated for the purposes of carrying on business.[44] *Legal entity* can refer to various expressions used to

---

[41] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 4.

[42] United Nations, Fifth United Nations Congress on the Prevention of Crimes and the Treatment of Offenders (1975), para 50- 51, online: https://www.unodc.org/documents/congress/Previous_Congresses/5th_Congress_1975/025_ACONF.56.10_Fifth_United_Nations_Congress_on_the_Prevention_of_Crime_and_the_Treatment_of_Offenders.pdf

[43] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 232.

[44] Different jurisdictions delineate the scope of corporate or entity liability differently. Many jurisdictions limit criminal liability to entities that are formally incorporated and have legal personality. In Canada, the scope of entity liability was extended beyond legal persons in 2003. Section 2 of the *Criminal Code*, R.S.C., 1985, c. C-46

describe a legal entity, such as an organization, company, corporation, or business.[45] Due to the typical involvement of businesses in transnational cartels, I refer to any form of legal entity with the term *business*.

There is a basis for attributing an individual act to the legal entity that works on its behalf,[46] including in the domain of competition and hardcore cartels.[47] This attribution of individual conduct can raise questions regarding the attribution of the individual character, conscience, will, and beliefs to the legal entity.[48] It should be mentioned in this context that the International Criminal Court has jurisdiction only over individuals.[49] In many domestic jurisdictions, however,

(Canada Criminal Code) expressly defines an "organization". Paragraph a) of the definition identifies specific types of entities that are "organizations". These are: "a public body, body corporate, society, company, firm, partnership, trade union or municipality." Par b) of the definition sets out three general criteria to apply when assessing if an "association of persons" not identified in par a) is an organization. The criteria are that the association: "(i) is created for a common purpose, (ii) has an operational structure, and (iii) holds itself out to the public as an association of persons." Organizations are subject to the criminal law generally and are included in the Criminal Code definition of "everyone."

[45] In Canada, for example, Section 35 of the Interpretation Act, R.S. 1985, c. I-21 states that "person, or any word or expression descriptive of a person, includes a corporation."

[46] In Canada, the rules governing organizational liability are set out in sections 22.1 and 22.2 of the Canada Criminal Code, *supra* note 44. These sections establish the imputation rules that allow the conduct of individuals to be used as evidence of organizational conduct and organizational intention. Section 22.1 governs offences of penal negligence. Section 22.2 applies where the offence requires proof of a subjective state of mind of the accused, which in Canada refers to recklessness, knowledge, wilful blindness and intent. The only contested cartel case on point has applied the imputation rules in s. 22.2 to cartel offences (these offences require proof of a combination of subjective and objective intent): R. *c. Pétroles Global Inc*., 2013 QCCS 4262. Under section 22.2, there are three ways to prove the elements of the offence against the organization: (a) a senior officer committed the offence, (b) the senior officer with the intent to commit the offence, directed others to commit it, (c) the senior officer becomes aware that others are committing or are about to commit the offence and fails to take all reasonable measures to stop them. All three methods of imputation require that proof of the mental element of the offence come from the mental state of a "senior officer" (as defined in Section 2 of the CRC) who is acting within the scope of their authority and at least in part for the benefit of the organization. See further Morris Manning, Alan W. Mewett & Peter Sankoff, *Criminal Law*, (5th ed., LexisNexis Canada Inc. 2015), at 302- 304, 311- 322. See also: Collins Hoffman, Pierre-Christian & Pinsonnault Guy "The Criminal Liability of Organizations for Economic Crimes" (2014) 27:1 Canadian Competition Law Review 79.

[47] Competition Bureau Canada, Competitor Collaboration Guidelines, *supra* note 25, at 17.

[48] See, for example, the discussion in Eilis Ferran "Corporate Attribution and the Directing Mind and Will" (2011) 127 Law Quarterly Review 239.

[49] Article 25(1) of the See Rome Statute of the International Criminal Court (1998), online https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf

businesses can be subject to criminal liability for both international and transnational crimes.[50]

Since the thesis focuses on the conduct of transnational cartels, I assume that the conduct of the individual regarding the cartel (e.g., conspiracy, agreement, application) and the individual's *mens rea* reflect that of the legal entity and thus are properly attributable to it. Further questions can arise in the context of sentencing. For example, it is not possible to punish legal entities with the most significant sanction in criminal matters: imprisonment. Those issues are general to other forms of criminal enforcement against legal entities in relation to their involvement in criminal offences. I address this issue under the sentencing section and consider imposing imprisonment on the individual.

Punishment model

In this thesis, I discuss sentencing theories to answer whether a criminal sanction, particularly imprisonment, is necessary in the punishment of transnational cartels. I do not, however, aim to present a punishment model for transnational cartels, nor do I suggest a precise amount of sanction against such conduct, because this strongly connected to each jurisdiction's circumstances. What I do present is a clear path for choosing the appropriate sanction against transnational cartels based on the concepts of general deterrence and retributivism.

Enforcement model

Global enforcement against cartels is a priority for economic stability.[51] The World Bank suggests that better enforcement for cartels could reduce food prices by 10% and lift 500,000

[50] James G. Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources* (Open Society Institute, 2011), at 77 & 79.

[51] ICN, Defining Hard Core Cartel Conduct—Effective Institutions, Effective Penalties, *supra* note 20, at 5 & 9; Okane, Cartel Enforcement: A Product of Globalisation, *supra* note 20, at 219.

people out of poverty in Kenya, Zambia, and South Africa.[52] Research from South Africa suggests that using resources for enforcement against hardcore cartels is 38 times more effective at reducing poverty than cash transfer to eligible households, because cash transfers can be appropriated by cartels.[53]

Given this, fully addressing the criminalization question necessitates a discussion of the issue of enforcement in suppressing transnational cartels. Here are some examples of how enforcement is relevant to the criminalization question, such as: the advantages and disadvantages of unilateral enforcement by the victim or offender country; the merits of assigning to a leading jurisdiction the ability to take enforcement action on behalf of all countries affected by a transnational cartel; the use of an extradition and mutual legal assistance treaty; the option to establish a multilateral agreement among countries or regional agreements to enhance enforcement or supranational enforcement; and the option to develop a monitoring or peer-review mechanism to assess the enforcement in each jurisdiction.[54] To keep the scope of this thesis within reasonable bounds, I refrain from discussing enforcement issues and focus only on the justifications for criminalizing transnational cartels.

Two other types of hardcore cartel conduct are also related to the link between competition and the international domain: export cartels and domestic cartels that affect foreign businesses. As the focal point of their discussion is the enforcement aspect and establishing an agreement among

[52] World Bank Group, Breaking Down Barriers: Unlocking Africa's Potential Through Vigorous Competition Policy (2016), at vii, online: http://documents.worldbank.org/curated/en/243171467232051787/pdf/106717-REVISED-PUBLIC-Africa-Competition-Report-FINAL.pdf

[53] World Bank, Fixing Markets, Not Prices: Policy Options to Tackle Economic Cartels in Latin America and the Caribbean, *supra* note 10, at 7, refers to Purfield, C., Hanusch, M., Algu, Y., Begazo, T., Martinez Licetti, M., & Nyman, S. South Africa economic update: promoting faster growth and poverty alleviation through competition (2016), WBG Working paper series 103057.

[54] I present some of those enforcement models in subchapter 3.8. "Multilateral enforcement mechanisms."

the relevant jurisdictions, those types of cartels will not be explicitly addressed in this thesis.

Export cartels

Export cartels are agreements between competitors from one jurisdiction that affect only foreign markets and not domestic ones. These cartels can be exempted from enforcement in their home jurisdictions.[55] The justification for such an exemption is to allow domestic businesses to collaborate and enter into collusion, enabling them to compete globally (regarding resources, size, technology, and more).[56] It also expresses each state's self-interest to allow its domestic businesses to "facilitate cooperative penetration of foreign markets, transfer income from foreign consumers to domestic producers and result in a favourable balance of trade."[57] Still, it could be argued that a country should not allow its businesses to collude where it may cause harm to other countries.[58]

Nonetheless, those cartels are not exempted from enforcement in the affected foreign countries where they are considered harmful. Accordingly, the justification for criminalizing them is the same as that of transnational cartels.

Domestic cartels

Domestic cartels can serve as private barriers and may prevent foreign businesses from

[55] For example, article 45(5) Canada Competition Act, *supra* note 25; Tyhurst, Canadian Competition Law and Policy, *supra* note 8, at 307- 309.

[56] Tyhurst, Canadian Competition Law and Policy, *supra* note 8, at 310.

[57] Organisation for Economic Co-operation and Development (OECD), Glossary of Industrial Organisation Economics and Competition Law (by RS Khemani & DM Shapiro), (1993) para 82, online: https://www.oecd.org/regreform/sectors/2376087.pdf; Tyhurst, Canadian Competition Law and Policy, *supra* note 8, at 310.

[58] See more at Aditya Bhattacharjea "Export Cartels—A Developing Country Perspective" (2004) 38:2 Journal of World Trade 331; Marek Martyniszyn "Export Cartels: Is it Legal to Target your Neighbour? Analysis in Light of Recent Case Law" (2012) 15:1 Journal of International Economic Law 181; see also in other fields, Robert McCorquodale & Penelope Simons "Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law" (2007) 70 Modern Law Review 598.

entering the domestic market and, as such, impair international trade.[59] In addition, countries may establish a domestic competition policy optimal to their interests, whether it be to enhance importing or exporting policy or to block foreign businesses from competing with rivalling domestic businesses.[60] Moreover, domestic competition law may have some exemptions in the relevant sectors that serve the domestic market but can still discriminate against foreign businesses.[61]

Thus, international trade liberalization aim to adopt a competition policy that prohibits anticompetitive conduct that could block market access and to ensure adequate enforcement against domestic cartels and other anticompetitive restrictions in the domestic market as a complement to international trade.[62] Without a multinational agreement, however, enforcement may be conducted by foreign countries whose businesses are affected when they try to enter a new market and extend their law over conduct that happens elsewhere.[63] This may raise questions of legitimacy and legality, which I do not discuss in this thesis, although I do present some of my

[59] WTO, Report (1999) of the Working Group On the Interaction Between Trade and Competition Policy, *supra* note 20, para 71; Daniel D. Sokol "Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements" (2008) 83:1 Chicago-Kent Law Review 231, at 240; Fox, International Antitrust and the Doha Dome, *supra* note 13, at 915; Wolfgang Fikentscher "The Draft International Antitrust Code (DIAC) in the Context of International Technological Integration - The Institutional and Jurisdictional Architecture" (1996) 72:2 Chicago-Kent Law Review 533, at 534; Anu Bradford "International Antitrust Negotiations and the False Hope of the WTO" (2007) 48 Harvard International Law Journal 383, at 383 & 419; Evenett, Levenstein & Suslow, International Cartel Enforcement: Lessons from the 1990s, *supra* note 16, at 1227, and in general at 1227- 1229.

[60] Anu Bradford "Antitrust Law in Global Markets" in Einer R. Elhauge (ed.) *Research Handbook on the Economics of Antitrust Law* (Elgar Publishing, 2012) 283, at 302 & 306.

[61] OECD, Trade and Competition: From Doha to Cancun, *supra* note 7, at 9- 10; ICN, Defining Hard Core Cartel Conduct—Effective Institutions, Effective Penalties, *supra* note 20, at 13- 14; For example, Israel allows exemptions in agriculture, which allow local farmers and growers to enter into hardcore agreements, see Section 3(4)(a) to Economic Competition Law, 5748-1988 (Israel Economic Competition Law).

[62] Jurgen Basedow "International Antitrust: From Extraterritorial Application to Harmonization" (2000) 60:4 Louisiana Law Review 1037, at 1037- 1038; Bradford, International Antitrust Negotiations and the False Hope of the WTO, *supra* note 59, at 383; Daniel J. Gifford "The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry" (1996) 6:1 J Minnesota Global Trade 1, at 2; Thanh Phan "Realism and International Cooperation in Competition Law" (2017) 40:1 Houston Journal of International Law 297, at 319.

[63] See further in this issue under subchapter 3.9. "The legal status of transnational cartels."

thoughts on this matter in chapter 9 ("Areas for further research").

1.3. Trends and examples of transnational cartels

Between 2000 and 2015, competition authorities worldwide discovered an average of 50 transnational cartels[64] yearly.[65] Around 54% of those transnational cartels included five or fewer participants, and about 25% had more than nine participants.[66] In 2000, the average duration of a transnational cartel was seven years, and from 2003 onward, it decreased to less than five years, which can be explained by the increase in cartel discoveries between 1999 and 2011.[67]

In terms of the scope of enforcement against transnational cartels, it varies from one jurisdiction to another.[68] Enforcement is accomplished through national or regional-based enforcement when cartels affect their jurisdictions.[69] Based on data on transnational cartels that were collected throughout the period 1989–2018, around 79% of transnational cartels were sanctioned within just one jurisdiction. In the case of global cartels, however, which are transnational cartels that operate across more than one continent, 68% of them were sanctioned by multiple jurisdictions.[70]

---

[64] OECD, OECD Competition Trends 2020, *supra* note 14, at 12 & 32. According to the report, international cartels are "cartels where at least two of the participating cartel members are headquartered in different jurisdictions, regardless of the geographic coverage of the cartel activities." I define those conducts as transnational cartels.

[65] OECD, OECD Competition Trends 2020, *supra* note 14, at 12. The report discusses the issue of international cartels based on data that Professor John Connor collected from the period 1989- 2018, see OECD, OECD Competition Trends 2020, *supra* note 14, at 6 & 32; see further in Organisation for Economic Co-operation and Development (OECD), OECD International Cartels Database (ICStats), online: https://qdd.oecd.org/subject.aspx?Subject=OECD_HIC

[66] OECD, OECD Competition Trends 2020, *supra* note 14, at 12 & 38.

[67] OECD, OECD Competition Trends 2020, *supra* note 14, at 12 & 41- 43.

[68] Gal, Antitrust in a Globalized Economy, *supra* note 11, at 14- 30.

[69] See in general about national based enforcement and rules of extraterritorial jurisdiction over cross-border cartels in Brendan Sweeney "International Governance of Competition and the Problem of Extraterritorial Jurisdiction" in Duns John, Arlen Duke and Brendan Sweeney (eds.) *Comparative Competition Law* (Elgar Publishing, 2015) 345.

[70] OECD, OECD Competition Trends 2020, *supra* note 14, at 12 & 33; see International Cartels Database, *supra* note 65.

The average investigation for transnational cartels took three years in the 1990s and dropped to an average of two years between 2010 and 2016.[71] In addition, transnational cartels that were discovered and later sanctioned increased in number from 2012 onwards before slightly decreasing in 2016.[72]

Table 1: Transnational cartels discovered and sanctioned, 2012–2016[73]	
Year	Transnational cartels discovered and sanctioned
2012	30
2013	32
2014	35
2015	38
2016	33

The OECD competition trends 2022, which covers most global competition enforcement, shows that 450 cartel decisions were issued in 2020 by jurisdictions participating in the OECD CompStats database.[74] This database does not focus on transnational cartels in particular but combines different types of cartels and is based on data provided by competition authorities under the condition that it is kept confidential.[75] Thus, the report refers to trends in competition by referring to regions while keeping a given jurisdiction's identity anonymous.[76] According to the report, between the years 2015 and 2020, most businesses that were fined[77] were in Europe

[71] OECD, OECD Competition Trends 2020, *supra* note 14, at 12 & 33.
[72] OECD, OECD Competition Trends 2020, *supra* note 14, at 35.
[73] OECD, OECD Competition Trends 2020, *supra* note 14, at 35, based on Figure 2.8.
[74] Organisation for Economic Co-operation and Development (OECD), OECD Competition Trends 2022 (2022), at 13 & 17 online: https://www.oecd.org/daf/competition/oecd-competition-trends-2022.pdf
[75] The report is based on the OECD CompStats database that includes 73 jurisdictions, reflecting 91% of the world's Gross Domestic Product (GDP) and 73% of the world population in 2015- 2020. See OECD, OECD Competition Trends 2022, *supra* note 74, at 12- 13.
[76] OECD, OECD Competition Trends 2022, *supra* note 74, at 18.
[77] The report uses the word fine but does not distinguish between criminal and administrative monetary sanctions.

(56.6%), followed by the Americas (19%), the Asia–Pacific region (16.5%), and elsewhere (8%).[78]

The ability to use imprisonment as a punishment against individuals is limited in scope. According to OECD Competition Trends 2022, 28 jurisdictions provided data on using imprisonment for hardcore cartels. The data show that imprisonment against individuals tripled from 2015 to 2018, from 16 cases to 49 cases, then fell to 11 cases in 2020.[79] Of those imprisonment cases, 69% were imposed in the Asia–Pacific region.[80]

Table 2: Number of cartel cases in which individuals were imprisoned, 2015–2020[81]

Cases					
2015	2016	2017	2018	2019	2020
16	40	38	49	30	11

In jurisdictions that allow sanctions against individuals, such sanctions represent only 27% of the total sanctions in cartel cases between 2015 and 2020.[82] The most widely used sanction worldwide against cartel conduct is in the form of fines imposed against corporate offenders.[83] Based on the information from 62 jurisdictions that provided data to the OECD CompStats database, cartel fines increased by 56% in the years 2015–2019 and decreased by 34% in 2020 from 2019, partly due to COVID-19.[84]

[78] OECD, OECD Competition Trends 2022, *supra* note 74, at 15 & 65. The data is based on 62 jurisdictions in the OECD CompStats database that provided comparable data for all six years; see there note at 65.

[79] OECD, OECD Competition Trends 2022, *supra* note 74, at 15, 68 & Figure 7.14.

[80] OECD, OECD Competition Trends 2022, *supra* note 74, at 68; this region includes the following jurisdictions: Australia, Bangladesh, Brunei Darussalam, People's Republic of China, Chinese Taipei, Hong Kong (China), India, Indonesia, Japan, Korea, Malaysia, New Zealand, Philippines, Singapore, Thailand, and Viet Nam. (See there at 94).

[81] OECD, OECD Competition Trends 2022, *supra* note 74, at 68 & Figure 7.14; see also OECD, OECD Competition Trends 2022; access the data in excel format, online: https://www.oecd.org/competition/oecd-competition-trends.htm

[82] OECD, OECD Competition Trends 2022, *supra* note 74, at 15.

[83] OECD, OECD Competition Trends 2022, *supra* note 74, at 15. The report uses the word fine but does not distinguish between criminal and administrative monetary sanctions.

[84] OECD, OECD Competition Trends 2022, *supra* note 74, at 60- 61, note under figure 7.5.

Table 3: Total cartel fines imposed in 62 jurisdictions, 2015–2020[85]					
Fines (€, billion)					
2015	2016	2017	2018	2019	2020
4.567	6.347	6.439	5.173	7.139	4.683

It should be noted that, according to the *OECD Competition Trends 2020*, which focuses on transnational cartels, the average sanctions imposed against transnational cartels are much higher than those imposed against domestic cartels.[86]

Examples of transnational cartels[87]

The 16 vitamin cartels are the most prominent illustration of how transnational cartels emerge and the significant transnational effects they have. The cartels involved businesses responsible for 80% of the global vitamin market and caused billions of dollars in damages.[88] The vitamin cases started with a price-fixing agreement among several vitamin businesses in 1989 and allocated markets in the vitamin industry, which affected various food products.[89] The agreement was expanded by inviting other businesses, resulting in 20 businesses at the end of 1991 being involved in one or more instances of price-fixing of 12 vitamin products.[90] Some cartels were

[85] OECD, OECD Competition Trends 2022, *supra* note 74, at 60- 61, note under figure 7.5. See also OECD, OECD Competition Trends 2022, and access the data in Excel format, *supra* note 81. The Euro currency is used according to the currency used in the report.

[86] OECD, OECD Competition Trends 2020, *supra* note 14, at 65. The report compares data from different authorities and concentrates on the OECD CompStats database. In contrast, the data focused on international cartels were gathered by Professor John Connor in 1989- 2018 and were gathered on the OECD International Cartels Database (ICStats) (see *supra* note 65). Nonetheless, those general figures are based on what the OECD gathered and do not suggest that they represent the complete and accurate situation.

[87] For further examples, check the OECD, OECD International Cartels Database (ICStats), *supra* note 65.

[88] Waller Spencer Weber "The Incoherence of Punishment in Antitrust" (2003) 78 Chicago-Kent Law Review 207, at 222 and 224; John M. Connor "The Great Global Vitamins Conspiracy: Sanctions and Deterrence" (2008) SSRN, at 3, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103604

[89] Waller, The Incoherence of Punishment in Antitrust, *supra* note 88, at 221- 222.

[90] John M. Connor "Extraterritoriality of the Sherman Act and Deterrence of Private International Cartels" (2005) SSRN, at 5, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=611948

effective for only four years, while others lasted for about 10 years,[91] and prices in the industry increased by 60% and 100% from 1990 to the mid-1990s.[92]

The affected sales revenues of the vitamin product cartels in the United States were estimated to be between USD 5 billion and USD 7 billion. The affected sales in the European Economic Area were estimated at USD 8.3 billion. The affected sales in Canada were USD 570 million. It is roughly estimated that the affected sales in other parts of the world, mainly in Asia, Africa, and Latin America, were approximately USD 18.2 billion. Thus, the global affected sales caused by the vitamin product cartel reached USD 34.3 billion.[93]

The vitamin cartels' illegal profits in all areas of the world are estimated at between USD 9 and USD 13 billion.[94] Only five jurisdictions brought the vitamin cartels to trial, however.[95] The monetary sanctions and private lawsuits were among the largest in history and were roughly estimated to be between USD 4.8 and USD 7.5 billion.[96] The monetary sanctions (criminal and administrative) imposed by various countries were as follows: the United States, USD 915 million; Canada, USD 100 million; the European Union (EU), USD 847 million; Australia and South Korea, USD 17 million.[97] Despite the substantial monetary sanctions, most of the profit earned by the cartels was not disgorged. Given this, the punishment was insufficient for optimal deterrence.[98]

---

[91] Connor, Extraterritoriality of the Sherman Act and Deterrence of Private International Cartels, *supra* note 90, at 5.

[92] Connor, The Great Global Vitamins Conspiracy: Sanctions and Deterrence, *supra* note 88, at 5.

[93] Connor, Extraterritoriality of the Sherman Act and Deterrence of Private International Cartels, *supra* note 90, at 7- 8.

[94] Connor, Extraterritoriality of the Sherman Act and Deterrence of Private International Cartels, *supra* note 90, at 4.

[95] Michal S. Gal "Regional Competition Law Agreements: An Important Step for Antitrust Enforcement" (2010) 60 Toronto Law Journal 239, at 245.

[96] Connor, The Great Global Vitamins Conspiracy: Sanctions and Deterrence, *supra* note 88, at 6.

[97] Connor, The Great Global Vitamins Conspiracy: Sanctions and Deterrence, *supra* note 88, at 6.

[98] Connor, The Great Global Vitamins Conspiracy: Sanctions and Deterrence, *supra* note 88, at 7.

The maritime car-carrier industry involved several businesses that participated in price-fixing cartels for the intercontinental maritime transport of vehicles, which affected various routes between continents. The businesses included Chilean maritime carrier Compañía Sudamericana de Vapores SA (CSAV), Japanese carriers Mitsui O.S.K. Lines, Ltd., and Kawasaki Kisen Kaisha, Ltd., Nippon Yusen Kabushiki Kaisha, and Norwegian-Swedish carrier Wallenius Wilhelmsen Logistics–EUKOR Car Carriers, Inc. The investigation began after the Japanese carrier Mitsui received full immunity under the EU programme. In February 2018, the European Commission imposed a total monetary sanction of EUR 395,288,000 on the different businesses.[99] In addition to the EU, other jurisdictions investigated the case, including the United States, Japan, Korea, China, Chile, South Africa, Australia, Brazil, and Mexico.[100]

In Canada,[101] the maritime car carriers led to a prosecution of the Japanese shipping businesses Nippon Yusen Kabushiki Kaisha (NYK) and Kawasaki Kisen Kaisha, Ltd., for their involvement in the international conspiracy of price-fixing that reduced competition for the shipment of vehicles to Canada. The Ontario Superior Court imposed fines on the two companies of CAD 1.5 million and CAD 460,000, respectively.[102]

[99] European commission, Summary of Commission Decision of 21 February 2018, Case AT.40009 — Maritime Car Carriers, (6 September 2018) online: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018XC0906(01)&from=EN

[100] OECD, OECD Competition Trends 2020, *supra* note 14, at 67.

[101] Further cases of hardcore cartels that were sanctioned in Canada are presented on Competition Bureau Canada, Cases of bid-rigging, price-fixing and other illegal agreements between competitors, online: https://ised-isde.canada.ca/site/competition-bureau-canada/en/bid-rigging-price-fixing-and-other-agreements-between-competitors/cases-and-outcomes/cases-bid-rigging-price-fixing-and-other-illegal-agreements-between-competitors

[102] Competition Bureau Canada, NYK and "K" Line fined for international conspiracy to reduce competition in vehicle shipping services to Canada (23 August 2023), online: https://www.canada.ca/en/competition-bureau/news/2023/08/nyk-and-k-line-fined-for-international-conspiracy-to-reduce-competition-in-vehicle-shipping-services-to-canada.html

1.4. Aims and contributions of the thesis

No comprehensive discussion to date has examined the issue of criminalizing transnational cartels from the perspective of transnational criminal law. Thus, the chief aim of this research is to provide a theoretical justification for and outline the legal requirements for criminalizing transnational cartels based on transnational criminal law.

This topic is a natural development of the current trends in international competition law. In June 2020, the OECD launched a roundtable to discuss the question of criminalizing hardcore cartels.[103] This roundtable reflects the active debate among scholars on criminalizing hardcore cartels. Furthermore, the relevant international institutions have recently given attention concerning the question of international enforcement. For example, in November 2018, an OECD roundtable discussion was held on the advantages and disadvantages of regional competition enforcement.[104] In 2020, the eighth conference of the United Nations Conference on Trade and Development (UNCTAD) focused on the problem of "cross-border" cartels.[105] To stay within its scope, this thesis covers only one aspect of those related topics, examining the criminality aspect of transnational cartels. This is a first and necessary step toward a comprehensive discussion before considering further enforcement issues.

This thesis can also contribute to developing international criminal enforcement against

[103] See the OECD website, online: http://www.oecd.org/daf/competition/criminalisation-of-cartels-and-bid-rigging-conspiracies.htm; OECD, Criminalisation of Cartels and Bid Rigging Conspiracies: A Focus on Custodial Sentence, *supra* note 18.

[104] See Organisation for Economic Co-operation and Development (OECD), Regional Competition Agreements: Benefits and Challenges, (2018) DAF/COMP/GF(2018)5, online: https://one.oecd.org/document/DAF/COMP/GF(2018)5/en/pdf

[105] United Nations Conference on Trade and Development (UNCTAD), Report of the Eighth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (2020) UNCTAD TD/RBP/CONF.9/9, at 15, online: https://unctad.org/system/files/official-document/tdrbpconf9d9_en.pdf

other transnational economic crimes. It can also shed light on environmental violations, mainly due to their effect on more than one jurisdiction and the progress made in adopting international treaties with a commitment to addressing global environmental issues.[106]

1.5. Theoretical framework, methodology, and methods

The thesis focuses on criminalizing transnational cartels in the global domain. It includes aspects of international law and criminal law. Therefore, it draws its theoretical assumptions from different theories that explain the function of international law among nations and establish criminal liability based on criminal law and sentencing theories.

The thesis examines transnational cartels based on international and transnational criminal law, which has developed without transparent methodology or an "internally consistent system or doctrine of law."[107] At the same time, international and transnational criminal law reflects diverse sovereign and equal states with different relations dynamics.[108] This dynamic can be explained by International Relations (IR) theories on how states behave with other states and how they design their relations and cooperation. IR refers to three primary schools of thought that share some of the assumptions of international relations but enhance different variables of international relations that distinguish them from each other.[109] Those schools of thought are realism, institutionalism,[110]

---

[106] See, for example, United Nations, Paris Agreement (12 December 2015; entered into force on 4 November 2016), online: https://unfccc.int/sites/default/files/english_paris_agreement.pdf; see introductory discussion on the transboundary characters of environmental issues, at Sebastien Lafrance, "India, International Energy Law, and Transboundary" (5 April 2021), Indian Journal of Projects, Infrastructure, and Energy Law (IJPIEL) online: https://ijpiel.com/index.php/2021/04/05/india-international-energy-law-and-transboundary-environmental-harms/

[107] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 13.

[108] See further discussion in chapter 2.

[109] Anne-Marie Slaughter "International Relations, Principal Theories" in Rüdiger Wolfrum (ed.) *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2011), para 1.

[110] Institutionalism has the same positive approach as realism and believes that states are the primary actors in international anarchy, but it promotes institutional mechanisms that modify conflicts between states, see Anne-Marie Slaughter, Andrew S. Tulumello & Wood Stepan "International Law and International Relations Theory: A New

and liberalism.[111]

The three IR schools of thought are not competing over the absolute global truth and do not determine what is right or wrong.[112] In addition, the international system contains all three schools of thought, and, naturally, all contribute to international law.[113] In this research I do not aim to favour one over the other, and it is not necessary to do so to structure the discussion or reach a conclusion. Still, the current cooperation among states in the context of enforcement against transnational cartels is more aligned with the assumptions that underpin realism than those of the other schools of thought.[114]

Realism, which is the dominant school of thought,[115] assumes that the international system is based on anarchy.[116] It views the state as a self-interested and welfare-maximazing actor that cooperates in "a competitive, power-based international environment"[117] and is responsible for protecting its interests.[118] A clear example of realism in the context of international competition can be seen in the example of an export cartel, which is exempted from enforcement in its home

Generation of Interdisciplinary Scholarship" (1998) 92 American Journal of International Law 367, at 386; Anne-Marie Slaughter "Liberal International Relations Theory and International Economic Law" (1995) 10 American University International Law Review 717, at 726.

[111] Liberalism is characterized mainly by a normative approach to how states should behave instead of how states behave, see Slaughter, Liberal International Relations Theory and International Economic Law, *supra* note 110, at 727.

[112] Slaughter, International Relations, Principal Theories, *supra* note 109, para 28.

[113] Slaughter, Liberal International Relations Theory and International Economic Law, *supra* note 110, at 731.

[114] See in general Phan, Realism and International Cooperation in Competition Law, *supra* note 62, at 300.

[115] Slaughter, Liberal International Relations Theory and International Economic Law, *supra* note 110, at 721; Shell, Trade Legalism and International Relations Theory, *supra* note 1, 855- 856.

[116] Slaughter, International Relations, Principal Theories, *supra* note 109, para 2; Kenneth W. Abbott "International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts" (1999) 93:2 The American Journal of International Law 361, at 364.

[117] Tomer Broude & Doron Teichman "Outsourcing and Insourcing Crime: The Political Economy of Globalized Criminal Activity" (2009) 62:3 Vanderbilt Law Review 795, at 832- 834.

[118] Slaughter, International Relations, Principal Theories, *supra* note 109, para 3; Paul R. Viotti & Mark V. Kauppi, *International Relations Theory* (6th ed., Rowman & Littlefield Publishers, 2019), at 21.

country as long as its negative effect is only felt in foreign markets and not domestic ones.[119] The rationale behind it is to allow domestic businesses to compete globally against businesses and cartels from other countries.[120]

According to realism, states are the international system's primary actors and maintain the international domain's order.[121] It believes that international law and institutions reflect the states' balance of power and that states will agree to cooperate with other states and international institutions if doing so serves their interests, whether those are beneficial outcomes or power restraints.[122] Therefore, the concept of globalization in realism is understood as reflecting sovereign states in the international system, which interact with each other based on their interests.[123]

Taking into account the globalization and competition aspects of the thesis, several methodological approaches can be considered. A typical methodology that has strong connections to competition is the law and economics methodology. It can discuss different competition policies and favour one over the other based on the outcome of the process after using the most efficient means.[124] It may not be the right choice, however, to consider in a global context. The methodology seeks to increase the individual member welfare in the society, which is determined according to

[119] See above in subchapter 1.2. "Definition and the scope of the thesis."

[120] Tyhurst, Canadian Competition Law and Policy, *supra* note 8, at 309- 310.

[121] Slaughter, Liberal International Relations Theory and International Economic Law, *supra* note 110, at 721; Shell, Trade Legalism and International Relations Theory, *supra* note 1, at 855.

[122] Slaughter, International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship, *supra* note 110, at 386; Slaughter, International Relations, Principal Theories, *supra* note 109, para 6- 7; Shell, Trade Legalism and International Relations Theory, *supra* note 1, at 855; Abbott, International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts, *supra* note 116, at 364- 365.

[123] Viotti & Kauppi, International Relations Theory, *supra* note 118, at 53- 54.

[124] Alessio M. Pacces & Louis T. Visscher "Methodology of Law and Economics" (2011) in Bart van Klink, & Sanne Taekema (eds.) *Law and Method: Interdisciplinary Research into Law*, Series Politika No. 4, (Mohr Siebeck, 2011) 85, para 2.1.

the costs and benefits of the individual's act.[125] In addition, this methodology does not consider external costs that affect society as a whole[126] or other societies. Moreover, the law and economics methodology is explicitly concerned with optimizing efficiency,[127] which may lead to undesirable results for other societies' interests. Therefore, the law and economics methodology is not the best choice for considering different jurisdictions' preferences in promoting competition or criminalizing transnational cartels from a global perspective.

An important methodology to consider from a global perspective is the comparative methodology. The comparative methodology explores similarities and differences between two or more legal systems or jurisdictions.[128] Such a comparison should be substantial but pragmatic and include the function of law, structure, history, culture, empiric, legal rules, and court decisions and interpretations and aim to represent the law in action, not just in the book.[129] Still, comparative methodology provides a "weak basis for normative argument."[130] In addition, a comprehensive comparative legal analysis goes far beyond the limit of this research. I do, however, compare different leading jurisdictions on their definition of hardcore cartels, their prohibitions, and the sanctions they use against transnational cartels.[131] I also use different legal rules and decisions from different jurisdictions to convey different examples or show relevant similarities or

[125] Pacces & Visscher, Methodology of Law and Economics, *supra* note 124, para 2.4; Michael Trebilcock "An Introduction to Law and Economics" (1997) 23 Monash University Law Review 123, at 132- 134.

[126] Pacces & Visscher, Methodology of Law and Economics, *supra* note 124, para 3.3.

[127] Trebilcock, An Introduction to Law and Economics, *supra* note 125, at 125- 136; Pacces & Visscher, Methodology of Law and Economics, *supra* note 124, para 2.4.-2.5.

[128] John C. Reitz "How to Do Comparative Law" (1998) 46 American Journal of Comparative Law 617, at 618- 634.

[129] Vernon Valentine Palmer "From Lerotholi to Lando: Some Examples of Comparative Law Methodology" (2005) 53 American Journal of Comparative Law 261, at 264- 265, 284- 285, 289-290; John Bell "Legal Research and the Distinctiveness of Comparative Law" in M. Van Hoecke, (eds.) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing, 2011), 155, at 165- 167.

[130] Reitz, How to Do Comparative Law, *supra* note 128, at 624.

[131] See further in subchapter 3.7. "National law source."

differences among jurisdictions.

Another methdology that comes to mind from the international perspective is the Third World Approach to International Law (TWAIL), which is framed as a critique of international law and Western hegemony.[132] TWAIL "offers both theories of, and methodologies for, analyzing international law and institutions."[133] TWAIL claims that international law "is based almost entirely on the intellectual, historical, and cultural experiences"[134] of Western countries. It also argues that the international legal regime was designed by Western countries to serve their interest by controlling Third World countries.[135] This methodology, however, is limited to Third World countries' perspectives[136] and does not present a broader perspective, as this thesis aims to examine the issue from a global perspective.

Further important methodology to consider is the law and society methodology, where "society" is represented by a global society and considers different transnational connections.[137] This methodology calls for an understanding of the function of law in the real world.[138] It relies on the understanding that the law should reflect people's experiences and be understood in a societal context;[139] as such, to a great extent, it is "law in the society."[140]

---

[132] Makau Mutua "What is TWAIL?" (2000) 94 Proceedings of the Annual Meeting 31, at 31 & 36.

[133] Obiora Chinedu Okafor "Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?" (2008) 10:4 International Community Law Review 371, at 377.

[134] Mutua, What is TWAIL, *supra* note 132, at 36.

[135] Mutua, What is TWAIL, *supra* note 132, at 31 & 36.

[136] For further definitions of those countries, see Obiora Chinedu Okafor "Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective." (2005) 43:1/2 Osgoode Hall Law Journal 171, 174-176; Mutua, What is TWAIL, *supra* note 132, at 35.

[137] Julieta Lemaitre, "Law and Globalism: Law without the State as Law without Violence" in Austin Sarat & Patricia Ewick (eds.) *The Handbook of Law and Society* (Wiley handbooks in criminology and criminal justice, 2015) 433, at 435.

[138] Laura Kalman "Legal Realism Now" 76:2 California Law Review 465; James A. Gardner "The Sociological Jurisprudence of Roscoe Pound" (1961) 7:1 Villanova Law Review 1.

[139] Lynn Mather "Law and Society" in Robert E. Goodin, (ed.) *The Oxford Handbook of Political Science* (Oxford University Press, 2009) 290, at 290.

[140] Mather, Law and Society, *supra* note 139, at 293.

Law and society, represented by global society, recognizes the struggle for economic and political power and ways to promote legal norms and justice worldwide.[141] In addition, it acknowledges global businesses efforts to achieve their own interests and lobbying for rules that serve them at the international and national level.[142] It also acknowledges organized and transnational crimes involving cross-border criminal activity that takes advantage of globalization.[143]

Law and globalism considers the origin of law a part of national law but acknowledges the dependence of states on mutual interests among states and external influence based on international law, international economics, and international relations.[144] Moreover, law and globalism examines how law is practiced beyond state borders and shapes global powers and institutions.[145] It also acknowledges the development of norms beyond state borders based on state consent and the involvement of businesses and other international institutions in developing soft law.[146] In addition, law and globalism sees the national jurisdiction as the leading legitimate actor to enforce the law.[147]

The typical law and society methodology is interdisciplinary or multidisciplinary,[148] including empirical approaches. It can discuss different disciplines, such as criminology, sociology, economics, and the legitimate power of states to enforce the law.[149] This thesis,

[141] Lemaitre, Law and Globalism, *supra* note 137, at 433- 434.
[142] Lemaitre, Law and Globalism, *supra* note 137, at 434.
[143] Lemaitre, Law and Globalism, *supra* note 137, at 434 & 440.
[144] Lemaitre, Law and Globalism, *supra* note 137, at 437.
[145] Lemaitre, Law and Globalism, *supra* note 137, at 433- 436.
[146] Lemaitre, Law and Globalism, *supra* note 137, at 436- 437.
[147] Lemaitre, Law and Globalism, *supra* note 137, at 437 & 442; Susan M. Sterett "What is Law and Society?: Definitional Disputes" in Austin Sarat & Patricia Ewick (eds.) *The Handbook of Law and Society* (Wiley handbooks in criminology and criminal justice, 2015) 3, at 11.
[148] Mather, Law and Society, *supra* note 139, at 291.
[149] Keramet Reiter "Domains of Policy: Law and Society Perspectives on Punishment and Social Control" in

however, does not strictly follow the law and society methodology and does not include empirical research. The thesis also lacks an interdisciplinary examination that addresses competition and its effect on the market using extinsive economic research as a social science to understand the factual application of competition in the market and the expected harm of hardcore cartels. Rather, I assume, based on different sources, that competition is beneficial to global markets and that transnational cartels are harmful.

I examine transnational cartels as a harmful economic phenomenon with the focus on a global perspective and according to the framework of transnational criminal law. As I further discuss in chapters 2 and 3 of the thesis, international law conceptualizes a global group of states with mutual interests, such as peace and security, that should be protected collectively from certain international crimes.[150] This understanding of states also includes international norms that enjoy universal jurisdiction, such as customary law and the general principles of law. In addition, states engage in different types of coordination and cooperation to address their mutual interests and establish international norms through treaty and soft law.

Transnational cartels are prohibited mainly based on national law.[151] In this situation, transnational criminal law allows an understanding of the international dimension of national criminal law.[152] This happens when a state extends its criminal law over a foreign crime to protect its interests.[153] Accordingly, national criminal law theories apply to the international domain. I use

Austin Sarat & Patricia Ewick (eds.) *The handbook of Law and Society* (Wiley-Blackwell, 2015) 228, at 236- 237; Lemaitre, Law and Globalism, supra note 137, at 437; Mather, Law and Society, *supra* note 139, at 296.

[150] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 19-20.

[151] See further discussion in subchapter 3.9. "The legal status of transnational cartels."

[152] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 15.

[153] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 67; see further discussion in subchapter 3.9. "The legal status of transnational cartels," and subchapter 4.1. "Criminal law foundations."

several well-established criminal law theories to examine the criminality of transnational cartels. These include utilitarianism and legal liberalism, which aim to prevent harm. I also apply legal moralism and legal perfectionism, which focus on moral wrongfulness or the offenders' bad character.[154] Those criminal law theories identify the required criminal threshold of conduct, establish the criminal responsibility of the offender, and justify a criminal punishment.

Presenting several criminal law theories contributes to a better understanding of the justifications for criminalizing conduct and clarifies some confusion associated with criminalizing transnational cartels. This confusion can be due to mixing arguments drawn from different theoretical bases, such as utilitarianism and legal moralism, which require other elements to justify criminal punishment. For example, while utilitarianism aims to prevent harm to society with no requirement for moral wrongfulness, legal moralism insists on the existence of a moral wrong that does not depend on the notion of harm.

This mixing of arguments may lead to one argument that calls for criminalizing transnational cartels due to their harm to society, while another view may dismiss this by arguing that transnational cartels do not include a sufficient moral wrong, such as cheating or deception. For example, it may be argued that criminalizing hardcore cartels is justified based on the need to prevent harm, while the argument relies on moral wrongfulness is an "unhelpful distraction."[155] On the other hand, it may be argued that hardcore cartels are morally ambiguous and that the dependence on deterrence as the primary goal of criminalization may create a morally neutral crime.[156] Still, the requirement of a strong moral wrongfulness or bad character is not a necessary

[154] See further discussion in subchapter 4.1. "Criminal law foundations."

[155] Andreas Stephan "Why Morality Should be Excluded from the Cartel Criminalisation Debate" (2012) 3:2 New Journal of European Criminal Law 127.

[156] Alison Jones & Rebecca Williams "The UK Response to the Global Effort Against Cartels: Is Criminalization Really the Solution?" (2014) 2:1 J Antitrust Enforcement 100, at 102.

threshold based on utilitarian or legal liberalism, whereas completely dismissing the moral wrongfulness is not acceptable according to legal moralism or legal liberalism.

Therefore, it is essential to acknowledge that there is more than one criminal law theory that provides an independent and valid argument for criminalizing conduct, and that it is a matter for each society to determine which approach to choose based on its social values. For example, Christopher Harding compares the U.S. system, which focuses on conspiracy and the wrongfulness of the offence that needs censure, and the European approach, which focuses on economic harm and the need to prevent it.[157] Hence, understanding the different arguments, and applying them separately in the case of transnational cartels, is a valuable process for understanding the different possible ways to criminalize conduct, as further presented in chapter 5.

The next step in the process is to explain why and how much society punishes. This step is necessary because criminal law theories do not clearly answer how much to punish or what sanction to use for punishment. The confusion spreads due to the practice of punishing transnational cartels in different jurisdictions using different sanctions. Around 35 states use criminal sanctions, including imprisonment, against all or some variations of transnational cartels. Most states, however, use administrative sanctions, typically a monetary sanction.[158] Using such administrative sanctions can create the impression that a criminal sanction is undesirable or has no basis. I argue, however, that the administrative sanctions used against transnational cartels are punitive and that they are used to punish the offender for violating the law, even though they are less severe than the criminal sanction.[159]

[157] Christopher Harding "Business Cartels as a Criminal Activity: Reconciling North American and European Models of Regulation" (2002) 9:4 Maastricht Journal of European and Comparative Law 393.

[158] See further discussion in subchapter 3.9. "The legal status of transnational cartels."

[159] See further discussion in subchapter 6.3. "Administrative sanctions against transnational cartels."

Accordingly, it is necessary to complete the discussion using sentencing theories.[160] To do so, I use a utilitarian branch of general deterrence, which assumes that offenders are rational beings who adjust their conduct according to the disincentives provided by sentencing. This approach considers mainly practical considerations when it comes to deterring offenders from committing crimes.[161] I also use the retributivist approach, which suggests punishing offenders according to the seriousness of their crimes.[162] This is based on each society's perspective regarding the amount of sanction that fits the severity of a crime. Concluding that the required sanction is imprisonment establishes a basis for treating transnational cartels as a criminal offence because the punishment of imprisonment can be imposed in criminal procedures but not in administrative procedures.[163]

In the end, I suggest understanding the criminal process against transnational cartels on the international level in three stages. First, identify the international norms that prohibit transnational cartels and classify them according to the crime categories of international law, international crime or transnational crime. Second, discuss the required threshold and justifications for criminalizing transnational cartels based on criminal law theories. Third, consider the various grounds to determine the type and quantum of sanction against transnational cartels based on sentencing theories.

The method used in this thesis is based on textual analyses of various legal texts and bodies of literature in relevant aspects, including legislation, treaties, case law, reports, and scholarly

[160] See further discussion in chapters 7 & 8.

[161] Andrew von Hirsch, Andrew Ashworth & Julian Roberts, *Principled Sentencing: Readings on Theory and Policy* (3rd ed., Hart Publishing, 2009) at 39.

[162] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 102.

[163] This is true with some exceptions, as imprisonment can be used as punishment in military procedures. In addition, imprisonment can be used as detention to prevent harm in some administrative procedures. See further discussion in subchapter 6.3.3. "Classifying administrative sanctions against transnational cartels as punitive."

literature, particularly in competition law, criminal law, and international law.

1.6. Structure of the thesis

The thesis is organized into the following chapters. In chapter 2, I detail the role of international law in the global sphere and the theoretical foundations for criminalizing conduct according to international and transnational criminal law. International law criminalizes conduct related to global society as a whole when the conduct shocks humanity's conscience or poses a severe threat to international peace or security. In addition, international law addresses transnational crimes that affect one or more jurisdictions by extending the national criminal law to the international domain.

In chapter 3, I present the different international norms that prohibit transnational cartels. I point out several attempts to establish a multilateral agreement that addresses international competition and the shift to soft law based on the recommendations of international organizations that call for the prohibition of hardcore cartels. I also discuss treaty law that exists in trade agreements and regional agreements. In addition, I discuss the sources of national law, where countries prohibit hardcore cartels in their jurisdictions, and identify different national approaches to addressing hardcore cartels, particularly the type of sanction, whether criminal or administrative.

In chapter 4, I classify transnational cartels as transnational crimes prohibited based on national criminal law. I present the framework for criminalizing transnational crimes based on national criminal law and the theoretical argument of several well-established criminal law theories. Criminal law theories, however, focus on prohibiting the conduct and the punishment of the offender by the authority; they do not clearly answer what kind of sanction should be used or how much to punish. Therefore, I further present the theoretical foundations of the main sentencing theories that determine which sanction to use and how much to punish.

In chapter 5, I comprehensively discuss criminalizing transnational cartels based on well-established criminal law theories, utilitarianism, legal liberalism, legal moralism, and legal perfectionism (character). These theories are centred in one way or another on the elements of harm, moral wrongfulness, and culpability. I start by analyzing the existence and scope of those elements of transnational cartels. This is a descriptive process aimed at identifying the harm associated with transnational cartels, their moral wrongfulness, and the role of culpability. The next step is applying the criminal law theories to transnational cartels and discussing whether there are justifications for prohibiting and punishing them. This is a normative process in which the criminal law theory justifies prohibiting and punishing conduct.

In chapters 6 through 8, I further discuss the process of punishment. I clarify the nature of the administrative sanctions typically used against transnational cartels. Following this, I apply the approaches of general deterrence and retributivism to justify the required type of sanction against transnational cartels.

In chapters 9 and 10, I summarize the justifications to criminalize transnational cartels in the international domain and point out areas for further research.

2. Chapter 2 Overview of international law

Transnational cartels exist in a world divided into sovereign states that have territorial jurisdiction.[164] Due to free trade, communication, internet, technology, and other strong connections among countries, the flow of goods and services from one state to another is inevitable, yet different states have different economic structures and competition policies, and these affect prices and the quality of goods and services. Thus, it is hard to imagine a country being isolated from the effects of transnational cartels or other anticompetitive conduct occurring elsewhere.[165] Therefore, transnational cartels have an international dimension, as they involve more than one jurisdiction, and should be examined in an international context.

This thesis focuses on the legal question of the justifications and legal structure surrounding the criminalization of transnational cartels based on transnational criminal law. Before discussing this matter, it is desirable to understand some concepts relevant to the international domain.

2.1. Sovereign states, legitimacy, and international law

Legitimate sovereign states can be seen as a historical development of treaties among states within a narrow geographical scope, which have progressively been extended to what are now recognized as the legitimate members of the United Nations.[166]

The Westphalia Treaty of 1684 is a cornerstone of the development of the qualitative

[164] Noonan, The Emerging Principles of International Competition Law, *supra* note 11, at 3.
[165] Noonan, The Emerging Principles of International Competition Law, *supra* note 11, at 11.
[166] Ian Clark, *Legitimacy in International Society* (Oxford University Press, 2005) at 33 & 145; see further discussion in Samantha Besson "Sovereignty" (2011) in Max Planck Institute for Comparative Public Law and International Law and Oxford Public International Law, online: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1472?prd=EPIL

international order[167] and the establishment of state sovereignty as a fundamental principle of international order.[168] Following the Westphalia Treaty, several important treaties contributed to developing the concept of legitimacy, including the Utrecht settlements of 1713–14, which contributed to understanding rightful conduct and the basic notion of consensus.[169] The Vienna Settlement of 1815 contributed to the concept of rightful membership in acknowledging the right of a successor after the French and American Revolutions and contributed to four main principles: 1) the format of negotiations; 2) developing legitimate order; 3) developing the notion of consensus; 4) contributing to the balance of power through formulation called "just equilibrium."[170]

After World War I, nations had difficulty reaching a consensus on how to treat defeated Germany[171] in the Versailles Settlement and failed to establish legitimate order.[172] The Versailles Settlement did establish, however, that membership was not unconditional, and each state had to conform to some norms to be accepted into the international society.[173] The settlement after World War II was unique in that it included a "universalistic component" and established the United Nations.[174]

[167] Clark, Legitimacy in International Society, *supra* note 166, at 60.
[168] Clark, Legitimacy in International Society, *supra* note 166, at 59.
[169] Clark, Legitimacy in International Society, *supra* note 166, at 71- 84.
[170] The "just equilibrium" is a balance of power between states that respect existing rights and the understanding of states that they will benefit from adherence to collective norms and protect their interest. Clark, Legitimacy in International Society, *supra* note 166, at 85-108.
[171] Clark, Legitimacy in International Society, *supra* note 166, at 109- 130.
[172] Clark, Legitimacy in International Society, *supra* note 166, at 128.
[173] Clark, Legitimacy in International Society, *supra* note 166, at 115.
[174] United Nations, History of the United Nations, online: https://www.un.org/en/about-us/history-of-the-un; Clark, Legitimacy in International Society, *supra* note 166, at 131- 152.

2.1.1. Rightful membership

A rightful member refers to a particular type of state that meets minimum standards.[175] The question of who is considered a fully rightful member and who is not can be considered the "carrot and stick" of international politics in categorizing the quality and strength of states' membership.[176] Thus, it is common to see in various arguments terms that describe different categories of members, such as "civilized nations," "Western countries," "developed countries," and similar terms.

In terms of competition law, some countries have competition laws, and some countries have none. In addition, some countries are part of the OECD and follow its recommendations, whereas other countries follow ICN recommendations regarding competition best practices. Thus, being part of a group of countries can influence the quality of membership of a given country and how other countries may interact with that country. For example, countries that do not adopt the specific international standards required to join an international organization, such as the World Trade Organization (WTO), may be excluded from membership and suffer adverse economic consequences.[177]

Sovereign states, for the purpose of rightful membership and the ability to enforce legal jurisdictions, are those recognized as members of the United Nations (UN).[178] The UN Charter[179] is based upon the purpose of maintaining peace and security, respecting the principles of justice and international law, and respecting the principle of equal rights and self-determination. As stated

[175] Clark, Legitimacy in International Society, *supra* note 166, at 173.
[176] Clark, Legitimacy in International Society, *supra* note 166, at 177.
[177] Allen Buchanan & Robert O. Keohane "The Legitimacy of Global Governance Institutions" (2006) 20:4 Ethics & International Affairs 405, at 407.
[178] Clark, Legitimacy in International Society, *supra* note 166, at 145.
[179] United Nations Charter (1945), online: https://www.un.org/en/about-us/un-charter/full-text

in Article 1:

> 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

Furthermore, the UN Charter recognizes states' sovereignty and equality, as stated in Article 2.1: "The Organization is based on the principle of the sovereign equality of all its Members."

Some political entities although not considered full member states under the UN enjoy some recognition of their right to self-determination or sovereignty, such as Palestine or Western Sahara. These political entities contribute to and are affected by international law. For example, Palestine is a non-member observer state under the UN[180] but is considered a state and member of the International Criminal Court (ICC) and has granted jurisdiction to the ICC to investigate international crimes within occupied Palestinian territory.[181] Western Sahara is a Non-Self-Governing Territory under international law[182] with an acknowledgment of the Sahrawi people as a separate identity and right to self-determination.[183] Western Sahara has an ongoing conflict with Morocco regarding illegal occupation and claims to be a victim of the international crime of Pillage

[180] Palestine has the status of a non-member observer State status in the UN under Resolution of the General Assembly 67/19 (29 November 2012), online: https://www.un.org/unispal/document/auto-insert-187149/

[181] International Criminal Court, Situation in the State of Palestine ICC-01/18, online: https://www.icc-cpi.int/palestine; International Criminal Court, Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine (3 March 2021), online: https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-respecting-investigation-situation-palestine

[182] Committee on Information from Non-Self-Governing Territories, *Report of the Committee on Information from Non-Self-Governing Territories*, UN General Assembly, 18th Sess, Supp No 14, UN Doc A/5514 (1963) Annex III, online: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N63/149/40/PDF/N6314940.pdf?OpenElement;

[183] International Court of Justice, Western Sahara, Advisory Opinion, [1975] ICJ Rep 39, online: https://www.icj-cij.org/case/61

that is being in the committed there by the Moroccan government and some of its corporations.[184]

Membership can be also determined based on whether a political entity follows the norms of international law. For example, some countries follow international norms, such as practicing effective enforcement against torture, while others do not.[185] Some countries are part of treaties that prohibit specific conduct, such as migrant smuggling, drug trafficking, transnational organized crime, and corruption, and are part of other treaties, while others are not.[186] Whether a country subscribes to such international norms and treaties also affects its type of membership and how it is dealt with by other states.

2.1.2. Rightful conduct

Rightful conduct is based on consensus, and what countries agreed upon.[187] Consensus is how society expresses its fundamental values and purposes to achieve legitimacy.[188] Consensus is best expressed through the UN's Security Council[189] in matters of war and of maintaining peace. It also plays a role in establishing international tribunals to prosecute offenders involved in international crimes, as exemplified by the International Criminal Tribunal for the Former Yugoslavia (ICTY)[190] and the International Criminal Tribunal for Rwanda (ICTR).[191]

---

[184] See, for example, Jeffrey J. Smith, "The Taking of the Sahara: The Role of Natural Resources in the Continuing Occupation of Western Sahara" (2015) 27:3 Global Change, Peace & Security 1; Joanna Allan, "Natural Resources and Intifada: Oil, Phosphates and Resistance to Colonialism in Western Sahara" (2016) 21:4 The Journal of North African Studies 645.

[185] It should be noted that although torture is considered a customary law prohibition and widespread countries agree that international law prohibits it, it is still widely practiced in many places worldwide, see Hugh Thirlway, *The Sources of International Law* (Oxford University Press, 2014), at 54.

[186] See, for example, Boister, An Introduction to Transnational Criminal Law, *supra* note 39, chapters 3- 14.

[187] Clark, Legitimacy in International Society, *supra* note 166, at 71- 84, 109- 130, 191.

[188] Clark, Legitimacy in International Society, *supra* note 166, at 164- 165, 193.

[189] Clark, Legitimacy in International Society, *supra* note 166, at 205.

[190] See more about ICTY at Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 198.

[191] See more about ICTR at Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 204.

Norms are essential to establishing consensus among states and producing legitimacy.[192] Norms have three dimensions: legality, morality, and constitutionality.[193] While each dimension is a source of legitimacy, no single dimension carries legitimacy alone. Nor does a missing dimension eradicate legitimacy.[194] Legality, the highest norm of international society,[195] is the concept of international law and what is sanctioned by international law. The focus of this thesis is international law and legality. It is beneficial, however, to put these concepts in the context of the other two dimensions of norms.

Morality is the concept of fairness according to the global community's core values and a shared moral value among states.[196] Morality can include values like human rights, freedom of religion, and the right of people to participate in governance and political processes.[197] Morality also promotes legitimacy, even in cases that do not involve legality.[198] This concept is less relevant, however, in the case of transnational cartels unless a country has constituted unjust law.[199] An example would be a country that decided to exercise extreme sanctions against transnational cartels, such as imposing the death penalty, which can be considered cruel and immoral punishment in the eyes of other states; those states might refuse to cooperate in investigations or extradite offenders.

Constitutionality is the "political realm of conventions, informal understandings, and

[192] Clark, Legitimacy in International Society, *supra* note 166, at 192-194.
[193] Clark, Legitimacy in International Society, *supra* note 166, at 207- 226, chapter 11- Legitimacy and Norms.
[194] Clark, Legitimacy in International Society, *supra* note 166, at 166, 207.
[195] Clark, Legitimacy in International Society, *supra* note 166, at 209.
[196] Clark, Legitimacy in International Society, *supra* note 166, at 216- 217; see also Thomas Franck, *Fairness in International Institutions* (Oxford University Press, 1997), at 9- 15.
[197] Franck, Fairness in International Institutions, *supra* note 196, at 81- 85.
[198] Clark, Legitimacy in International Society, *supra* note 166, at 219-220.
[199] Clark, Legitimacy in International Society, *supra* note 166, at 209.

mutual expectations."[200] It concerns what is considered proper according to states' mutual expectations and their opinions on how international affairs should be conducted.[201] These mutual expectations, however, can change rapidly compared to legality or morality.[202] This concept is also less relevant to the question of criminalizing transnational cartels. It can, however, play a role in enforcement against transnational cartels, such as mutual expectations on preventing transnational cartels that negatively affect other states in cases where there is no other enforcement treaty with binding power.

2.1.3. Legality in the international domain

For this thesis, it is sufficient to understand that the world is composed of sovereign states with some fundamental values to be rightful members and behave in a fashion of rightful conduct. In addition, states rely on legality to promote legitimacy.[203] Legality, however, is not the only way to achieve legitimacy, as norms can also be morals or be based on constitutionality.[204] Furthermore, international law represents only a portion of the international domain, which is also influenced by other power dynamics, such as those related to war among countries, economic pressure, negotiations, and diplomacy.[205]

International law falls under the concept of legality and may include international crimes whose prevention protects the fundamental values of states and transnational crimes that may involve different states' sovereignty and require cooperation among states for enforcement. As

[200] Clark, Legitimacy in International Society, *supra* note 166, at 220.
[201] Clark, Legitimacy in International Society, *supra* note 166, at 220.
[202] Clark, Legitimacy in International Society, *supra* note 166, at 221.
[203] Franck, Fairness in International Institutions, *supra* note 196, at 7, 22-23; Clark, Legitimacy in International Society, *supra* note 166, at 217.
[204] Clark, Legitimacy in International Society, *supra* note 166, at 166, 207- 209.
[205] Clark, Legitimacy in International Society, *supra* note 166, at 2- 7, 173; Franck, Fairness in International Institutions, *supra* note 196, at 22.

states remain the main actors in the international legal system,[206] they give international law legitimacy through consent, either through treaties or by behaviour in the case of customary international law. State-centred legitimacy stresses that international law is controlled by every individual state,[207] reflecting the international principle of self-determination.[208]

Legality and international law, however, also reflect states' consensus regarding their core values and norms. Accordingly, being a rightful sovereign state necessitates conforming to certain norms.[209] Thus, if a state commits genocide in its jurisdiction, its leaders and other involved offenders would be subject to international criminal law regardless of whether that state provided previous consent to be subject to those international criminal prohibitions, as those crimes violate the core values applicable to each state. Furthermore, as a protector of global peace under Chapter VII,[210] the UN Security Council ordered the establishment of two international *ad hoc* criminal courts, the ICTY and ICTR, without the official consent of those states.[211]

2.2. Sources of legal rule in international law

International law has several sources, including international customary law,[212] general principles of law,[213] and treaty law.[214] These sources can have identical content, such as obligations and rights, but they can also exist separately with no hierarchy and apply to the same situation in a

[206] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 45.
[207] Rüdiger Wolfrum "Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations" in Rüdiger Wolfrum & Volker Röben. (eds.) *Legitimacy in International Law* (Springer, 2008), at 2-8.
[208] Buchanan & Keohane, The Legitimacy of Global Governance Institutions, *supra* note 177, at 415.
[209] Clark, Legitimacy in International Society, *supra* note 166, at 115; Franck, Fairness in International Institutions, *supra* note 196, at 29.
[210] United Nations Charter, *supra* note 179, Chapter VII.
[211] Wolfrum, Legitimacy of International Law from a Legal Perspective, *supra* note 207, at 16.
[212] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 36.
[213] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 40- 41.
[214] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 32.

parallel manner.[215] Soft law[216] and national law[217] can also apply to the international domain. These different types of law can transform from one to another. For example, the domestic law of one jurisdiction can become soft law or treaty law. Soft law can become treaty or domestic law. Treaty law can codify existing customary law. In addition, treaty law can shift to international customary law if the treaty is widely accepted and performed as a law-making function.[218]

2.2.1. Treaty law

Treaties are based on consent and are the primary source of international law.[219] The state-consent-based principle is a fundamental principle in international treaty law.[220] It is based on the assumption that the state can negotiate and shape international agreements to serve its interests.[221]

Article 38(1)(a) of the Statute of the International Court of Justice[222] recognizes treaty law as a basis for solving conflict among countries: "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;" Thus, states can proceed with a dispute settlement process when conflict arises between states.

---

[215] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 32; United Nations, General Assembly, International Law Commission, Third Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur, A/CN.4/753 (2022), para 83- 94 online: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/321/79/pdf/N2232179.pdf?OpenElement

[216] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 42.

[217] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 29-30.

[218] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 37.

[219] Wolfrum, Legitimacy of International Law from a Legal Perspective, *supra* note 207, at 7.

[220] Wolfrum, Legitimacy of International Law from a Legal Perspective, *supra* note 207, at 7.

[221] Wolfrum, Legitimacy of International Law from a Legal Perspective, *supra* note 207, at 6.

[222] Statute of the International Court of Justice (1945), online: https://www.icj-cij.org/statute#:~:text=1.,exercises%20civil%20and%20political%20rights

Article 2(1)(a) of the Vienna Convention on the Law of Treaties[223] identifies a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation," and, according to Article 26 of the Vienna Convention, a treaty is binding to the parties and must be executed in good faith. A treaty is also binding on all the parties as part of customary international law.[224]

States can withdraw their consent from a treaty either temporarily or permanently.[225] It is worth mentioning, however, that treaties may declare or codify existing customary law.[226] For example, the Rome Statutes codify international crimes. If a state withdraws its consent, it does not affect the binding requirements of the customary law on that state.

Article 34 of the Vienna Convention clarifies that a treaty is not binding on a third party without its consent. In international law dynamics, however, it is essential to recognize the movement of law, as there can be a transfer of crimes from a treaty to a customary law that is binding even without reception by the state. One example is the Convention against Torture, established in 1984 to fight torture in an official capacity. This convention is now considered part of customary law, which prohibits torture regardless of whether the country approved the convention against torture.[227]

---

[223] Vienna Convention on the Law of Treaties (Vienna: 23 May 1969. Entered into force on 27 January 1980), online: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

[224] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 32.

[225] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 33.

[226] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 36.

[227] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 12-13.

2.2.2. Customary international law

Customary international law is a basic rule of international law designed to promote peace and stability and avoid anarchy.[228] Article 38(1)(b) of the Statute of the International Court of Justice[229] recognizes international customary law as a fundamental law for solving conflicts among countries: "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: … b. International custom, as evidence of a general practice accepted as law;"

The critical aspect of customary law is that it is binding on all states even without reception or official approval by a state.[230] Customary law demands that a new state accept all the existing customary norms as a member of the international community.[231] Moreover, a new state inherits the rights and duties of the former state.[232] The principle of *jus cogens* applies on customary law and protects it from being cancelled by treaty.[233] Customary law can change, however, when states change their practices over time.[234]

Customary law has two requirements that complement each other.[235] First, a sufficient and consistent state practice should follow a custom. Second, evidence of what is known as *opinio juris,* which reflects the subjective belief of states that the practice is legally binding on them as

[228] Anthony D'Amato "On the Legitimacy of International Institutions" in Wolfrum, Rüdiger and Volker Röben. (eds) *Legitimacy in International Law* (Springer, 2008) 83, at 90- 91.

[229] Statute of the International Court of Justice, *supra* note 222.

[230] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 36; Thirlway, The Sources of International Law, *supra* note 185, at 54.

[231] Thirlway, The Sources of International Law, *supra* note 185, at 54.

[232] Franck, Fairness in International Institutions, *supra* note 196, at 43.

[233] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 36- 37; see also Article 53 to Vienna Convention on the Law of Treaties, *supra* note 223.

[234] Thirlway, The Sources of International Law, *supra* note 185, at 81- 83.

[235] Thirlway, The Sources of International Law, *supra* note 185, at 62; Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 36.

part of international law.[236]

The state practice relevant to establishing customary law is the state's interaction with other states or a recognized international actor, such as an international organization, followed by "acceptance, rejection, or toleration" by the other party.[237] The practice should be widespread and consistent. Thus, a single-state practice is not sufficient to establish a practice, and there is a need for consistent and uniform repetition by several states or acceptance by some states affected by the act,[238] although it is not necessary for every state to follow the practice.[239]

The *opinio juris* is to behave in certain practices, believing it is required as customary law.[240] A clear and sufficient definition of this element of customary law was clarified by the International Court of Justice (ICJ) in the North Sea case:

> "Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty."[241]

Evidence for *opinio juris* can be what states have practiced or a recorded acknowledgement of its existence, such as scholarly writings, judicial decisions, or states' conventions that gather

[236] Thirlway, The Sources of International Law, *supra* note 185, at 57 refers to International Court of Justice, North Sea Continental Shelf (Federal Republic of Germany, Denmark; Federal Republic of Germany/Netherlands) (1969), ICJ Reports 1969, para 77, online: https://www.icj-cij.org/sites/default/files/case-related/52/052-19690220-JUD-01-00-EN.pdf; see also International Court of Justice, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (1986), ICJ Reports 1986, para 183 & 207, online: https://www.icj-cij.org/public/files/case-related/70/070-19860627-JUD-01-00-EN.pdf

[237] Thirlway, The Sources of International Law, *supra* note 185, at 63.

[238] Thirlway, The Sources of International Law, *supra* note 185, at 64.

[239] Thirlway, The Sources of International Law, *supra* note 185, at 67.

[240] Thirlway, The Sources of International Law, *supra* note 185, at 72.

[241] ICJ North Sea Continental Shelf, *supra* note 236, para 77.

and express existing customary law.[242]

2.2.3. General principles of law

General principles of law refers to principles widely accepted in many domestic law systems.[243] General principles of law can establish an independent source of obligation[244] or assist other sources of law in interpretation or filling the gaps when there is a lacuna in customary or treaty law on a specific issue.[245] In cases where the general principles of law are recognized, they have a universal application.[246]

Article 38(1)(c) of the Statute of the International Court of Justice[247] refers to "the general principles of law recognized by civilized nations." There are two steps for recognizing general principles of law: "first, determining the existence of a principle common to the principal legal systems of the world; second, ascertaining the transposition of that principle to the international legal system."[248] The first step requires comparing different legal systems that recognize the

[242] Thirlway, The Sources of International Law, *supra* note 185, at 58.

[243] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 40.

[244] United Nations, Third Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 215, para 110 - 121. One example includes "an obligation by States to exclude statements and confessions obtained prior to notification to a foreign national of his/her right to consular assistance." Another example is recognizing the "principle of unjust enrichment." See para 112- 113 and the relevant references.

[245] United Nations, General Assembly, International Law Commission, General Principles of Law Text of the Draft Conclusions provisionally adopted by the Drafting Committee on first reading, A/CN.4/L.982 (2023) para 10, online: https://documents-dds-ny.un.org/doc/UNDOC/LTD/G23/100/48/pdf/G2310048.pdf?OpenElement; For example, an international tribunal can rely on general principles of law to identify what is considered a rape crime or other elements in the crime, see more on United Nations, Third Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 215, para 39- 73, and the reference there; United Nations- General Assembly, International Law Commission, First Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur, A/CN.4/732 (2022) para 215- 219 and the reference there, online: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/100/93/pdf/N1910093.pdf?OpenElement

[246] United Nations, First Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 245, para 161.

[247] Statute of the International Court of Justice, *supra* note 222.

[248] United Nations, General Assembly, International Law Commission, Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur, A/CN.4/741 (2022) para 19, online: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/093/44/pdf/N2009344.pdf?OpenElement

general principles of law.[249] When, however, there is "no sufficient commonality across national legal systems" [250] or they are "fundamentally different,"[251] there is no general principles of law.

No precise number of national legal systems must be examined to prove the existing general principles of law. Any examination, however, should broadly represent the "majority of legal systems."[252] It is not necessary to examine each jurisdiction separately, and it is sufficient to examine families of legal systems, such as "Anglo-American law," "civil law," or "Islamic law."[253] General principles of law can also be detected through existing rules in customary international law, treaties, or international organizations as a resolution of the General Assembly. These sources can serve as evidence for the wide acceptance and recognition of most states on specific matters.[254]

In addition, there is a need to show a transposition of the general principles of law from the national legal system to the international legal system.[255] The transposition occurs when: "(a) the principle is compatible with fundamental principles of international law; and (b) the conditions exist for the adequate application of the principle in the international legal system."[256] Thus, the general principles of law should fit within the general structure of the international law and should

[249] United Nations, Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 248, para 23; Thirlway, The Sources of International Law, *supra* note 185, at 95.

[250] United Nations, Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 248, para 65.

[251] United Nations, Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 248, para 69.

[252] United Nations, First Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 245, para 223; United Nations, Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 248, para 25.

[253] United Nations, Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 248, para 28 & 51- 53.

[254] United Nations, First Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 245, para 234; United Nations, Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 248, para 72 & 121- 122; Thirlway, The Sources of International Law, *supra* note 185, at 95- 96.

[255] United Nations, First Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 245, para 225- 230.

[256] United Nations, Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 248, para 74.

not contradict other international law or cause "distortions or possible abuses."[257]

A recent debate regarding the general principles of law resulted in a draft from 12 May 2023 that suggests some changes regarding the identification of the general principles of law. It suggests that the principle of law be recognized by the "community of nations" as opposed to "civilized nations,"[258] as it appears in Article 38(1)(c) of the Statute of the International Court of Justice.[259] This represents a natural development in international law, as the term "civilized nations" is no longer accepted today; all nations should be seen as civilized nations.[260]

Article 21(1)(c) of the Rome Statute[261] recognizes the general principles of law as one of the applicable laws to the International Criminal Court (ICC). The general principles of law based on this article, however, can be narrower than those in Article 38(1)(c) of the Statute of the International Court of Justice. The general principles of law based on the ICC can be derived from just one legal system of the state that has jurisdiction over the examined specific matter and need not be derived from different legal systems.

Several necessary criminal rights are recognized as general principles of law. For example, part 3 of the Rome Statute, titled "General Principles of Criminal Law," recognizes, among 12 different articles, the principles of legality, prohibiting retroactivity in punishment, and others

[257] United Nations, Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 248, para 85.

[258] For more discussion on recognizing a general principle of law among "civilized nations" check United Nations, First Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 245, para 176- 187.

[259] United Nations, Third Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 215, para 2.

[260] United Nations, Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 248, para 1(d), 3 & 12- 13; Thirlway, The Sources of International Law, *supra* note 185, at 95.

[261] This article states: "Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards." Article 21(1)(c) of Rome Statute of the International Criminal Court, *supra* note 49.

excluding criminal responsibility.[262] The right to a fair trial in criminal procedures is a recognized general principle of law.[263] Articles 10 and 11 of the Universal Declaration of Human Rights[264] ensure the presumption of innocence, the principle of legality, and the offender's right to be heard in front of an independent tribunal.[265] Article 14 of the International Covenant on Civil and Political Rights[266] ensures necessary criminal procedural safeguards to guarantee a fair trial, such as being informed in a language one understands, having adequate time for preparation of a defence, and the right to examine witnesses.[267]

---

[262] See also Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 41.

[263] United Nations, Third Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 215, para 126.

[264] United Nations, Universal Declaration of Human Rights, - General Assembly resolution 217 A (10 December 1948), online: https://www.un.org/en/about-us/universal-declaration-of-human-rights. The declaration was accepted as a regular resolution without binding force, but due to the "overwhelming support, and such prestige has accrued to it in succeeding years, that it may be said to have become a customary rule of state obligation." Franck, Fairness in International Institutions, *supra* note 196, at 98.

[265] Article 10: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." Article 11: "1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. 2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

[266] United Nations, International Covenant on Civil and Political Rights, - General Assembly resolution 2200A (XXI) (16 December 1966; entered into force on 23 March 1976), online: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights; The International Covenant on Civil and Political Rights has been ratified by numerous numbers of states and has a binding power toward them, and it is moving toward becoming customary binding norm to all states, see article 51.2. to International Covenant on Civil and Political Rights; Franck, Fairness in International Institutions, *supra* note 196, at 100 & 109.

[267] Article 14: "1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have

Article 15.2[268] of the International Covenant on Civil and Political Rights recognizes the general principles of law as a source of criminal obligation against an individual. Crimes based on general principles of law were recognized as war crimes in the Nuremberg Tribunal. In that case, the tribunal clarified this point in response to a defendant's claim against the legality of a war crime claiming that there was no applicable prohibition on the offender:

> The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world.[269]

In the Nuremberg Tribunal, however, war crimes were recognized as international crimes based on customary law. Nevertheless, Article 15.2:

> leaves the possibility open, when the conditions are met, for the criminalization of certain acts under international law on the basis of general principles of law. Therefore, a general principle of law may impose a direct obligation on individuals not to commit a given crime, and they may be tried and punished for its

---

legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt. 4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. 6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him. 7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

[268] This article states: "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations." See also section 11 (g) of Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 (Canada): "not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations."

[269] Nazi Conspiracy and Aggression: Opinion and Judgment (The Nuremberg Trials) (Washington, United States Government Printing Office, 1947), at 49- 51, can be found online: https://www.jewishvirtuallibrary.org/the-nuremberg-trials

commission.[270]

2.2.4. Soft law

Soft law represents general guidelines for desirable practices and is typically more general than hard law. Soft law lacks the formal binding norm of hard law.[271] Thus, it is more flexible, easier to accept, and less costly to negotiate.[272] This enables states to achieve greater compromise and implement general norms in their jurisdictions while considering their particular political and economic backgrounds, thus allowing each state to choose the better practice based on its unique legal, political, and economic background.[273] Although soft law lacks the formal binding portion of hard law,[274] national authorities will seek to apply the soft law of international organizations to be considered capable practitioners[275] and, therefore, more legitimate members. Moreover, soft law based on the support of many states can produce better outcomes as more countries adopt it.[276]

Another feature of soft law is that it can help to elaborate hard law.[277] For example, the WTO Appellate Body members have used soft law to interpret hard rules to solve disputes among countries regarding trade issues.[278] This, however, is at the centre of the WTO Appellate Body's crisis and one of the reasons behind the refusal of the United States to appoint new WTO Appellate

[270] United Nations, Third Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 215, para 120.

[271] Daniel D. Sokol "International Antitrust Institutions" in Andrew T. Guzman (ed.) *Cooperation, Comity, and Competition Policy* (Oxford University Press, 2011) 187, at 196; Gregory C. Shaffer & Mark A. Pollack "Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance" (2010) 94:3 Minnesota Law Review 706, at 707- 708, 713 & 716.

[272] Shaffer & Pollack, Hard vs. Soft Law, *supra* note 271, at 719.

[273] Sokol, International Antitrust Institutions, *supra* note 271, at 195- 196.

[274] Sokol, International Antitrust Institutions, *supra* note 271, at 196.

[275] Mateusz Błachucki "The Role of Soft Law in Functioning of Supranational Competition Networks" (2019) 1:133 Contemporary Central & East European Law 33, at 35.

[276] Joost Pauwelyn, Ramses A. Wessel & Jan Wouters "When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking" (2014) 25:3 European Journal of International Law 733, at 748- 751.

[277] Shaffer & Pollack, Hard vs. Soft Law, *supra* note 271, at 721.

[278] Shaffer & Pollack, Hard vs. Soft Law, *supra* note 271, at 750- 751.

Body members. The position of the United States is that the WTO Appellate Body must apply the WTO rules—as is—and adhere strictly to the text of WTO agreements without any further interpretation or added rights or obligations not agreed upon through the WTO agreements.[279]

Generally speaking, the new international legal dynamic is shifting from the traditional structure of international law based on state consent to a process whereby states adopt soft law according to the existing international consensus regarding the desirable standards and regulations.[280] In addition, the legal dynamic order has shifted to a growing number of harmonizing regulations and coordination between countries through NGOs and international organizations that produce soft law, such as the ICN, in the case of international competition.[281] In this environment, the state remains the leading actor for legislation, enforcement, control, and legitimization, but the new international organizations contribute to shaping, assisting, and correcting the states' approaches, which leads to informal cooperation in the international arena.[282]

2.2.5. National law

Another important source of international law is the national criminal law of each state that reaches outside its territory.[283] In different situations, states criminalize acts committed beyond their borders. To justify extraterritorial jurisdiction, a country should show that the conduct has some ties to its jurisdiction, such as the need to prevent a direct harmful effect on its territory, that the crime was conducted by its citizen outside its territory, or that its citizen is a victim of a crime that

[279] Robert E. Lighthizer, Ambassador of US, THE PRESIDENT'S 2018 TRADE POLICY AGENDA, (March 2018), at 22- 24, online: https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20I.pdf,

[280] Pauwelyn, Wessel, and Wouters, When Structures Become Shackles, *supra* note 276, at 734- 737 & 742- 743.

[281] Pauwelyn, Wessel, and Wouters, When Structures Become Shackles, *supra* note 276, at 738.

[282] Pauwelyn, Wessel, and Wouters, When Structures Become Shackles, *supra* note 276, at 742.

[283] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 28- 30.

occurred outside the territory. It is worth mentioning that crimes based on international customary law, treaty law, or soft law are typically codified in domestic criminal law.[284] International law becomes part of domestic law and becomes enforceable in a country's territory, a process known as "reception."[285]

2.2.6. Other sources

Article 38(1)(d) of the Statute of the International Court of Justice[286] recognizes judicial decisions and scholarly writing as secondary sources of law.[287] Those sources are useful in determining international legal norms and can serve as evidence for state practice or the law in a particular state.[288] These sources are not independent sources of law, however, and have no binding power in international law but rather are tools that can help to determine law.[289]

2.3. Crimes in international and transnational criminal law

International law criminalizes international crimes related to the international community as a whole, as well as transnational crimes that affect one or more jurisdictions.[290] Both kinds of crimes have an international legal dimension,[291] but, while all states can prosecute international crimes under universal jurisdiction, the jurisdiction against transnational crimes is more limited.[292]

[284] For example, Canada codifies war crimes on the Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24.

[285] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 31 & 34; see further discussion on ways that the international law is transferred to national law and examples from several jurisdictions, in Sebastien Lafrance "The Reception and Effectiveness of International Fundamental Rights in Some Selected ASEAN States" (2022) conference paper presented in "Legal Cooperation, Harmonization and Unification: An ASEAN Perspective" Melbourne Law School, online: https://law.unimelb.edu.au/centres/alc/news-and-events/legal-cooperation,-harmonization-and-unification-an-asean-perspective-online-conference/papers

[286] Statute of the International Court of Justice, *supra* note 222.

[287] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 41.

[288] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 41.

[289] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 41- 42.

[290] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 16, 19- 20.

[291] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 30.

[292] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 17- 18.

Nevertheless, both kinds of crimes share the same problems: the international scope of the investigations, acquiring evidence in other jurisdictions, or capturing a suspected criminal who is a fugitive and has sought protection in another jurisdiction.[293]

2.3.1. International crimes

International crimes usually emerge from customary international law and concern conduct that threatens the vital interests of the international community as a whole or conduct that shocks the conscience of humanity due to its gravity or severe threat to international peace or security.[294] This can be understood as the general requirement of states to behave in a manner that reflects minimum core values and basic rules.[295]

The core international crimes are based on customary international law and codified in Articles 5 to 8 of the Rome Statute.[296] Article 5 clarifies that the ICC jurisdiction is limited to "the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression." Articles 6 to 8 of the Rome Statute clarify different kinds of crimes and circumstances that establish these categories of international crimes.

It should be noted that some international crimes developed in the last century as treaty prohibitions to address specific phenomena or in specific areas and were later recognized as

[293] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 31.
[294] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 19- 20, 76 & 109.
[295] Clark, Legitimacy in International Society, *supra* note 166, at 109- 130, particularly 115 & 128- 129, also 173; Franck, Fairness in International Institutions, *supra* note 196, at 29.
[296] Rome Statute of the International Criminal Court, *supra* note 49; Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 30.

customary law binding on all states regardless of whether they were part of the treaty.[297] For example, the crimes of torture[298] and apartheid[299] were prohibited under a treaty but are now recognized as international crimes under the category of crimes against humanity when they are committed "as part of a widespread or systematic attack directed against any civilian population" as described under Article 7 of the Rome Statute.[300]

Jurisdiction

Jurisdiction refers to where and how a state can impose its power and enforce the law. In the international context, jurisdiction refers to the state's legal power and what it can legally do in the international domain.[301] International crimes are prohibited under international law against the individual, whether by a supranational authority with direct enforcement or by a national authority with indirect enforcement, regardless of domestic criminal prohibition. This category of crimes has universal jurisdiction, which is the broadest existing jurisdiction and is absolute.[302] Under universal jurisdiction, each state can prosecute an offender regardless of where the offence occurred or the offender's nationality and without having to be based on protective interests related to territory, nationality, or the victim's nationality.[303] Still, a state can have a legality rule that does not allow criminal prosecution in its territory against conduct that is not recognized as a crime

[297] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 12- 13.

[298] United Nations, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984; entered into force on 26 June 1987), online: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading

[299] United Nations, International Convention on the Suppression and Punishment of the Crime of Apartheid (30 November 1973; entered into force 18 July 1976), online: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-7&chapter=4&clang=_en

[300] Article 7.1. (f) & (j) to Rome Statute of the International Criminal Court, *supra* note 49.

[301] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 53.

[302] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 76- 81 & 364; Boister, Transnational Criminal Law, supra note 39, at 961- 962.

[303] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 17- 20, 74- 75 & 346; Boister, Transnational Criminal Law, *supra* note 39, at 963- 964.

under its domestic criminal law, despite the conduct being considered an international crime under customary international law.[304]

2.3.2. Transnational crimes

Transnational criminal law provides an analytical concept of cross-border crimes that affect or attract the interest of more than one state.[305] Transnational crimes do not have the special features of international crimes and do not shock the conscience as international crimes do, but they may nevertheless escalate to a level that would "threaten international peace and security or shock the conscience of mankind" and become an international crime.[306] Transnational crimes harm various interests, including economic interests, security interests, human rights, social interests, religious beliefs, and morality.[307]

Due to the reality of globalization, criminals and crimes exist in a borderless world.[308] "[T]he movement of money, physical objects, people, or other tangible and intangible items across state boundaries" has become of critical interest to countries in their international relations.[309] Therefore, and more broadly since the nineteenth century,[310] countries have coordinated and developed mechanisms for cooperation to achieve effective enforcement against transnational crimes.[311] Some notable examples of transnational crimes include narcotics smuggling, corruption of foreign officials, terrorism, human trafficking, money laundering, illicit trade in firearms, and

[304] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 38.

[305] Boister, Transnational Criminal Law, *supra* note 39, at 953- 954, 956 & 974- 975; Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 30, and a comprehensive discussion at his book there; Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 11-12.

[306] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 31.

[307] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 9.

[308] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 3 & 8.

[309] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 3.

[310] Fifth United Nations Congress on the prevention of Crimes and the Treatment of Offenders, *supra* note 42, at 9, para 48.

[311] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 17 & 365.

cybercrime.[312]

The term *transnational crimes* describes domestic crime that has a harmful effect on other jurisdictions or attracts the interest of more than one jurisdiction.[313] For example, Article 3(2) of the United Nations Convention against Transnational Organized Crime (UNTOC) refers to the offence as having a transnational character when it meets one or more of the following criteria:

> (a) It is committed in more than one State;
> (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
> (c) It is committed in one State but involves an organised criminal group that engages in criminal activities in more than one State; or
> (d) It is committed in one State but has substantial effects in another State.[314]

Thus, transnational crime includes a clear international dimension, but enforcement is conducted through the application of domestic law.[315] It is important to note, however, that transnational crime excludes a purely domestic crime that requires international cooperation when the offender moves to another country. An example would be an offender who commits a theft in country A against a local victim, then moves to country B, and later, country A requires country B to extradite the offender to country A. The need for legal cooperation does not transform this domestic crime into a transnational crime. In this example, there is no transnational concern, as theft is criminalized domestically and for domestic purposes. Using transnational extradition procedures to enforce domestic law does not alter this.[316]

---

[312] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 378; see also comprehensive discussion at Boister, An Introduction to Transnational Criminal Law, *supra* note 39.

[313] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 17 & 365.

[314] United Nations, Convention against Transnational Organized Crime, General Assembly Resolution 55/25 (15 November 2000; entered into force on 29 September 2003), online: https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf; Boister, Transnational Criminal Law, *supra* note 39, at 966.

[315] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 17.

[316] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 18.

Nevertheless, transnational crime need not include a transnational element in its definition; it can cover both conduct that has an express cross-border element and conduct that does not.[317] Therefore, transnational crime can be an act that "(i) actually crosses borders; (ii) has substantial effects in other states; and (iii) local crime that has only the most tenuous potential extraterritorial impact but which is of transnational interest whether for moral or other more prudential reasons."[318]

The different legal environments of different jurisdictions influence transnational crimes. First, different jurisdictions can have different legal environments in one state regarding producing, distributing, transporting, exporting, or importing goods, which changes the character (e.g., price or quality) of the good or service.[319] For example, relaxed regulations in jurisdiction A can generate a low price for goods illegally smuggled into jurisdiction B, which has stricter regulations, and this consequently affects jurisdiction B's market. This happens in many transnational crimes, where the wrongfulness of the crimes is due to the violation of a rule that represents a state policy[320] and, accordingly, affects the internal sovereignty of a state.[321] Nonetheless, it can apply to cases involving strong moral wrongs, such as terrorism, human trafficking, and cybercrime of theft or other wrongful conduct.

Second, jurisdictions may not have a criminal prohibition or different enforcement policies or provide protection for extraditing their nationals, which leads to benefiting criminals.[322] Having such enforcement policies can also result in a global dynamic where countries with weak

[317] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 25.
[318] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 25.
[319] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 6- 7.
[320] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 24.
[321] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 10.
[322] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 3.

enforcement attract transnational crimes to their jurisdictions.[323] It also can lead to the spread of powerful criminal networks, making transnational crimes a global threat to many jurisdictions.[324] Thus, developing enforcement mechanisms that include coordination and cooperation among different countries is necessary to suppress transnational crimes.[325] Cooperation is not always possible, however, as it can contradict one state's interests, or it may be impossible to achieve at all when the conduct is criminalized in one jurisdiction but not in another.[326]

Criminalization

Transnational crimes are criminalized by domestic criminal law.[327] Accordingly, their criminal liability is based on national criminal law that has an international dimension, where states extend it beyond their borders.[328] Therefore, the theoretical foundations for criminalizing conduct should be based on national criminal law theories in each jurisdiction that criminalizes the conduct.

Limited jurisdiction

Transnational crimes do not have the broad universal jurisdiction international crime does. Rather, transnational crimes have territorial jurisdiction, where each state has sovereignty over its own territory, including every person and everything within it,[329] or ships and airplanes.[330] It is

[323] See more on this phenomenon at Broude & Teichman, Outsourcing and Insourcing Crime: The Political Economy of Globalized Criminal Activity, *supra* note 117. They discuss the phenomenon of transnational mobility of crimes from one country to another depending on the jurisdictions' approach to criminal activity and the expected sanction (lenient sanction or harsh sanction) and suggest global crime control design to control transnational crimes.

[324] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 11.

[325] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 12.

[326] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 27.

[327] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 23- 24 & 30; Boister, Transnational Criminal Law, *supra* note 39, at 962.

[328] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 15.

[329] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 53-54; see comprehensive discussion on the jurisdiction over transnational crimes at Boister, An Introduction to Transnational Criminal Law, *supra* note 39, chapter 16.

[330] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 252- 253.

also a desirable principle for practical reasons, as, most of the time, the victim, witnesses, and evidence are all within the territorial jurisdiction.[331]

There are several bases for extraterritorial jurisdiction over other territories. The first is based on the *nationality principle*, where a state claims jurisdiction over its national who committed a crime abroad.[332] The second is based on the *passive personality principle*, whereby a state claims jurisdiction over an extraterritorial offence where the victims are a state's national[333] or even specific people.[334] The third is based on the *protective principle*, where the state claims jurisdiction to protect or prevent harm to its vital national interest.[335]

It should be noted, however, that certain other crimes are not yet recognized as international crimes but may be recognized as crimes under customary law and have universal jurisdiction. Piracy, for example, has a universal jurisdiction that was developed for historical reasons to fight piracy on the open sea and prevent pirates from obtaining safe havens.[336] Other grounds for claiming universal jurisdiction concern the nature of the crimes deemed as serious under international law. For example, there is a basis to argue for universal jurisdiction in the case of torture and slavery.[337]

---

[331] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 63.

[332] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 69- 71; Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 257- 258.

[333] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 71- 72; Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 260- 261.

[334] Israel, for example, protects Israeli nationals or any Jewish person if they were a victim of a crime because they are Israeli or Jewish, Section 13(b) to Penal Law-1977 (Israel Penal Law).

[335] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 73; Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 262- 264.

[336] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 75- 76.

[337] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 77; Princeton Project on Universal Jurisdiction, The Princeton Principles on Universal Jurisdiction (Princeton University, 2001), at 29 and generally at 15– 38, online: https://lapa.princeton.edu/hosteddocs/unive_jur.pdf; Council of the European Union, AU-EU Expert Report on the Principle of Universal Jurisdiction, 8672/1/09/ REV1 (16 April 2009), para 9 refers to torture but not slavery, online: https://data.consilium.europa.eu/doc/document/ST%208672%202009%20REV%201/EN/pdf;

Having different justifications for applying jurisdiction over a crime often causes a conflict among states over the right to apply jurisdiction over specific conduct. For example, crimes on the internet provide a complex and ongoing development process with regard to determining the superior justification among the many justifications to attract jurisdiction.[338] One accepted view is that the priority of enforcement is to be given to the state with the greatest centre of gravity to the crime.[339] For example, one UN study on fraud crimes suggests that states should consider several factors in determining which state to prosecute.[340] These factors are:

a) the state which has suffered the greatest direct and indirect harm,
b) the state in which most of the elements of the offence were committed,
c) the state that has the greatest investment of investigative efforts in the case,
d) the location of witnesses and evidence,
e) the state that has the strongest case,
f) the state with the best capacity,
g) the nationality of the offender and whether she can be extradited,
h) other offences involved or which may be prosecuted,
i) other offenders that are involved or may be prosecuted, and
j) the respective sentencing regimes.

Countries may, however, choose to have general consultation regarding which country should prosecute offenders for the same conduct or to have a joint or parallel investigation and prosecution procedures.[341]

Transnational crimes can be further categorized as transnational crimes with either

United Nations- General Assembly, Report of the Secretary-General, The Scope and Application of the Principle of Universal Jurisdiction, A/65/181 (2010), para 27–28, online: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N10/467/52/PDF/N1046752.pdf?OpenElement

[338] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 97 & 465.

[339] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 28.

[340] United Nations, Results of the 2nd Meeting of the Intergovernmental Expert Group to Prepare a Study on Fraud and the Criminal Misuse and Falsification of Identity: report of the Secretary-Genera, UN Doc No E/CN.15/2007/8/Add.2 (2007), para 50, online: https://digitallibrary.un.org/record/612652?ln=en; Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 68- 69.

[341] See, for example, Article XIX.C. to The Organization for Economic Co-operation and Development (OECD), Recommendation of the Council for OECD Legal Instruments Further Combating Bribery of Foreign Public Officials in International Business Transactions (2021) (OECD/LEGAL/0378) (Adopted on: 25/11/2009; Amended on: 25/11/2021), online: https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0378

international or domestic concerns. Those categories do not change the nature of transnational crimes but rather recognize an advanced enforcement mechanism in the case of transnational crimes that carry international concern.

2.3.2.1. Transnational crimes of international concern

Transnational crimes are crimes that affect the interest of several jurisdictions. There is sufficient mutual state interest to create treaties that include obligation and enforcement cooperation or mechanisms to suppress them, known as "suppression conventions."[342] Suppression conventions allow states to enforce laws against transnational crimes and protect economic, political, and other interests.[343] These conventions require a horizontal international obligation among states to prohibit and criminalize the conduct and the establishment of a broad regime for territorial and extraterritorial jurisdiction. Beyond this, a mechanism for coordination and cooperation in enforcement is necessary and should include prosecuting offenders in the state's territory or extraditing them to the victim's member state to prevent transnational criminals from finding safe havens in other countries.[344]

The most important aspect of the suppression convention is that it is legally binding on the state members, and failure of a state to fulfil its obligation has legal consequences according to regular treaty law,[345] according to which disputes are resolved through tribunals, such as the ICJ.[346]

---

[342] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 16-18, 22 & 365- 366.

[343] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 16.

[344] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 21- 22 102- 103, & 367; Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 12, 18, 23 & 33; Boister, Transnational Criminal Law, *supra* note 39, at 955.

[345] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 372; Boister, Transnational Criminal Law, *supra* note 39, at 963.

[346] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 372 and footnote 31. Recent cases include the case of Belgium v. Senegal for the failure of Senegal to extradite or prosecute the former Chadian dictator Hissene Habre under article 7(1) of the Convention against Torture, *supra* note 298; International

The conventions have binding obligations only on the state parties, however, while enforcement conflicts between party states and non-party states are not addressed.[347]

Soft law can also provide a basis for increasing enforcement and facilitating cooperation and coordination among states. Soft law, however, differs from a suppression convention in that it does not include a state obligation or concrete consequences if a state does not adopt those recommendations. Nonetheless, an effective soft law, such as exists in the anti-money laundering context, can include economic pressure from other countries against a country that does not adopt the proper means of enforcing the soft law's recommendations in its authority.[348] This last approach of soft law plays a vital role in fighting transnational crimes, and it can be a means for prohibiting harmful conduct, facilitating coordination, and improving cooperation among states for enforcement.[349]

Jurisdiction and supranational authority

The existence of the suppression treaty does not transform national jurisdiction into

Court of Justice, *Belgium v. Senegal* (2012), ICJ General List No 144, online: www.icj-cij.org/docket/files/144/17064.pdf; International Court of Justice, *Equatorial Guinea v. France* (2018), ICJ General List No 163 (Preliminary Objections), online: www.icj-cij.org/files/case-related/163/163-20180606-JUD-01-00-EN.pdf

[347] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 372.

[348] The Financial Action Task Force (FATF) is the leading force fighting money laundering. The FATF works as a monitor of states and a forum where international experts develop policy recommendations in the field of money laundering. The FATF recommendations have no binding effect as treaties, but their standards are the most accepted international standards and have more forceable power than many other treaties in achieving compliance by states. The FATF members are expected to implement the recommendations domestically as binding rules. FATF members that do not enforce the FATF recommendations or non-FATF members that do not adopt the FATF recommendations are listed on the "blacklist," which encourages economic pressure against non-complying states. See more at Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 451- 453; Pauwelyn, Wessel, and Wouters, When Structures Become Shackles, *supra* note 276, at 746. However, different aspects of money laundering can be prohibited under other binding treaties, such as Article 8 of United Nations, International Convention for the Suppression of the Financing of Terrorism (15 December 1997; entered into force on 10 April 2002), online: https://treaties.un.org/doc/db/terrorism/english-18-11.pdf; Article 5 of United Nations, Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (20 December 1988; entered into force on 11 November 1990), online: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=VI-19&chapter=6

[349] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 22- 23.

universal jurisdiction. It remains limited to the typical jurisdiction of transnational crimes discussed above. The suppression treaty makes jurisdiction broader, however, as it requires each state party to prosecute any offender in its territory or extradite the offender to another state party that is requesting to prosecute the offender. This broad-jurisdiction mechanism applies only to state parties, however, not to other states that are not party to the suppression convention.[350]

Furthermore, transnational crimes of international concern receive no direct enforcement by a supranational authority under international law,[351] but countries can establish, by treaty, a supranational authority to address such crimes. For example, the Republic of Trinidad and Tobago asked to establish a direct prosecution jurisdiction against the transnational crime of narcotics trafficking under the jurisdiction of the ICC. Consequently, the ICC's state parties seriously considered including transnational narcotics trafficking and terrorism crimes under the ICC's direct jurisdiction, although the request was ultimately declined.[352] Another example of supranational authority with direct jurisdiction against transnational crimes was suggested in June 2014 at the African Union Assembly of Heads of States and Government meeting in Malabo, Equatorial Guinea. The meeting resulted in the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol), which suggests establishing the African Court of Justice and Human and Peoples' Rights, with direct jurisdiction over international crimes, as well as against some significant transnational crimes. The court was not established, however, because an insufficient number of African Union members ratified the

[350] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 22; Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 251.

[351] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 21.

[352] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 9- 10 & 210.

protocol.[353]

2.3.2.2. Transnational crimes of domestic concern

Transnational crimes of domestic concern are domestic crimes that involve more than one state. Such crimes have not been subject to international treaty law.[354] Simply put, not all transnational crimes transfer to suppression conventions, and not all suppression conventions are adopted by a large number of states. This is due to either the lack of support from states to undertake the prohibition or criminalization of the conduct or establish the enforcement mechanism or to the existence of alternative instruments that already cover the issue. [355]

In the absence of a suppression treaty, the enforcement of the conduct remains a matter of national jurisdiction, which criminalizes the conduct based on its national criminal law while also considering the international aspect of the crime.[356] The enforcement is carried out with or without the coordination of the other involved states. Thus, this category has more potential for conflicts among countries regarding jurisdiction, which is determined according to the ties the conduct has to each country's jurisdiction. In this case, the domestic court can apply international rules and consider the interests of other states, such as through international comity or a bilateral mutual legal assistance agreement, or via a different form of negotiation between the involved countries.

---

[353] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 261; see also Amnesty International, Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court (Amnesty International, 2017), online: https://www.amnesty.org/en/wp-content/uploads/2021/05/AFR0161372017ENGLISH.pdf; see also different texts related to Statute of the African Court of Justice and Human Rights, African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (is not in force), online: https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights

[354] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 22- 23 & 480.

[355] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 231.

[356] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 21- 23; Boister, Transnational Criminal Law, *supra* note 39, at 963.

3. Chapter 3 Prohibitions against transnational cartels

This chapter comprehensively discusses different sources of international norms that can prohibit transnational cartels. Under the guise of globalization, harmonizing law has become a significant feature of the international legal system.[357] Currently, no common international competition law exists.[358] Although countries do have a broad consensus on prohibiting hardcore anticompetitive conduct,[359] they have not been able to establish a binding multilateral agreement.

The chapter begins by describing the attempts to establish a multilateral competition agreement and prohibit transnational cartels. Next, it presents the mechanisms used by the UNCTAD, ICN, and OECD to encourage countries to prohibit hardcore cartels. The chapter then presents the option of promoting competition and controlling transnational cartels on a more limited basis through bilateral and regional agreements. Lastly, it provides a short overview of national law regarding the prohibition and criminalization of transnational cartels. Following this, the chapter discusses whether an international prohibition against transnational cartels has emerged.

[357] See overview at Katharina Pistor "The Standardization of Law and its Effect on Developing Economies" (2002) 50:1 American Journal of Comparative Law 97, at 97- 102.

[358] See in general the challenges facing the issue of countries' cooperation concerning international competition policy and the countries' different interests at Andrew Guzman "Is International Antitrust Possible?" (1998) 73 NYU Law Review 1501; Spencer Weber Waller "Neo-Realism and the International Harmonization of Law: Lessons from Antitrust" (1993) 42 Kansas Law Review 557, at 596- 603.

[359] Fox, Competition Policy: The Comparative Advantage of Developing Countries, *supra* note 21, at 82; Drexl, International Competition Policy after Cancún, *supra* note 21, at 428; see also WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para 47- 64; The recent OECD recommendations from July 2019, replaced the worldwide accepted recommendations from 1998, see OECD, Recommendation of the Council Concerning Effective Action against Hard Core Cartels (2019), *supra* note 26; Organisation for Economic Co-operation and Development (OECD), Recommendation of the OECD Council Concerning Effective Action against Hard Core Cartels (1998), online: http://www.oecd.org/daf/competition/review-of-the-1998-oecd-recommendation-concerning-effective-action-against-hard-core-cartels.htm; ICN, Defining Hard Core Cartel Conduct—Effective Institutions, Effective Penalties, *supra* note 20, at 5.

3.1. From the League of Nations to the WTO – Attempts to obtain binding rules

3.1.1. The League of Nations' attempt

The first modern attempt to achieve a multilateral binding agreement on competition policy can be traced back to 1927 under the League of Nations, which put hardcore cartels on its agenda at the World Economic Conference in Geneva.[360] According to this proposal, international industrial agreements that restrain trade were to be prohibited and enforced by national institutions supervised by an international institution. This indicates the understanding of several countries concerning the need to prohibit transnational cartels at that time.[361] This proposal failed, however, due to the diverse approaches among countries regarding what was considered a restriction on trade, as some countries considered hardcore cartels desirable for promoting their economies and trade.[362]

3.1.2. The International Trade Organization's attempt

A subsequent attempt was made in the 1940s under the International Trade Organization (ITO) through the Havana Charter to establish a multilateral agreement that included international competition provisions to restrain competition that could harm the flow of trade.[363] The approach in the Havana Charter was that international agreements that reduce governmental trade barriers, such as tariffs, should pay attention to private trade barriers created by businesses like hardcore

[360] Leslie Runciman "The World Economic Conference at Geneva" (1927) 37:147 The Economic Journal 465, at 468; Oliver Budzinski "International Antitrust Institutions" in Roger D. Blair and Daniel D. Sokol (eds.) *The Oxford Handbook of International Antitrust Economics* (Oxford University Press, 2014) 119, at 130 refers to Wyatt C. Wells, *Antitrust and the Formation of the Postwar World* (Columbia University Press, 2002) at 10- 11.

[361] Budzinski, International Antitrust Institutions, *supra* note 360, footnote 12.

[362] Ioannis Lianos "The Contribution of the United Nations to the Emergence of Global Antitrust Law" (2006) 15:2 Tulane Journal of International & Comparative Law 415, at 418- 419; Christopher Garrett Lehrer "Ensuring Competition Law Enforcement Under International Trade Agreements" (2017) 26:2 Transnational Law & Contemporary Problems 449, at 465- 466.

[363] Fox, International Antitrust and the Doha Dome, *supra* note 13, at 912- 913; Diane P. Wood "The Impossible Dream: Real International Antitrust" (1992) 1992 University of Chicago Legal Forum 277, at 281–284.

cartels, which could also limit domestic markets to foreign businesses.[364] Article 46 and Chapter V of the Havana Charter required that each state member take measures to prevent business practices from affecting international trade, such as through price-fixing, market allocation, production restrictions, or the exclusion of competitors.[365] Therefore, the suggested enforcement mechanism relied on the enforcement of member states with the obligation of adequate enforcement and notification and reporting to the ITO, in addition to complying with its recommendations.[366]

The Havana Charter collapsed because developed countries and developing countries had differing demands. For example, developing countries required "unequal treatment," while other countries, including Britain, asked to apply the "non-discrimination" principle to all countries.[367] Furthermore, the U.S. Congress did not ratify the Charter due to political opposition and its preference for an isolationist approach.[368] These factors reflect the countries' hesitation to transfer some of their sovereignty power to international institutions.[369] Thus, this option was dismissed.[370] GATT was adopted in 1947, but the negotiation rounds concerning multilateral free trade did not

[364] Gifford, The Draft International Antitrust Code Proposed at Munich, *supra* note 62, at 1- 2.

[365] United Nations, United Nations Conference on Trade and Employment, Havana Charter for an International Trade Organization UN Doc. E/807 (1948), online: https://www.wto.org/english/docs_e/legal_e/havana_e.pdf; Phan, Realism and International Cooperation in Competition Law, *supra* note 62, at 324.

[366] Article 50 to the Havana Charter for and International Trade Organization, *supra* note 365.

[367] Phan, Realism and International Cooperation in Competition Law, supra note 62, at 326.

[368] Hugh M. Hollman, William E. Kovacic & Andrew S. Robertson "Building Global Antitrust Standards: the ICN's Practicable Approach" in Ezrachi, Ariel (ed.) *Research Handbook on International Competition Law* (Elgar Publishing, 2012) 89, at 95- 96; Phan, Realism and International Cooperation in Competition Law, *supra* note 62, at 326.

[369] Peter Hilpold "Regulating International Competition Issues by Regional Trade Agreements: A Stepping Stone Towards a Plurilateral Trade Agreement?" in Christoph Herrmann, Markus Krajewski & Jörg Philipp Terhechte (eds.) *European Yearbook of International Economic Law (EYIEL)* (Springer, 2013) 71, at 74.

[370] Cejnar & Burgess, The Globalization of Competition Law: Yes or No?, *supra* note 13, at 11; Bradford, Antitrust Law in Global Markets, *supra* note 60, at 313.

include provisions on competition.[371]

3.1.3. Economic and Social Council of the United Nations' attempt

A later attempt at a multilateral competition agreement was made in the early 1950s under the Economic and Social Council (ECOSOC) of the United Nations.[372] In 1953, ECOSOC published a draft based on Chapter V of the Havana Charter recommending establishing an international organization that was qualified to receive and investigate complaints against restrictive business practices. The United States opposed this option, however, citing a disparity between domestic law and policies. Thus, an international organization was not desirable, and it was deemed preferable to support the development of domestic rules to address those matters.[373]

3.1.4. The Draft International Antitrust Code

In 1992 and 1993 a group of experts at the Max Planck Institute drafted a detailed proposal on international competition law, the Draft International Antitrust Code (DIAC), which was presented to the OECD and WTO.[374] The DIAC was supposed to provide a framework for dealing with international competition through GATT, and later the WTO. The DIAC's expert group relied on five principles in drafting their code. First, the DIAC was not to serve as an international hard or a soft law but rather would allow national law to address the international competition problem.[375] Second, the DIAC was to apply the non-discrimination principle in the treatment of domestic

[371] Lianos, The Contribution of the United Nations to the Emergence of Global Antitrust Law, *supra* note 362, at 418- 420.

[372] Guzman, Is International Antitrust Possible, *supra* note 358, at 1535- 1536; Lehrer, Ensuring Competition Law Enforcement Under International Trade Agreements, *supra* note 362, at 465- 466.

[373] Cejnar & Burgess, The Globalization of Competition Law: Yes or No? *supra* note 13, at 11; Wood, The Impossible Dream: Real International Antitrust, *supra* note 363, at 284- 285.

[374] Mitchell, Broadening the Vision of Trade Liberalisation: International Competition Law and the WTO, *supra* note 7, at 356- 357.

[375] Fikentscher, The Draft International Antitrust Code (DIAC) in the Context of International Technological Integration, *supra* note 59, at 536- 537.

businesses and foreign businesses.[376] Third, the DIAC was to adopt the approach of the minimum-standards principle, which would include anticompetitive behaviours that are considered wrong based on a consensus among states and aim to establish equal international standards in different countries.[377]

The fourth principle is the principle of self-execution, where a state applies its law against offenders in its jurisdiction.[378] This self-execution, however, should be supervised by an international agency, suggested to be GATT, later replaced by the WTO. The international agency could intervene when a state did not apply its commitment according to the code by taking action in the national courts, bringing suits against firms, having the right to appeal in all competition cases, and "charg[ing] an adhering nation with a violation of the Code and to bring that nation before the International Antitrust Panel."[379] The international agency would still be bound to the national competition law accepted by the particular state. Thus, this was a procedural intervention: the Principle of International Procedural Initiative ("IPI").[380] The fifth principle is that the DIAC would be applied to cross-border competition issues, while national competition cases would remain exclusively national.[381] The DIAC failed due to the difference in competition law and policy among the members of GATT and was ultimately rejected.[382]

---

[376] Fikentscher, The Draft International Antitrust Code (DIAC) in the Context of International Technological Integration, *supra* note 59, at 537.

[377] Fikentscher, The Draft International Antitrust Code (DIAC) in the Context of International Technological Integration, *supra* note 59, at 537.

[378] Fikentscher, The Draft International Antitrust Code (DIAC) in the Context of International Technological Integration, *supra* note 59, at 538; see also at Phan, Realism and International Cooperation in Competition Law, *supra* note 62, at 326- 327.

[379] Gifford, The Draft International Antitrust Code Proposed at Munich, *supra* note 62, at 26- 27.

[380] Fikentscher, The Draft International Antitrust Code (DIAC) in the Context of International Technological Integration, *supra* note 59, at 538- 539.

[381] Fikentscher, The Draft International Antitrust Code (DIAC) in the Context of International Technological Integration, *supra* note 59, at 539.

[382] Hollman, Kovacic & Robertson, Building Global Antitrust Standards: the ICN's Practicable Approach, *supra* note 368, at 96; Gifford, The Draft International Antitrust Code Proposed at Munich, *supra* note 62, at 4.

3.1.5. The WTO's attempt

The last serious attempt to adopt a binding multilateral competition agreement was through the WTO, which was considered an appropriate forum for a multilateral agreement on competition due to the negative effect of transnational cartels and other cross-border anticompetitive practices on international trade that the WTO promotes.[383] Other rationales include the WTO's broad-based membership of developed and developing countries, the option to resolve conflicts among countries through its dispute-settlement mechanism,[384] and its ability to provide technical assistance and support to developing countries in building competition regimes.[385] Article 23 of the Doha Ministerial Declaration recognized the contribution of competition to international trade, as it states: "Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development."[386]

In 1997, the WTO established the Working Group on the Interaction Between Trade and Competition Policy (WGTCP). The WGTCP discussions were built on views and opinions from member states and other organizations (such as the World Bank and the OECD) about competition and how to promote negotiations and establish a possible agreement. The WGTCP, in its seven annual reports from 1997 to 2003, discussed the relationship between international competition and international trade, including the influence of anticompetitive conduct on trade;[387] the

[383] WTO, Report (2001) of the Working Group on the Interaction Between Trade and Competition Policy, *supra* note 4, para 92; WTO, Report (2003) of the Working Group on the Interaction Between Trade and Competition Policy, *supra* note 15, para 13- 15.

[384] Aditya Bhattacharjea "The Case for a Multilateral Agreement on Competition Policy: A Developing Country Perspective" (2006) 9:2 Journal of International Economic Law 293, at 295- 296.

[385] WTO, Report (2001) of the Working Group on the Interaction Between Trade and Competition Policy, *supra* note 4, para 92.

[386] World Trade Organization (WTO), Doha 4th Ministerial - Ministerial declaration (14 November 2001), online: https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm

[387] WTO, Report (1998) of the Working Group on the Interaction Between Trade and Competition Policy, *supra* note 7, para 81- 96.

relationship between competition and intellectual property and investment;[388] the effect of competition on core international free-trade principles, such as transparency, non-discrimination, and procedural fairness;[389] the promotion of cooperation and communication among WTO members in competition context;[390] and other issues.

A broad discussion was given to possible multilateral agreements, with the expectation of providing clear and precise information on members' possible obligations under a competition agreement.[391] The WGTCP acknowledged the need for a multilateral approach due to the globalization of business activity and the increasing activity of anticompetitive behaviour across several countries.[392] Separate bilateral agreements among all the relevant countries could be time-consuming and might not cover all the relevant countries. Moreover, countries with powerful enforcement abilities might not be interested in cooperating with countries with weak enforcement abilities. In addition, as a multilateral agreement was considered necessary for developing

[388] WTO, Report (1998) of the Working Group on the Interaction Between Trade and Competition Policy, *supra* note 7, para 112- 134.

[389] WTO, Report (1999) of the Working Group On the Interaction Between Trade and Competition Policy, *supra* note 20, para 10- 37; World Trade Organization (WTO), Report (2000) of the Working Group On the Interaction Between Trade and Competition Policy to the General Council WT/WGTCP/4 (2000), para at 11- 15 online: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/WGTCP/4.pdf&Open=True; WTO, Report (2001) of the Working Group on the Interaction Between Trade and Competition Policy, *supra* note 4, para 11- 46; WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para at 17- 40; WTO, Report (2003) of the Working Group On the Interaction Between Trade and Competition Policy, *supra* note 15, para 20; World Trade Organization (WTO), Study on Issues Relating to a Possible Multilateral Framework on Competition Policy, Working Group on the Interaction Between Trade and Competition Policy, WT/WGTCP/W/228 (2003) (prepared by Simon J. Evenett), para 185- 207 online: https://docs.wto.org/dol2fe/Pages/FE_Search/MultiDDFDocuments/46167/Q:/WT/WGTCP/W228-00.pdf;Q:/WT/WGTCP/W228-01.pdf;Q:/WT/WGTCP/W228-02.pdf;Q:/WT/WGTCP/W228-03.pdf/; see also the OECD discussion on the link between international competition and the core principles of international trade at OECD, Trade and Competition: From Doha to Cancun, *supra* note 7, at 8- 15.

[390] WTO, Report (1999) of the Working Group on the Interaction Between Trade and Competition Policy, *supra* note 20, para 38- 64; WTO, Report (2000) of the Working Group on the Interaction Between Trade and Competition Policy, *supra* note 389, para 16- 99; WTO, Report (2001) of the Working Group on the Interaction Between Trade and Competition Policy, *supra* note 4, para 47- 93.

[391] WTO, Report (2003) of the Working Group on the Interaction Between Trade and Competition Policy, *supra* note 15, para 19.

[392] WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para 67.

countries with limited or no bilateral and regional agreements,[393] a multilateral approach was favourable.[394] This approach was not considered a replacement for bilateral and regional agreements, however, but rather as complementary because bilateral and regional agreements can supplement multilateral agreements in different areas of cooperation.[395]

The WGTCP discussed the need for binding or voluntary international cooperation to address anticompetitive practices in a globalized economic environment.[396] Not all countries, however, were in favour of a binding agreement because of differences in the level of development among countries and the undesirability of a comprehensive competition agreement based on the recognition that no competition policy fits all countries.[397] Finally, the differing enforcement abilities of the countries was another reason they were not in favour of binding agreements. Thus, voluntary cooperation based on countries' mutual enforcement interests was considered.[398] Voluntary cooperation can be implemented for general matters, such as the exchange of experience and views, or on specific matters that refer to individual cases that include notification, the exchange of information and evidence, and mutual assistance on enforcement. This voluntary cooperation can be expanded to various anticompetitive areas, including abuse of one's dominant position and vertical restraints.[399] Another view, however, was that voluntary cooperation would

[393] WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para 8.

[394] WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para 52.

[395] WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para 81.

[396] WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para 66.

[397] WTO, Report (2000) of the Working Group on the Interaction Between Trade and Competition Policy, *supra* note 389, para 28; WTO, Report (2003) of the Working Group on the Interaction Between Trade and Competition Policy, *supra* note 15, para 16- 18.

[398] WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para 73.

[399] WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para 68- 69.

be ineffective, as countries would have little incentive to participate without a binding agreement, particularly if they had differing enforcement abilities.[400]

The suggestion was made to narrow the commitment of a binding multilateral framework to focus on transnational cartels due to the broad consensus among countries against this practice.[401] The evidence before the working group showed that the known transnational cartels caused severe harm to international trade and the expected welfare, particularly in developing countries.[402] By contrast, countries had no consensus on anticompetitive conduct beyond hardcore cartels, for instance on mergers, vertical restraints, and monopolies.[403]

The suggestion was made to provide a clear definition of hardcore cartels through negotiations and to ban those cartels, while the penalties would need to be a matter of domestic law under WTO guidelines.[404] The WGTCP pointed out there was no clear definition of hardcore cartels, with different countries using different definitions and prohibitions.[405] One issue was whether hardcore cartels should be defined according to efficiency grounds.[406] Another issue was whether the WTO discussion was in accordance with the 1998 OECD report and restricted hardcore cartels to "price-fixing, bid-rigging, market allocation, and output restrictions" or

[400] WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para 70- 74. There, they use the term "international cartels."

[401] WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para 70- 79; WTO, Report (2000) of the Working Group on the Interaction Between Trade and Competition Policy, *supra* note 389, para 39. The reports use the term "international cartels" to describe those conducts.

[402] The evidence showed that hardcore cartels affected developing countries by approximately 6.7 percent of all their imports in the year 1997, or a total of USD 81.1 billion in goods and services, see WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para 49.

[403] WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para 61.

[404] WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para 53.

[405] WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para 55.

[406] WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para 55.

whether those restrictions should simply be the starting point for further discussion.[407] Furthermore, countries raise the need for exemptions from prohibitions when necessary, such as for industry-specific regulations or a specific field.[408]

The WGTCP discussed whether hardcore cartels should include a *per se* approach or rule of reason approach.[409] The *per se* approach was recognized as preferable, as it would ban price-fixing and bid-rigging.[410] Other views expressed, however, were that there was no justification for limiting output restrictions and market allocation at the international level, as they are not limited to the size of the market at the domestic level.[411] Another view expressed during the WGTCP discussion was that multilateral agreements should not limit countries to providing some exemptions in specific industrial fields or exemptions involving small and medium-sized enterprises and export and import cartels. Exemptions should, however, be narrowly defined, as well as transparent and temporary.[412]

The WGTCP concluded that transnational hardcore cartels are a serious global phenomenon, but further discussion was needed on "definitions, exemptions and other dimensions of provisions on hard core cartels in a multilateral framework on competition policy."[413]

---

[407] WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para 55.

[408] WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para 24, 55.

[409] WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para 55- 56.

[410] WTO, Report (2002) of the Working Group on the Interaction Between Trade and Competition Policy, *supra* note 15, para 55- 56; WTO, Report (2003) of the Working Group on the Interaction Between Trade and Competition Policy, *supra* note 15, para 49.

[411] WTO, Report (2002) of the Working Group on the Interaction Between Trade and Competition Policy, *supra* note 15, para 56.

[412] WTO, Report (2002) of the Working Group on the Interaction Between Trade and Competition Policy, *supra* note 15, para 42, 53 & 59.

[413] WTO, Report (2002) of the Working Group on the Interaction Between Trade and Competition Policy, *supra* note 15, para 64.

Ultimately, no agreement was achieved among the WTO members regarding a multilateral agreement on competition, and the WGTCP has been inactive since the Cancún Conference in 2003.[414] As a result, the WTO General Council dismissed the issue of competition from the WTO agenda by its decision of 1 August 2004.[415]

3.2. UNCTAD and the UN Set

The UNCTAD plays a vital role in developing norms on competition policy. In addition, UNCTAD provides a forum for government representatives and experts to discuss competition issues, undertakes voluntary peer review, conducts research, and collects data.[416]

UNCTAD focuses on the needs of developing countries. It assists them in adopting and revising competition law, provides technical assistance in applying competition law in developing countries' jurisdictions, and facilitates connections between developing and developed countries in competition matters.[417]

Furthermore, UNCTAD has various working groups that discuss specific matters in competition policy. For example, UNCTAD has a working group on international cooperation on

[414] Anderson, Müller & Sen, Competition Policy in WTO Accessions: Filling in the Blanks in the International Trading System, *supra* note 1, at 301; for more explanation about the failure of the negotiating on the international antitrust agreement between countries, see Bradford, International Antitrust Negotiations and the False Hope of the WTO, *supra* note 59; Eleanor M. Fox "Linked-In: Antitrust and the Virtues of a Virtual Network" (2009) 43:1 The International Lawyer 151, at 154- 157.

[415] See World Trade Organization, General Council Decision, Doha Development Agenda WT/L/579 1(g) (1 August 2004), online: https://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm

[416] United Nations Conference on Trade and Development (UNCTAD), Competition and Consumer Protection, online: https://unctad.org/Topic/Competition-and-Consumer-Protection; UNCTAD, Implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices: Note by the UNCTAD secretariat, *supra* note 3.

[417] United Nations, United Nations Conference on Trade and Development (UNCTAD), Guiding Policies and Procedures under Section F of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices UNCTAD/DITC/CPLP/MISC/2021/2, (2021) at 8, online: https://unctad.org/system/files/official-document/ditccplpmisc2021d2_en.pdf

competition law enforcement,[418] a working group on cross-border cartels,[419] and other working groups related to competition and consumer protection.

3.2.1. The UN Set

Negotiation under the UN to control restrictive business practices began in 1973[420] following developing countries' efforts to create a different economic order.[421] The outcome of those negotiations created the only agreed-upon international agreement on competition,[422] "The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices"[423] (UN Set) in Geneva on 22 April 1980.[424] On 5 December 1980, the United Nations General Assembly empowered UNCTAD to be the main UN forum for competition issues and adopted the UN Set under resolution 35/63.[425] The UN Set defines "restrictive business practices"

[418] United Nations Conference on Trade and Development (UNCTAD), Working Group on International Cooperation on Competition Law Enforcement, online: https://unctad.org/Topic/Competition-and-Consumer-Protection/working-group-on-competition-law-enforcement

[419] United Nations Conference on Trade and Development (UNCTAD), Working Group on Cross-Border Cartels, online: https://unctad.org/Topic/Competition-and-Consumer-Protection/working-group-on-cross-border-cartels

[420] Cejnar & Burgess, The Globalization of Competition Law: Yes or No?, *supra* note 13, at 12.

[421] Lianos, The Contribution of the United Nations to the Emergence of Global Antitrust Law, *supra* note 362, at 418- 412; Wood, The Impossible Dream: Real International Antitrust, *supra* note 363, at 285- 286; Judith M. Czako "The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices Recent Development" (1981) 13 Law and Policy in International Business 313, at 316- 317.

[422] UNCTAD, Implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices: Note by the UNCTAD secretariat, *supra* note 3, at 2.

[423] United Nations Conference on Trade and Development (UNCTAD), The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices in United Nations Conference on Trade and Development (UNCTAD), The United Nations Set of Principles and rules on Competition UNCTAD, TD/RBP/CONF/10/Rev.2 (2000) at 7, online: https://unctad.org/en/Pages/DITC/CompetitionLaw/The-United-Nations-Set-of-Principles-on-Competition.aspx; The set also known as the Restrictive Business Practices Code (RBPC), see Czako, The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices Recent Development, *supra* note 421, at 313.

[424] Basedow, International Antitrust: From Extraterritorial Application to Harmonization, *supra* note 62, at 1042-1043; Eleanor M. Fox "Harnessing the Multinational Corporation to Enhance Third World Development - The Rise and Fall and Future of Antitrust as Regulator" (1988) 10 Cardozo Law Review 1981, at 1992- 1993.

[425] United Nations, The General Assembly Resolution Number 35/63 Restrictive business practices, (5 December 1980), online: https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/390/82/IMG/NR039082.pdf?OpenElement; UNCTAD, Competition and Consumer Protection, *supra* note 416.

as:

> acts or behaviour of enterprises which, through an abuse or acquisition and abuse of a dominant position of market power, limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries, or which through formal, informal, written or unwritten agreements or arrangements among enterprises, have the same impact.[426]

Section D.3. of the UN Set suggests that enterprises "should refrain from practices such as the following when … they limit access to markets or otherwise unduly restrain competition." Such practices include:

> (a) Agreements fixing prices, including as to exports and imports;
> (b) Collusive tendering;
> (c) Market or customer allocation arrangements;
> (d) Allocation by quota as to sales and production;
> (e) Collective action to enforce arrangements, e.g. by concerted refusals to deal;
> (f) Concerted refusal of supplies to potential importers;
> (g) Collective denial of access to an arrangement, or association, which is crucial to competition.

The UN Set provides rules to control anticompetitive behaviours and encourages the adoption and strengthening of competition laws and policies on national and supranational levels.[427] In addition, the UN Set includes provisions on collaboration, mutual assistance, the exchange of information, and the application of national law on restrictive cross-border practices.[428] The UN Set also provides model law on competition to provide a reference for countries to adopt or revise their national law.[429]

---

[426] UNCTAD, The United Nations Set of Principles and rules on Competition, *supra* note 423, at section B.

[427] UNCTAD, Guiding Policies and Procedures under Section F of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, *supra* note 417, at 8; Mitchell, Broadening the Vision of Trade Liberalisation: International Competition Law and the WTO, *supra* note 7, at 353.

[428] UNCTAD, The United Nations Set of Principles and rules on Competition, *supra* note 423; Lianos, The Contribution of the United Nations to the Emergence of Global Antitrust Law, *supra* note 362, at 427.

[429] United Nations Conference on Trade and Development (UNCTAD), Model Law on Competition, TD/RBP/CONF.5/7/Rev.3, (2010; revised 1 June 2019), online: https://unctad.org/en/Docs/tdrbpconf5d7rev3_en.pdf

The general objectives of the UN Set are to ensure that restrictive business practices do not impede the benefits of world trade or eliminate the disadvantages that may result, promote social welfare and protect consumers in developed and developing countries, and encourage the efficiency of international trade and development.[430]

The UN Set points out the adverse effect of restrictive business practices, including those of transnational businesses, on international trade and developing countries.[431] It calls, however, for avoiding certain restrictive business practices by using general terms and leaving room for various possible interpretations.[432] In addition, the rules that aim to prohibit restrictive business practices are written as recommendations to enterprises to avoid such conduct rather than as mandatory prohibitions.[433] Nonetheless, specific prohibitions remain a local matter of the country of operation, and the enforcement remains under national jurisdiction in the affected countries.[434] This empowers the relevant affected countries to prohibit any restrictive business practice that poses potential harm to its market.

The UNCTAD holds a conference every five years to review the UN Set on Competition. In its fourth conference, on 25–29 September 2000,[435] UNCTAD reviewed and reaffirmed the UN Set's validity and called upon all members to implement its provisions.[436]

---

[430] UNCTAD, The United Nations Set of Principles and rules on Competition, *supra* note 423, at section A.

[431] UNCTAD, The United Nations Set of Principles and rules on Competition, *supra* note 423, at section B. 4.

[432] Czako, The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices Recent Development, *supra* note 421, at 324.

[433] UNCTAD, The United Nations Set of Principles and rules on Competition, *supra* note 423, at section D.

[434] UNCTAD, The United Nations Set of Principles and rules on Competition, *supra* note 423, at section D.1.

[435] United Nations Conference on Trade and Development (UNCTAD), Fourth United Nations Conference to review all aspects of the set of multilaterally agreed equitable principles and rules for the control of restrictive business practices, online: https://unctad.org/meeting/fourth-united-nations-conference-review-all-aspects-set-multilaterally-agreed-equitable

[436] UNCTAD, The United Nations Set of Principles and rules on Competition, *supra* note 423, at 1.

The UN Set is meant to be universal to all countries and enterprises, regardless of the parties involved in the transaction or behaviour.[437] The UN Set has limited power, however, for two main reasons. First, it has no legally binding effect, and has thus remained voluntary and is adopted at the discretion of each country.[438] The UN Charter did not empower the General Assembly to adopt binding decisions concerning competition, only recommendations.[439] Moreover, the process by which the UN Set was approved and confirmed by states does not indicate that the states expressed their intent for it to become a legally binding agreement.[440]

Second, the UN Set broadly represents developing countries' interests and does not fully promote developed countries' understanding of competition as promoting efficiency rationales.[441] The EU and United States are only partially involved in the UNCTAD programme. Thus, UNCTAD's competition policy does not conform to a global competition agenda, and it plays a secondary role in international competition compared to the role of the OECD and ICN in developing soft law.[442] Thus, the UN Set has limited influence and does not establish a binding practice toward other states or international organizations, nor is it considered a source of binding international competition law.[443]

---

[437] UNCTAD, The United Nations Set of Principles and rules on Competition, *supra* note 423, at section B.7.

[438] Phan, Realism and International Cooperation in Competition Law, *supra* note 62, at 337; Lianos, The Contribution of the United Nations to the Emergence of Global Antitrust Law, *supra* note 362, at 429; Wood, The Impossible Dream: Real International Antitrust, *supra* note 363, at 286- 287.

[439] Lianos, The Contribution of the United Nations to the Emergence of Global Antitrust Law, *supra* note 362, at 431- 432.

[440] Lianos, The Contribution of the United Nations to the Emergence of Global Antitrust Law, *supra* note 362, at 432.

[441] Lianos, The Contribution of the United Nations to the Emergence of Global Antitrust Law, *supra* note 362, at 455.

[442] Sokol, International Antitrust Institutions, *supra* note 271, at 200; Lianos, The Contribution of the United Nations to the Emergence of Global Antitrust Law, *supra* note 362, at 456; Bradford, Antitrust Law in Global Markets, *supra* note 60, at 315.

[443] Wood, The Impossible Dream: Real International Antitrust, *supra* note 363, at 286- 287.

3.2.2. Cross-border cartels

In 2020, the Eight Conference of UNCTAD focused on the problem of "cross-border" cartels.[444] UNCTAD recognizes the severe harm and serious challenges that cross-border cartels raise for competition authorities around the world and the need for effective cooperation to help authorities overcome the obstacles of enforcement related to them.[445] Thus, one important outcome of the Eight Conference was the establishment of a special working group for this matter.[446]

The Working Group on Cross-Border Cartels includes competition authority representatives from member states and other stakeholders from international organizations, networks, academia, and civil society.[447] At the few meetings held since its establishment, several topics have been suggested for discussion, including best practices for combatting cross-border cartels, sanctions that would be useful in cross-border cartel enforcement, and the drafting of international standards for cross-border cartels.[448]

3.3. The OECD's recommendations

The OECD has been discussing competition issues since 1961.[449] It provides a platform for meeting competition agencies from both OECD members and non-OECD members, collecting

[444] UNCTAD, Report of the Eighth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, *supra* note 105, at 15.

[445] UNCTAD, Report of the Eighth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, *supra* note 105, at 15.

[446] UNCTAD, Working Group on Cross-Border Cartels, *supra* note 419.

[447] United Nations Conference on Trade and Development (UNCTAD), Report on the Working Group on Cross-Border Cartels - UNCTAD Secretariat Note, (2021), at 2, online: https://unctad.org/system/files/information-document/ccpb_IGECOMP2021_Report_WG_Cross_Border_Cartels_en.pdf

[448] UNCTAD, Report on the Working Group on Cross-Border Cartels -UNCTAD Secretariat Note, *supra* note 447, at 2 & 4.

[449] Shaffer, Criminalizing Cartels: A Global Trend, *supra* note 21, at 330.

data regarding competition violations and sanctions, publishing research and guidelines, suggesting enforcement tools against competition violations, and providing technical assistance programmes and training for competition authorities.[450]

The OECD holds the OECD Global Forum on Competition and organizes an annual meeting for officials from more than 110 competition authorities from both OECD and non-OECD members and other experts and organizations to discuss current competition topics relevant to the global competition agenda.[451] The OECD regularly publishes reports on competition law and policy areas.[452] It also promotes roundtable dialogues that enable an exchange of views among countries and experts and an opportunity to discuss various competition issues.[453] These discussions often generate non-binding recommendations and suggest best practices for dealing with diverse competition issues.[454]

3.3.1. Recommendation on hardcore cartels

The OECD strongly calls for enhanced international cooperation against hardcore cartels.[455] The recent OECD recommendations from July 2019[456] replaced the worldwide accepted

[450] Shaffer, Criminalizing Cartels: A Global Trend, *supra* note 21, at 330; Sokol, International Antitrust Institutions, *supra* note 271, at 198- 199.

[451] Organisation for Economic Co-operation and Development (OECD), Global Forum on Competition, online: https://www.oecd.org/competition/globalforum/

[452] Organisation for Economic Co-operation and Development (OECD), Reports by the Competition Committee, online: https://www.oecd.org/daf/competition/reportsbythecompetitioncommittee.htm

[453] Organisation for Economic Co-operation and Development (OECD), Best Practice Roundtables on Competition Policy, online: https://www.oecd.org/daf/competition/roundtables.htm; Sokol, International Antitrust Institutions, *supra* note 271, at 199.

[454] Organisation for Economic Co-operation and Development (OECD), Recommendations and Best Practices on Competition Law and Policy, online: http://www.oecd.org/daf/competition/recommendations.htm

[455] OECD, Trade and Competition: From Doha to Cancun, *supra* note 7, at 20.

[456] OECD, Recommendation of the Council Concerning Effective Action against Hard Core Cartels (2019), *supra* note 26.

recommendations from 1998,[457] following a review of those recommendations in 2019.[458] The review found that the 1998 recommendations lacked some notable developments in the last 20 years, particularly on the leniency programs that proved to be very effective[459] and the need to improve the effectiveness of enforcement.[460]

The recommendations of 2019 acknowledge that "hard core cartels are the most egregious violations of competition law," as they "aim to fix and raise prices, restrict supply and divide or share markets, thereby causing substantial economic harm,"[461] and consider that, "in a globalised economy international cartels distort competition and have a detrimental effect on consumers and market participants."[462] Thus, the OECD view is that effective enforcement and sanctions with an international approach of close cooperation among competition authorities must be carried out to deter hardcore cartels.[463]

The 2019 recommendations suggest fighting hardcore cartels as follows. First, prohibit hardcore cartels in all countries regardless of the need to prove their harmful effect on the market and establish adequate compensation for the cartels' victims.[464] Second, establish an effective deterrence system, which includes an effective leniency program. Third, empower the

[457] OECD, Recommendation of the OECD Council Concerning Effective Action against Hard Core Cartels (1998), *supra* note 359.

[458] OECD, Review of the 1998 OECD Recommendation Concerning Effective Action against Hard Core Cartels, (2019), *supra* note 14.

[459] OECD, Review of the 1998 OECD Recommendation Concerning Effective Action against Hard Core Cartels, (2019), *supra* note 14, at 11.

[460] OECD, Recommendation of the Council Concerning Effective Action against Hard Core Cartels (2019), *supra* note 26, at 3; OECD, Review of the 1998 OECD Recommendation Concerning Effective Action against Hard Core Cartels, (2019), *supra* note 14, at 7- 8.

[461] OECD, Recommendation of the Council Concerning Effective Action against Hard Core Cartels (2019), *supra* note 26, at 3.

[462] OECD, Recommendation of the Council Concerning Effective Action against Hard Core Cartels (2019), *supra* note 26, at 5.

[463] OECD, Recommendation of the Council Concerning Effective Action against Hard Core Cartels (2019), *supra* note 26, at 5.

[464] OECD, Recommendation of the Council Concerning Effective Action against Hard Core Cartels (2019), *supra* note 26, at 5- 6.

investigation mechanism with active investigations. Fourth, increase collaboration between competition authorities and other public entities and authorities in the jurisdiction, which can help suppress hardcore cartels. Fifth, enable an early settlement, such as a plea bargain. Sixth, provide effective sanctions to deter hardcore cartels. Seventh, enable and support victims in prosecuting cartels and claiming compensation through various means. Eighth, support the advocacy efforts to promote competition. The final recommendation was to restrict the exemption of hardcore cartels to limited necessary goals.[465]

In 2020, the OECD launched a roundtable to discuss the option to criminalize hardcore cartels and impose imprisonment on individuals.[466] The discussion included the participation of specialists in the field and presented the opinions of 20 countries. The discussion also provided theoretical arguments for criminalizing hardcore cartels and the challenges and benefits of using imprisonment in such situations. One of the main conclusions of the discussion was that, at this point, countries should build institutions to address competition issues before debating criminalizing hardcore cartels and choose the combination of sanctions against hardcore cartels according to each jurisdiction's perception.[467]

3.3.2. Source of information and potential monitoring center

The OECD also established a significant source of information for competition issues in different

[465] OECD, Recommendation of the Council Concerning Effective Action against Hard Core Cartels (2019), *supra* note 26, at 6- 7.

[466] Organisation for Economic Co-operation and Development (OECD), Best Practice Roundtables on Competition Policy, Criminalisation of cartels and bid rigging conspiracies (9 June 2020), online: https://www.oecd.org/daf/competition/criminalisation-of-cartels-and-bid-rigging-conspiracies.htm

[467] OECD, Criminalisation of Cartels and Bid Rigging Conspiracies: A Focus on Custodial Sentence, *supra* note 18; the OECD also discussed the option of imposing a sanction against individuals in 2003, see Organisation for Economic Co-operation and Development (OECD), Cartel Sanctions against Individuals (2003-2004) DAF/COMP (2004)39 (2003- 2004), online: https://www.oecd.org/competition/cartels/34306028.pdf

jurisdictions, including non-OECD members. The OECD conducts a peer review of countries' competition systems in which it assesses how each country deals with competition, identifies its competition institutes' weaknesses and strengths, and facilitates necessary change in the legal system.[468] Another important aspect is its role in providing information about trends in competition from a global perspective.[469]

The OECD also has a valuable information center that collects information and evidence about the activity and prosecution of transnational cartels. The International Cartels Database[470] contains approximately 200 references related to transnational cartels since 2012 from approximately 50 jurisdictions. Also contained in the database is information about different aspects of cartel operation, including geographic extension, industries, jurisdictions, damages, sanctions, and cartel participants. The database was based on Professor John Connor's database on transnational cartels, which he collected during the period of 1989–2018 and was acquired by the OECD in 2017.[471]

Although those information sources do not represent the full and precise situation of competition violations and enforcement in worldwide jurisdictions, they are important to furthering the discussions and research on developing desirable global competition policy. Those information sources can also serve as a first step toward establishing a monitoring mechanism for evaluating the performance of different jurisdictions in fighting hardcore cartels. Such a

[468] Organisation for Economic Co-operation and Development (OECD), Country reviews of competition policy frameworks, online: https://www.oecd.org/competition/countryreviewsofcompetitionpolicyframeworks.htm; Sokol, International Antitrust Institutions, *supra* note 271, at 198.

[469] Organisation for Economic Co-operation and Development (OECD), OECD Competition Trends, online: https://www.oecd.org/competition/oecd-competition-trends.htm

[470] OECD, OECD International Cartels Database (ICStats), *supra* note 65.

[471] OECD, OECD International Cartels Database (ICStats), *supra* note 65; OECD, OECD Competition Trends 2020, *supra* note 14, at 6.

mechanism exists: for example, in the global efforts to fight foreign corruption[472] and control money-laundering practices.[473]

Another potential monitoring mechanism is a global information agency,[474] which could provide the public and worldwide authorities with information about illegal activities that occur in different jurisdictions. If the OECD database can be developed to reach a sufficient level of monitoring of illegal transnational activities, accurately estimates the number of hardcore cartels in a specific jurisdiction, and examines the precise enforcement against them, it can be a valuable tool for assessing the economic environment in a jurisdiction. For example, a jurisdiction with poor enforcement against hardcore cartels can indicate an undesirable economic environment for investment and trade for businesses and can be criticized by other jurisdictions as an undesirable member for competition and economic matters.

3.4. ICN's recommendations

The ICN is a unique organization: it is the only international body focusing exclusively on competition issues. It was established in 2001 with 15 competition agencies and has expanded to include more than 141 competition agencies worldwide,[475] as well as nongovernmental advisors

[472] The United Nations Convention against Corruption suggests the Implementation Review Mechanism (IRM), which is a peer-review process that assists state parties in implementing the convention effectively against corruption, see online: https://www.unodc.org/unodc/en/corruption/implementation-review-mechanism.html; The OECD Anti-Bribery Convention suggests the monitoring implementation mechanism, see online: http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm

[473] The mechanism is known as "mutual evaluation" under the organization of MONEYVAL http://www.coe.int/en/web/moneyval/moneyval-brief; see also: Daniel J. Steinbock "Designating the Dangerous: From Blacklists to Watch Lists" (2006) 30 Seattle University Law Review 65.

[474] Global information agency can be responsible for providing data, sharing information between state officials to coordinate relations among them, and sharing experts' opinions to define a common problem and provide a range of possible responses. See more at Anne-Marie Slaughter "Global Government Networks, Global Information Agencies, and Disaggregated Democracy" (2003) 24:4 Michigan Journal of International Law 1041, at 1059- 1065.

[475] International Competition Network, Members, online: https://www.internationalcompetitionnetwork.org/members/?location=oceania

(NGAs), academics, and practitioners who share their views and experiences on competition issues.[476]

The unsuccessful attempt to create international hard law in competition led to the alternative soft-law approach represented broadly by the ICN.[477] The ICN works under the recognition that countries are willing to have meaningful cooperation with other countries but are not prepared to bind themselves legally under international law,[478] making the organization more accessible to authorities opposed to harmonized binding rules.[479] Thus, the ICN does not create rules; instead, it promotes different policies on competition issues based on consensus among countries.[480]

The ICN provides a forum for voluntary discussion, various competition regulations, and the sharing of various practices and policies. It also produces a large volume of documents on best-practice recommendations, tools to facilitate the implementation of recommended practices, enforcement manuals, research documents, education programs, and training on implementing desirable competition policies.[481] The national competition authorities are free to decide whether to adopt these tools and recommendations in dealing with competition issues.[482]

---

[476] International Competition Network website: https://www.internationalcompetitionnetwork.org/; Hollman, Kovacic & Robertson, Building Global Antitrust Standards: the ICN's Practicable Approach, *supra* note 368, at 89-94; Sokol, International Antitrust Institutions, *supra* note 271, at 201; For a review about the ICN see Fox, Linked-In: Antitrust and the Virtues of a Virtual Network, *supra* note 414.

[477] Sokol, International Antitrust Institutions, *supra* note 271, at 200.

[478] Hollman, Kovacic & Robertson, Building Global Antitrust Standards: the ICN's Practicable Approach, *supra* note 368, at 94.

[479] François-Charles Laprévote, Sven Frisch, and Burcu Can "Competition Policy within the Context of Free Trade Agreements" (E15 initiative on Strengthening the Global Trade and Investment System for Sustainable Development, September 2015), at 18.

[480] Shaffer, Criminalizing Cartels: A Global Trend, *supra* note 21, at 332- 335.

[481] Hollman, Kovacic & Robertson, Building Global Antitrust Standards: the ICN's Practicable Approach, *supra* note 368, at 90- 101; Budzinski, International Antitrust Institutions, *supra* note 360, at 134- 137.

[482] Organisation for Economic Co-operation and Development (OECD), International Co-operation on Competition Investigations and Proceedings: Progress in Implementing the 2014 OECD Recommendation (2022), at

3.4.1. Recommendations on hardcore cartels

The ICN has special working groups for different areas of competition law. The ICN's first working group was on mergers, but it quickly expanded to hardcore cartels and other areas of competition.[483] In 2004, the ICN established a Cartel Working Group that focuses on improving and overcoming the enforcement challenges of competition authorities in dealing with domestic and transnational cartels.[484]

The ICN acknowledges the widespread consensus on the basic definition of cartels across jurisdictions, including three standard components: 1) an agreement 2) between competitors 3) to restrict competition. In addition, cartels' conduct is commonly identified as hardcore conduct if it falls under one of four categories: price-fixing; output restrictions; market allocation; and bid-rigging.[485]

Further ICN discussions include the sanctioning of cartels. These discussions include, the differences between criminal sanctions and administrative sanctions; the relevant philosophies of sanctions, retribution, and deterrence; approaches to calculating a monetary sanction based on the damages or profit of the cartel based on the businesses' turnover; the option to sanction managers or decision-makers in the business and the desirability of imprisonment; and aggravating and mitigating circumstances.[486]

18, online: https://www.oecd.org/daf/competition/international-cooperation-on-competition-investigations-and-proceedings-progress-with-2014-recommendation.pdf

[483] Sokol, International Antitrust Institutions, *supra* note 271, at 201.

[484] Sokol, International Antitrust Institutions, *supra* note 271, at 202.

[485] ICN, Defining Hard Core Cartel Conduct—Effective Institutions, Effective Penalties, *supra* note 20, at 10.

[486] International Competition Network (ICN), Setting of Fines for Cartels in ICN Jurisdictions (2017), online: http://old.internationalcompetitionnetwork.org/uploads/library/doc1127.pdf

3.5. Competition rules within trade agreements

Trade agreements are vital for promoting competition in international trade,[487] as many include competition chapters or provisions. A recent examination from 2022 of 334 Regional Trade Agreements (RTAs)[488] that have been reported to the WTO's Regional Trade Agreements Database[489] shows that 238 contain competition provisions concerning commitments to prohibit anticompetitive agreements and the abuse of market power. Other provisions address international cooperation and coordination.[490] An examination from 2019 of 296 RTAs shows that more than 80% include competition provisions and recognize the importance of competition policy to trade.[491] Of those agreements that include competition provisions, around 82% refer to anticompetitive agreements (including hardcore cartels), 80% to the abuse of market power, and 26% to mergers.[492] Around 70% of RTAs refer to cooperation, coordination, information-sharing, and consultation relating to the competition.[493]

Another study from 2019 on 267 bilateral and plurilateral free trade agreements (FTAs), including RTAs reported to the WTO,[494] shows that around 90% of FTAs include provisions on

[487] François-Charles Laprévote "Competition Policy within the Context of Free Trade Agreements" (17 October 2019) OECD, DAF/COMP/GF(2019)5, at 4, online: https://one.oecd.org/document/DAF/COMP/GF(2019)5/en/pdf. This study is an update to a previous study from 2015 see Laprévote, Frisch and Can, Competition Policy within the Context of Free Trade Agreements, *supra* note 479.

[488] RTAs in this context cover several types of trade agreements, including bilateral trade agreements between two countries (known as free trade agreements), trade agreements between one country and a group of countries (plurilateral agreements), and finally, between several countries, whether they are at the same geographical region or not (multilateral agreements); OECD, International Co-operation on Competition Investigations and Proceedings: Progress in Implementing the 2014 OECD Recommendation, *supra* note 482, at 34.

[489] World Trade Organization (WTO), Regional Trade Agreements Database, online: http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx; Nowadays, the database includes 355 RTAs.

[490] OECD, International Co-operation on Competition Investigations and Proceedings: Progress in Implementing the 2014 OECD Recommendation, *supra* note 482, at 34.

[491] Robert D. Anderson, William E. Kovacic, Anna Caroline Müller and Nadezhda Sporysheva "Competition Policy, Trade and the Global Economy: An Overview of Existing WTO Elements, Commitments in Regional Trade Agreements, Some Current Challenges and Issues for Reflection" (2019) OECD, DAF/COMP/GF (2019) 11, para 38.

[492] Anderson, Competition Policy, Trade and the Global Economy, *supra* note 491, para 55.

[493] Anderson, Competition Policy, Trade and the Global Economy, *supra* note 491, para 57.

[494] Laprévote, Competition Policy within the Context of Free Trade Agreements, *supra* note 487, at 4.

competition.[495] These provisions can include, among other obligations, one or more related to competition policy; adopting and maintaining competition law; regulating monopolies and state-owned enterprises; and cooperation and coordination mechanisms.[496] FTAs may also include competition-specific exemptions, such as in the telecommunications, the agricultural, or financial sectors.[497]

3.5.1. FTAs and dispute settlement

While many FTAs include a general dispute-settlement mechanism, some specifically exclude competition chapters from it. For example, an examination from 2019 of 296 RTAs reported to the WTO system reveals that 34% included competition provisions subject to dispute settlement.[498] More than half of RTAs with detailed competition chapters, however, do not allow a dispute settlement on competition matters.[499] Another research report from 2019 on 267 trade agreements reveals that 27% specifically exclude competition provisions in trade agreements from dispute-settlement mechanisms.[500]

A replacement for a dispute-settlement mechanism for a competition issue can be provided

[495] Laprévote, Competition Policy within the Context of Free Trade Agreements, *supra* note 487, at 5.
[496] Laprévote, Competition Policy within the Context of Free Trade Agreements, *supra* note 487, at 6- 8.
[497] Laprévote, Competition Policy within the Context of Free Trade Agreements, *supra* note 487, at 18- 20.
[498] Some EU's agreements provide examples of dispute settlement that cover competition, such as EU-Mexico Economic Partnership, Political Coordination and Cooperation Agreement (1997), online: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mexico_en; the EU-Israel Association Agreement (1995), online: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/israel_en
[499] Anderson, Competition Policy, Trade and the Global Economy, *supra* note 491, para 38 & 58; For example, Article 17.4 to The EU-Canada Comprehensive Economic and Trade Agreement (CETA) (2016), excludes competition from dispute settlements, online: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/canada/eu-canada-agreement_en; another example is Article 23.6 EU-Chile Interim Trade Agreement (2022), which excludes dispute settlements on competition matters online: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/text-agreement_en
[500] Laprévote, Competition Policy within the Context of Free Trade Agreements, *supra* note 487, at 25- 26.

through a consultation procedure.[501] For example, Article 21.7 of CUSMA excluded the competition chapter from the dispute-settlement procedure, while Article 21.6 enables a consultation mechanism.[502] Article XI.6 of the Canada–Costa Rica FTA excludes competition from dispute settlement and enables consultation.[503] This may indicate that countries consider competition chapters on trade agreement to be soft law in hard law agreements, either to improve domestic enforcement[504] or because countries prefer to solve cross-border competition issues through bilateral discussions between the relevant competition agencies than through trade remedies.[505] Others, however, see such an exclusion as making competition provisions symbolic in trade agreements and weakening their enforcement.[506]

3.6. Regional authorities

At least 11 regional economic organizations address competition law.[507] The European Union is the most integrated and comprehensive regional authority on competition matters.[508] It covers anticompetitive conduct that affects the mutual EU market, including hardcore cartels.[509] The

[501] Laprévote, Competition Policy within the Context of Free Trade Agreements, *supra* note 487, at 26.

[502] Canada- United States- Mexico Agreement (CUSMA) (2019), online: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/index.aspx?lang=eng

[503] Canada-Costa Rica Free Trade Agreement (2002), online: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/costa_rica/fta-ale/background-contexte.aspx?lang=eng

[504] Sokol, Order without (Enforceable) Law, *supra* note 59, at 262- 263 & 266- 267.

[505] Sokol, Order without (Enforceable) Law, *supra* note 59, at 265.

[506] Laprévote, Frisch and Can, Competition Policy within the Context of Free Trade Agreements, *supra* note 479, at 13- 19.

[507] UNCTAD, Implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices: Note by the UNCTAD secretariat, *supra* note 3, at 6; see also Andreea-Florina Fora "Regional Trade Agreements and Competition Policy. Case Study: EU, ASEAN and NAFTA" (2014) 23:1 Annals of the University of Oradea, Economic Science Series 86, at 89.

[508] OECD, International Co-operation on Competition Investigations and Proceedings: Progress in Implementing the 2014 OECD Recommendation, *supra* note 482, at 35.

[509] European Union, The Treaty on the Function of the European Union 2007 (2007; entered into force on 1 December 2009,) C 326/342, Title VII, Chapter 1, Section 1, Articles: 101, 102 & 103, online: https://eur-lex.europa.eu/EN/legal-content/summary/treaty-on-the-functioning-of-the-european-union.html#:~:text=The%20TFEU%20is%20one%20of,details%20of%20the%20EU%20institutions; Article 101

European Commission is mandated to investigate and impose noncriminal monetary sanctions against businesses but not individuals.[510]

The East African Community (EAC) includes Burundi, Kenya, Rwanda, South Sudan, the United Republic of Tanzania, and Uganda. In 2018, the East African Community Competition Authority became operational[511] and functions based on the East African Community Competition Act. Article 5 of the Competition Act labels hardcore cartel conduct as an offence with a limited criminal fine of one hundred thousand dollars.[512] Prosecution and enforcement, however, remain under the jurisdiction of the member states' national courts.[513]

The West African Economic and Monetary Union (WAEMU) includes Benin, Burkina Faso, Ivory Coast, Guinea-Bissau, Mali, Niger, Senegal, and Togo.[514] The treaty prohibits

---

prohibits: "1. The following shall be prohibited as incompatible with the internal 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 internal 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 connection with the subject of such contracts."

[510] Article 23 to the European Union, Council Regulation (EC) No 1/2003 (2003), online: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32003R0001; see also Fora, Regional Trade Agreements and Competition Policy. Case Study: EU, ASEAN and NAFTA, *supra* note 507, at 89; Okane, Cartel Enforcement: A Product of Globalisation, *supra* note 20, at 229- 230.

[511] East African Community Competition Authority, online: https://www.eacompetition.org/; UNCTAD, Implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices: Note by the UNCTAD secretariat, *supra* note 3, at 8.

[512] Article 5 to the East African Community Competition Act (2006), online: https://www.eacompetition.org/laws/category/competition-act; Article 5.2 prohibits: "a person shall not engage in the following practices— (a) collusion by competitors to fix prices; (b) collusive tendering and bid rigging; (c) collusive market or customer allocation; (d) quantitative restraints on investment, input, output or sales; (e) barring competitors from access to the market or from access to an association or arrangement which is essential for competition; (f) concerted practice restricting movement of goods within the Community."; Article 5.4 treats the prohibition as an offence: " (4) A person who contravenes this section commits an offence and shall be liable to a fine of not more than one hundred thousand dollars."

[513] Article 48.2 to the East African Community Competition Act, *supra* note 512.

[514] Organisation for Economic Co-operation and Development (OECD), Regional Competition Agreements-Inventory of Provisions in Regional Competition Agreements, (2018) DAF/COMP/GF (2018)12, at 3, online: https://one.oecd.org/document/DAF/COMP/GF(2018)12/en/pdf

anticompetitive conduct that restricts trade.[515] Another monetary union for the west African states, however, is the Economic Community of West African States (ECOWAS),[516] which includes Benin, Burkina Faso, Cape Verde, Ivory Coast, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.[517] In 2008, ECOWAS adopted a competition law prohibiting hardcore cartels,[518] treating them as an offence sanctioned by a fine.[519] In 2019, the ECOWAS launched a regional competition authority, which can fill the gap between national jurisdictions that do not have competition authority[520] and has vast investigatory and enforcement power.[521]

The Common Market for Eastern and Southern Africa (COMESA) was established in 2004 and included Burundi, Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland,

[515] Articles 88- 90 to the West African Monetary and Economic Union, Treaty of the West African Monetary and Economic Union (WAEMU) (1994), online: http://www.uemoa.int/en/amended-treaty; OECD, Regional Competition Agreements- Inventory of Provisions in Regional Competition Agreements, *supra* note 514, at 26 & 81.

[516] According to the 2010 ECOWAS Revised Treaty, the member states are allowed to have different regional and bilateral treaties but shall eliminate any incompatibility on their obligations, see Article 84 to Economic Community of West African States (ECOWAS) Revised Treaty (2010), online: https://ecowas.int/wp-content/uploads/2022/08/Revised-treaty-1.pdf

[517] OECD, Regional Competition Agreements- Inventory of Provisions in Regional Competition Agreements, *supra* note 514, at 3.

[518] Article 5 to Supplementary Act A/SA.1/06/08, at 25, online: https://ecowas.int/wp-content/uploads/2022/09/Regional-Competition-policy-Framework.pdf; Article 5 prohibits agreements and concerted practices in restraint of trade, which are defined: "(1) The following shall be prohibited as incompatible with the ECOWAS Common Market all agreements between enterprises, decisions by associations of enterprises and concerted practices which may affect trade between ECOWAS Member States and the objects or effect of which are or may be the prevention, restriction, distortion or elimination of competition within the Common Market, and in Particular those which: (a) directly or indirectly fix purchase or selling prices, terms of sale, or any other, trading conditions; (b) limits or control production, markets, technical development, or investment; (c) share markets, customers, or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties; thereby placing them at a competitive disadvantage; or (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 connection with the subject of such contracts."

[519] Article 8(2) to the Supplementary Act A/SA.2/12/08, *supra* note 518, at 39.

[520] UNCTAD, Implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices: Note by the UNCTAD secretariat 3, *supra* note, at 8.

[521] Article 4 to the Supplementary Act A/SA.2/12/08, *supra* note 518.

Tunisia, Somalia, Uganda, Zambia, and Zimbabwe.[522] It covers anticompetitive conduct, including agreements restricting competition in the common market,[523] and treats hardcore cartels as an offence.[524] COMESA has territorial jurisdiction over the common market, encourages cooperation among member states, and has the authority to investigate and impose fines.[525]

The ANDEAN Community (CAN) includes Bolivia, Colombia, Ecuador, and Peru.[526] It was established in 1969 and began to address competition policy in 1991, when only Colombia had a competition law.[527] Based on 2005's Decision 608, the Secretariat of the ANDEAN Community has the right to independently (i.e., without the national agencies' involvement) investigate anticompetitive behaviours that restrict free competition[528] and the ability to impose

[522] OECD, Regional Competition Agreements- Inventory of Provisions in Regional Competition Agreements, *supra* note 514, at 3.

[523] Article 16 of the Common Market for Eastern and Southern Africa, COMESA Competition Regulations (2004), online: https://comesacourt.org/wp-content/uploads/2020/01/COMESA-Competition-Regulations-December-2004.pdf; Article 16.1 defines restrictive business practice as follows: "The following shall be prohibited as incompatible with the Common Market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which: a) may affect trade between Member States; and b) have as their object or effect the prevention, restriction or distortion of competition within the Common Market."

[524] Article 16 of the COMESA Competition Regulations, *supra* note 523: "1. It shall be an offence for undertakings engaged in the market in rival or potentially rival activities to engage in the practices appearing in paragraph 3; 2. Provided that this paragraph shall not apply where undertakings are dealing with each other in the context of a common entity wherein they are under common control or where they are otherwise not able to act independently of each other. 3. This Article applies to formal, informal, written and unwritten agreements, arrangements and understandings. 4For the purpose of paragraph 1, the following are prohibited: a) agreements fixing prices , which agreements hinder or prevent the sale or supply or purchase of goods or services between persons, or limit or restrict the terms and conditions of sale or supply or purchase between persons, or limit or restrict the terms and conditions of sale or supply or purchase between persons engaged in the sale of purchased goods or services; b) collusive tendering and bid-rigging; c) market or customer allocation agreements; d) allocation by quota as to sales and production; e) collective action to enforce arrangements; f) concerted refusals to supply goods or services to a potential purchaser, or to purchase goods or services from a potential supplier; or g) collective denials of access to an arrangement or association which is crucial to competition."

[525] Article 6- 8 of the COMESA Competition Regulations, *supra* note 523.

[526] OECD, Regional Competition Agreements- Inventory of Provisions in Regional Competition Agreements, *supra* note 514, at 3.

[527] Sokol, International Antitrust Institutions, *supra* note 271, at 205; OECD, Regional Competition Agreements- Inventory of Provisions in Regional Competition Agreements, *supra* note 514, at 4.

[528] Article 7 to Decision 608 on Andean Community, Decision 608 on the Rules for the Protection and Promotion of Competition in the Andean Community (normativa andina) (2005), online: http://www.sice.oas.org/trade/junac/decisiones/dec608s.asp; Article 7 defines restrictive behaviours of free competition as follow: "The agreements that have the purpose or effect of: a) Directly or indirectly set prices or other marketing conditions; b) Restrict the supply or demand of goods or services; c) Distribute the market of goods or

monetary sanctions and cease orders for anticompetitive practices.[529]

The Caribbean Community (CARICOM) is a regional economic organization for Caribbean countries. It includes Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Lucia, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Suriname, and Trinidad and Tobago.[530] CARICOM was established in 1973 by the Treaty of Chaguaramas, which was revised in 2001.[531] Chapter 8 of the revised treaty[532] addresses competition issues and encourages national jurisdictions to prohibit anticompetitive conduct, including cross-border cartels.[533] The enforcement typically remains in the hands of the national authorities based on their enforcement regime and sanctions, but the CARICOM Competition Commission provides oversight and intervenes when necessary.[534]

---

services; d) Prevent or hinder the access or permanence of current or potential competitors in the market; either, e) Establish, arrange or coordinate positions, abstentions or results in public tenders, contests or auctions." (This is a translation from Spanish based on google translation); see also Sokol, International Antitrust Institutions, *supra* note 271, at 206.

[529] Article 34 to Decision 608 on the Rules for the Protection and Promotion of Competition in the Andean Community, *supra* note 528; Sokol, International Antitrust Institutions, *supra* note 271, at 206; OECD, Regional Competition Agreements- Inventory of Provisions in Regional Competition Agreements, *supra* note 514, at 23.

[530] OECD, Regional Competition Agreements- Inventory of Provisions in Regional Competition Agreements, *supra* note 514, at 3.

[531] Sokol, International Antitrust Institutions, *supra* note 271, at 207.

[532] Caribbean Community, Revised Treaty of Chaguaramas Establishing the Caribbean Community, CARICOM Single Market and Economy (2001), online: https://caricom.org/treaties/revised-treaty-of-chaguaramas-establishing-the-caricom-including-csme/

[533] Article 173 and 177 to the Revised Treaty of Chaguaramas Establishing the Caribbean Community, *supra* note 532; Article 177 prohibits different forms of restrictive competition conducts including: "Anti-competitive business conduct within the meaning of paragraph 1 includes the following: (a) the direct or indirect fixing of purchase or selling prices, (b) the limitation or control of production, markets, investment or technical development; (c) the artificial dividing up of markets or restriction of supply sources; (d) the application of unequal conditions to parties undertaking equivalent engagements in commercial transactions thereby causing a competitive disadvantage; (e) making the conclusion of a contract subject to the acceptance by the other party to the contract of additional obligations which, by their nature or according to commercial practice, have no connection with the subject matter of the contract; (f) unauthorised denial of access to networks or essential infrastructure; (g) predatory pricing; (h) price discrimination; (i) loyalty discounts or concessions; (j) exclusionary vertical restrictions; and (k) bid-rigging;" see also OECD, Regional Competition Agreements- Inventory of Provisions in Regional Competition Agreements, *supra* note 514, at 75.

[534] Article 173 and 176 to the Revised Treaty of Chaguaramas Establishing the Caribbean Community, *supra* note 532; Sokol, International Antitrust Institutions, *supra* note 271, at 208; OECD, Regional Competition Agreements- Inventory of Provisions in Regional Competition Agreements, *supra* note 514, at 23.

The Eurasian Economic Union (EAEU) treaty includes Armenia, Belarus, Kazakhstan, Kyrgyzstan, and Russia. It was established in 2015 and includes general principles and rules on competition, including prohibitions on agreements that restrict competition.[535] The EAEU Commission can enforce the law on cross-border anticompetitive cartels between members.[536] Nonetheless, the treaty requires its members to establish "effective sanctions for conducting anticompetitive actions … based on the principles of effectiveness, proportionality, security, inevitability and definiteness."[537]

The Central African Economic and Monetary Community (CEMAC) includes Cameroon, the Central African Republic, Chad, Equatorial Guinea, Gabon, and the Republic of Congo.[538] It covers anticompetitive conduct, including hardcore cartels that affect trade between member states.[539] National authorities and the Executive Secretariat of CEMAC are authorized to impose monetary sanctions.[540]

The Southern Common Market (MERCOSUR) includes Brazil, Argentina, Paraguay, and

[535] Article 76 of the Eurasian Economic Union, Treaty on the Eurasian Economic Union (2015), online copy from the WTO website: https://www.wto.org/english/thewto_e/acc_e/kaz_e/wtacckaz85_leg_1.pdf; Article 76 prohibits: "Agreements are forbidden between business entities (market entities) - competitors acting in one goods market which lead or can lead to: 1) establishment or maintenance of the prices (tariffs), discounts, extra charges (surcharges), margins; 2) increase, decrease or support of the prices at the auctions; 3) division of the goods market by the territorial principle, volume of sale or purchase of goods, the range of goods sold or structure of sellers or buyers (customers); 4) reduction or termination of goods production; 5) refusal of the conclusion of agreements with certain sellers or buyers (customers)."

[536] Article 19 and 74.3 of the Treaty on the Eurasian Economic Union, *supra* note 535; UNCTAD, Implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices: Note by the UNCTAD secretariat, *supra* note 3, at 8.

[537] Article 75.6 of the Treaty on the Eurasian Economic Union, *supra* note 535.

[538] OECD, Regional Competition Agreements- Inventory of Provisions in Regional Competition Agreements, *supra* note 514, at 3.

[539] Article 23 of Community of Central Africa, Treaty Establishing the Economic and Monetary Community of Central Africa (1999), online: https://www.wipo.int/wipolex/en/treaties/details/296; OECD, Regional Competition Agreements- Inventory of Provisions in Regional Competition Agreements, *supra* note 514, at 23.

[540] OECD, Regional Competition Agreements- Inventory of Provisions in Regional Competition Agreements, *supra* note 514, at 27 & 45.

Uruguay.[541] The Protocol of the Defense of Competition from 1996 prohibits various conduct that restricts competition.[542] MERCOSUR's competition policy, however, remains unfulfilled due to a lack of political will and differences in competition policies, agency structures and enforcement mechanisms among MERCOSUR's members.[543]

3.7. National law sources

In 1970, only 12 jurisdictions had a competition law,[544] while, today, many countries recognize the importance of efficient competition to enjoy the benefits of trade liberalization[545] and are aware of hardcore cartels' role in hindering international trade benefits.[546] Currently, more than 140

[541] MERCOSUR website, online: https://www.mercosur.int/en/

[542] The Southern Common Market, MERCOSUR, Protocol of the Defense of Competition (1996), version in English online: http://www.ftaa-alca.org/Wgroups/WGCP/English/cpa/cpa3_e.asp; Article 6 defines restrictive competition practices as: "The following forms of conduct, inter alia, insofar as they embody the hypotheses advanced in article 4, constitute practices which limit competition; I. to fix, impose or practice, directly or indirectly, in collaboration with competitors or individually, in any form, the prices and conditions of the purchase or sale of goods, the providing of services or production; II. to procure or to contribute to the adoption of uniform business practices or concerted action by competitors; III. to regulate goods or service markets, entering into agreements to limit or control research and technological development, the production of goods or the supply of services, or to hinder investments intended for the production of goods or services or their distribution. IV. to divide up the markets of finished or semifinished goods or services, or the supply source of raw materials and intermediate products. V. to limit or prevent access of new enterprises to the market; VI. to agree on prices or advantages which may affect competition in public bids; VII. to adopt, with regard to third parties, unequal conditions for equivalent services, thus placing them at a competitive disadvantage; VIII. to subordinate the sale of one good to the purchase of another good or to the use of a service, or to subordinate the supply of a service to the use of another or to the purchase of a good; IX. to prevent the access of competitors to raw materials, investment goods or technologies, as well as to distribution channels; X. to require or to grant exclusivity with respect to the dissemination of publicity in the communication media; XI. to subordinate buying or selling to the condition of not using or acquiring, selling or supplying goods or services which are produced, processed, distributed or marketed by a third party; XII. to sell merchandise, for reasons unfounded on business practices, at prices below the cost price; XIII. to reject without good reason the sale of goods or the supply of services; XIV. to interrupt or to reduce production on a large scale, without any justifiable cause; XV. to destroy, render useless or accumulate raw materials, intermediate or finished goods, as well as to destroy, render useless or obstruct the functioning of equipment designed to produce, transport or distribute them. XVI. to abandon, cause to be abandoned or destroy crops and plantations without just cause. XVII. to manipulate the market in order to impose prices."

[543] Sokol, International Antitrust Institutions, *supra* note 271, at 203- 204.

[544] OECD, OECD Competition Trends 2020, *supra* note 14, at 11.

[545] Anderson, Müller & Sen, Competition Policy in WTO Accessions: Filling in the Blanks in the International Trading System, *supra* note 1, at 301 & 306.

[546] Gifford, The Draft International Antitrust Code Proposed at Munich, *supra* note 62, at 28.

countries have a law that includes competition regulations.[547] Many of these countries are developing countries[548] that understand that competition policy is necessary for trade liberalization and its benefits.[549]

International competition is not harmonized, however, because different socioeconomic features justify different treatment.[550] Thus, competition policy may be hindered when it clashes with existing socioeconomic patterns,[551] such as the widespread existence of state-owned enterprises with privileges or monopolies[552] or administrative barriers, such as price controls.[553]

Furthermore, there are inherent differences between developed and developing markets.[554] For example, developing markets have low economic-development levels, institutional problems,

---

[547] OECD, International Co-operation on Competition Investigations and Proceedings: Progress in Implementing the 2014 OECD Recommendation, *supra* note 482, at 14; John M. Connor "Global Enforcement Directed at International Cartels: A Concise Introduction and Summary" (2016) OECD's Global Forum on Competition: Sanctions in Antitrust Case, on 1-2 December 2016. DAF/COMP/GF(2016)9, at 5, online: https://one.oecd.org/document/DAF/COMP/GF(2016)9/en/pdf; UNCTAD, Implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices: Note by the UNCTAD secretariat, *supra* note 3, at 2; see also a list of countries at Federal Trade Commission, Competition and Consumer Protection Agencies Worldwide, online: https://www.ftc.gov/policy/international/competition-consumer-protection-agencies-worldwide

[548] Aydin & Büthe, Competition Law & Policy in Developing Countries, *supra* note 20, at 2.

[549] Anderson, Müller & Sen, Competition Policy in WTO Accessions: Filling in the Blanks in the International Trading System, *supra* note 1, at 301.

[550] WTO, Report (2000) of the Working Group on the Interaction Between Trade and Competition Policy, *supra* note 389, para 28; Indig Tamar & Michal S. Gal "Lifting the Veil: Rethinking the Classification of Developing Economies for Competition Law and Policy" in Michal S. Gal, Mor Bakhoum, Josef Drexl, Eleanor M. Fox, Walter J. Derenberg & David J. Gerber (eds.) *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Elgar Publishing, 2015) 51, at 53; Fox, Competition Policy: The Comparative Advantage of Developing Countries, *supra* note 21, at 73; Guzman, Is International Antitrust Possible, *supra* note 358, at 1505; Gifford, The Draft International Antitrust Code Proposed at Munich, *supra* note 62, at 29; Ana Maria Alvarez, & Pierre Horna "Implementing Competition Law and Policy in Latin America: The Role of Technical Assistance" (2008) 83:1 Chicago-Kent Law Review 91, at 95; Hollman, Kovacic & Robertson, Building Global Antitrust Standards: the ICN's Practicable Approach, *supra* note 368, at 92.

[551] Aydin & Büthe, Competition Law & Policy in Developing Countries, *supra* note 20, at 20.

[552] Fox, Competition Policy: The Comparative Advantage, *supra* note 21, 72.

[553] Michal S. Gal "The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries" (2005), SSRN, chapter 2, online: https://ssrn.com/abstract=665181

[554] Ignacio L. De Leon "What Features Measure Economic Competition in Developing Countries" in Michal S. Gal, Mor Bakhoum, Josef Drexl, Eleanor M. Fox, Walter J. Derenberg and David J. Gerber (eds.) *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Elgar Publishing, 2015) 31, at 34.

and governmental bureaucracy.[555] Developing markets may also suffer from poor infrastructure that may limit trade due to the division of the market into smaller markets and the lack of connection between traders and customers, which reduces competition.[556] In addition, countries may suffer from high poverty rates, wealth inequality, lack of economic opportunities, and a low-functioning capital market.[557] Such circumstances often require government intervention in the market to overcome short-term hardship and supply the population's needs. Other obstacles that developing countries may face include resource limitations and a lack of training and expertise in applying the competition rules and tests established in developed countries.[558]

There are also differences between countries with large or small markets, as the latter have unique characteristics, including high entry barriers and limited capacity due to geographical size and a small population that can support only a few competitors.[559] Thus, countries may use competition policy to promote different public interests.[560] Furthermore, as competition law can protect competition but not necessarily competitors, discrimination among competitors can occur.[561] For example, a country may approve a domestic merger between two local businesses while prohibiting a foreign merger.[562] Moreover, a domestic competition law may have some

[555] Gal, The Ecology of Antitrust, *supra* note 553, chapter1.

[556] Aydin & Büthe, Competition Law & Policy in Developing Countries, *supra* note 20, at 23; Simon J. Evenett "Competition Law and the Economic Characteristics of Developing Countries" in Michal S. Gal, Mor Bakhoum, Josef Drexl, Eleanor M. Fox, Walter J. Derenberg & David J. Gerber (eds.) *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Elgar Publishing, 2015) 15, at 28.

[557] Fox, Competition Policy: The Comparative Advantage of Developing Countries, *supra* note 21, at 72.

[558] David J. Gerber "Adapting the Role of Economics in Competition Law- A Developing Country Dilemma" in Michal S. Gal, Mor Bakhoum, Josef Drexl, Eleanor M. Fox, Walter J. Derenberg & David J. Gerber (eds.) *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Elgar Publishing, 2015) 248, at 253- 255.

[559] Michal S. Gal, *Competition Policy for Small Market Economies* (Harvard University Press, 2003), at 4.

[560] Organisation for Economic Co-operation and Development (OECD) "The Benefits of Competition Law and Policy for Developed and Developing Countries" (2004) 6:1/2 Journal of Competition Law and Policy 40, at 47-48; Aditya Bhattacharjea "Who Needs Antitrust? Or Is Developing-Country Antitrust Different? A Historical Comparative Analysis" in Sokol D. Daniel, Thomas K. Cheng & Ioannis Lianos (eds.) *Competition Law and Development* (Stanford, 2013) 52, at 58.

[561] OECD, Trade and Competition: From Doha to Cancun, *supra* note 7, at 9.

[562] OECD, Trade and Competition: From Doha to Cancun, *supra* note 7, at 9.

exemptions from enforcing hardcore cartels in the relevant sectors, which serve the domestic market but can still be discriminatory toward foreign businesses.[563] Consequently, a competition policy in one country can serve different goals than in another, based on each country's needs.[564]

3.7.1. Goals of competition

The goals of competition, which are the socio-legal interests that should be protected by law, vary by jurisdiction. In a 2003 multilateral discussion of 35 countries in the OECD, two main goals of competition were recognized as core goals: 1) promoting and protecting the competitive process and 2) achieving greater economic efficiency.[565] Efficiency standards[566] support the total economic efficiency of consumers, who pay less than they are willing to pay and producers, who receive more revenue than the cost of production.[567]

These core goals are expressed in several ways, including through competitive prices, product choices, resource allocation, free competition, consumer protection, and boosting consumer welfare.[568] Consumer-welfare standards promote long-term consumer welfare with or

[563] OECD, Trade and Competition: From Doha to Cancun, *supra* note 7, at 9- 10.

[564] OECD, The Benefits of Competition Law and Policy for Developed and Developing Countries, *supra* note 560, at 47- 48; Bhattacharjea, Who Needs Antitrust, *supra* note 560, at 58.

[565] Organisation for Economic Co-operation and Development (OECD), The Objectives of Competition Law and Policy (2003), para 4 & 20 online http://www.oecd.org/daf/competition/2486329.pdf; Tyhurst, Canadian Competition Law and Policy, *supra* note 8, at 132- 134.

[566] The efficiency standard aims to maximize the total efficiency in society. The analysis is done in economic values and has two concepts of efficiency: first, the Pareto concept of efficiency, which is the increasing individual welfare without making others worse off. Second, Kaldor-Hick's concept of efficiency is increasing individual welfare, which achieves the highest amount of welfare in a given society with marginal consideration to the equal distribution of the wealth among the different individuals, as long as he can compensate those who lost because of the new policy. See further discussion in Pacces & Visscher, Methodology of Law and Economics, *supra* note 124, para 2.1- 2.4; Trebilcock, An Introduction to Law and Economics, *supra* note 125, at 125, 132- 134, 156.

[567] Noonan, The Emerging Principles of International Competition Law, *supra* note 11, at 64.

[568] OECD, The Objectives of Competition Law and Policy, *supra* note 565, para 9 & 20; Aydin & Büthe, Competition Law & Policy in Developing Countries, *supra* note 20, at 5- 6; Fox, Harnessing the Multinational Corporation to Enhance Third World Development, *supra* note 424, at 1984 & 1998- 2000.

without consideration for other public interests,[569] and support the passing of efficiency gains from producers to consumers.[570] The priority of consumer-welfare standards, however, is discussed and is continuously compared in relation to efficiency standards and protecting the competitive process standards.[571] Still, there is no acceptable international standard, and countries can choose different competition goals based on their interests.[572]

The focus on core goals, such as the competitive process, efficiency, and consumer welfare, reflects an acknowledgement on the part of countries that they need to focus on core goals and restrict the use of competition regulations to promote peripheral competition goals.[573] Competition policy, however, is still used in different countries to promote the peripheral goals of public interests,[574] including "pluralism, de-centralisation of economic decision-making, preventing abuses of economic power, promoting small business, fairness and equity and other socio-political values."[575] Competition goals can also prioritize public interests, such as fighting poverty, strengthening social security, promoting agriculture, and decreasing unemployment.[576] Other goals are education equality and access to capital, encouraging competition culture, and educating the public and institutions on the benefit and desirability of competition for markets.[577]

---

[569] Organisation for Economic Co-operation and Development (OECD), Purchasing Power and Buyers' Cartels, (2022), at 8, online: https://www.oecd.org/daf/competition/purchasing-power-and-buyers-cartels-2022.pdf

[570] Noonan, The Emerging Principles of International Competition Law, *supra* note 11, at 64.

[571] OECD, Purchasing Power and Buyers' Cartels, *supra* note 569, at 8- 9 and the references there, Marshall Steinbaum & Maurice E. Stucke "The Effective Competition Standard: A New Standard for Antitrust" (2020) 87(2) Chicago Law Review, 595; Herbert Hovenkamp "Whatever Did Happen to the Antitrust Movement?" (2018) 94(2) Notre Dame Law Review 583.

[572] Noonan, The Emerging Principles of International Competition Law, *supra* note 11, at 162- 165.

[573] OECD, The Objectives of Competition Law and Policy, *supra* note 565, para 4.

[574] OECD, The Objectives of Competition Law and Policy, *supra* note 565, para 21.

[575] Tyhurst, Canadian Competition Law and Policy, *supra* note 8, at 132- 133; see also OECD, The Objectives of Competition Law and Policy, *supra* note 565, para 5 & 22.

[576] OECD, The Benefits of Competition Law and Policy for Developed and Developing Countries, *supra* note 560, at 47- 48; Gal, The Ecology of Antitrust, *supra* note 553, chapter 2; Fox, Competition Policy: The Comparative Advantage of Developing Countries, *supra* note 21, at 74- 79; Alvarez & Horna, Implementing Competition Law and Policy in Latin America, *supra* note 550, at 99- 100.

[577] Aydin & Büthe, Competition Law & Policy in Developing Countries, *supra* note 20, at 9- 13.

Furthermore, peripheral competition goals that promote the general public interest may change over time. For example, the European Commission and the Canadian Competition Bureau recently addressed the connections between competition and public environmental concerns.[578] Thus, competition law can arguably be used to address other public interests, such as the environment, health, labour rights, and others, rather than using other specific legal mechanisms.[579] Therefore, different countries can promote different competition goals, which can explain the differences among countries in their competition law and enforcement policies.[580]

3.7.2. Prohibitions

Different countries may base their prohibition of hardcore cartels on different definitions. Some jurisdictions prefer general law with broad prohibitions against agreements that restrict competition. Those general prohibitions, however, can be balanced by the enforcement policies of well-established agencies and court interpretations that provide clarity and guidance on what are otherwise textually vague rules.[581] Other jurisdictions prefer to enact a precise prohibition with detailed categories or lists of prohibited conduct to increase the legal stability and transparency of

[578] Competition Bureau Canada, Environmental Claims and Greenwashing, (2 December 2021), online: https://ised-isde.canada.ca/site/competition-bureau-canada/en/environmental-claims-and-greenwashing; Competition Bureau Canada, What we Heard from the Competition and Green Growth Summit 2022, (20 September 2022, reported in website on 10 January 2023), online: https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/what-we-heard-competition-and-green-growth-summit-2022; see also in EU, European Commission, "Competition Policy Brief 1/2021 - Policy in Support of Europe's Green Ambition" (10 September 2021), online: https://competition-policy.ec.europa.eu/about/news/competition-policy-brief-12021-policy-support-europes-green-ambition-2021-09-10_en

[579] Richard Whish & David Bailey, Horizontal Guidelines on Purchasing Agreements: Delineation between by Object and by Effect Restrictions, Luxembourg, Publications Office of the European Union, 2022, at 19-22, available at https://competition-policy.ec.europa.eu/system/files/2022-03/kd0722013enn_purchasing_agreements.pdf

[580] Bradford, Antitrust Law in Global Markets, *supra* note 60, at 289- 290; Guzman, Is International Antitrust Possible, *supra* note 358, at 1539; Alvarez & Horna, Implementing Competition Law and Policy in Latin America, *supra* note 550, at 95.

[581] Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, & Duncan Snidal "The Concept of Legalization" (2000) 54:3 International Organization, 401, at 413.

what is prohibited.[582]

For example, the United States adopts prohibitions against anticompetitive conduct by using an open definition of conduct that hinders competition. Section 1 of the Sherman Act states that "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."[583] The United States, however, uses a clear policy for what is considered a violation of Section 1 of the Sherman Act that justifies criminal enforcement. Those actions are narrowly categorized as illegal *per se* and include price-fixing, bid-rigging, and market or customer allocation.[584] In this way, U.S. authorities declare their policy of what justifies criminal enforcement to "increase transparency and create certainty for businesses."[585]

The European Union, on the other hand, has an explicit prohibition. Article 101 of the Treaty on the Functioning of the European Union (TFEU)[586] stipulates the following:

> 1. The following shall be prohibited as incompatible with the internal 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 internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control

[582] ICN, Defining Hard Core Cartel Conduct—Effective Institutions, Effective Penalties, *supra* note 20, at 13; OECD, Trade and Competition: From Doha to Cancun, *supra* note 7, at 11.

[583] Section 1 to the Sherman Act, *supra* note 30; see also an overview at Connor, Global Antitrust Prosecutions of International Cartels, *supra* note 37, at 580- 582.

[584] See the definition that the US department of Justice uses: US Department of Justice, Identifying Sherman Act Violations, (updated February 2020), online: https://www.justice.gov/archives/jm/antitrust-resource-manual-2-antitrust-division-field-offices

[585] OECD, Criminalisation of cartels and bid rigging conspiracies – Note by the United States, DAF/COMP/WP3/WD(2020)12, (2020), at 2 online: https://one.oecd.org/document/DAF/COMP/WP3/WD(2020)12/en/pdf

[586] European Union, Consolidated Versions of the Treaty on the Functioning of the European Union (2016/C 202/01), online: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12016ME%2FTXT; see also European Commission, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, C/2023/4752, (21 July 2023) online: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2023.259.01.0001.01.ENG&toc=OJ%3AC%3A2023%3A259%3ATOC

> 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 connection with the subject of such contracts.

Canada also clearly defines hardcore cartels, but with a narrower application, as it applies to "production or supply" and not to "purchase," as the EU prohibition does. Section 45 (1) of the Canadian Competition Act[587] states that:

> Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges: (a) to fix, maintain, increase or control the price for the supply of the product;(b) to allocate sales, territories, customers or markets for the production or supply of the product; or (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

In addition, Section 47 (2) prohibits bid-rigging:

> Every person who is a party to bid-rigging is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding 14 years, or to both.

These clear definitions of what is prohibited are aimed at transparency, legal stability, and fair warning. Nonetheless, there is a practical effect when circumstances change or there is a need to update the prohibition to respond to a new practice through an official legislation process or a new enforcement policy. For example, an important discussion from recent years focused on prohibiting buyers' cartels.[588] Buyers' cartels are not the focus of this thesis, but they are worth mentioning because, unlike the consensus against hardcore cartels, there is a recognizable disparity among countries on prohibiting buyers' cartels, which can exemplify the differing views and prohibitions in different jurisdictions.

[587] Competition Bureau Canada, Competitor Collaboration Guidelines, *supra* note 25.
[588] OECD, Purchasing Power and Buyers' Cartels, *supra* note 569.

Buyers' cartels occur when buyers agree to fix the price to buy goods, which can negatively affect markets.[589] Similar concerns also arise with wage-fixing and no-poach agreements, where in wage-fixing, employers agree to hire employees at a fixed price, and in a no-poach agreement, employers agree not to solicit or hire each other's employees.[590]

This kinds of anticompetitive conduct received previous attention in the United States and the EU.[591] Other jurisdictions, however, have not, or at least not fully, addressed buyers' cartels, owing to skepticism about their potential harm to consumers and lack of sufficient data to support their estimated harm.[592] In addition, agreements among buyers may have a potential procompetitive effect in some circumstances, for instance, if small businesses establish the purchasing power to buy products from major suppliers at a discount, which may lead to lower prices for customers.[593] In those cases, it is suggested to distinguish between buyers' cartels and a desirable purchasing power by limiting the participation of small businesses with limited market power and by ensuring transparency, particularly by acknowledging the sellers in the existing agreement among the buyers.[594] Those issues, however, remain under discussion, and further clarification and data support are needed regarding the potential effect on consumers and markets.[595]

---

[589] OECD, Purchasing Power and Buyers' Cartels, *supra* note 569, at 6 & 21- 22.

[590] OECD, Purchasing Power and Buyers' Cartels, *supra* note 569, at 6 & 16- 18; Competition Bureau Canada, Enforcement Guidelines on Wage-Fixing and no Poaching Agreements, (30 May 2023), para 2.2, online: https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/enforcement-guidelines-wage-fixing-and-no-poaching-agreements

[591] OECD, Purchasing Power and Buyers' Cartels, *supra* note 569, at 6 & 16- 20.

[592] OECD, Purchasing Power and Buyers' Cartels, *supra* note 569, at 6 & 21- 22.

[593] OECD, Purchasing Power and Buyers' Cartels, *supra* note 569, at 6-7 & 22; Competition Bureau Canada, Competitor Collaboration Guidelines, *supra* note 25, at 48- 49.

[594] OECD, Purchasing Power and Buyers' Cartels, *supra* note 569, at 22- 24; Organisation for Economic Co-operation and Development (OECD), Purchasing Power and Buyers' Cartels – Note by the European Union, DAF/COMP/WD(2022)16, (2022), at 9, online: https://one.oecd.org/document/DAF/COMP/WD(2022)16/en/pdf

[595] OECD, Purchasing Power and Buyers' Cartels, *supra* note 569, at 6.

Some jurisdictions, such as the United States, the EU, South Korea, and Singapore, make no distinction between buyers' and sellers' cartels.[596] The U.S. prohibition on competition based on Section 1 of the Sherman Act includes "every contract … or conspiracy, in restraint of trade or commerce." Accordingly, "the Sherman Act applies equally to all industries and markets—to sellers and buyers, to goods and services, and consequently to buyers of services—otherwise known as employers in the labour market."[597] Therefore, according to the United States, buyers' cartels and wage-fixing hinder competition and are criminally prohibited when they cause harm to the market.[598] Purchasing power among buyers who have a small market share, however, is not necessarily assumed to be harmful, but whether the agreement has a procompetitive effect is examined.[599]

The EU competition law also makes no distinction between sellers and buyers,[600] as Article 101 (a) of the TFEU clearly refers to "…fix **purchase or selling** prices..." Thus, buyers' cartels are illegal based on this prohibition, and there have been several enforcements against these types of cartels within the EU.[601] Nevertheless, the EU recognizes that purchase agreements can be desirable.[602] In recent guidelines from July 2023, the EU distinguishes between purchasing

[596] OECD, Purchasing Power and Buyers' Cartels, *supra* note 569, at 16- 17.

[597] *United States v. Jindal, et al*., No. 4:20-cr-00358 (2021), at 10 online: https://fingfx.thomsonreuters.com/gfx/legaldocs/gkvlgdrjgpb/USA-mazzant-order-2021-11-29.pdf

[598] Organisation for Economic Co-operation and Development (OECD), Purchasing Power and Buyers' Cartels – Note by the United States DAF/COMP/WD (2022)15, (2022), online: https://one.oecd.org/document/DAF/COMP/WD(2022)15/en/pdf; see also US Department of Justice, Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation, (20 October 2016), online: https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals

[599] OECD, Purchasing Power and Buyers' Cartels, *supra* note 569, at 23- 24.

[600] OECD, Purchasing Power and Buyers' Cartels – Note by the European Union, *supra* note 594, at 2.

[601] OECD, Purchasing Power and Buyers' Cartels – Note by the European Union, *supra* note 594, at 2- 4.

[602] European Commission, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, *supra* note 586, at 55- 66; OECD, Purchasing Power and Buyers' Cartels – Note by the European Union, *supra* note 594, at 6- 7.

agreements that may have a procompetitive effect and buyers' cartels, which are prohibited.[603]

There is, however, no consensus on prohibiting buyers' cartels or wage-fixing, and this discussion is still evolving in different countries.[604] Canada, for example, does not apply illegal *per se* treatment to buyers' cartels, as Section 45(1) of the Canada Competition Act applies only to the "supply of the product."[605] Still, the fact that Section 45(1) was found not to cover purchasing agreements or buyers' cartels or non-poaching or wage-fixing agreements was deeply unpopular. In February 2022, the Canada Competition Bureau recommended prohibiting "harmful buy-side conspiracies, including wage-fixing and no-poaching agreements."[606] In June 2022, a new criminal prohibition on wage-fixing and no-poaching agreements was added to the Competition Act.[607] Therefore, outside of this new specific prohibition of wage-fixing and no-poach agreements covered by Section 45(1.1), for now, buyers' agreements can only be assessed under the civil collaboration provision set out in Section 90.1 of the Competition Act.[608]

Another factor to be aware of is that different jurisdictions may have different exemptions from competition law that fit their interests. For example, some jurisdictions may have specific

---

[603] European Commission, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, *supra* note 586, at 56- 57, para 279- 282.

[604] See different views on Organisation for Economic Co-operation and Development (OECD), Purchasing Power and Buyers Cartels – Summaries of contributions, DAF/COMP/WD(2022)62 (2022) online: https://one.oecd.org/document/DAF/COMP/WD(2022)62/en/pdf

[605] This has been confirmed by a 2022 Federal Court of Appeal decision *Mohr v. National Hockey League*, 2022 FCA 145; see also Competition Bureau Canada, Competitor Collaboration Guidelines, *supra* note 25, at 21; Canada Competition Bureau, Examining the Canadian Competition Act in the Digital Era (8 February 2022), para 5.1, online: https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/examining-canadian-competition-act-digital-era

[606] Canada Competition Bureau, Examining the Canadian Competition Act in the Digital Era, *supra* note 605, Recommendation 5.1.

[607] Section 45(1.1) to the Canada Competition Act, *supra* note 25; See also discussion on Competition Bureau Canada, Enforcement Guidelines on Wage-Fixing and no Poaching Agreements, *supra* note 590; Competition Bureau Canada, Guide to the 2022 amendments to the Competition Act, (24 June 2023), online: https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/guide-2022-amendments-competition-act#sec03

[608] Competition Bureau Canada, Competitor Collaboration Guidelines, *supra* note 25, at 48- 50 & 62; OECD, Purchasing Power and Buyers' Cartels, *supra* note 569, at 17.

exemptions for agricultural cooperatives or for the communication or oil industry. Those specific exemptions can be unique to the specific jurisdiction and reflect historical development or serve economic needs or other interests.[609] In addition, the OECD recommendations recognize the need of members to exclude certain industries or activities from anti-cartel enforcement.[610] Since those exemptions order different enforcements of what may considered an illegal hardcore cartel, however, it is recommended that they be transparent and narrowly defined.[611] Those exemptions illustrate that, although there is consensus against hardcore cartels, competition policy in different countries can address various types of conduct,[612] and there is no coherent and harmonized approach for all jurisdictions.

3.7.3. Sanctions

Currently, most states address competition violations outside the realm of criminal law and instead use civil or administrative enforcement tools.[613] The EU competition authority, one of the world's largest economic centres, acts against hardcore cartels by applying administrative sanctions.[614] Its monetary sanction can be hefty and impose serious consequences on those who violate the law. For example, in July 2016, the European Commission imposed a monetary sanction of EUR 2,926,499,000 on four track businesses, Volvo/Renault, Daimler, Iveco, and DAF for running a

[609] ICN, Defining Hard Core Cartel Conduct—Effective Institutions, Effective Penalties, *supra* note 20, at 13.

[610] OECD, Recommendation of the Council Concerning Effective Action against Hard Core Cartels (2019), *supra* note 26.

[611] ICN, Defining Hard Core Cartel Conduct—Effective Institutions, Effective Penalties, *supra* note 20, at 13- 14; WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para 42, 53 & 59.

[612] WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para 24, 42, 53, 55 & 59.

[613] Caron Beaton-Wells & Julie Clarke "Deterrent Penalties for Corporate Colluders: Lifting the Bar" (2018) 37:1 University of Queensland Law Journal 107, at 107; Pascal Wirz "Imprisonment for Hard Core Cartel Participation: A Sanction with Considerable Potential" (2016) 28:2 Bond Law Review 89, at 91- 92.

[614] Regulation No 1/2003, *supra* note 510; The Treaty on the Function of the European Union 2007, Article 101, *supra* note 509.

price-fixing cartel from 1997 to 2011 in the European Economic Area. In 2017, the European Commission imposed a monetary sanction of EUR 880,523,000 on another involved business, Scania, which, unlike the other businesses, decided not to settle with the European Commission. The cartel was revealed by another cartel's member, MAN, which received a 100% reduction in punishment under a leniency program.[615]

By contrast, criminal sanctions against hardcore cartels have spread in recent years.[616] Around 35 countries—among them, Australia, Brazil, Canada, Chile, Denmark, Estonia, Greece, Ireland, Israel, Japan, Korea, Mexico, New Zealand, Norway, Oman, the Philippines, Romania, Russian Federation, the Slovak Republic, Slovenia, South Africa, the United Kingdom, and the United States—impose criminal penalties, including imprisonment for one or more hardcore cartel activities.[617] According to *OECD Competition Trends 2020*, around 26 jurisdictions permit criminal sanctions on individuals for hardcore cartels, and 10 jurisdictions permit criminal sanctions only in the case of bid-rigging,[618] among them Austria, Belgium, Finland, Germany, Hungary, Italy, Poland, Portugal, and Turkey.[619]

In addition to the EU, which uses administrative sanctions, the United States and Canada are other worldwide leading enforcement authorities that use criminal sanction against hardcore

---

[615] OECD, OECD Competition Trends 2020, *supra* note 14, at 66; European Commission, Antitrust: Commission fines truck producers € 2.93 billion for participating in a cartel 19 July 2016), online: https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2582; European Commission, Antitrust: Commission fines Scania €880 million for participating in trucks cartel (27 September 2017), online: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_3502

[616] John M. Connor "The Impact of International Cartels" in Albert A. Foer & Jonathan W. Cuneo (eds.) *The International Handbook on Private Enforcement of Competition Law* (Elgar Publishing, 2010) 12, at 24; Okane, Cartel Enforcement: A Product of Globalisation, *supra* note 20, at 231- 233.

[617] Shaffer, Criminalizing Cartels: A Global Trend, *supra* note 21, at 305; OECD, Criminalisation of Cartels and Bid Rigging Conspiracies: A Focus on Custodial Sentence, *supra* note 18, at 13.

[618] OECD, OECD Competition Trends 2020, *supra* note 14, at 18 & 61.

[619] OECD, Criminalisation of Cartels and Bid Rigging Conspiracies: A Focus on Custodial Sentence, *supra* note 18, at 14.

cartels.[620] U.S. policy encourages the use of imprisonment to threaten and deter offenders from forming hardcore cartels.[621] Individuals can face imprisonment of up to 10 years and a criminal fine of up to USD 1 million.[622] Businesses can be punished with a criminal fine of up to USD 100 million[623] or no more than twice the gain or loss resulting from the offence and determined by the volume of commerce affected by the offence.[624] Between 2010 and 2018, over 450 individuals were criminally charged with engaging in hardcore cartels, and the average imprisonment was 19 months.[625]

Canada was the first nation in modern times to enact competition law, which it did in 1889, a year before the United States.[626] Canada's Criminal Code has diverse objectives, including denouncing unlawful conduct, deterring offenders, and rehabilitating offenders.[627] The Canada Competition Act established imprisonment of up to 14 years for violations of hardcore cartel prohibitions.[628] Still, Canadian courts have not imposed a custodial prison sentence since 1996 but rather a conditional sentence, such as community service or house arrest.[629] Nonetheless, Canadian

[620] Connor, Global Antitrust Prosecutions of International Cartels, *supra* note 37, at 580; For original data on the historical prosecution patterns in those countries, see there at 586- 591.

[621] OECD, Criminalisation of cartels and bid rigging conspiracies – Note by the United States, *supra* note 585, at 4.

[622] Section 1 of the Sherman Act, *supra* note 30; OECD, Criminalisation of cartels and bid rigging conspiracies – Note by the United States, *supra* note 585, at 6.

[623] Section 1 of the Sherman Act, *supra* note 30; OECD, Criminalisation of cartels and bid rigging conspiracies – Note by the United States, *supra* note 585, at 6.

[624] Section 3571(d), Title 18 to the United States Code, online: https://uscode.house.gov/browse/prelim@title18/part2/chapter227/subchapterC&edition=prelim; United States Sentencing Commission, Guidelines Manual (2018), Part R — Antitrust Offences, at 311- 314 https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf

[625] OECD, Criminalisation of cartels and bid rigging conspiracies – Note by the United States, *supra* note 585, at 6.

[626] Tyhurst, Canadian Competition Law and Policy, *supra* note 8, at 15.

[627] Section 718, Canada Criminal Code, *supra* note 44; Organisation for Economic Co-operation and Development (OECD), Criminalisation of Cartels and Bid Rigging Conspiracies – Note by Canada, DAF/COMP/WP3/WD (2020)3 (2020), at 4- 5 online: https://one.oecd.org/document/DAF/COMP/WP3/WD(2020)3/en/pdf

[628] Article 45(2) and Article 47(2) to Canada Competition Act, *supra* note 25.

[629] OECD, Criminalisation of cartels and bid rigging conspiracies – Note by Canada, *supra* note 627, at 5-6.

courts impose heavy fines for hardcore cartel activity.[630] In June 2023, a historical fine of CAD 50 million was imposed against a bread business for its role in criminal price-fixing arrangements that raised prices in 2007 and 2011.[631]

3.8. Multilateral enforcement mechanisms

As countries could not achieve international agreement on competition, and given that international competition has a close connection to international trade and globalization, it was essential to find other alternatives for multilateral agreement.[632] Discussing cooperation in detail is beyond the scope of this thesis, but a short overview of cooperation mechanisms may help provide a comprehensive understanding of transnational cartels.

Countries worldwide acknowledge the need for close cooperation and coordination to achieve effective competition enforcement in a globalized world.[633] Cooperation includes formal and informal contacts, notification, the coordination of investigations, the gathering and exchanging of (sometimes confidential) information, enforcement advice or tools, positive comity,

[630] Sections 45(2) and 47(2) of Canada Competition Act, *supra* note 25; see cartel cases and their outcomes at Competition Bureau Canada, Cases of bid-rigging, price-fixing and other illegal agreements between competitors, *supra* note 101.

[631] *R. v. Canada Bread Company Limited*, 2023 ONSC 3790; see also Competition Bureau Canada, Canada Bread sentenced to $50 million fine after pleading guilty to fixing wholesale bread prices, (21 June 2023), online: https://www.canada.ca/en/competition-bureau/news/2023/06/canada-bread-sentenced-to-50-million-fine-after-pleading-guilty-to-fixing-wholesale-bread-prices.html

[632] Bhattacharjea, The Case for a Multilateral Agreement on Competition Policy, *supra* note 384, at 320; Lianos, The Contribution of the United Nations to the Emergence of Global Antitrust Law, *supra* note 362, at 416.

[633] International Competition Network (ICN), International Cooperation and Information Sharing (2013), at 18 online: https://www.internationalcompetitionnetwork.org/portfolio/international-cooperation/: Antonio Capobianco & Aranka Nagy "Developments in International Enforcement Co-operation in the Competition Field" (2016) 7:8 Journal of European Competition Law & Practice 566, at 583; Bradford, Antitrust Law in Global Markets, *supra* note 60, at 314; United Nations Conference on Trade and Development (UNCTAD), International Cooperation under Section F of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices: Adoption of the guiding policies and procedures: Note by the UNCTAD Secretariat, TD/RBP/CONF.9/5 (2020), at 2, online: https://unctad.org/meetings/en/SessionalDocuments/tdrbpconf5d1_en.pdf

negative comity, and discussions on general strategies.[634] The most essential forms of cooperation are extradition and mutual legal assistance treaties (MLATs).[635] Extradition is a process whereby a state requests the rendition of an offender from the foreign state where the offender is residing to a state where the offender can be prosecuted or serve a sentence if the offender has already been convicted.[636] An MLAT places legal obligation on the state parties to assist the other state in investigations, collecting evidence, seizing assets, interviewing witnesses or providing a platform for online examination in court, and assisting in prosecution procedures. [637]

More sophisticated multilateral cooperation mechanisms also address competition, such as within a regional framework with specific competition provisions, as discussed above.[638] One of the most established cooperation agreements regarding competition is the European Competition Network (ECN), which includes the European Commission and the National Competition Agencies of the EU member states to enforce competition matters in different jurisdictions.[639] Another example is the Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities signed on 2 September 2020 among Canada, the United States, Australia,

[634] ICN, International Cooperation and Information Sharing (2013), *supra* note 633; OECD, Review of the 1998 OECD Recommendation Concerning Effective Action against Hard Core Cartels, (2019), *supra* note 14; OECD, International Co-operation on Competition Investigations and Proceedings: Progress in Implementing the 2014 OECD Recommendation, *supra* note 482; Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 284; Capobianco & Nagy, Developments in International Enforcement Co-operation in the Competition Field, *supra* note 633, at 571- 572.

[635] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 285.

[636] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 531.

[637] Julian M. Joshua, Peter D. Camesasca & Youngjin Jung "Extradition and Mutual Legal Assistance Treaties: Cartel Enforcement's Global Reach" (2008) 75:2 Antitrust Law Journal 353, at 387- 388; International Competition Network (ICN), Cooperation between Competition Agencies in Cartel Investigations (2007), at 15, online: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_Cooperation.pdf

[638] See above in subchapter 3.6. "Regional authorities."

[639] Regulation No 1/2003, *supra* note 510, on the implementation of the rules on competition laid down in Articles 81 and 82; European Competition Network (ECN), online: https://competition-policy.ec.europa.eu/european-competition-network_en; see also Capobianco & Nagy, Developments in International Enforcement Co-operation in the Competition Field, *supra* note 633, at 572; UNCTAD, Implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices: Note by the UNCTAD secretariat, *supra* note 3, at 8.

New Zealand, and the United Kingdom for sharing knowledge and practices. Also included in the agreement is the provision of investigation assistance for all competition matters (civil and criminal), including exchanging confidential information and evidence-gathering.[640]

Likewise, FTAs can include specific cooperation mechanisms for competition.[641] Cooperation may include mutual legal assistance, locating and securing evidence and witnesses, coordinating on investigations, providing technical assistance, communication, notification, consultation, exchanging information, and ensuring positive and negative comity.[642] Some FTAs also include the option to request that another party investigate conduct in its jurisdiction[643] or eliminate specific anticompetitive conduct.[644]

In addition, the leading international organizations—UNCTAD, the OECD, and the ICN—recommend enhanced cooperation among countries on competition matters. In 2017, UNCTAD established a working group on international cooperation on competition law enforcement to discuss and exchange views on international cooperation.[645]

The OECD also urges its members to cooperate on competition matters, while the most

---

[640] See the Competition Bureau Canada's announcement, Competition Bureau strengthens relationship with five foreign counterparts to enhance cross-border enforcement (2 September 2020), online : https://www.canada.ca/en/competition-bureau/news/2020/09/competition-bureau-strengthens-relationship-with-five-foreign-counterparts-to-enhance-cross-border-enforcement.html; see a review at Wu William & Sarah Stirling-Moffet "Canada Enters into Cooperation Framework with the Competition Enforcement Agencies of the "Five Eyes" Countries" (September 2020) online: https://mcmillan.ca/Files/225547_Canada_Enters_into_Cooperation_Framework_FINAL.pdf

[641] According to research from 2019 that reviewed 267 FTA, reveals that half of them included competition cooperation mechanisms, see Laprévote, Competition Policy within the Context of Free Trade Agreements, *supra* note 487, at 23.

[642] Laprévote, Competition Policy within the Context of Free Trade Agreements, *supra* note 487, at 23- 24; UNCTAD, Implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices: Note by the UNCTAD secretariat, *supra* note 3, at 7.

[643] Laprévote, Competition Policy within the Context of Free Trade Agreements, *supra* note 487, at 24; OECD, Trade and Competition: From Doha to Cancun, *supra* note 7, at 30.

[644] Laprévote, Competition Policy within the Context of Free Trade Agreements, *supra* note 487, at 23.

[645] UNCTAD, Working Group on International Cooperation on Competition Law Enforcement, *supra* note 418.

recent recommendations are from 2014, which, in addition to their practical and effective cooperation and enforcement recommendations, recognize that cooperation is done within the boundaries of national laws and without effecting each state's sovereignty or its application to extraterritorial law on competition issues.[646]

The ICN recognizes the challenges that arise from the global economy and the need for effective enforcement mechanisms against transnational hardcore cartels. Thus, the ICN discusses and provides guidelines for "reliable, constructive and innovative means" of cooperation.[647] Another topic of discussion in the ICN is information-sharing[648] and ways to facilitate the sharing of confidential information.[649]

Other suggested enforcement models include agreeing on a leading jurisdiction for enforcement, where several jurisdictions enable a lead jurisdiction to investigate and be granted the authority to make the decisions on cross-border cases.[650] Another option is a one-stop-shop model, which suggests handling all cross-border competition issues in one location, where the business can apply for merger reviews or requests for leniency.[651]

On 2 July 2019, multiple countries signed the Hague Convention on the Recognition and

---

[646] OECD, OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings, (2014), *supra* note 3, at 2.

[647] ICN, International Cooperation and Information Sharing (2013), *supra* note 633, at 3; see also, ICN, Cooperation between Competition Agencies in Cartel Investigations (2007), *supra* note 637.

[648] International Competition Network (ICN), Information Sharing Mechanisms, online: https://www.internationalcompetitionnetwork.org/working-groups/cartel/information-sharing/

[649] International Competition Network (ICN), Framework for the Promotion of the Sharing of Non-Confidential Information, (continued operation), online: https://www.internationalcompetitionnetwork.org/portfolio/non-confidential-information-sharing/

[650] See further in Capobianco & Nagy, Developments in International Enforcement Co-operation in the Competition Field, *supra* note 633, at 579- 580.

[651] See further in Capobianco & Nagy, Developments in International Enforcement Co-operation in the Competition Field, *supra* note 633, at 579.

Enforcement of Foreign Judgements in Civil or Commercial Matters.[652] The convention allows the adoption of the court's judgement of another jurisdiction in civil and commercial matters, including on domestic hardcore cartels.[653] It does not, however, apply to criminal matters or transnational cartels.[654]

With the increase of globalization and thus anticompetition risks,[655] countries may seek different kinds of cooperation in the future. Recent serious challenges were addressed in the digital markets, as they work in a borderless environment.[656] This is because firms in one jurisdiction can expand their activities to different jurisdictions almost without restrictions, thus posing serious enforcement challenges.[657] Another example is the use of algorithms and their potential to undermine competition.[658] These and other challenges of the digital markets raise serious concerns for many competition authorities worldwide, and there is a remarkable commitment to address

[652] HCCH, Hague convention On the Recognition and Enforcement of Foreign Judgements in civil or Commercial Matters (2019), online: https://assets.hcch.net/docs/806e290e-bbd8-413d-b15e-8e3e1bf1496d.pdf

[653] A similar suggestion in competition matters was suggested by Michael Gal and called "Recognition-of-Judgments Mechanism." This mechanism advocates for allowing domestic authorities to recognize and apply foreign findings concerning international competition violations in their own domestic courts to prove competition violations in their domestic market; see Gal, Free Movement of Judgments: Increasing Deterrence of International Cartels through Jurisdictional Reliance, *supra* note 18.

[654] Article 2 (p) clarifies the following: "Article 2 Exclusions from scope 1. This Convention shall not apply to the following matters – […] (p) anti-trust (competition) matters, except where the judgment is based on conduct that constitutes an anti-competitive agreement or concerted practice among actual or potential competitors to fix prices, make rigged bids, establish output restrictions or quotas, or divide markets by allocating customers, suppliers, territories or lines of commerce, and where such conduct and its effect both occurred in the State of origin;"

[655] OECD, International Co-operation on Competition Investigations and Proceedings: Progress in Implementing the 2014 OECD Recommendation, *supra* note 482, at 76; UNCTAD, Implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices: Note by the UNCTAD secretariat, *supra* note 3, at 7.

[656] Competition and Markets Authority, G7, 2021 Compendium of Approaches to Improving Competition in Digital Markets (2021), at 35 para 4.48, online: https://www.gov.uk/government/publications/compendium-of-approaches-to-improving-competition-in-digital-markets

[657] UNCTAD, Implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices: Note by the UNCTAD secretariat, *supra* note 3, at 7.

[658] Competition and Markets Authority, G7, 2022 Compendium of Approaches to Improving Competition in Digital Markets, *supra* note 2, para 5.

them collectively on the international level.[659]

3.9. The legal status of transnational cartels

These different international norms presented regarding competition and prohibiting transnational cartels show that soft law and national law are the dominant sources of law that apply in the international domain.

National law

National law applies to transnational cartels and the international domain when a jurisdiction extends its national law to foreign conduct. Traditionally, each state has jurisdiction over its territory due to state sovereignty.[660] Under the territorial jurisdiction principle, a state has jurisdiction over a crime committed in its territory. Some states require an element of the offence to have been committed within its territory, while others only require a harmful effect on its territory to acquire jurisdiction.[661]

Different jurisdictions worldwide have adopted different extraterritorial jurisdictions when dealing with competition. The United States, for example, expands its jurisdiction over foreign conduct to protect its competition according to the effect doctrine in cases where the conduct has an intended and substantial effect on U.S. commerce.[662] The effect doctrine can also apply to conduct that occurs in a foreign jurisdiction when its consequences are foreign but affect U.S.

[659] Competition and Markets Authority, G7, 2022 Compendium of Approaches to Improving Competition in Digital Markets, *supra* note 2, para 10, 77 & 82.

[660] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 53.

[661] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 67.

[662] Noonan, The Emerging Principles of International Competition Law, *supra* note 11, at 224- 273; Sweeney, International Governance of Competition and the Problem of Extraterritorial Jurisdiction, *supra* note 69, at 358; Leigh Davison & Debra Johnson "An Exploration of the Evolution of the EU's Twin-Track Approach to the Achievement of Its International Competition Policy Goals" (2015) 36:1 Liverpool Law Review 73, at 88.

military bases abroad. The explanation for this extremely broad jurisdiction is that such conduct affects U.S. consumers in their taxpayer capacity.[663] For example, on 25 June 2021, the U.S. Department of Justice announced that it had entered into a plea agreement with G4S Secure Solutions NV (G4S), a Belgian business, for its role in a hardcore cartel while it was providing security services for the U.S. Department of Defense operations in Belgium. The rationale given was that the defendant's conduct "had a direct, substantial, and reasonably foreseeable effect on U.S." and violated Section 1 of the Sherman Act.[664]

Several countries have adopted a similar approach to that of the effect doctrine.[665] Canada, for example, has extraterritorial reach even when the activity occurs abroad but has an unlawful consequence in Canada, as long as there is a "real and substantial connection" between the subject matter and Canada.[666] Other jurisdictions, however, take a narrower approach and require that the defendant have a business within the state.[667] The EU, for example, uses the single-economic-entity approach, which holds that firms are considered to fall under EU jurisdiction if they have subsidiaries within the EU markets.[668] The EU also uses the implementation doctrine, which allows

---

[663] Noonan, The Emerging Principles of International Competition Law, *supra* note 11, at 262.

[664] *United States v. G4S Secure Solutions NV, Information*, Case 1:21- CR-00432 (2021), at 2- 3 & 4, online: https://www.justice.gov/opa/press-release/file/1406351/download; Department of Justice Office of Public Affairs, "Belgian Security Services Firm Agrees to Plead Guilty to Criminal Antitrust Conspiracy Affecting Department of Defense Procurement" (25 June 2021), online: https://www.justice.gov/opa/pr/belgian-security-services-firm-agrees-plead-guilty-criminal-antitrust-conspiracy-affecting#:~:text=G4S%20Secure%20Solutions%20NV%20(G4S,U.S.%20Department%20of%20Defense%20for

[665] Sweeney, International Governance of Competition and the Problem of Extraterritorial Jurisdiction, *supra* note 69, at 371- 372; Bhattacharjea, Export Cartels—A Developing Country Perspective, *supra* note 58, at 333.

[666] *R. v. Libman*, 1985 2 SCR 178; *Rakuten Kobo Inc. v. Canada (Commissioner of Competition*), 2018 FC 64, para 81-141; Sweeney, International Governance of Competition and the Problem of Extraterritorial Jurisdiction, *supra* note 69, at 378- 379; see also article 46 to the Canada Competition Act, *supra* note 25, which applies only on corporations (not individual) that implement foreign conspiracy in Canada; Tyhurst, Canadian Competition Law and Policy, *supra* note 8, at 301- 302 and the references there, and at 319.

[667] Sweeney, International Governance of Competition and the Problem of Extraterritorial Jurisdiction, *supra* note 69, at 371- 372.

[668] Sweeney, International Governance of Competition and the Problem of Extraterritorial Jurisdiction, *supra* note 69, at 367; Davison & Johnson, An Exploration of the Evolution of the EU's Twin-Track Approach, *supra* note 662, at 90.

jurisdiction if the implementation of the cartel agreement is within the borders of an EU member states.[669]

Soft law

In addition to national law, several international soft laws address transnational cartels. Soft law is mainly promoted by the ICN, OECD, and UNCTAD, which cooperate closely and play a significant role in promoting international competition policy.[670] These international organizations provide domestic competition authorities with political support to strengthen their independence and build a professional reputation, expert advice, and resources, allowing them to share experiences among countries, provide recommendations, and offer technical assistance.[671] In addition, their credibility and positive reputation influence the development of desirable practices among many national competition agencies and lead to amendments in domestic regulations.[672] Soft law is more flexible and more comfortable to accept.[673] It enables countries to develop consensus and adapt gradually to a new regime. In addition, soft law has already contributed to an increase in harmonizing procedural issues that have established cooperation on transnational competition cases.[674]

[669] Sweeney, International Governance of Competition and the Problem of Extraterritorial Jurisdiction, *supra* note 69, at 364- 365; Noonan, The Emerging Principles of International Competition Law, *supra* note 11, at 273- 295.

[670] OECD, International Co-operation on Competition Investigations and Proceedings: Progress in Implementing the 2014 OECD Recommendation, *supra* note 482, at 17; Błachucki, The Role of Soft Law in Functioning of Supranational Competition Networks, *supra* note 275, at 34.

[671] Aydin & Büthe, Competition Law & Policy in Developing Countries, *supra* note 20, at 28.

[672] Błachucki, The Role of Soft Law in Functioning of Supranational Competition Networks, *supra* note 275, at 35.

[673] Shaffer & Pollack, Hard vs. Soft Law, *supra* note 271, at 719.

[674] Budzinski, International Antitrust Institutions, *supra* note 360, at 137- 138; Phan, Realism and International Cooperation in Competition Law, *supra* note 62, at 335; Shaffer, Criminalizing Cartels: A Global Trend, *supra* note 21, at 332- 333; Sokol, International Antitrust Institutions, *supra* note 271, at 187.

Treaty law

In addressing international competition, soft law was a favorable alternative after the unsuccessful attempts to create an international treaty.[675] The modern attempts to establish a multilateral binding treaty can be traced back to 1927 under the League of Nations, followed by other unsuccessful attempts, which finally ended in rejection in 2004 during the Doha round of the WTO negotiations.[676] Several regional agreements that prohibit transnational cartels on a regional and national level do exist and are binding on their members, but they are limited in scope. There are also binding free-trade agreements that address competition.[677] While some FTAs include a general dispute-settlement mechanism, others exclude competition chapters from dispute-settlement mechanisms and replace them with consultation procedures.[678] This suggests that countries have chosen competition chapters as soft law in hard law agreements.[679] Therefore, for now, no multilateral treaty addresses or criminalizes transnational cartels.

Customary law and general principles of law

Addressing competition issues in FTAs, the WTO, and other leading international organizations, such as ICN, the OECD, and UNCTAD, can indicate the existence of other significant sources of international law: customary law and general principles of law. The documents of international organizations are rich in materials from different jurisdictions and can

[675] Sokol, International Antitrust Institutions, *supra* note 271, at 200.

[676] World Trade Organization, General Council Decision, Doha Development Agenda WT/L/579 1(g) (1 August 2004), *supra* note 415; Andrew Guzman "The Case for International Antitrust" (2004) 22 Berkeley Journal of International Law 355, at 365; Waller, Neo-Realism and the International Harmonization of Law, *supra* note 358, at 596- 603.

[677] Sokol, Order without (Enforceable) Law, *supra* note 59, at 249.

[678] Laprévote, Competition Policy within the Context of Free Trade Agreements, *supra* note 487, at 25- 26; Anderson, Competition Policy, Trade and the Global Economy, *supra* note 491, para 38 & 58.

[679] Sokol, Order without (Enforceable) Law, *supra* note 59, at 262- 263 & 266- 267.

provide evidence for the broad recognition of general principles of law or for the practice or *opinio juris* of most states on specific matters.[680]

Customary law and the general principles of law can cover the same norm and may overlap.[681] Still, they are separate sources of norms. Customary law is a general practice that is believed to be a binding law, known as *opinio juris*.[682] On the other hand, general practice and *opinio juri*s are not necessary for the emergence of general principles of law, which is the *recognition* of a principle in different legal systems and is used to solve domestic matters.[683] Furthermore, general principles of law require a transposition from domestic law to international law, which is not required in customary law.[684]

There are, however, no sufficient indications for the emergence of customary law or general principles of law that establish a criminal prohibition against transnational cartels. Around 140 countries currently have competition laws in their jurisdictions,[685] yet those national competition laws are diverse and use different rules and competition policy to promote different goals.[686] In addition, there is no sufficient and consistent state practice toward other states or international organizations as a binding practice that follows customary law or any legal duty in prohibiting transnational cartels. Similarly, the lack of response from other states shows no acceptance,

[680] United Nations, First Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 245, para 234; United Nations, Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 248, para 72 & 121- 122; Thirlway, The Sources of International Law, *supra* note 185, at 79 & 95- 96.

[681] United Nations, Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 248, para 152 & 160- 161.

[682] United Nations, Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 248, para 108- 110 & 151.

[683] United Nations, First Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 245, para 233; United Nations, Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 248, para 110 & 165.

[684] United Nations, Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 248, para 111.

[685] See above in subchapter 3.7. "National law source" and footnote 547.

[686] See above in subchapter 3.7. "National law source."

rejection, or tolerance of a specific practice.[687] Previous attempts to create a reciprocal binding obligation have failed, suggesting that states oppose treating other states or other international organizations in a binding fashion.

Furthermore, the UN Set adopted by the United Nations General Assembly under resolution 35/63 has no binding legal effect on countries.[688] The UN Set also did not recognize pre-existing norms, and there was no consensus among countries regarding the existence of international competition standards.[689] In addition, during the negotiation to adopt the UN Set, there was disagreement on creating a legally binding international agreement.[690] Moreover, the UN Set's rules call for the prohibition of restrictive business practices, but they are written as recommendations to enterprises to avoid such conduct, not as mandatory prohibitions.[691]

Similarly, the OECD and ICN provide nonbinding recommendations on how jurisdictions can address hardcore cartels but do not represent an existing practice among states. Furthermore, there is no indication of *opinio juris*, which would indicate how states behave in certain practices with the belief that such is required as custom law.[692] As explained in the North Sea case, "not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the

[687] Thirlway, The Sources of International Law, *supra* note 185, at 63- 67.

[688] Lianos, The Contribution of the United Nations to the Emergence of Global Antitrust Law, *supra* note 362, at 431- 432.

[689] Lianos, The Contribution of the United Nations to the Emergence of Global Antitrust Law, *supra* note 362, at 439.

[690] Lianos, The Contribution of the United Nations to the Emergence of Global Antitrust Law, *supra* note 362, at 441.

[691] UNCTAD, The United Nations Set of Principles and rules on Competition, *supra* note 423, at section D; Czako, The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices Recent Development, *supra* note 421, at 324.

[692] Thirlway, The Sources of International Law, *supra* note 185, at 72.

existence of a rule of law requiring it."[693] Thus, the UN Set does not establish a customary law,[694] nor does the ICN's or OECD's recommendations.

FTAs and regional agreements do not emerge as customary law. As mentioned, some FTAs exclude competition from dispute-settlement clauses and are not binding. When there is an FTA agreement, the competition law mostly remains national and does not undergo harmonization. National competition laws differ among jurisdictions and reflect the specific economic character of each jurisdiction. This suggests that jurisdictions have not enacted a competition law out of international obligation or as part of states' practice with the belief that it is obligatory.[695] Regional agreements are limited in scope to a specific regional territory and are part of a broader agreement regarding economic and other shared interests.

The same deduction can be made regarding general principles of law. Although there is no precise number of national legal systems that should be examined to prove general principles of law,[696] general principles must be widely accepted in many domestic law systems.[697] Not all states have competition regulations, however, and those that do have them use them to promote different goals and policies. The WTO negotiations show that countries are aware of their different

[693] ICJ North Sea Continental Shelf, *supra* note 236, para 77.

[694] See also comprehensive discussion and conclusion at Lianos, The Contribution of the United Nations to the Emergence of Global Antitrust Law, *supra* note 362, at 439- 448.

[695]International Centre for Settlement of Investment Disputes, *United Parcel Service of America Inc. v. Government of Canada*, (2002), ICSID Case No. UNCT/02/1, para 70- 99, particularly para 84, online: https://www.italaw.com/sites/default/files/case-documents/ita0884.pdf; However, Lianos raised some reservations on this clear-cut conclusion and argued that bilateral trade agreements should be considered in a broader context and taking into account other sources of consensus to prohibit hardcore cartels, as appear in the ICN and OECD's recommendation and the UN Set, see further in Lianos, The Contribution of the United Nations to the Emergence of Global Antitrust Law, *supra* note 362, at 452- 455. Still, Lianos also concludes that there is no customary law even considering those sources; see there at 456- 462.

[696] United Nations, First Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 245, para 223; United Nations, Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 248, para 25.

[697]Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 40.

socioeconomic levels, legal frameworks, and cultural norms. Accordingly, they claimed that no competition policy fits all countries.[698]

Although there is a general consensus among countries on the basic definition of hardcore cartels and the need to prohibit them,[699] different countries use different definitions and prohibitions.[700] For example, no agreement exists on whether hardcore cartels should be defined according to efficiency grounds or consumer-welfare grounds.[701] Further disagreements concern countries' need for exemptions from prohibiting hardcore cartels when they result in more benefits in a specific field or when they involve small and medium-sized enterprises and export and import cartels.[702] Lastly, a comparison among states shows that only a minority of states treat transnational cartel activity as crimes. A recent comparison of states from 2022 shows that only a minority of states (26) treat hardcore cartels as crimes, and around 10 more only criminalize bid-rigging.[703]

Thus, no common principle exists in different legal systems,[704] and there are major differences[705] among states regarding the goals of competition, the scope of prohibiting hardcore

[698] See above in subchapter 3.7. "National law source;" WTO, Report (2000) of the Working Group on the Interaction Between Trade and Competition Policy, *supra* note 389, para 28; WTO, Report (2003) of the Working Group on the Interaction Between Trade and Competition Policy, *supra* note 15, para 16- 18; see also Bhattacharjea, The Case for a Multilateral Agreement on Competition Policy, *supra* note 384, at 293.

[699] ICN, Defining Hard Core Cartel Conduct—Effective Institutions, Effective Penalties, *supra* note 20, at 10.

[700] WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para 55; see further discussion above in subchapter 3.7. "National law sources."

[701] WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para 55; OECD, The Objectives of Competition Law and Policy, *supra* note 565, para 20; OECD, The Benefits of Competition Law and Policy for Developed and Developing Countries, *supra* note 560, at 47- 48; see also Bradford, Antitrust Law in Global Markets, *supra* note 60, at 289- 290; Aydin & Büthe, Competition Law & Policy in Developing Countries, *supra* note 20, at 7.

[702] WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para 24, 42, 53, 55 & 59.

[703] OECD, OECD Competition Trends 2020, *supra* note 14, at 18 & 61.

[704] United Nations, Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 248, para 65.

[705] United Nations, Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 248, para 69.

cartels, and what constitute desirable sanctions. Accordingly, there is no ground by which to recognize specific general principles of law for prohibiting transnational cartels based on the same standards in all jurisdictions or to criminalize transnational cartels, as required by general principles of law.

In addition, general principles of law require the transposition from the national legal systems to the international legal system and the relations among nations.[706] This may not be adequate, however, as it contradicts other international principles and increases conflicts among countries.

As mentioned, states use different rules about extraterritorial jurisdiction over foreign conduct that affects their markets or commerce in the context of competition, yet this approach has already attracted several disputes, notably between the United States and other countries, including Canada, Japan, the United Kingdom, and Switzerland.[707] Some objections include diplomatic protests, blocking cooperation and evidence, and prohibiting local firms from complying with foreign orders.[708] In addition, Switzerland's government once threatened to complain about the U.S. effect doctrine to the International Court of Justice (ICJ).[709] No claim was brought in this matter to the ICJ, however. This could be due to a growing acceptance of the effects doctrine among states and the belief that the ICJ is not qualified to discuss complicated issues regarding

[706] United Nations, First Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 245, para 225- 230.

[707] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 67- 68; Noonan, The Emerging Principles of International Competition Law, *supra* note 11, at 5- 6 & 487- 489.

[708] Noonan, The Emerging Principles of International Competition Law, *supra* note 11, at 524- 526 & 536- 537; Sweeney, International Governance of Competition and the Problem of Extraterritorial Jurisdiction, *supra* note 69, at 353- 354; Evenett, Levenstein & Suslow, International Cartel Enforcement: Lessons from the 1990s, *supra* note 16, at 1237- 1238, and footnote 25; Joel Davidow "The UNCTAD Restrictive Business Practice Code" (1979) 13 The International Lawyer 587, at 588; see, for example in Canada, Foreign Extraterritorial Measures Act R.S.C., 1985, c. F-29.

[709] Noonan, The Emerging Principles of International Competition Law, *supra* note 11, at 488- 489.

competition law, particularly in the absence of international competition rules.[710]

Although international law has no specific rule that prohibits extraterritorial jurisdiction over other territories or nations,[711] doing so may contradict other international principles.[712] First, when a country extends its national criminal law to another country's territory, it affects the other country's national sovereignty,[713] which according to international law ensures equality for all countries.[714] Moreover, states have not ceded their sovereignty over transnational crimes to an international jurisdiction, nor have they consented to allow other states to enforce the law in their own jurisdictions.[715] Second, when a jurisdiction enforces its competition law in another country, it uses its own regulations and forces norms developed in its society. This kind of enforcement subdues the principle of "self-determination" and violates the principle of "non-intervention."[716] These two principles promote countries' right to develop their political, economic, legal, and cultural characteristics independently and without the intervention of other countries.[717]

Accordingly, applying domestic law over foreigners in other jurisdictions threatens the international principles of sovereignty, self-determination, and non-intervention and does not seem

[710] Noonan, The Emerging Principles of International Competition Law, *supra* note 11, at 489.

[711] See, for example, the Permanent Court of International Justice, Lotus case, The Case of the S.S. Lotus, *France v. Turkey* (1927), PCIJ Judgement N. 9, online: https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_A/A_10/30_Lotus_Arret.pdf; Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 246- 247; Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 55 & 67.

[712] See United Nations Charter, *supra* note 179, Articles 1- 2; Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 247, and chapter 16 in general.

[713] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 35; Noonan, The Emerging Principles of International Competition Law, *supra* note 11, at 4- 6 & 524- 525.

[714] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 55; United Nations, Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 248, para 147.

[715] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 30.

[716] See articles 1(2) and 2(7) of the United Nations Charter, *supra* note 179.

[717] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 35; David P. Fidler "Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law" (2003) 2:1 Chinese Journal of International Law 29, at 39- 40.

to fit the general structure of international law, as it contradicts other bases of international law.[718] Therefore, it is not appropriate to adopt one country's prohibition over another country's, suggesting that the transposition of general principles of law from national legal systems to the international legal system is undesirable.

[718] United Nations, Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 248, para 85.

4. Chapter 4 The foundations for criminalizing transnational cartels

4.1. Criminal law foundations

4.1.1. Classifying transnational cartels: International versus transnational crime

The core international crimes are based on customary international law and are codified in articles 5 to 8 of the Rome Statute. They include the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.[719] They are the most serious crimes and conduct that threaten the vital interests of the international community as a whole or shock the conscience of humankind due to their severe gravity.[720] No customary law prohibits transnational cartels, however, nor do the general principles of law. The prohibitions and their sanctions remain at the national level and in some cases the regional level and are based on treaty law. More importantly, the character of the conduct is not on a level of gravity that shocks humanity as a whole or threatens the peace of the international community or its security or other vital interests.[721] Viewed in this light, transnational cartels should not be recognized as international crimes.

In our current world, where wide connections exist among jurisdictions and their residents, through free trade, investment, and internet interactions, there is also a flow of transnational crimes from one country to another.[722] Transnational cartels are no different, as they have a transnational character, where cartels established in one or more jurisdictions can affect other jurisdictions.[723]

[719] Rome Statute of the International Criminal Court, *supra* note 49; Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 30.

[720] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 19-20, 76, 109; Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 31.

[721] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 19-20, & 109.

[722] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 8; Broude & Teichman, Outsourcing and Insourcing Crime: The Political Economy of Globalized Criminal Activity, *supra* note 117, at 796-798.

[723] Gal, Antitrust in a Globalized Economy, *supra* note 11, at 5; Capobianco & Nagy, Developments in International Enforcement Co-operation in the Competition Field, *supra* note 633, at 566.

In addition, there is a growing frequency of transnational cartels in global markets, which could form the basis for recognizing them as transnational crimes.[724] Although no multinational treaty prohibits transnational cartels, they have received special attention by the leading international organizations of this domain, including UNCTAD, the OECD, and the ICN. In addition, many jurisdictions worldwide have adopted prohibitions against transnational cartels, with some jurisdictions using criminal sanctions and others administrative sanctions with punitive and deterrence objectives.[725]

Transnational cartels can be seen as transnational crimes with domestic concerns based on domestic national prohibitions. A sufficient understanding of criminalizing transnational crimes under transnational criminal law is an acknowledgement of the international dimension of national criminal law.[726] In other words, national criminal law acquires jurisdiction over conduct that has a transnational effect on the interests of the jurisdiction.[727] Thus, the source of criminalizing the conduct is the national criminal law, and the discussion is based on the national criminal law's theoretical foundations.

Different jurisdictions may criminalize conduct based on different theoretical grounds that are acceptable in their legal systems. Some recognized legal systems include the Anglo-American, Germanic, Hindu, Islamic, and Romance legal systems.[728] Discussing the theoretical basis for

---

[724] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 232; see also Fifth United Nations Congress on the Prevention of Crimes and the Treatment of Offenders, *supra* note 42, para 50- 51.

[725] Organisation for Economic Co-operation and Development (OECD), Sanctions in Antitrust Cases-Background Paper by the Secretariat, DAF/COMP/GF(2016)6, (2016), at 9 online https://one.oecd.org/document/DAF/COMP/GF(2016)6/en/pdf; Shaffer, Criminalizing Cartels: A Global Trend, *supra* note 21, at 305; Andreas Stephan "An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation" (2017) 37:4 Legal Studies 621, at 623 & 645; Wouter P.J. Wils "Optimal Antitrust Fines: Theory and Practice" (2006) 29:2 World Competition 183, at 198; see further discussion in chapter 6.

[726] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 15.

[727] See the above discussion on jurisdiction in subchapter 2.3.2. "Transnational crimes."

[728] United Nations, General Assembly, International Law Commission, Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 248, para 52.

criminalizing transnational cartels based on each legal system goes far beyond the scope of this study, but in the next chapter I present the acceptable core arguments for criminalizing conduct based on criminal law theories that are accepted in the Anglo-American legal system, which also represents the leading enforcer countries that use criminal enforcement against transnational cartels.

Anglo-American jurisdictions, including the United States, the United Kingdom, Ireland, Australia, New Zealand, and Canada, use criminal enforcement against transnational cartels.[729] Furthermore, the United States and Canada, in addition to the EU, are the leading enforcement jurisdictions against transnational cartels.[730] While Canada and the United States use criminal sanctions against hardcore cartels, however, the EU allows only administrative sanctions.[731] Therefore, analyzing the criminal character of transnational cartels based on criminal law theories that are well established in Anglo-American legal system is an important step in criminalizing transnational cartels. Moreover, it can provide an established basis for further discussion based on other legal systems, particularly when younger competition agencies typically adopt the norms of more established and influential ones.[732]

4.1.2. Criminal responsibility based on national criminal law

Criminal responsibility is based on different grounds and justifications from social science, philosophy, criminology, economics, and other fields. Criminal responsibility is designed by criminal law and represents society's need to protect a valuable sociolegal interest through the law.

[729] See discussion in subchapter 3.7. "National law source."

[730] Connor, Global Antitrust Prosecutions of International Cartels, *supra* note 37, at 580; For original data on the historical prosecution patterns in those countries, see there at 586- 591.

[731] See further discussion about the enforcement of these authorities in subchapter 3.7. "National law source."

[732] Sokol, Order without (Enforceable) Law, *supra* note 59, at 262; Anderson, Competition Policy, Trade and the Global Economy, *supra* note 491, para 48.

Criminal prohibition aims to discourage antisocial behaviour forbidden by offence,[733] which announces to society that those actions should not be taken.[734] Theories of criminal responsibility are needed to identify the wrongfulness of the act and establish criminal liability, which is the primary justification for punishment.

Criminal law typically discusses three elements as justifying criminal enforcement: harm, moral wrongfulness, and culpability. These elements overlap and are discussed in combination or separately by different approaches or by different scholars using the same approach. At the same time, scholars may differ on which element should be emphasized as the main justification for criminalization. I discuss these three elements and present the view on this matter through several criminal law theories, including utilitarianism, legal liberalism, legal moralism, and legal perfectionism (character). These criminal law theories can have similarities or connections regarding the critical three elements as well as some key differences. In short, the main justification of legal liberalism is to prevent harm, but it also requires moral wrongfulness and culpability. Utilitarianism, however, can justify criminal prohibition based solely on the need to prevent harm. On the other hand, legal moralism can justify criminal prohibition for preventing moral wrong even without harm. Lastly, legal perfectionism emphasizes culpability and focuses on punishing the offender's bad character.

[733] Joel Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (Oxford University Press, 1987), at 19- 20.

[734] H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd ed., Oxford University Press, 2008), at 6.

4.1.3. Overview of national criminal law theories

Harm

The first element is *harm*, which utilitarianism also recognizes as mischief or as having other negative consequences. Harm refers to different types, including those experienced by an individual in the society or by the society as a whole or can affect one of its main interests. The main theories that establish their justification to prohibit harmful conducts are utilitarianism and legal liberalism.

Utilitarianism

The utilitarian approach is one of the most prominent approaches for criminalization based on utility and the prevention of mischief. Jeremy Bentham, the Enlightenment-era philosopher from whose writings modern utilitarian theories have emerged, recognizes two merits that govern humankind: pain and pleasure. These merits are responsible for what people do or should do.[735] Utility, according to Bentham, is the production of "benefit, advantage, pleasure, good, or happiness" and the prevention of "the happening of mischief, pain, evil, or unhappiness" for the individual or the community in general.[736] Thus, an action is in line with the principle of utility if it brings happiness to the community more than it reduces it.[737]

[735] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1789): chapter I Of the Principle of Utility, in J.H. Burns and H.L.A. Hart (eds.) *The Collected Works of Jeremy Bentham: An Introduction to the Principles of Morals and Legislation* (Clarendon Press, 1996) at 11.

[736] Bentham, Chapter I Of the Principle of Utility, *supra* note 735, at 11.

[737] Bentham, Chapter I Of the Principle of Utility, *supra* note 735, at 12- 13.

Based on the utilitarian approach, offence ought to prevent mischief to an individual or some individuals in a community or a state and promote good.[738] Otherwise, punishment would be groundless.[739] Thus, offences should protect an individual's "property, his condition in life, or his reputation."[740] In addition, offences should protect the public from the mischief that may affect public interests, such as external security, justice, public wealth, sovereignty, or the national interest.[741] Offences against public wealth are offences that affect the application of money or other public wealth that the government reserves as a fund.[742] These may include non-payment of forfeitures, non-payment of taxes, the breach of monetary regulations, or the violation of judicial and military trust.[743]

Legal liberalism

Another important and broadly accepted approach for prohibiting conduct is legal liberalism,[744] whose main reason for prohibiting conduct is to prevent harm to others.[745] Legal

[738] Jeremy Bentham, An *Introduction to the Principles of Morals and Legislation* (1789): chapter XIII Cases Unmeet for Punishment, in J.H. Burns and H.L.A. Hart (eds), *The Collected Works of Jeremy Bentham: An Introduction to the Principles of Morals and Legislation* (Clarendon Press, 1996), at 158; Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1789): chapter XIV Of the proportion between punishment and offence in J.H. Burns and H.L.A. Hart (eds), *The Collected Works of Jeremy Bentham: An Introduction to the Principles of Morals and Legislation* (Clarendon Press, 1996), at 165; Peter Arenella "Character, Choice and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments" (1990) 7 Social Philosophy & Policy 59, at 62.

[739] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1789): chapter XVI Division of Offences, in J.H. Burns and H.L.A. Hart (eds), *The Collected Works of Jeremy Bentham: An Introduction to the Principles of Morals and Legislation* (Clarendon Press, 1996), at 188.

[740] Bentham, Chapter XVI Division of Offences, *supra* note 739, at 193.

[741] Bentham, Chapter XVI Division of Offences, *supra* note 739, at 196.

[742] Bentham, Chapter XVI Division of Offences, *supra* note 739, at 201.

[743] Bentham, Chapter XVI Division of Offences, *supra* note 739, at note Vi.

[744] The origin of legal liberalism is attributed to John Stuart Mill's essay, see John Stuart Mill, *On Liberty* (London, 1859).

[745] Joel Feinberg "Some Unswept Debris from the Hart-Devlin Debate" (1987) 72 Syntheses 249; Bernard E. Harcourt, "The Collapse of the Harm Principle" (1999) 90:1 Journal of Criminal Law and Criminology 109, at 114, 120- 122, 129 & 138; Stuart P. Green, *Lying, Cheating, and Stealing: A Moral Theory of White- Collar Crime* (Oxford University Press, 2006), at 42-43; Erik Luna "The Overcriminalization Phenomenon: The Politics of Crime" (2004-2005) 54 American University Law Review 703, at 734; Claire Finkelstein "Positivism and the Notion of an Offense" (2000) 88:2 California Law Review 335, at 358- 393, where he discusses that government must have a theoretical justification for any use of the criminal sanction, and the harm principle supplies the content for such a theory.

liberalism sees liberty as a limiting principle for criminal enforcement.[746] Liberalism limits the application of criminal law based on favouring liberty[747] and protects a citizen's liberty from other citizens.[748] According to H.L.A. Hart, the justification for a society to prohibit an act with an offence is to prevent the harm that may injure an individual in the society or because the offence challenges a law that is essential to the authority.[749] As Joel Feinberg suggests, "it is legitimate for the state to prohibit conduct that causes serious private harm, or the unreasonable risk of such harm, or harm to important public institutions and practices."[750]

Feinberg's approach is broader than Hart's,[751] however, as he also recognizes the offence principle under legal liberalism,[752] although he finds it less desirable than the harm principle.[753] The offence principle is an unpleasant state of mind or something offensive to the victim. It may include "passing annoyance, disappointment, disgust, embarrassment, and various other disliked conditions such as fear, anxiety, and minor ("harmless") aches and pains."[754] This principle can serve as a basis for offences that can be seen as "moral offences," such as prohibiting pornography, activities offensive to religious or patriotic public sensibilities, or racial and ethnic slurs.[755]

According to Feinberg's legal liberalism approach,[756] the harm principle is always a good reason to support criminalizing conduct to prevent harm to a person and when there is no other

---

[746] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 9- 10.
[747] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 14.
[748] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 8.
[749] Hart, Punishment and Responsibility: Essays in the Philosophy of Law, *supra* note 734, at 22-23.
[750] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 11.
[751] Alex Steel "The Harms and Wrongs of Stealing: The Harm Principle and Dishonesty in Theft" (2008) 31:3 UNSW Law Journal 712, at 714.
[752] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 12- 13.
[753] Harcourt, The Collapse of the Harm Principle, *supra* note 745, at 130- 131.
[754] Joel Feinberg, *The Moral Limits of the Criminal Law Volume 2: Offense to Others* (Oxford University Press, 1988), at 1.
[755] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 13.
[756] Joel Feinberg, *The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing* (Oxford University Press, 1990), at 323.

effective means at no greater cost.[757] The offence principle is also good grounds for criminalizing conduct to prevent serious offence to persons and would be effective for this purpose.[758] This discussion will focus on the primary principle relevant to this thesis: the harm principle.

Harm to interest

Harm is when the offender causes a setback of the victim's interests.[759] The degree of interest that a person has in a given issue depends on how much that person stands to gain or lose from it. A person has a vital interest in his or her welfare interests, and without them, he or she is in loss. Welfare interests can include one's life, health, family, career, property, economy, the well-being of one's family and loved ones, the peace and prosperity of one's country, and the freedom of choice concerning any of the above.[760]

A person's welfare can be promoted by meditating on some act or policy that improves that individual's interests.[761] Some interests are widely shared and belong to a large group of people, institutions, or corporations that deserve the protection of criminal law and are called "public interests." Public interests belong to everyone, and, at the same time, public harm is harm to anyone.[762] Such interests are important to individuals and their welfare but are widely shared so that they belong to the community. These include, for example, "public peace, health, security from foreign enemies, and a sound economy."[763]

---

[757] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 26.
[758] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 26.
[759] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 105.
[760] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 33- 34, 37, 112- 113 &188.
[761] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 42.
[762] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 222- 223.
[763] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 63.

Harm and wrong

The harm principle in legal liberalism combines the concept of harm as a setback to others' interests and harm that is also wrong.[764] The meaning is that the offender treated the victim unjustly and the action was neither excusable nor justifiable.[765] Only those interests that were "invaded" by human beings (whether an individual, group, or when those represent organization) and are consequently in a worse condition than would have been the case without the invasion are relevant for the criminal law.[766] Still, not all "invasions" of interests are wrong, as the "invasion" can be justified or excusable.[767]

R.A. Duff has suggested adjusting Feinberg's concept of harm. Feinberg sees harm caused by nature and harm caused by wrongful conduct as the same type of harm. For Duff, however, these are two different types of harm. In addition to the physical harm in both situations, in wrongful harm (harm caused by the wrongful act of a human), the victim suffers from another specific kind of harm, which is a real sense of violation of the person's autonomy and interests, such as the intentional invasion of one's home in a burglary offence. This different kind of harm is considered to be the offender's "fault" as harm in itself and not just wrong.[768] Accordingly, Duff turns the focus of criminal law to "harm and with (even harmless) infringements of autonomy as serious evils"[769] because the harm involves a denial of the victim's humanity.[770] In addition, the

[764] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, chapter 1; Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 34.
[765] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 105- 107.
[766] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 34; Steel, The Harms and Wrongs of Stealing, *supra* note 751, at 715.
[767] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 35.
[768] R.A. Duff "Harms and Wrongs" (2001) 5:1 Buffalo Criminal Law Review 13, at 22-26.
[769] Duff, Harms and Wrongs, *supra* note 768, at 30.
[770] Duff, Harms and Wrongs, *supra* note 768, at 44.

wrong is public and not private and thus concerns the community as a whole.[771] A similar approach is recognized by Arthur Ripstein, who sees that, in the criminal offence, the offender causes *special harm*: a wrongful denial of a right when the offender denies the victim's right in society to fair terms of interaction.[772]

Moral wrongfulness

The second important element is moral wrongfulness. For legal liberalism, applying criminal law to conduct without wrongful moral restraint can be seen as unjustifiable and illegitimate. Thus, punishment should reflect, to some degree, retribution for the offender's blameworthiness and express censure against the offender's conduct.[773] Here, it should be noted that one of the main critiques against utilitarianism is its separation of law and morals or principles of justice.[774] Although utilitarianism does not consider it necessary that the conduct be morally wrongful, it does see the moral stigma of a criminal conviction as a relevant tool for deterrence. Thus, utilitarianism has the intention of being careful to impose criminal convictions with censure in those cases in which the public believes that the offender deserves it. Otherwise, the criminal stigma may lose its deterrence effect.[775]

Breaking the law

Moral wrongfulness does not have to be a moral wrong that developed through history as

[771] Duff, Harms and Wrongs, *supra* note 768, at 42.

[772] Arthur Ripstein, *Equality, Responsibility, and the Law* (Cambridge University Press, 2001) at 134, 147-149.

[773] Feinberg, Some Unswept Debris from the Hart-Devlin Debate, *supra* note 745, at 251-253; Jeffrie G. Murphy "Legal Moralism and Liberalism" (1995) 37:1 Arizona Law Review 73, at 78.

[774] H.L.A. Hart "Positivism and the Separation of Law and Morals" in Ronald Dworkin. (ed.) *The Philosophy of Law* (Oxford University Press:1977) at 17.

[775] Arenella, Character, Choice and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments, *supra* note 738, at 62- 63.

an inherent wrong, such as murder or stealing; it could also be the normative wrong of breaking the law. Several scholars emphasize the moral wrong of breaking the law.[776] H.L.A. Hart, for example, argues that the justification for following the law of authority is that the existence of the legal system is better than the chaos of its collapse; otherwise, such a system would not be defensible.[777] In the case of a legitimate legal system that prevents chaos, voluntarily breaking the law is considered morally wrong.[778]

Based solely on moral wrongfulness

Moral wrongfulness was also the subject of a serious debate in criminal law between legal liberalism and legal moralism that took place from the late 1950s to the 1970s. Although legal liberalism sees moral wrongfulness as a necessary part of recognizing wrongful conduct toward others, it will not support criminalizing conduct merely because it is immoral when it is not harmful to others.[779]

Legal moralism

Legal moralism suggests that it is acceptable to criminalize conduct because it is immoral even if it is harmless.[780] Patrick Devlin, one of the principal modern proponents of this approach argues for justifying the enforcement of immoral conduct to protect the moral fabric of society.[781]

---

[776] Joel Feinberg "The Right to Disobey" (1989) 87:6 Michigan Law Review 1690, at 1690; Michael Davis "How to Make the Punishment Fit the Crime" (1983) 93:4 Ethics 726, at 731 & 743; Ripstein, Equality, Responsibility, and the Law, *supra* note 772, at 24- 48. 134; see further discussion below in subchapter 5.2.1. "First approach- Hardcore cartels as disobedience."

[777] Hart, Punishment and Responsibility: Essays in the Philosophy of Law, *supra* note 734, at 39.

[778] Hart, Punishment and Responsibility: Essays in the Philosophy of Law, *supra* note 734, at 36- 37.

[779] Feinberg, Some Unswept Debris from the Hart-Devlin Debate, *supra* note 745, at 258- 259.

[780] Harcourt, The Collapse of the Harm Principle, *supra* note 745, at 120- 123; Heta Hayry "Liberalism and Legal Moralism: The Hart-Devlin Debate and Beyond" (1991) 4:2 Ratio Juris 202, at 203; Feinberg, Some Unswept Debris from the Hart-Devlin Debate, *supra* note 745.

[781] Patrick Devlin "Morals and the Criminal Law" in Patrick Devlin, *The Enforcement of Morals* (Oxford; 1965) at 6; Harcourt, The Collapse of the Harm Principle, *supra* note 745, at 124- 125.

The first explanation for this approach is pure moralism, as it is justified to enforce criminal law against immoral conduct simply because of its immorality.[782] The second explanation involves the harm aspect, as Devlin argues that immoral conduct causes public harm.[783] Under this justification, not every immoral act should be punished, just that immoral conduct that a "collective judgement" of the public indicates that the immoral conduct affects the moral structure of the society and may cause the society to lose its moral bonds.[784] This argument of Devlin can be described as impure moralism as it includes harm arguments.[785] There is, however, a critique against Devlin's argument regarding harm to the moral structure of the society, as there is no concrete definition of this kind of harm, the mechanism to prove it, or evidence that may support it.[786]

In any case, no agreement exists among scholars, and there is considerable opposition to a state's ability to criminalize morally wrongful conduct just because it is immoral if it causes no harm.[787] Bernard Harcourt, however, recognizes a shift from a debate between legal liberalism and legal moralism to one between progressives' and conservatives' approaches under the liberal theory domain, where both agree on the need for a harm principle to justify legal enforcement.[788] Harcourt points out, however, that conduct that used to be considered immoral but harmless, such as prostitution, pornography, and public drinking, is now argued to be harmful to others or oneself, which justifies its prohibition based on the harm principle and due to a better understanding of the

[782] Devlin, Morals and the Criminal Law, *supra* note 781, at 7; see also Harcourt, The Collapse of the Harm Principle, *supra* note 745, at 128.

[783] Harcourt, The Collapse of the Harm Principle, *supra* note 745, at 124.

[784] Devlin, Morals and the Criminal Law, *supra* note 781, at 8- 13.

[785] Feinberg, The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing, *supra* note 756, at 8.

[786] Harcourt, The Collapse of the Harm Principle, *supra* note 745, at 125- 127.

[787] See particularly H.L.A. Hart "Immorality and Treason" in Ronald Dworkin (ed.) *The Philosophy of Law* (Oxford University Press:1977) at 83; H.L.A. Hart, *Law, liberty and morality* (Stanford University Press, 1963); Harcourt, The Collapse of the Harm Principle, *supra* note 745, at 125; Green, Lying, Cheating, and Stealing, *supra* note 745, at 42- 43. However, this kind of enforcement may be acceptable in other jurisdictions, such as jurisdictions that are influenced by religious philosophy.

[788] Harcourt, The Collapse of the Harm Principle, *supra* note 745, at 115- 116.

negative consequences of such conduct.[789] Thus, although legal liberalism is no longer opposed, it is still influenced by legal moralism and has developed the sub-category of conservative liberalism that supports the harm principle as a necessary condition for criminal prohibition and the enforcement of morality under this condition.[790]

Although the debate between legal moralism and legal liberalism has generally tilted in favour of legal liberalism and the harm principle, legal moralism can still be recognized as an approach that stands by itself. Joel Feinberg, for example, distinguishes between bold liberalism and cautious liberalism. In bold liberalism, the only acceptable justifications for criminalization are the harm and offence principles. In cautious liberalism, the harm and offence principles are the strongest reasons for criminalization, while legal moralism can, in rare cases, offer another independent reason for criminalization.[791]

Feinberg recognizes legal moralism in the broad sense as a basis for criminalization to prohibit conduct based on moralism, although the conduct causes neither harm nor offence.[792] Under legal moralism in a broad sense, a theoretical argument can be promoted to criminalize conduct based on "the need (1) to preserve a traditional way of life, (2) to enforce morality, (3) to prevent wrongful gain, and (4) to elevate or perfect human character."[793] In addition to legal moralism in a broad sense, legal moralism can be defined in the narrow sense to include a class of evils described as "sins" that cause no harm or offence and can be done discreetly and by

[789] Harcourt, The Collapse of the Harm Principle, *supra* note 745, at 114- 116 & 183- 185.
[790] Harcourt, The Collapse of the Harm Principle, *supra* note 745, at 115- 116.
[791] Feinberg, The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing, *supra* note 756, at 324.
[792] Feinberg, The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing, *supra* note 756, at 3 and chapter 28 in general; Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 12 & 27.
[793] Feinberg, The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing, *supra* note 756, at 3-4.

consenting parties.[794] Under this concept, it is suggested that conduct be prohibited when it is inherently immoral[795] and based on a pure argument of moralism.[796]

Culpability and *mens rea*

In addition to the main justifications for prohibiting conduct—whether it is morally wrong or harmful—there is a need to establish the responsibility of the offender to justify enforcement. Offenders are responsible for their actions when they voluntarily break the law and act with intention, recklessness, or negligence.[797] According to H.L.A. Hart, it is unfair and unjust to punish those who have not voluntarily broken the law,[798] which reflects the offenders' culpability or their responsibility for having committed the crime.[799]

Attributing offence to those who break the law reflects the *distribution principle*, which justifies punishment only against an offender for the offender's offence.[800] According to Hart's definition of punishment, it is unfair to apply punishment to an innocent person, as punishment should be imposed "for an offence against legal rules" as well as against "an actual or supposed offender for his offence."[801] According to Hart, punishing an innocent person, such as a random person or an offender's wife or children, should not be defined as punishment.[802] In addition,

[794] Feinberg, The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing, *supra* note 756, at 4.
[795] Feinberg, The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing, *supra* note 756, at 4.
[796] Feinberg, The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing, *supra* note 756, at 8-9.
[797] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 105 & 107- 108.
[798] Hart, Punishment and Responsibility: Essays in the Philosophy of Law, *supra* note 734, at 38- 39.
[799] Hart, Punishment and Responsibility: Essays in the Philosophy of Law, *supra* note 734, at 36.
[800] Hart, Punishment and Responsibility: Essays in the Philosophy of Law, *supra* note 734, at 9, 12; von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 42- 43.
[801] Hart, Punishment and Responsibility: Essays in the Philosophy of Law, *supra* note 734, at 5.
[802] Hart, Punishment and Responsibility: Essays in the Philosophy of Law, *supra* note 734, at 5-6.

punishment as a response to a crime can be used only when the penalty is known in advance.[803]

Utilitarian theorists also avoid punishing those who did not break the law because this practice is not considered punishment.[804] Jeremy Bentham argues that punishment is inappropriate when it is ineffective at preventing mischief.[805] This can occur when the prohibition is established after the act has been done or when the prohibition is established but is not adequately conveyed to the public and has failed to warn the offender of the prohibition.[806] Based on this understanding, punishment follows the breaking of legal rules and includes guilt.[807]

One critique against utilitarianism, however, is that it does not include as part of its theory the principle of the distribution of punishment that restricts punishment to those convicted adequately.[808] This, may lead to an argument about whether utilitarianism can support punishing those who are innocent.[809] Nonetheless, the argument regarding punishing the innocent lacks support in international and national law, which punishes offenders based on the legality principle and after the violation of an established and written offence.[810]

Arthur Ripstein, whose work is heavily inspired by Immanuel Kant, focuses on a person's

---

[803] Davis, How to Make the Punishment Fit the Crime, *supra* note 776, at 731.

[804] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 42; Russell L. Christopher "Deterring Retributivism: The Injustice of "Just" Punishment" (2002) 96:3 Northwestern University Law Review 843, at 871- 872.

[805] Bentham, Chapter XIII Cases Unmeet for Punishment, *supra* note 738, at 159; Christopher, Deterring Retributivism: The Injustice of "Just" Punishment, *supra* note 804, at 872- 873.

[806] Bentham, Chapter XIII Cases Unmeet for Punishment, *supra* note 738, at 160.

[807] Frederick Rosen "Utilitarianism and the Punishment of the Innocent: The Origins of a False Doctrine" (1997) 9:1 Utilitas 23, at 25 & 32; Christopher, Deterring Retributivism: The Injustice of "Just" Punishment, *supra* note 804, at 872.

[808] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 42- 43.

[809] Christopher, Deterring Retributivism: The Injustice of "Just" Punishment, *supra* note 804, at 874, also 862, 871 & 877; at least one approach clearly states that it theoretically can support punishing the innocent in case it achieves more satisfaction to the society, see comprehensive discussion in Ted Honderich, *Punishment: The Supposed Justifications* (Pluto Press, 2006) at 86- 111.

[810] The legality principle is recognized as customary law and general principles of law; see above in subchapter 2.2.3. "General principles of law," and the references there.

"choice" to commit an offence as the main justification for criminalizing conduct and dealing with it under criminal law. In Ripstein's approach, criminal law protects the "fair term of interaction" between individuals in society.[811] Ripstein acknowledges the harm principle but distinguishes between harm that causes injury, which is protected by tort law and compensates the victim, and harm that is the result of the denial of the victim's rights and is protected by criminal law and punishment.[812]

According to Ripstein, criminal law and punishment are serious matters for society, and it is necessary to add something to justify criminal enforcement.[813] Criminal law applies where the offender "*chooses* a risk (or result) … seeks to substitute private rationality for public standards of reasonableness."[814] In cases where the person endangers the rights of others due to the offender's actions and acts recklessly or intentionally,[815] or chooses unreasonable risks or makes an unreasonable mistake,[816] criminal law is appropriate. Thus, the "added something" that justifies criminal enforcement is the offender's "choice" to act in a way that denies the victim's rights.[817]

The "choice" of offenders to violate the law reflects their responsibility for their actions and establishes the justification for blaming them. This choice expresses the moral wrongfulness element, however, as offenders voluntarily break the law and violate the *objective* moral value of the society proscribed by law and the citizens' rights maintained by the "fair term of interaction" between the individuals in the society.[818] Thus, it is a similar understanding to that of H.L.A. Hart's

[811] Ripstein, Equality, Responsibility, and the Law, *supra* note 772, at 24- 48 & 134.
[812] Ripstein, Equality, Responsibility, and the Law, *supra* note 772, at 147- 149.
[813] Ripstein, Equality, Responsibility, and the Law, *supra* note 772, at 147.
[814] Ripstein, Equality, Responsibility, and the Law, *supra* note 772, at 134.
[815] Ripstein, Equality, Responsibility, and the Law, *supra* note 772, at 134.
[816] Ripstein, Equality, Responsibility, and the Law, *supra* note 772, at 135- 139, 167.
[817] Ripstein, Equality, Responsibility, and the Law, *supra* note 772, at 149.
[818] Ripstein, Equality, Responsibility, and the Law, *supra* note 772, at 24- 48 & 134.

argument concerning the role of law in society to protect the legal system to prevent chaos and the moral wrongfulness associated with voluntarily breaking the law.[819]

Legal perfectionism and character

Another approach, however, focuses on the offender's "character" by punishing a bad character and attempting to develop a good character.[820] Legal perfectionism or "character" examines offenders' motives or emotions.[821] It sees the offender as a moral agent who is morally responsible for his or her attitude.[822] According to this approach, the blame should be assigned for character traits representing the offender's *subjective* moral wrongfulness. Thus, if undesirable conduct reflects an undesirable character trait, blame is appropriate; otherwise, blame is inappropriate.[823] According to this approach, however, even if a person has a bad character and is appropriately blameworthy, the person does not need to be punished, as society could consider other practical considerations, such as the harmful consequences to society and the utility of enforcement.[824]

Developing a person's good character and excellence can be a proper aim of criminal law, which can play an educative role in improving citizens.[825] Joel Feinberg recognizes this as a form of legal perfectionism for the positive benefit of improving a citizen's character. One form is a counterpart to legal paternalism, where the state uses legal coercion not only to prevent harm to

[819] Hart, Punishment and Responsibility: Essays in the Philosophy of Law, *supra* note 734, at 36- 37.

[820] See, for example, Michael D. Bayles "Character, Purpose, and Criminal Responsibility" (1982) 1 Law & Philosophy 5; Arenella, Character, Choice and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments, *supra* note 738.

[821] Green, Lying, Cheating, and Stealing, *supra* note 745, at 22.

[822] Arenella, Character, Choice and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments, *supra* note 738, at 77- 83.

[823] Bayles, Character, Purpose, and Criminal Responsibility, *supra* note 820, at 7.

[824] Bayles, Character, Purpose, and Criminal Responsibility, *supra* note 820, at 7- 8.

[825] Feinberg, The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing, *supra* note 756, at 277.

oneself (when a person voluntarily agrees to harm himself) but also to make one a better person. Feinberg, however, recognizes that a state has a weak legitimate basis for legal paternalism.[826] Thus, legal perfectionism for the purpose of making the person develop a better character has a weak basis.[827]

The second form is the counterpart to the harm principle, where legal perfectionism uses the law to prevent a person from causing harm to others and encourages the person to benefit others.[828] This can also explain a member's interest in society to behave in a certain way similar to what others have agreed to, for the collective good. This coordination can apply to various complex legal mechanisms that regulate our lives in society, such as traffic law and the tax system. In such cases, it is legitimate for the state to impose a criminal sanction as a backup sanction to ensure compliance with the system's rules.[829] Still, even in those cases, criminalizing conduct that violates the rules can be explained based on the harm principle, as it affects the public and non-compliance with the rules may eliminate the advantages of the complex legal system.[830]

Legal liberalism, character, and punishment

In legal liberalism, as it is based on the offender's "choice" to violate the legal prohibition, the character or the subjective moral wrongfulness of the offender is not necessary to establish an

[826] See in general Joel Feinberg, *The Moral Limits of the Criminal Law Volume 3: Harm to Self* (Oxford University Press, 1989).

[827] Feinberg, The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing, *supra* note 756, at 311- 312.

[828] Feinberg, The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing, *supra* note 756, at 311.

[829] Feinberg, The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing, *supra* note 756, at 316.

[830] Feinberg, The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing, *supra* note 756, at 316.

offence and, by itself, should not be criminalized.[831] The offenders will not be deemed innocent if they have a good character but violate the law; people will not be convicted of criminal violation just because they have a bad character.[832] In legal liberalism, however, the character or particular motivation of the offender plays a role in their punishment. For example, in economic crimes, the criminal system may add extra gravity to the punishment if the person committed the crime to gain more money or because the individual is "greedy." Those special characteristics are not a replacement for the harm principle or a justification for the jurisdiction against an offender to prevent wrongful harm but a justification for harsher sanction for his or her bad character.[833]

Summary

Legal liberalism and the harm principle have gradually prevailed over the legal enforcement of morality and became the main principles justifying enforcement.[834] Still, under legal liberalism and on the basis of the harm principle, moral wrongfulness serves as an essential element in justifying criminal enforcement as legitimate and fair. Utilitarianism focuses on preventing harm and will not consider moral wrongfulness a necessary element, but it can be considered at the punishment stage. Legal moralism can still justify criminalization in some circumstances, such as when a person obtains unjustified gains from the victim. Legal perfectionism (bad character) did not take a leading role in justifying criminal responsibility. Based on legal liberalism, the voluntary "choice" of the offender to commit the crime is sufficient to

[831] Gerald Dworkin "Devlin Was Right: Law and the Enforcement of Morality" (1998) 40:3 William & Mary Law Review 927, at 930.

[832] Arenella, Character, Choice and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments, *supra* note 738, at 74.

[833] Feinberg, Some Unswept Debris from the Hart-Devlin Debate, *supra* note 745, at 251-254; Murphy, Legal Moralism and Liberalism, *supra* note 773, at 79- 80 & 82- 83.

[834] Harcourt, The Collapse of the Harm Principle, *supra* note 745, at 131-133.

impose responsibility, while the offender's character can still play a role in punishment.

4.1.4. Triple framework for criminalization

According to the criminal law theories discussed above, the three main elements that justify criminal treatment are: harm, moral wrongfulness, and culpability. Approaches for criminalizing conduct vary, and some societies may tolerate the weakness or even absence of one of the elements and justify criminalization on the basis of another element. For example, a society may justify criminalizing an act that entails severe harm but is devoid of moral wrongfulness. Each jurisdiction can also establish its legal enforcement based solely on the offender's serious moral wrongfulness (objective or subjective) based on legal moralism or the offender's character.

An important work that establishes a comprehensive framework for distinguishing the criminal character of *white-collar crimes*[835] is suggested by Stuart Green, who suggests distinguishing the criminal character of white-collar crimes based on: *mens rea*, harmfulness, and the everyday moral norms of wrongfulness.[836] According to Green, the absence of the above three elements casts doubt on the criminal status.[837]

Green establishes his framework through the lens of various criminal law theories, recognizing the complexity and wide range of discussions on criminal liability, the differences between criminal law and morality, the differences between criminal law and civil law, the limits

[835] Green acknowledges that this term may be controversial and refers to different categories of crimes. However, he chooses to "explore the moral content of a specific collection of interesting, but mostly under-theorized, crimes: perjury, fraud, false statements, obstruction of justice, bribery, extortion and blackmail, insider trading, tax evasion, and certain regulatory offenses. I use the term 'white-collar crime' as a kind of shorthand to refer to the crimes contained on this list, but I recognize some potential problems with my doing so." Green, Lying, Cheating, and Stealing, *supra* note 745, at 19, and in more detail, there at 9- 20.

[836] Green, Lying, Cheating, and Stealing, *supra* note 745, at 30- 47.

[837] Green, Lying, Cheating, and Stealing, *supra* note 745, at 30.

of criminal law, the scope in which the criminal law address citizens, and the legitimacy of and reasons for punishing a citizen.[838] He suggests discussing moral wrongfulness and harmfulness separately rather than combining them as previously done.[839] In addition, Green focuses on *mens rea* to reflect the offender's awareness of the conduct, representing the offender's "choice" of whether to engage in the criminal conduct and free will in committing the illegal conduct. Green does not completely ignore the offender's "character" and sees it as part of the concept of moral wrongfulness.[840]

Green's framework may, however, neglect some relevant aspects used in other criminal law theories, such as utilitarianism's focus on punishing without moral wrong or the tendency of legal moralism to criminalize based on moral wrong even in the absence of harm. It also should be noted that Green establishes his approach on the assumption that retribution, in the sense that offenders deserve punishment when they are at moral fault, is a necessary goal of criminal law and punishment.[841] Thus, he focuses on the violation of moral rules or duty rather than preventing the consequences of the act.[842] I discuss retribution separately, however, as part of the sentencing discussion in chapter 8.

The clear advantage of Green's framework is that it provides a structured tool by which to recognize the criminal character of an act based on the three dimensions of assessment (*mens rea*, harmfulness, and moral wrongfulness). I do not strictly adopt Green's approach or justify criminalizing conduct based on his arguments. Rather, I use Green's framework to discuss harm,

[838] Green, Lying, Cheating, and Stealing, *supra* note 745, at 21- 29.
[839] Green, Lying, Cheating, and Stealing, *supra* note 745, at 44; see, for example, Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733.
[840] Green, Lying, Cheating, and Stealing *supra* note 745, at 22- 23.
[841] Green, Lying, Cheating, and Stealing, *supra* note 745, at 21-22.
[842] Green, Lying, Cheating, and Stealing, *supra* note 745, at 39.

moral wrongfulness, and *mens rea* to understand the *factual* aspects of transnational cartels as I present them in subchapters 5.1-5.3. After analyzing and understanding these elements, I apply the criminal law theories (utilitarianism, legal liberalism, legal moralism, and legal perfectionism) and present their *normative* justifications to criminalize transnational cartels in subchapter 5.4.

4.2. Sentencing foundations

4.2.1. The need for a sentencing explanation

Sanctions are the legitimate response of society to an offender for committing an offence and are designed by sentencing theories, which are vital complementary aspects of criminal law. The justifications for criminal prohibitions and punishment are, however, distinct.[843] Under the criminal law heading, we justify the state's act of prohibiting conduct or providing the grounds for doing so. Under the heading of sentencing law, we justify the state's response of punishing the offender or determining how much to punish.

Jurisdictions worldwide have no agreement on which sanctions to use against hardcore cartels, be they criminal sanctions, such as imprisonment, administrative sanctions, such as monetary sanction, or a hybrid of different kinds of sanctions.[844] Still, criminal law theories do not clearly explain how much to punish and which sanctions to use. Thus, in addition to the criminal law framework, there is a need to complete the criminalization discussion by further discussion using the main sentencing theories: utilitarianism and retributivism.

---

[843] Feinberg, Some Unswept Debris from the Hart-Devlin Debate, *supra* note 745, at 250.

[844] Organisation for Economic Co-operation and Development (OECD) "Cartels: Sanctions Against Individuals" (2007) 9:3 OECD Journal of Competition Law and Policy 7, at 42- 43; Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 286; International Competition Network (ICN), Anti-Cartel Enforcement Manual (2011), at 1 online: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_ACEMCaseResolution.pdf; see further discussion in chapter 6.

4.2.2. Utilitarian approaches to sanctions

Many countries give weight to preventive considerations in punishment.[845] Utilitarian punishment is justified based on a good or bad outcome.[846] In utilitarianism, punishment is evil and is allowed if it prevents greater evil,[847] which makes punishment inappropriate in certain cases. Such cases include first, where there is no ground for punishment, as there is no harm; second, where punishment is ineffective in preventing the harm; third, when punishment is too expensive or produces more harm than it prevents; and fourth, when punishment is needless, as the harm can be prevented without using punishment or using a less expensive method.[848] There are four main utilitarian approaches, which are discussed in the following sections.

4.2.2.1. Rehabilitation

Rehabilitation benefits society by reducing reoffending or avoiding unnecessary harm resulting from excessive penalties.[849] Its intention is to reform or correct the criminal tendency of the offender and change the offender's attitude.[850] Based on this approach, courts are encouraged to impose sentencing with rehabilitation treatment if the offender is likely to change his or her behaviour.[851] Rehabilitation treatment typically refers to a treatment model "in which the

[845] Johannes Andenaes "The Morality of Deterrence" (1969) 37 University of Chicago Law Review 649, at 649, at 655.

[846] Richard S. Frase, *Just Sentencing: Principles and Procedures for a Workable System, Studies in Penal Theory and Philosophy* (Oxford University Press, 2013), at 7; Christopher, Deterring Retributivism: The Injustice of "Just" Punishment, *supra* note 804, at 862 & 865.

[847] Bentham, Chapter XIII Cases Unmeet for Punishment, *supra* note 738, at 158.

[848] Bentham, Chapter XIII Cases Unmeet for Punishment, *supra* note 738, at 159- 164; von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 56.

[849] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 2.

[850] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 1- 2.

[851] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 1.

pathological state of the offender is diagnosed and treated by experts."[852] In any case, it should be an effective method for reducing repeated offences.[853] This kind of sentencing goal is typically used for young offenders or as part of adult probation,[854] as well as for offenders with alcohol or drug addiction.[855]

4.2.2.2. Incapacitation

Incapacitation aims to incapacitate the convicted offender so that the person cannot reoffend for a certain time period.[856] Incapacitation does not aim to change the offender in the way that rehabilitation is intended to but rather to put an obstacle in place that has the practical effect of preventing the offender from offending, which can be, for example, imprisonment, house arrest, or license cancellation.[857]

4.2.2.3. General deterrence

Deterrence relies on threat and fear and assumes that people are rational beings who will adjust their conduct according to the disincentives provided by sentence enforcement. According to Jeremy Bentham, "pain and pleasure are the great springs of human action."[858] If a person expects an action to produce greater pain than pleasure, that person will avoid conducting such an act

[852] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 2.

[853] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 3- 5.

[854] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 1.

[855] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 3.

[856] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 75.

[857] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 75.

[858] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 53; Bentham, Chapter I Of the Principle of Utility, *supra* note 735, at 11.

owing to the fear of consequences.[859] It is a forward-looking approach with consequentialist aims to prevent future crimes.[860]

General deterrence aims to apply to all members of the community.[861] It aims to present the punishment of an offender as an example to each member of society of what one can expect to suffer in terms of punishment for committing a similar offence.[862] General deterrence has been attacked as unjust because it treats individuals not as ends in themselves but as a means of threatening others.[863] Those who support general deterrence reject this criticism, however, on the ground that, in reality, society treats people in a way meant to promote the good of society. In addition, the law is necessary for society, and punishment is essential to the law's effectiveness. Thus, punishment based on general deterrence is ethically justifiable for maintaining the law.[864] Scientific proof is lacking, however, on the effectiveness of general deterrence.[865]

4.2.2.4. Specific deterrence

Specific deterrence is a form of deterrence that focuses on a particular individual. It aims to deter a specific offender via the court's consideration of the offender's character, circumstances, and previous record and calculation of the sentence needed to induce the offender to comply.[866]

---

[859] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 53; Per-Olof H. Wikstrom "Deterrence and Deterrence Experiences: Preventing Crime through the Threat of Punishment" in *International Handbook of Penology and Criminal Justice* (CRC Press, 2008) 345, at 349- 350.

[860] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 39- 41.

[861] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 53- 54.

[862] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 54.

[863] Andenaes, The Morality of Deterrence, *supra* note 845, at 649.

[864] Andenaes, The Morality of Deterrence, *supra* note 845, at 650.

[865] Andenaes, The Morality of Deterrence, *supra* note 845, at 663; von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 40- 41.

[866] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 41.

4.2.3. Retributivist approaches to sanctions

Many philosophers and legal scholars acknowledge retributivism as the leading theory of punishment.[867] Retributivism sees punishment as an end in itself because the offender deserves it and not as a way to use the offender as a means for good consequences, such as deterring others.[868] Retributivism looks back in time to the wrongdoing already committed[869] and suggests that offenders deserve punishment according to the seriousness of their crimes.[870] It relies on desert theories, which generally agree that punishment is the right thing to do when the offender is morally wrong and that punishment helps achieve justice.[871]

Desert theories agree on the question of whom to punish: the offender. They also agree on how much to punish: the quantum of punishment should be proportionate to the relative seriousness of the crime.[872] The seriousness of the crime depends on the degree of harm that resulted from the offence and the offender's culpability:[873] whether the offender intentionally committed the act or did so out of recklessness or negligence.[874] This concept of rendering a punishment that fits the crime is independent of and inherent in the retributive approach, which differs from the utilitarian approach and its considerations of consequences in determining

[867] Christopher, Deterring Retributivism: The Injustice of "Just" Punishment, *supra* note 804, at 846-847.

[868] Christopher, Deterring Retributivism: The Injustice of "Just" Punishment, *supra* note 804, at 847-848 & 864; Frase, Just Sentencing: Principles and Procedures for a Workable System, Studies in Penal Theory and Philosophy, *supra* note 846, at 8.

[869] Christopher, Deterring Retributivism: The Injustice of "Just" Punishment, *supra* note 804, at 862.

[870] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 102.

[871] Green, Lying, Cheating, and Stealing, *supra* note 745, at 21-22; Peter Arenella "Convicting the Morally Blameless: Reassessing the Relationship between Legal and Moral Accountability" (1991-1992) 39 UCLA Law Review 1511, at 1528; Christopher, Deterring Retributivism: The Injustice of "Just" Punishment, *supra* note 804, at 865.

[872] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 102.

[873] Andrew von Hirsch & Andrew Ashworth, (eds.) *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005) chapter 1, at 4.

[874] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 143.

punishment.[875] Desert theories, however, have different rationales for punishment.

4.2.3.1. Desert theory approach – Deserves to be punished

One important desert approach states that those who commit crimes deserve to be punished (and suffer) because of moral considerations.[876] According to Michael Moore, there is an intuitive connection, based on corrective action, between crime and punishment, similar to the connection between civil wrongs and the need to pay damages. This connection is justified by society's belief in the punishment's "rightness or fairness" and not the beneficial consequences that punishment may generate.[877] In addition, it is the intuitive censure against the offender and the intuitive feeling of regret for committing a crime.[878] Thus, society must support institutions to punish for justice considerations.[879] Nonetheless, society can take into account the cost and benefit considerations for punishment and decide not to punish certain behaviours. A society may also consider other benefits of punishment, such as deterrence, education, or incapacitation.[880]

4.2.3.2. Desert theory approach – Eliminate the unfair advantage

Another approach is the "unfair advantage." Michael Davis sees criminal law as necessary to maintaining order in society, and it is relevant in morally indifferent situations as well as morally wrong offences.[881] Accordingly, the obedience of other citizens makes the disobedience an act of

[875] Davis, How to Make the Punishment Fit the Crime, *supra* note 776, at 727.

[876] Michael Moore "The Moral Worth of Retribution" in *Placing Blame* (Oxford University Press, 2010) 104, at 150; von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy *supra* note 161, at 110.

[877] Moore, The Moral Worth of Retribution, *supra* note 876, at 104- 105; von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 102 & 110.

[878] Moore, The Moral Worth of Retribution, *supra* note 876, at 111- 118.

[879] Moore, The Moral Worth of Retribution, *supra* note 876, at 104; von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 110.

[880] Moore, The Moral Worth of Retribution, *supra* note 876, at 151.

[881] Davis, How to Make the Punishment Fit the Crime, *supra* note 776, at 731 & 743.

taking unfair advantage, which is, at minimum, the "'illicit pleasure' in every crime."[882] Thus, the offender gains an unfair advantage over law-abiding citizens by committing the offence, and the purpose of sentencing is to "price" the advantage and remove or cancel out that unfair advantage.[883] To price the advantage concerns not only material gain, such as the amount of money a thief has stolen from the victim, but also other advantages, including power, fame, and, at minimum, the illicit pleasure of committing any crime.

4.2.3.3. Desert theory approach – Censure and the communicative function of the sanction

A third approach emphasizes what the offender should fairly receive for the crime committed and not focus only on its outcome.[884] Andrew von Hirsch and Andrew Ashworth regard desert punishment that expresses disapprobation of the conduct as an integral part of "everyday moral judgements used in a wide variety of social context."[885] This "censure" approach sees that the criminal sanction conveys censure of or "moral communication" to someone who has committed a wrong.[886] Censure alone is insufficient, however; it is also necessary to impose hard treatment.[887]

---

[882] Davis, How to Make the Punishment Fit the Crime, *supra* note 776, at 743.

[883] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 102; Davis, How to Make the Punishment Fit the Crime, *supra* note 776, at 744- 745.

[884] von Hirsch & Ashworth, Proportionate Sentencing: Exploring the Principles, *supra* note 873, chapters 1 & 2; von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 115-116.

[885] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy *supra* note 161, at 117.

[886] von Hirsch & Ashworth, Proportionate Sentencing: Exploring the Principles, *supra* note 873, chapter 2, at 17-18; von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy *supra* note 161, at 116; This also reflects the German understanding of the criminal sanction, as it traditionally described as: "a) the repressive aim, the sanction being the reaction to a culpably committed wrong in the past which does not, however, exclude a preventive (side) effect; b) the importance of the unlawfulness of the convict's behaviour as it infringes fundamentally important interests of the individual or of society which are often related to the concept of Rechtsgüter, and finally c) the communication of a stigma on the part of the perpetrator in the form of a public disapproval or moral blame expressed by the judge within a formalised and generally public procedure." See Helmut Satzger "Definition and Scope of "Criminal" Sanctions (ESP. for the Application of Specific Safeguards in Criminal Law)" (2019) 90:2 Revue Internationale de Droit Pénal (RIDP) 265, at 267; see also the expressive function of the criminal punishment as presented in Dan M. Kahan "What Do Alternative Sanctions Mean" (1996) 63 Chicago Law Review 591, at 601-602.

[887] von Hirsch & Ashworth, Proportionate Sentencing: Exploring the Principles, *supra* note 873, chapter 2,

The sanction that treats the conduct as wrong has two moral functions: the first is "to recognise the importance of the rights that have been infringed," and the second is for the purpose of "addressing the offender as a moral agent, by appealing to his or her sense of right and wrong."[888] This is a critical aspect of blaming offenders and recognizing them as moral agents who understand right and wrong, rather than being restrained or intimidated without understanding the wrong and being treated as "beasts in a circus."[889]

It should be noted that Stuart Green also adopts the approach of moral wrongfulness, which consists of powerful everyday moral norms, such as cheating, deception and disobedience.[890] Moreover, he recognizes the principle of fair labelling, which is labelling and punishing certain conduct as criminal and deserving of censure.[891] In this justification respect, those approaches have the same grounds.

R.A. Duff also focuses on the meaning of punishment to convey censure or condemnation of the crime.[892] According to this approach, communicative punishment supports the concept that offenders deserve to suffer the pain of being censured by their fellow citizens and the pain of remorse.[893] In addition, the justification for imposing such a punishment is a matter of justice against the crime, which is a public wrong that violates society's core values.[894] Furthermore,

---

at 21- 22; von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 103, 116- 117.

[888] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 116.

[889] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 117.

[890] Green, Lying, Cheating, and Stealing, *supra* note 745, at 45.

[891] Green, Lying, Cheating, and Stealing, *supra* note 745, at 46.

[892] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 126- 127; R.A. Duff, *Punishment, Communication, and Community* (Oxford University Press, 2001).

[893] R.A. Duff "Crime, Prohibition, and Punishment" (2002) 19:2 J Applied Philosophy 97, at 101; von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 127.

[894] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 127.

punishment addresses offenders as moral agents responsible for their wrongdoing.[895] The punishment, however, goes beyond verbal or symbolic communication, which is too easily ignored.[896] It also goes beyond the moral reparation of apology, which is not always genuinely expressed or taken seriously by offenders.[897] Finally, it requires the hard treatment of imprisonment, fines, or social service to be sufficiently burdensome on offenders.[898]

4.2.4. Considerations for choosing a sentencing approach

4.2.4.1. A mix of different sentencing approaches

The mixed approach to punishment combines retributivism and utilitarianism. It adopts the retributivist approach that only the offender should be punished for the offence, and retribution sets certain boundaries on sentencing severity that fits the severity of the crime but recognizes deterrence under the limit of retributivism.[899] Thus, the mixed approach allows for the deterrence of punishment, which must not exceed the highest limit of punishment according to retributivism, which is proportionate to the severity of the crime. In addition, it will not require the fullest extent of desert punishment according to the severity of the crime if the lesser punishment is sufficient to deter the offender.[900]

---

[895] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 127.

[896] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 129.

[897] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy *supra* note 161, at 130.

[898] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 127.

[899] von Hirsch & Ashworth, Proportionate Sentencing: Exploring the Principles, *supra* note 873, chapter 1, at 8, and the references there; Christopher, Deterring Retributivism: The Injustice of "Just" Punishment, *supra* note 804, at 867- 868.

[900] Christopher, Deterring Retributivism: The Injustice of "Just" Punishment, *supra* note 804, at 869.

Few scholars today base their punishment theory on pure retributivism.[901] Examples of mixed approaches include the above-discussed approaches of Michael Moore, which suggest considering other benefits of punishment besides retributivism, such as deterrence, education, and incapacitation.[902] Andrew von Hirsch and Andrew Ashworth base their approach on the normative considerations of censure to justify punishment, but hard treatment nevertheless plays a critical supplementary role in threat and prevention considerations within the framework of the censuring institution.[903] R.A. Duff also suggests that the main justifications remain the communication of censure for the wrong the offender has done but deems the consequentialist consideration an instrument for achieving the good of crime prevention.[904] Furthermore, legal liberalists, such as H.L.A. Hart, advocate a mixed theory of punishment that anchors its argument on fairness and justice requirements but also has consequentialist goals.[905]

Further approaches suggest the use of a structured framework of mixed theories that enable jurisdictions to achieve a more consistent approach to punishment. For example, Norval Morris suggests basing his approach on determining a flexible range of deserved punishments and considering utilitarian factors within the range.[906] Richard Frase suggests structured rules to determine a range of deserved sentencing, with a limit placed on the maximum allowed sanction but with a more flexible lower limit to the sanction, recognizing that more severe offences deserve more punishment than less severe offences. He also suggests recognizing expressive goals, such

[901] von Hirsch & Ashworth, Proportionate Sentencing: Exploring the Principles, *supra* note 873, chapter 2, at 13.

[902] Moore, The Moral Worth of Retribution, *supra* note 876, at 151.

[903] von Hirsch & Ashworth, Proportionate Sentencing: Exploring the Principles, *supra* note 873, chapter 2, at 12- 13 & 23-24.

[904] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 128 & 131.

[905] Hart, Punishment and Responsibility: Essays in the Philosophy of Law, *supra* note 734, chapters 1 & 2.

[906] Norval Morris & Michael Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* (Oxford University Press, 1990).

as censure of punishment, and the need to take utilitarian considerations into account, such as the notion that public and private costs of punishment should not outweigh the expected benefit of the sanction to deter the offender. Other considerations include the effect of punishment on the offender and the offender's family, the risk from the offender, and procedural considerations.[907]

More broadly, criminal enforcement systems in different jurisdictions can use mixed approaches to punishment based on retributivism and utilitarianism at different punishment stages or a mix of them without a specific order or prioritization of the various aspects of punishment. An example would be to use the retributivist approach to determine a proportionate sentence range for a particular offence violation. A utilitarian approach could then be used to set the precise sentencing within a range that can achieve utilitarian consequences, such as general deterrence for the specific circumstances of the offence and specific deterrence or rehabilitation based on the offender's circumstances.[908]

4.2.4.2. A sentencing approach based on criminal law theories

Several criminal law and sentencing theories share the same background and have clear, logical, and intuitive connections. For example, the exact same theory of utilitarianism argues as part of criminal law prohibiting conduct for preventing mischief, while its punishment aspect requires preventing offenders and others from committing crimes, either by rehabilitation, incapacitation,

[907] Frase, Just Sentencing: Principles and Procedures for a Workable System, Studies in Penal Theory and Philosophy, *supra* note 846, see also summary there at 13- 22.

[908] See, for example, in Israel: Israel Penal Law, *supra* note 334, (Amendment No 113, 2012), Sections 40(1)-40(7); Julian V. Roberts & Oren Gazal-Ayal "Statutory Sentencing Reform in Israel: Exploring the Sentencing Law of 2012" (2013) 46(3) Israel Law Review 455. In Canada: Section 718, Canada Criminal Code, *supra* note 44. In England: Sentencing Act 2020, Section 57; Julian V. Roberts and Anne Rafferty "Sentencing Guidelines in England and Wales: Exploring the New Format" (2011) 9 Criminal Law Review 681; Andrew Ashworth and Julian Roberts (eds.), *Sentencing Guidelines: Exploring the English Model* (Oxford University Press 2013). In New Zealand: Sentencing Act 2002 (NZ), Section 7; Warren Young and Claire Browning "New Zealand's Sentencing Council" (2008) 4 Criminal Law Review 287–98.

or deterrence.

There is an intuitive connection between legal moralism[909] and character[910] approaches in criminalizing conduct for moral reasons or bad character and Michael Moore's retributivist approach of punishment that argues for punishing the offender because the individual deserves it.[911] There is also a logical connection between the legal liberalism of preventing harm because it is unfair to fellow citizens, as presented by Arthur Ripstein,[912] and Michael Davis' retributivist approach of cancelling unfair advantage.

A clear connection also exists between the legal liberalism of preventing harm, as presented by H.L.A. Hart, Joel Feinberg and Stuart Green and the fairness requirement to censure the person,[913] and the retribution approach presented by Andrew von Hirsch and Andrew Ashworth that justifies punishment based on the need to censure offenders for their wrongdoing.[914]

There are, however, grounds for distinguishing between the justifications for criminalization and punishment. Criminal law designs criminal prohibitions, which is the justification aim of the enforcement system. Along with the justification aim, there are fair procedures that govern the system and assess the moral functions that should be considered, such as moral wrongfulness and the offender's character, motives, and circumstances. These components are essential in punishment and reflect a society's condemnation of the offender for

[909] See above in subchapter 4.1.3. "Overview of national criminal law theories."
[910] See above in subchapter 4.1.3. "Overview of national criminal law theories."
[911] See above in subchapter 4.2.3.1. "Desert theory approach – Deserves to be punished."
[912] See above in subchapter 4.1.3. "Overview of national criminal law theories."
[913] See above in subchapter 4.1.3. "Overview of national criminal law theories;" Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 24.
[914] von Hirsch & Ashworth, Proportionate Sentencing: Exploring the Principles, *supra* note 873, at 31- 32.

the offence.[915]

More importantly, the connections between criminal law and sentencing do not imply that a jurisdiction must use the punishment approach in sentencing that fits the criminal approach used in prohibiting the conduct. Once the jurisdiction decides during the first stage to prohibit conduct based on any of the national criminal law approaches or a mix of them, the jurisdiction and its relevant authorities may choose at the second stage any of the punishment approaches or a mix of different sentencing approaches, as it is accepted in the jurisdiction regardless of the justification for prohibiting the conduct.[916]

[915] Feinberg, Some Unswept Debris from the Hart-Devlin Debate, *supra* note 745, at 251-254; Murphy, Legal Moralism and Liberalism, *supra* note 773, at 79-80 & 82-83.

[916] See, for example, in Canada, Section 718, Canada Criminal Code, *supra* note 44; see also references above at footnote 908.

5. Chapter 5 Criminalizing transnational cartels

In the previous chapter, I presented an overview of several important criminal law theories. I also suggested a legal framework for analyzing different aspects of an offence based on harm, moral wrongfulness, and culpability. In this chapter, I analyze the existence of those elements (harm, moral wrongfulness, and *mens rea*) in the conduct of transnational cartels and their doers. This process allows a better understanding of the criminal merits of transnational cartels. Following this analysis, I justify, normatively, why transnational cartels should be criminally prohibited based on several key criminal law theories.

5.1. Harm in transnational cartels

Preventing harm is the central justification of utilitarianism and legal liberalism.[917] *Harmfulness,* according to Stuart Green's framework, refers to "the degree to which a criminal act causes (or risks causing) harm."[918] Green adopts Joel Feinberg's definition of harm as "some relatively lasting or significant setback to a person's interests."[919] Green also adopted Jean Hampton's definition of harm as a disruption to a person's "well-being, including damage to that person's body, psychological state, capacities to function, life plans, or resources over which we take this person to have an entitlement."[920] Green also assumes that harm caused by criminal acts is "public" because it concerns society as a whole.[921]

[917] See above in subchapter 4.1.3. "Overview of national criminal law theories," the utilitarian approach.
[918] Green, Lying, Cheating, and Stealing, *supra* note 745, at 34.
[919] Green, Lying, Cheating, and Stealing, *supra* note 745, at 34.
[920] Green, Lying, Cheating, and Stealing, *supra* note 745, at 34.
[921] Green, Lying, Cheating, and Stealing, *supra* note 745, at 34.

Objective harm

Effective competition in the market is an important public interest in that it promotes efficiency and customer welfare.[922] The justification for prohibiting hardcore cartels is that they limit competition, affect consumers, affect rivalry and efficiency, and substantially harm the economy.[923] They also increase prices and transfer wealth from consumers, who pay more for the product, to producers. They reduce output, reduce innovation, and affect the quality of products, which in turn affects consumers' choices. In addition, they cause allocative inefficiency, wherein economic resources are not used optimally, causing waste and reducing overall economic welfare.[924] Further harm includes the high prices that uninvolved businesses charge because the hardcore cartel has produced an "umbrella effect" of high uncompetitive prices in the market, leading other players to raise their prices.[925] Similarly, transnational cartels prevent competition in global markets, raise the prices of goods and services, and reduce consumer welfare and development.[926] Transnational cartels are seen as more harmful than domestic cartels[927] and are

[922] See further discussion above in subchapter 3.7.1. "Goals of competition."

[923] OECD, Recommendation of the Council Concerning Effective Action against Hard Core Cartels (2019), *supra* note 26, at 3; WTO, Report (1998) of the Working Group on the Interaction Between Trade and Competition Policy, *supra* note 7, para 55; Aydin & Büthe, Competition Law & Policy in Developing Countries, *supra* note 20, at 6.

[924] Tyhurst, Canadian Competition Law and Policy, *supra* note 8, at 265-266; Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 90- 91; William M. Landes "Optimal Sanctions for Antitrust Violations" (1983) 50 University of Chicago Law Review 652, at 653, 656, 662- 672; Noonan, The Emerging Principles of International Competition Law, *supra* note 11, at 64.

[925] John M. Connor & Robert H. Lande "The Size of Cartel Overcharges: Implications for U.S. and EC Fining Policies" (2006) 51 Antitrust Bulletin 983, at 985-986; Robert H. Lande & John M. Connor "Cartel Overcharges and Optimal Cartel Fines" (2008), SSRN, at 2203- 2204 online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1285455

[926] WTO, Report (1999) of the Working Group on the Interaction Between Trade and Competition Policy, *supra* note 20, para 71; WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para 49; Evenett, Levenstein & Suslow, International Cartel Enforcement: Lessons from the 1990s, *supra* note 16, at 1221.

[927] John M. Connor "Optimal Deterrence and Private International Cartels" (2006) SSRN, at 3 & 14, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103598

estimated to be 75% more effective in raising prices than domestic cartels,[928] while the estimated effect on annual sales is billions of dollars.[929]

Furthermore, when a transnational cartel affects the victim country's markets, reduces competition, and raises entry barriers to other foreign businesses to keep them from entering the domestic markets.[930] Therefore, economic harm is done to investors and traders, who lose opportunities in new markets due to hindering international trade by blocking market access.[931] In addition, this activity affects the jurisdiction's reputation as a cartelized market, which does not create an environment conducive to attracting investments from abroad or trade in this market.

In addition to the harm to the economy and customers, a transnational cartel that operates from its home jurisdiction and affects other countries can affect the reputation of the home jurisdiction and international relations with foreign powers or communities,[932] as that jurisdiction may be perceived by other countries as a centre for illegal activity as well as harmful to trade. This can reduce trade and other connections with the home jurisdiction and affect its economy.

Policy considerations

I categorize the kind of harm that affects private and public interests, consumers, and markets as *objective* harm. Further public-policy considerations, however, should be considered

[928] Connor & Lande, The Size of Cartel Overcharges: Implications for U.S. and EC Fining Policies, *supra* note 925, at 1007.

[929] Evenett, Levenstein & Suslow, International Cartel Enforcement: Lessons from the 1990s, *supra* note 16; Levenstein & Suslow, Contemporary International Cartels and Developing Countries, *supra* note 15; WTO, Report (2003) of the Working Group on the Interaction Between Trade and Competition Policy, *supra* note 15.

[930] WTO, Report (1999) of the Working Group on the Interaction Between Trade and Competition Policy, *supra* note 20, para 71; Sokol, Order without (Enforceable) Law, *supra* note 59, at 240.

[931] Basedow, International Antitrust: From Extraterritorial Application to Harmonization, *supra* note 62, at 1037- 1038; Bradford, International Antitrust Negotiations and the False Hope of the WTO, *supra* note 59, at 383; Gifford, The Draft International Antitrust Code Proposed at Munich, *supra* note 62, at 2; Phan, Realism and International Cooperation in Competition Law, *supra* note 62, at 319.

[932] Bentham, Chapter XIII Cases Unmeet for Punishment, *supra* note 738, at 164; Bentham, Chapter XVI Division of Offences, *supra* note 739, at 196.

when rationalizing criminal prohibition.[933] A society has the right to decide what amount of harm it can tolerate and under what circumstances. Some considerations are the severity of the harm, the probability of the harm, and the potential social benefit of the act.[934] In cases where the harm is severe, immediate, and certain, there are more justifications for prohibiting the conduct. Fewer justifications can be made, however, for prohibiting the conduct when it involves slight or remote harm. Still, in cases where the probability of harm is low but the consequences are severe, there are more justifications for prohibition.

Where there are no potential social benefits of the conduct, there is no justification for allowing any risk of harm.[935] For example, firing guns randomly in a neighbourhood should be prohibited due to the severe consequences and the lack of value of the conduct, despite the low probability of this harmful occurrence.[936] On the other hand, driving a car should be allowed due to its social benefit, despite the risk. Still, driving recklessly should be prohibited even if the probability of harm occurrence is low, due to its potential severe consequences that can be avoided in case the driver follows the rules.

Therefore, it is a matter of balancing the risks of harm and the potential benefit of the act. Based on those calculations, legislators may draft a policy that reflects those considerations and test how much society may tolerate the risk of harm.[937] For example, when the potential benefit of the activity is high, society may require that the prohibited conduct have a clear and immediate harmful effect on society to justify the prohibition of an offence. When, however, the activity has

[933] Manning, Mewett & Sankoff, Criminal Law, *supra* note 46, Part I — Constitutional Considerations: II. Conceptual and Legal Limits of the Criminal Law: (b) Public Wrong.
[934] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 190- 191.
[935] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 191.
[936] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 190.
[937] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 191- 192.

little benefit to society and the harmful effect is severe, society may require a probability test of the occurrence of the harmful result to justify the prohibition. Similarly, when there is no potential benefit to society, the activity may be prohibited altogether. Thus, it is a matter of scale, with one edge representing the benefit to society and the other representing harm to society.

Non-regulative violation

One parameter to address is the merits of hardcore cartels and whether they constitute a regulative violation that needs to be corrected or an unjustified and intolerable violation that requires punishment. Criminal sanction is not an obvious choice for keeping order in society or keeping society's systems functioning, as in the case of traffic on roads or obeying a court order or the orders of other administrative authorities. This is because those social mechanisms aim to promote good in society, while deviating from the order may have negative consequences that should be avoided and corrected. In such cases, the authority typically uses moderate means to maintain its orders rather than severe sanctions to punish their violation. For example, a license requires passing exams that test knowledge or meeting certain qualifications, which can make individuals more aware about certain risks and enhance the need to maintain safe order. Licences can be used to maintain order on the road, provide eligibility to sell alcohol, or serve as grounds for closing an unsanitary facility. Criminal sanctions, however, can be used as a backup sanction for authoritative orders in cases of violations.[938] For example, when a person does not follow a court's order or obtain a required licence, the person can be punished to force the person to follow the rules.

[938] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 227.

Hardcore cartels, however, are not just a matter of keeping order. Instead, they fall into the category of offences for which criminal law, in the sense of prohibition and punishment, should be the primary means of enforcement. This is because hardcore cartels have a high probability of causing harm to the market and customers owing to their anticompetitive conduct (which we indeed assume causes harm and has no positive features from an economic perspective). This situation differs from a violation of competition regulations due to lack of judgment, refusing the competition authority's order, or failing to notify the competition authority of a merger. In those cases, the criminal sanction can be considered a backup sanction to maintain the order of a complex competition system (that is, competition policy, merger policy, and its relevant institutions and regulations).

If we compare hardcore cartels and competition systems to efforts to maintain traffic order on the road, hardcore cartels are unlike the case of a skilled foreign driver who has not been issued a valid license to drive in his new country of residence. Here, the focus is on the regulative order of traffic. This is similar to the order needed in competition rules, such as merger notification or the respecting of administrative orders, such as time limits until submitting a file. A hardcore cartel case, on the other hand, could be compared to a group of drunk drivers who have a car race inside the city, hoping to win a bet and causing fatal injuries to pedestrians (or putting them at high risk). In this latter case, the traffic order is less relevant than the urgent need to protect society from potential killers. Hardcore cartels are not merely a deviation from the proper order of the competition system, which aims to keep desirable competition and order in specific jurisdiction

based on its policy, such as the requirements for merger notification. Rather, hardcore cartels are conducts without benefit to the public that cause serious harm to customers and the market.[939]

Substantial harm or accumulative harm with benefits

A further consideration is the degree of harm committed by hardcore cartels, whether substantial or accumulative. In some cases, each person's activity can cause minor harm and is harmless to society overall. When this kind of harm accumulates through the actions of large numbers of people, however, it can cause serious harm to the public, such as in the case of pollution by cars or manufacturers. Using criminal sanction in those cases can be seen as extreme, even though the action has resulted in social harm. Each individual can say that the act has minimal harmful effects and, in the same way, benefits the individual or society.[940] From a public perspective, however, the accumulation of harm on the part of numerous users can cause severe harm to the public and must be controlled under an undesirable-harm threshold. Thus, legislatures should consider what effective means can be used to receive desirable results that keep the harm under the undesirable-harm threshold and optimize the benefits of the activity. For example, the legislature can use means like regulations for safe use, special taxes, licenses, the requirement of prior approval by the administrative authority, and so on. In these cases, criminal punishment should also be kept as a backup sanction to enforce authoritative orders and ensure that users obey the order of the system.[941]

[939] R.A. Duff uses the driving example to distinguish between *mala in se* and *mala prohibita*. According to Duff, violating traffic rules but still driving safely is considered *mala prohibita*, but violating traffic rules and driving unsafely while endangering others is considered *mala in se*. See Duff, Crime, Prohibition, and Punishment, *supra* note 893, at 102- 104.

[940] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 227- 229.

[941] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 229.

Hardcore cartels present the opposite case of accumulative harm by multiple users. Hardcore cartels can cause substantial harm to customers and the market in general through a single cartel collusion. A transnational cartel can even harm multiple markets in different jurisdictions. Thus, we should not confuse the tiny harm caused by many users, such as in some environmental violations, with the dynamic of hardcore cartels. Typically, hardcore cartels cause a tiny amount of harm to each victim, which gets distributed to mass numbers of victims in the market (it can also cause severe harm to one victim). This tiny harm to the victim, however, represents considerable harm to society and to public wealth and interests—harm that society has a good reason to prevent. More importantly, as I explain below, hardcore cartels cause harm to private and public interests with no recognized benefit or legitimate purpose except the unfair benefit to the offender.[942] Therefore, it is an undesirable activity by default, even if the harm is not severe.

Direct harm with no benefits

Competition in the market has many benefits, including lowering prices, making the production process more effective, and innovating.[943] In addition, other cooperation between players in the market and different types of agreements among them may benefit competition and offer some advantages to the market, as in the case of vertical agreements or mergers.[944] In those cases, there are grounds for weighing the anti- or pro-competitive effects of the practice or

[942] Gregory J. Werden, Scott D. Hammond & Belinda A. Barnett "Deterrence and Detection of Cartels: Using All the Tools and Sanctions" (2011) 56:2 Antitrust Bulletin 207, at 208.

[943] Anderson & Kovacic, Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets, *supra* note 9, at 70.

[944] WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para 55-56.

agreement and its effect on the market.[945] Thus, society is interested in allowing such conduct entirely, or allowing it under specific circumstances or with the provision of specific exemptions due to its potential benefits to society.

The case of hardcore cartels provides a different situation. The justification for prohibiting hardcore cartels is that such conduct, without the need for further analysis, limits competition and causes harm.[946] Furthermore, hardcore cartels serve no legitimate economic purpose and include no feasible advantages to the public that can be balanced against their severe harm.[947] Thus, there is a clear justification for their prohibition unless there are authorized exceptions. For example, based on benefit–harm analysis, it is still possible that a country may decide that specific industries are eligible to have hardcore cartels under certain circumstances due to the benefits they offer to society.[948] In addition, the OECD acknowledges that developing countries might prioritize other goals, such as fighting poverty, in some circumstances.[949] Thus, the country may include some exemptions for hardcore cartels.[950] Countries must consider certainty, clarity, and predictability, however, in applying those exceptions.[951]

---

[945] WTO, Report (1998) of the Working Group on the Interaction Between Trade and Competition Policy, *supra* note 7, para 55.

[946] OECD, Recommendation of the Council Concerning Effective Action against Hard Core Cartels (2019), *supra* note 26, at 3; WTO, Report (1998) of the Working Group on the Interaction Between Trade and Competition Policy, *supra* note 7, para 55; Tyhurst, Canadian Competition Law and Policy, *supra* note 8, at 265- 266; Aydin & Büthe, Competition Law & Policy in Developing Countries, *supra* note 20, at 6.

[947] OECD, Cartels: Sanctions Against Individuals (2007), *supra* note 844, at 25.

[948] For example, Israel allows exemptions in agriculture, which allow local farmers and growers to enter into hardcore agreements, see Section 3(4)(a) to Israel Economic Competition Law, *supra* note 61.

[949] OECD, The Benefits of Competition Law and Policy for Developed and Developing Countries, *supra* note 560, at 47- 48; Bhattacharjea, Who Needs Antitrust, *supra* note 560, at 58.

[950] OECD, Trade and Competition: From Doha to Cancun, *supra* note 7, at 9- 10; ICN, Defining Hard Core Cartel Conduct—Effective Institutions, Effective Penalties, *supra* note 20, at 13- 14.

[951] OECD, Trade and Competition: From Doha to Cancun, *supra* note 7, at 11; WTO, Report (2000) of the Working Group on the Interaction Between Trade and Competition Policy, *supra* note 389, para 28.

The need for the occurrence of a specific result

Another aspect to consider regarding the harm threshold is the amount of harm that justifies criminal sanction. Legislation can shape a desirable policy based on empirical evidence and other knowledge resources to keep a safe and desirable system functioning and prevent undesirable harm. In addition, legislative bodies can determine what actions meet the harm thresholds and describe specific prohibitions to prevent harmful conduct.[952] This issue is a matter of what amounts of harm society will bear.[953] Caron Beaton-Wells, for example, suggests determining the amount of harm that justifies enforcement based not on a fixed monetary value but by choosing a minimum percentage level of the combined sales level of all competitors in the specific line of sales in the same geographic area to justify criminal enforcement.[954]

There is no reason, however, to design a hardcore cartel offence as one that requires the occurrence of a specific result (i.e., affecting competition on X level) to justify its prohibition and punishment. Determining the need for the occurrence of a result depends, foremost, on the potential benefit of the conduct. It is a matter of harm and benefit analysis, since, when there is a high potential for benefit, the conduct may be tolerable unless it causes intolerable, specific, and severe harm. Hardcore cartels, however, have no legitimate benefits to the public. In addition, they are harmful to the protection of social interests, and their prohibition is justified even when the conduct puts the socio-legal interest at risk.[955] Thus, society should not risk or tolerate harm with

[952] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 229- 232 & 244.

[953] Harcourt, The Collapse of the Harm Principle, *supra* note 745, at 182.

[954] Caron Beaton-Wells "Capturing the Criminality of Hard-Core Cartels: The Australian Proposal" (2007) 31 Melbourne University Law Review 675, at 692 & 702.

[955] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 11; Claire Finkelstein "Is Risk a Harm" (2002) 151 Pennsylvania Law Review 963; Ripstein, Equality, Responsibility, and the Law, *supra* note 772, at 134; Green, Lying, Cheating, and Stealing, *supra* note 745, at 34.

no potential benefit. Another consideration is more of a practical nature, as it is not always possible to determine or prove the amount of harm.[956]

Further consideration is more related to the issue of enforcement than a justification for prohibition and punishment. Each jurisdiction must determine, based on its interest and resources, whether a certain kind of violation requires a harm threshold to justify the effort and resources of enforcement. Therefore, the enforcement authority can design an enforcement policy for the circumstances under which it should intervene.

Subjective harm – Denial of rights

Another type of harm is the effect on the victim's rights. One of the interests of a person's welfare is one's freedom of choice and how a person desires to shape and pursue his or her interests.[957] In competition, hardcore cartels prevent other competitors, customers, and the general public from enjoying their right to choose how to run their economy according to the selected competition policy that meets the public interest.

Furthermore, the offender's wrongful act while engaged in a hardcore cartel violates the victims' autonomy.[958] Hardcore cartel conduct also denies the victim's right in society for fair terms of interaction[959] and causes unpleasant consequences.[960] As I discuss in the following subchapter (on moral wrongfulness), hardcore cartels may include deceiving, cheating, or breaking

[956] Connor & Lande, The Size of Cartel Overcharges: Implications for U.S. and EC Fining Policies, *supra* note 925, at 987- 988; Stephan, An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation, *supra* note 725, at 633.

[957] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 113.

[958] Duff, Harms and Wrongs, *supra* note 768, at 22-26, 30, 42 & 44.

[959] Ripstein, Equality, Responsibility, and the Law, *supra* note 772, at 134 & 147- 149; Jennifer A. Quaid "Making Sense of the Shift in Paradigm on Cartel Enforcement: The Case for Applying a Desert Perspective" (2012) 58:1 McGill Law Journal 149, at 186.

[960] Bentham, Chapter I Of the Principle of Utility, *supra* note 735, at 11- 13.

the laws that regulate the common life of people in a society, all acts that can be seen as wrongful to the victim's autonomy and in violation of that individual's rights in the society. This affects the victim's autonomy and should be seen as a separate type of harm.[961]

Enforcement harm

Hardcore cartels are typically conducted in secrecy due to the active effort of their members to hide them. In this case, hardcore cartels cause inefficiency due to the effort to establish and maintain their existence.[962] Moreover, when cartels are hard to discover, it allows them to operate longer and thus cause continuous objective harm (to customers, the market, and resources).

Jurisdictions devote a specific enforcement effort to detect, investigate, and enforce the law against cartels. Jurisdictions also invest resources to establish an effective enforcement authority and use specialists from a variety of fields and proper equipment. For example, based on OECD competition trends, in 2021, a total of 79 jurisdictions around the world had 8,849 competition agency staff and invested EUR 1.3 billion for competition authority operations.[963] During the year 2021–2022, Canada had 399 full-time employees and an annual operating budget of CAD 59.5 million.[964] These enforcement costs constitute another type of harm that should be considered.[965]

Transnational cartels are considered more harmful than domestic cartels, as the former are

[961] Duff, Harms and Wrongs, *supra* note 768, at 22-26, 30, 42 & 44.

[962] Tyhurst, Canadian Competition Law and Policy, *supra* note 8, at 268.

[963] Organisation for Economic Co-operation and Development (OECD), OECD Competition Trends 2023, (2023), at 11, online: https://www.oecd-ilibrary.org/finance-and-investment/oecd-competition-trends-2023_bcd8f8f8-en. Those jurisdictions include OECD members and non-OECD members.

[964] Competition Bureau Canada, Competition Bureau of Canada - 2021–22 Annual Report (12 October 2022), at 4, online: https://ised-isde.canada.ca/site/competition-bureau-canada/sites/default/files/attachments/2022/CB-AnnualReport-2021-2022-Eng.pdf

[965] See, for example, Landes, Optimal Sanctions for Antitrust Violations, *supra* note 924, at 657.

harder to detect and deter.[966] Transnational cartels also create specific challenges related to cross-border operations that require cooperation among different authorities.[967] Finally, they are particularly harmful to developing countries because of their weak enforcement ability.[968]

Prohibition and punishment or compensation

The various types of harm caused by transnational cartels justify prohibiting the conduct and punishing the offender for violating the prohibition rather than compensating the victims. First, objective harm is a serious harm that affects the individual in society and the public as a whole. Therefore, it requires a public response and should not be left to be handled between a specific group of customers and the cartel members and settled by compensation. Moreover, it is hard to eliminate harm merely by compensating a specific group, as hardcore cartels affect the market and the public in general. Therefore, objective harm justifies the prohibition and punishment when such prohibitions have been violated.

Furthermore, compensation does not always cover the subjective harm to the victim. Compensation does not include genuine remorse or an acknowledgement of the inherent harmfulness of the conduct and ignores the intangible and unmeasurable harm caused by the offender's violation of the victim's autonomy.[969]

Moreover, compensation does not cover enforcement harm. Although compensation can provide damages for the harm that has been discovered, it cannot cover all other potential harm

[966] Sokol, International Antitrust Institutions, *supra* note 271, at 191; Connor, The Impact of International Cartels, *supra* note 616, at 13.

[967] Ezrachi, & Kindl, Cartels as Criminal, *supra* note 21, at 239.

[968] WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para 49- 50.

[969] Duff, Crime, Prohibition, and Punishment, *supra* note 893, at 101; von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 127.

that may be attributed to a hardcore cartel, such as undiscovered activity. Thus, compensation that is limited to the harm that has been revealed will not deter the offenders from creating more hardcore cartels to secure further illegal gains that go undetected. This will lead to an undesirable result that supports the cartel in continuing its conduct, based on risk/benefit calculations, as the cartel will end up compensating victims only when it has been discovered but will continue making wrongful gain from other unexposed conduct. Thus, even if we assume that compensation can cover the harm done by the discovered illegal cartel, it does not include an adequate response to the low probability of exposing the cartel or a response to the active effort of the cartel's members to hide it and destroy evidence.

Lastly, compensation does not serve as a proper response to the offender's moral wrongfulness and choice to engage in illegal activity knowing its potential harmful consequences to the public.[970]

5.2. Moral wrongfulness in transnational cartels

Moral wrongfulness refers to violating a moral norm whose presence or absence is what often distinguishes an act as being criminal.[971] Such moral norms are a collection of everyday and powerful norms, including "cheating, deception, coercion, exploitation, disloyalty, promise-breaking, and disobedience," as "it is morally wrong, at least in certain core cases, to lie, cheat, steal, coerce, exploit, break promises, and the like."[972] In addition, moral wrongfulness plays a role in the fair labelling of the offender for the crime committed, in connection with the way society

[970] See above in subchapter 4.1.3 "Overview of national criminal law theories;" see below subchapter 5.2 "Moral wrongfulness" and subchapter 5.3 "Mens rea;" Ripstein, Equality, Responsibility, and the Law, *supra* note 772, at 147- 149; Green, Lying, Cheating, and Stealing, *supra* note 745, at 34.

[971] Green, Lying, Cheating, and Stealing, *supra* note 745, at 39.

[972] Green, Lying, Cheating, and Stealing, *supra* note 745, at 45.

distinguishes between various moral norms, such as cheating and stealing.[973]

I focus on five moral wrongs that seem relevant to transnational cartels and may reflect the moral wrongfulness inherent in them: 1) disobedience, 2) cheating, 3) exploitation, 4) stealing or fraud, and 5) deception.

5.2.1. First approach – Hardcore cartels as disobedience

Disobeying the law is morally wrong based on the idea that obeying the law is an obligation when the law is just and not prevailed by other moral claims.[974] The obligation to obey the law can be based on social contract theory,[975] in which citizens give their consent to the government and promise to abide by its decisions.[976] Stuart Green, however, recognizes a main flaw of social contract theory, as it is hard to see how all citizens or residents promise to obey the law.[977] In an attempt to solve this, it was suggested that a people give their consent because they choose to remain in a country, receive government benefits, or have the right to vote.[978] Still, Green points out that such arguments do not support the obligation to obey the law for various reasons: people often stay in their home countries out of convenience; government benefits cannot always be refused by citizens; and many citizens do not vote or have limited choices when doing so.[979]

---

[973] Green, Lying, Cheating, and Stealing, *supra* note 745, at 42 refers to Andrew Ashworth, *Principles of Criminal Law* (4th ed.) (Oxford, 2003) at 89–90.

[974] Green, Lying, Cheating, and Stealing, *supra* note 745, at 114-115.

[975] See further about social contract theory in John Locke, *Second Treatise of Government,* chapters VII & VIII. (Raleigh, NC, 1994); Kent Greenawalt, "Promise, Benefit, and Need: Ties that Bind Us to the Law" (1984) 18 Georgia Law Review 727, at 733; John A. Simmons, *Moral Principles and Political Obligations* (Princeton University Press, 1979), at 75–100; John A. Simmons, "Consent, Free Choice, and Democratic Government" (1984) 18 Georgia Law Review 791; see also Jean Jacques Rousseau, *Social Contract: Or, Principles of Political Law* (New York: Peter Eckler., 1893).

[976] Green, Lying, Cheating, and Stealing, *supra* note 745, at 115.

[977] Green, Lying, Cheating, and Stealing, supra note 745, at 116.

[978] Green, Lying, Cheating, and Stealing, supra note 745, at 116.

[979] Green, Lying, Cheating, and Stealing, *supra* note 745, at 116.

An alternative to social contract theory is fair play theory, which suggests that citizens who choose to profit from the benefits of the government create a duty of fair play to their fellow citizens and a duty to obey the law that governs their lives together.[980] Here, the obligation to obey the law does not rest on the citizens' consent to do so but rather on the duty of fairness to their fellow citizens, including the duty to obey the laws that govern their lives together.[981]

Green points out two main flaws of this approach. First, citizens do not always voluntarily accept the benefits of governments. Second, in many cases, breaching the law does not cause unfair disadvantages to other citizens; for example, running a red light on an empty street late at night under perfect conditions causes harm to no one.[982]

Green suggests overcoming the problem of the questionable morality of disobedience by focusing on four sources that indicate why society sees disobedience as morally wrong: first, by focusing on the traditional distinction in criminal law between *mala in se* and *mala prohibita*; second, by presenting empirical studies of why people obey the law; third, by perceiving the moral psychology (reactive emotion) of law-breaking; fourth, by considering how criminal law addresses recidivism.[983]

The first source that can be used to indicate the moral wrongfulness of disobedience is the traditional common distinction of *mala in se* and *mala prohibita*. The source of moral wrongfulness of *mala in se* crimes (such as murder, rape, or theft) was traditionally perceived as originating from a higher source than civil authority, such as God or natural law. It is now

[980] Green, Lying, Cheating, and Stealing, *supra* note 745, at 116; see also Justin Tosi "Rethinking the Principle of Fair Play" (2018) 99 Pacific Philosophical Quarterly 612.

[981] Green, Lying, Cheating, and Stealing supra note 745, at 117.

[982] Green, Lying, Cheating, and Stealing, supra note 745, at 117; see also Feinberg, The Right to Disobey, *supra* note 776, at 1694.

[983] Green, Lying, Cheating, and Stealing, *supra* note 745, at 117- 118.

understood, however, as moral wrongfulness regardless of whether it is prohibited by law.[984] The *mala prohibita,* by contrast, derives its moral wrongfulness from being prohibited by civil authority.[985] The notion of moral wrongfulness is also derived from the legal culture of a society, where individuals recognize *mala prohibita* crimes as immoral because they know that they are legally prohibited.[986] Thus, based on this source, breaking the law is immoral.

The second instructive source comprises empirical studies that explain why people obey the law. Green refers to Tom Tyler's study,[987] which asked 1,575 residents of Chicago in the United States about the existence of moral wrongfulness in committing six offences (illegal parking, speeding, making enough noise to disturb neighbours, littering, drunk driving, and stealing inexpensive items from stores). The study showed that breaking the law was considered morally wrong by a high percentage of the people who participated in the study.[988]

The third source is the reactive emotion experienced by the lawbreaker after breaking the law.[989] The moral content is slight if the lawbreaker feels no guilt or regret after breaking the law. On the other hand, if the person has a sense of guilt or regret, it means that breaking the law is morally wrong. Green acknowledges that there are no empirical studies on these reactive emotions, which can vary from person to person. One analogy of this kind of reactive emotion, however, is religious or, in some places, ethical prohibitions that prohibit *mala in se* crimes and *mala prohibita* crimes (such as consuming alcohol). The moral content in those prohibitions is the fact of their

[984] Green, Lying, Cheating, and Stealing, *supra* note 745, at 118.
[985] Green, Lying, Cheating, and Stealing, *supra* note 745, at 118.
[986] Green, Lying, Cheating, and Stealing, *supra* note 745, at 120 and footnote 33 there.
[987] Tom R. Tyler, *Why People Obey the Law* (Princeton University Press, 2006)
[988] Green, Lying, Cheating, and Stealing, *supra* note 745, at 122.
[989] Green, Lying, Cheating, and Stealing, *supra* note 745, at 123.

being prohibited, which supports the idea of moral wrongfulness in breaking the law.[990]

The fourth source is the society's attitude towards lawbreakers who are recidivists.[991] Recidivists, who repeatedly commit the same offence, are viewed by society and the courts as more blameworthy and worthy of more punishment, and such an offence constitutes a moral wrongfulness.[992]

Other scholars also see disobedience as a serious moral wrongfulness. According to Joel Feinberg, it is morally justified to disobey a law only when "the weighty reasons that tend to support a moral duty of obedience are outweighed in a particular set of circumstances by even weightier reasons that support a moral duty (or at least a moral right) to do something inconsistent with obedience."[993] H.L.A. Hart justifies following the law of authority because the existence of a legal system is better than the chaos of its collapse.[994] In the case of a legitimate legal system that prevents chaos, breaking the law voluntarily is considered morally wrong.[995] Michael Davis sees criminal law as necessary to maintaining order in society.[996] Accordingly, the obedience of other citizens makes the disobedience an act of taking unfair advantage, which is at minimum the "'illicit pleasure' in every crime."[997]

A comprehensive approach based on disobedience can be found in Arthur Ripstein's approach to criminal law as a protector of the "fair term of interaction."[998] Under this concept,

[990] Green, Lying, Cheating, and Stealing, *supra* note 745, at 124.
[991] Green, Lying, Cheating, and Stealing, *supra* note 745, at 125.
[992] Green, Lying, Cheating, and Stealing, *supra* note 745, at 125.
[993] Feinberg, The Right to Disobey, *supra* note 776, at 1690.
[994] Hart, Punishment and Responsibility: Essays in the Philosophy of Law, *supra* note 734, at 39.
[995] Hart, Punishment and Responsibility: Essays in the Philosophy of Law, *supra* note 734, at 36- 37.
[996] Davis, How to Make the Punishment Fit the Crime, *supra* note 776, at 731 & 743.
[997] Davis, How to Make the Punishment Fit the Crime, *supra* note 776, at 743.
[998] Ripstein, Equality, Responsibility, and the Law, *supra* note 772, at 134.

Ripstein expresses his core idea that society depends on the law to maintain fair interaction between individuals in society.[999] Criminal law applies when the offender chooses a risk by replacing his "private rationality for public standards of reasonableness."[1000] Under Ripstein's understanding of criminal law, crimes against the public order, such as traffic violations or tax evasion, should be seen as crimes because fairness requires that people adjust their behaviour to meet the demands of public order. In those cases, punishment is needed in response to breaking the law.[1001]

Jennifer Quaid bases her argument for criminalizing hardcore cartels on Arthur Ripstein's core idea that a society needs the existence of law to maintain a fair term of interaction between individuals. Quaid integrates several criminal elements in her argument that emphasizes the criminal character of hardcore cartels, including the offender's deliberate conduct,[1002] the means of deception used, the receipt of illegal benefits,[1003] and the need for desert punishment and censure.[1004] At its core, however, Quaid's argument is against the offender's violation of law that maintains the fair term of interaction between individuals,[1005] which can be seen as a sophisticated version of disobedience. Quaid recognizes competition law as being part of the system that balances freedom and restrains freedom for the benefit of all.[1006] In a system based on competition, a person can engage in the market and exercise economic freedom under legal rules that establish

[999] Ripstein, Equality, Responsibility, and the Law, *supra* note 772, at 24- 48.
[1000] Ripstein, Equality, Responsibility, and the Law, *supra* note 772, at 134.
[1001] Ripstein, Equality, Responsibility, and the Law, *supra* note 772, at 156.
[1002] Quaid, Making Sense of the Shift in Paradigm on Cartel Enforcement, *supra* note 959, at 154.
[1003] Quaid, Making Sense of the Shift in Paradigm on Cartel Enforcement, *supra* note 959, at 194.
[1004] Quaid, Making Sense of the Shift in Paradigm on Cartel Enforcement, *supra* note 959, at 155 & 195-196.
[1005] Quaid, Making Sense of the Shift in Paradigm on Cartel Enforcement, *supra* note 959, at 185 refers to Ripstein, Equality, Responsibility, and the Law, *supra* note 772, at 31- 50.
[1006] Quaid, Making Sense of the Shift in Paradigm on Cartel Enforcement, *supra* note 959, at 192.

acceptable behaviours.[1007] It is the offender's choice, however, to "use a private cost-benefit analysis while ignoring public standards" and commit a crime, which makes the conduct wrong.[1008] This autonomous decision of the offender to voluntarily ignore the rights of others is inconsistent with the system that protects the offender's and others' freedom.[1009]

I suggest understanding hardcore cartels mainly as the conduct of breaking the law. For a comprehensive discussion, however, I present other relevant concepts of moral wrongfulness and some of their flaws in the discussion that follows.

5.2.2. Second approach – Hardcore cartels as cheating

Several scholars have suggested that hardcore cartels are a form of cheating.[1010] According to Stuart Green, cheating occurs when a person breaks a rule under four conditions: "First, the rule broken must be fair and enforced in an even-handed manner and not subject to a justified exception. Secondly, the rule-breaking must be intentional. Thirdly, the rule-breaker must be part of a cooperative rule-governed activity that involves another party. Fourthly, the rule-breaker must intend to gain an advantage through her rule-breaking."[1011]

In cheating, the rule involves a cooperative party with rivalry and a horizontal, rather than vertical, relationship, such as in a "game, market, or a political contest."[1012] The horizontal requirement emphasizes that both parties are obliged to follow the rules that benefit them, while

[1007] Quaid, Making Sense of the Shift in Paradigm on Cartel Enforcement, *supra* note 959, at 193.
[1008] Quaid, Making Sense of the Shift in Paradigm on Cartel Enforcement, *supra* note 959, at 191.
[1009] Quaid, Making Sense of the Shift in Paradigm on Cartel Enforcement, *supra* note 959, at 186- 188.
[1010] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 106- 107; Beaton-Wells, Capturing the Criminality of Hard-Core Cartels, *supra* note 954, at 699; Angus Macculloch "The Cartel Offence: Defining an Appropriate 'Moral Space'" (2012) 8:1 European Competition Journal 73, at 87- 88.
[1011] Green, Lying, Cheating, and Stealing, *supra* note 745, at 63.
[1012] Green, Lying, Cheating, and Stealing, *supra* note 745, at 63- 64 & 67- 68.

cheating occurs among competitive parties, where one breaks the rule to gain an advantage over the party bound by the rule.[1013] The relationship should also be mutually beneficial, where each one restrains his or her liberty to make possible a group activity that has potential benefit for both.[1014]

Caron Beaton-Wells suggests seeing hardcore cartels as cheating because 1) hardcore cartels break the rules; 2) the rules are fairly enforced; and 3) the offenders commit the offence to obtain an advantage over parties with whom they are in a cooperative, rule-bound relationship. According to Beaton-Wells, however, the victims of the cheating are not just the competitors but also the customers and suppliers.[1015]

Peter Whelan expands the discussion of the cheating concept and recognizes three victims in hardcore cartels: 1) the cartel's competitors; 2) the cartel's customers; and 3) the final consumer of the cartelized product.[1016] When the potential victim of a hardcore cartel is the set of the cartel's competitors, Whelan does not recognize an obvious disadvantage. This is because, when the cartel is successful, it may lead to an increase in prices in the market, which may be in the interest of the other competitors, as they can increase their prices independently or set more competitive prices and be more attractive to consumers.[1017] On the other hand, competitors who are not part of the cartel have the disadvantage of exercising self-restraint by following the competition rules in the market. Therefore, being out of the cartel prevents them from determining how the cartel functions and how the cartel can serve their interest.[1018]

[1013] Green, Lying, Cheating, and Stealing, *supra* note 745, at 67 & 71.
[1014] Green, Lying, Cheating, and Stealing, *supra* note 745, at 64- 65.
[1015] Beaton-Wells, Capturing the Criminality of Hard-Core Cartels, *supra* note 954, at 699.
[1016] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 106- 107.
[1017] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 107.
[1018] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 107.

When the potential victim of a hardcore cartel is the cartel's direct customer, Whelan suggests seeing the disadvantage by "exercising a self-restraint in not violating the rule." In addition, customers may suffer if the cartel overcharges for its products.[1019]

When the potential victim of the cartel is the final consumer of the product, Whelan acknowledges the difficulty that arises from this situation as, according to Green's argument, cheating occurs when a person seeks an advantage by violating the law that others are obeying. In hardcore cartels, the business violates competition law, whereas customers are not expected to obey competition law. Whelan, however, suggests that cheating should be understood in a broader approach and sees businesses and customers as obeying a set of rules of one marketplace system. While the cartel's members violated one of the rules in the set, the customers obeyed the relevant rules in the set.[1020] Thus, the customers are being cheated.

I find that cheating is a limited concept in explaining hardcore cartels. First, as Green explains, cheating as moral wrongfulness should be among two moral agents with "horizontal, rather than vertical, relationships"[1021] and a mutually "beneficial, or cooperative, rule-governed relationship."[1022] When the relationship is vertical, Green suggests a moral wrongfulness of disobedience to the rules.[1023]

I also think that Whelan's suggestion to extend the rules to all rules in the set of rules of the marketplace can be an undesirable stretch and potentially result in other kinds of offences' being categorized as cheating. Thus, offences like taxes, environmental damage, obstruction of

[1019] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 107.
[1020] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 107.
[1021] Green, Lying, Cheating, and Stealing, *supra* note 745, at 67.
[1022] Green, Lying, Cheating, and Stealing, *supra* note 745, at 65.
[1023] Green, Lying, Cheating, and Stealing, *supra* note 745, at 68 & 117.

justice, or bribery could be considered cheating under this broad understanding of cheating. In addition, it seems unnecessary to extend the cheating concept to other cases where there is a vertical relationship among the parties, as other moral wrongfulness can be considered, including disobedience and exploitation.

In addition, the concept of cheating is limited in the context of hardcore cartels and the need to protect competitors who have a horizontal rivalry with the cartel's members. Many countries recognize the core goals of competition as protecting the competitive process and promoting economic efficiency.[1024] It should be emphasized that protecting the competitive process does not necessarily mean protecting the competitors themselves but rather protecting competition, particularly in the global domain and international trade. For example, the OECD suggests that discrimination can occur between domestic and foreign competitors without harming the competitive process that competition policies and international trade aim to promote.[1025]

Moreover, a domestic competition policy may have some exemptions in relevant sectors that serve the domestic market but can still be discriminatory against foreign businesses.[1026] Under this understanding, cheating against competitors may occur in hardcore cartels, but, since protecting competitors is not the priority of competition policy in different jurisdictions, a jurisdiction may decide not to enforce the law as a matter of competition policy.

Other competition goals, however, lie in the grey zone between the core and peripheral goals that different jurisdictions promote under their respective competition policies. One goal is

[1024] OECD, The Objectives of Competition Law and Policy, *supra* note 565, para 4 & 20; Tyhurst, Canadian Competition Law and Policy, *supra* note 8, at 133- 134.
[1025] OECD, Trade and Competition: From Doha to Cancun, *supra* note 7, at 9.
[1026] OECD, Trade and Competition: From Doha to Cancun, *supra* note 7, at 9- 10.

to ensure an equitable opportunity for small and medium-sized enterprises to compete.[1027] The violation of this goal is in line with the moral wrongfulness of cheating, as the competitors have horizontal relationships and a mutually beneficial cooperative relationship. This competition goal, however, is not one of the core goals and is recognized to have secondary importance from a global perspective. Thus, not all jurisdictions may accept it as part of their competition policy.

In cases where one of the competition goals of a jurisdiction is to protect other competitors, then cheating competitors through hardcore cartels may cause them to make uninformed decisions, as they do not know that other competitors are not playing according to the rules. Whelan points out that cartels may raise prices in the markets, and this may be beneficial to other competitors in the market even if they are not part of the cartel. In such cases, there is no apparent disadvantage to the other competitors, as they can raise their prices to meet the cartel's. Thus, the cheating concept is limited. As Whelan explains, however, even in this case, competitors can be morally wrong because the other competitors use self-restraint by not entering the cartel and determining that the cartel is functioning based on their interests.[1028] More importantly, the disadvantage is that the cartel breaks the rules and violates others' right to choose whether they want to continue to obey the rules when others are not. In breaching the rules that others are following, the cheater breaches an obligation to restrain his liberty as agreed and gains an unfair advantage over those who follow the rules and restrain their liberty.[1029]

All in all, hardcore cartels can be explained with the concept of cheating as causing harm to other competitors. Protecting competitors, however, is not one of the main goals of competition

[1027] OECD, The Objectives of Competition Law and Policy, *supra* note 565, para 5 & 22.
[1028] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 107.
[1029] Green, Lying, Cheating, and Stealing, *supra* note 745, at 63- 64.

and is not recognized as a desirable goal to protect in all jurisdictions.

5.2.3. Third approach – Hardcore cartels as exploitation

Exploitation is another important concept that should be considered in addressing hardcore cartels. Exploitation is when "X's 'using' or 'manipulating' or 'taking advantage of V, usually for his benefit and often at V's expense."[1030] Such acts can include "playing on" the victim, such as begging, making seductive suggestions, or using sympathy, friendship, and other means to take advantage of the victim's traits or circumstances. Such traits might include generosity, greed, loyalty, or recklessness. Circumstances might include illness, hunger, or the opposite: for instance, new-found wealth. Finally, there is a need for intent to benefit from the exploitation.[1031] According to Joel Feinberg, the exploitation principle arises when someone (A) uses someone (B) and takes advantage of B's circumstances without B's voluntary consent for A's ends,[1032] such as deception, coercion, manipulation, or other forms of taking advantage of the victim's situation.[1033]

Stuart Green distinguishes exploitation from coercion, as, in coercion, the focus is on the victim's options, while in exploitation, the focus is on the offender's interests. For example, it is coercive "when a doctor tells her patient that she will no longer treat him unless he gives up smoking."[1034] Here, the focus is the limited options of the patient, whether treatment or smoking. Exploitation occurs, however, when "a tugboat encounters a ship in distress and offers to tow it for a fee that greatly exceeds the normal market price for such services."[1035] Here, the focus is on

[1030] Green, Lying, Cheating, and Stealing, *supra* note 745, at 95.
[1031] Green, Lying, Cheating, and Stealing, *supra* note 745, at 95.
[1032] Feinberg, The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing, *supra* note 756, at 177.
[1033] Feinberg, The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing, *supra* note 756, at 176, 178, 204 & 206.
[1034] Green, Lying, Cheating, and Stealing, *supra* note 745, at 96.
[1035] Green, Lying, Cheating, and Stealing, *supra* note 745, at 96.

the unfair advantage that the tugboat will receive.

The unfair gain received from exploitation can provide a better explanation of Peter Whelan's interpretation of cheating in a broad sense. Whelan suggests that cheating should be understood through a broader approach, where businesses and customers are seen as obeying a set of rules of one marketplace system. While the cartel's members violated one of the rules in the set, the customers obeyed the relevant rules in the set.[1036] I oppose this understanding of the cheating concept.[1037] Nonetheless, I suggest understanding such a situation with the exploitation concept, where those who violate the rules take advantage of those who follow the rules. This concept of unfair or unjust gain resulting from breaking the law relative to others who are following the law is also supported by Arthur Ripstein[1038] and Michael Davis.[1039] In the case of a cartel, there is a denial of the victim's right to fair interaction in society, including competition in the market protected by the law, which makes the cartel's profit unfair and wrongful gain.

5.2.4. Fourth approach – Hardcore cartels as stealing and fraud (obtaining something)

Another approach in the field is that hardcore cartels are committing sophisticated stealing[1040] to the degree that some have describe cartels as "thieves in well-dressed suits."[1041] According to this

[1036] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 107.

[1037] See above in subchapter 5.2.2. "Second approach- Hardcore cartels as a cheating."

[1038] See above under the concept of disobedience: Ripstein, Equality, Responsibility, and the Law, *supra* note 772, at 24- 48 & 134.

[1039] See above under the concept of disobedience; Davis, How to Make the Punishment Fit the Crime, *supra* note 776, at 731 & 743.

[1040] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 96; Beaton-Wells, Capturing the Criminality of Hard-Core Cartels, *supra* note 954, at 700.

[1041] Terry Calvani "Cartel penalties and damages in Ireland: criminalization and the case for custodial sentences" in Katalin J. Cseres, Maarten Pieter Schinkel, Floris O.W. Vogelaar, (eds.) *Criminalization of Competition Law Enforcement* (Elgar Publishing, 2006) 270, at 271; the same approach was also expressed by a senior official of the US Justice Department's Antitrust Division, see Tyhurst, Canadian Competition Law and Policy, *supra* note 8, at 271 refers to Scott D. Hammond, Director of Criminal Enforcement, Antitrust Division, US Department of Justice, "The Fly On The Wall Has Been Bugged — Catching An International Cartel In The Act" EU Competition Law Congress, Dublin (15 May 2001).

approach, cartel activity is a sophisticated form of theft, as the cartel's members transfer the wealth that rightly belongs to the consumers to the cartel's members.[1042]

Stealing is "unlawful taking or exercising unlawful control over … [the] movable property of another."[1043] Thus, stealing is about violating another person's rights of ownership.[1044] The right of ownership needs to be applied to "some particular piece of property, including, at a minimum, the right of possession."[1045] For a right of ownership to be stolen, it must be "commodifiable;" thus, it "must be capable of being bought and sold."[1046] Moreover, the right to the property needs to be a legitimate right that the holder legitimately possesses.[1047] Finally, stealing requires the intent of depriving the owners of their property.[1048]

Caron Beaton-Wells discusses the moral wrongfulness of hardcore cartels and suggests that they are acting in a way similar to stealing. She uses the analogy of stealing, which is the intentional violation of a person's legitimate right of ownership, and argues that, in hardcore cartels, "what is stolen is the amount that is paid constituting the margin between the competitive price (that is, the price that would have prevailed absent the cartel) and the cartel price."[1049]

Peter Whelan expands this discussion and suggests that cartels contain the four elements of stealing. First, cartels fulfill the element of "something that is capable of being bought or sold." According to Whelan, when there is a successful cartel, individuals can buy fewer goods or

---

[1042] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 81 and the references there.

[1043] Stuart P. Green "Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights," (2002) 54 Hastings Law Journal 167, at 208.

[1044] Green, Lying, Cheating, and Stealing, *supra* note 745, at 89.

[1045] Green, Lying, Cheating, and Stealing, *supra* note 745, at 90.

[1046] Green, Lying, Cheating, and Stealing, *supra* note 745, at 90- 91.

[1047] Green, Lying, Cheating, and Stealing, *supra* note 745, at 91.

[1048] Green, Plagiarism, Norms, and the Limits of Theft Law, *supra* note 1043, at 208; Green, Lying, Cheating, and Stealing, *supra* note 745, at 90.

[1049] Beaton-Wells, Capturing the Criminality of Hard-Core Cartels, *supra* note 954, at 700.

services with a given amount of money than they would have been able to buy in the absence of cartel activity. Thus, the reduction of goods or services represents something capable of being bought or sold.[1050] Whelan also claims that, when cartel activity overcharges customers when selling goods or services, it interferes with the ability of customers to possess property and exercise their right of ownership.[1051] In addition, cartels fulfill the element of intent, as the cartel's members aim to enter the cartel and overcharge prices for goods and services.[1052]

Whelan argues that consumers are entitled to a free market and competitive prices for goods and services.[1053] Therefore, the cartel's victims (consumers) have ownership over competitive prices. Whelan, however, is aware of the different appropriate standards for competition. Adopting consumer welfare standards, which focus on maximizing consumer welfare, supports the argument that the consumers have the right of ownership over the property (competitive prices for goods or services). Thus, stealing can occur.[1054] Neoclassical economists, however, prefer total welfare standards, which focus on efficiency effects, regardless of who benefits from welfare. In this case, consumers have no right to consumer welfare. As such, there is no ownership over competitive prices and, therefore, no stealing.[1055]

The above rationale for characterizing hardcore cartels as stealing has some clear weaknesses. To start with, the right of possession "must be capable of being bought and sold."[1056] Thus, it is not considered stealing if it is something of value that cannot be bought or sold, such as

[1050] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 96.
[1051] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 99.
[1052] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 99.
[1053] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 96- 97.
[1054] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 97- 98.
[1055] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 97.
[1056] Green, Lying, Cheating, and Stealing, *supra* note 745, at 90- 91.

a person's life, personal dignity, security,[1057] or, in this case, the legal right to competitive prices in the markets. In addition, competition rights do not fall under the category of *property*. John Locke, for example, refers to a person's property as "the labour of his body, and the work of his hands, we may say, are properly his."[1058] Property in English and Canadian criminal law must have the character that it can be "owned or possessed,"[1059] including money and all other intangible property, but it has limits. For example, it does not include confidential information. Thus, if someone takes a document that contains confidential information, it would not be considered the stealing of property.[1060] Furthermore, the person must have possession or control of it.[1061] Thus, consumers must have possession or control, not just the right to buy at a competitive price.

More importantly, consumers have no *ownership* over competitive prices. Whelan assumes that consumers' right to ownership of competitive prices and services depends on consumer welfare standards.[1062] He acknowledges, however, a limitation of stealing as moral wrongfulness in explaining hardcore cartels[1063] because many economists prefer efficiency standards.[1064] This is supported by various countries, particularly developed countries, that adopt efficiency maximization as their primary competition goal.[1065]

[1057] Green, Plagiarism, Norms, and the Limits of Theft Law, *supra* note 1043, at 216- 217.

[1058] John Locke "Of Property" in *Second Treatise of Government*, chapter V (Raleigh NC, 1994), Section 27.

[1059] See in Canada Manning, Mewett & Sankoff, Criminal Law, *supra* note 46, Part IV — Specific Offences: Chapter 22 — Theft and Related Offences: I. Theft, para 22.12- 22.18.

[1060] Andrew Ashworth & Jeremy Horder, *Principles of Criminal Law* (7ed., Oxford University Press, 2013) at 381; other interests that stealing does not protect include license or data, see Green, Plagiarism, Norms, and the Limits of Theft Law, *supra* note 1043, at 214.

[1061] Ashworth and Horder, Principles of Criminal Law (2013), *supra* note 1060, at 382.

[1062] See further explanation two paragraphs above at page 189.

[1063] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 98.

[1064] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 97.

[1065] Aydin & Büthe, Competition Law & Policy in Developing Countries, *supra* note 20, at 6; there are also differences between the US and EU's goals; OECD, The Objectives of Competition Law and Policy, supra note 565, para 20; see also at Ioulia Kampouridi "Arguments for the EU-US Convergence and against a Global Merger Control Regime" (2015) 38:1 World Competition 107, at 124- 125; Daniel D. Sokol "Troubled Waters between U.S. and European Antitrust" (2017) 115 Michigan Law Review 955, at 956- 960.

Whelan suggests that, while he is aware that the argument is problematic, consumers have a pre-legal right to competitive prices for goods and services.[1066] Still, competition is not recognized in all jurisdictions' societies. In fact, in 1970, only 12 jurisdictions had a competition law.[1067] Thus, competition in general and competitive prices are premature concepts in modern days to be understood as pre-legal rights in many societies worldwide.

Moreover, it is hard to see how consumers have ownership of something that exists in the socio-economic system of their jurisdictions before they have bought anything from the cartel or even decided to do so. In addition, the cartel may also choose to sell its products to only certain customers and not to others. Although the cartel may or may not be subject to antidiscrimination laws in the jurisdiction, it will still "own" the goods or the service; the consumers will not.

Furthermore, the cartel may decide not to sell its goods or services to consumers in this jurisdiction and, instead, export all its products, which is exempted from enforcement in many jurisdictions due to the export cartel exemption. The export cartel exemption allows an agreement between domestic businesses to charge a specified export price with only external impacts, and it exists in Canada, the United States, and other countries, including in the EU.[1068] Such exemptions indicate that competitive prices are not granted to consumers in the same domestic market and that consumers do not own the goods.

Therefore, competition should be seen as a public right granted by the legitimate authority to protect competition in the market and achieve greater economic efficiency and other desirable

[1066] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 96.
[1067] OECD, OECD Competition Trends 2020, *supra* note 14, at 11.
[1068] Tyhurst, Canadian Competition Law and Policy, *supra* note 8, at 307- 309.

goals.[1069] Nevertheless, hardcore cartels increase prices and transfer wealth from consumers and the general public to the cartel members.[1070] Thus, they cause direct harm to consumers by reducing their wealth.

In some circumstances, the *factual elements* of a hardcore cartel can fulfil the legal elements of stealing. For example, businesses A and B compete in selling bread, which results in their selling one loaf of bread for one dollar. These two businesses decide to become richer by charging consumers more money, however, so they fix prices to sell the loaf of bread for two dollars. In this case, the extra dollar that the consumers pay is part of their property, which the two businesses took by creating a misleading reality that the competitive price is two dollars. It should be noted that it makes no difference in this case whether the competition law is based on consumer welfare or efficiency maximization. In this example, based on both standards, the competitive price of the bread is one dollar. In addition, the two businesses have the intention to permanently deprive consumers of that extra dollar.

Under this understanding, competition law creates an economic reality. To avoid this reality, the cartel members present the reality that they are abiding by the competition law, and this misleads consumers. In addition, the cartel members do so to deprive consumers of their money. Here, the focus is on the factual elements of specific price-fixing in specific economic structures that fulfill the legal elements of stealing. Competition law or hardcore cartel prohibitions, however, are not necessary for the crime of stealing, which can occur based on factual

[1069] OECD, The Objectives of Competition Law and Policy, *supra* note 565, para 4, 20; Tyhurst, Canadian Competition Law and Policy, *supra* note 8, at 133- 134.

[1070] OECD, Trade and Competition: From Doha to Cancun, *supra* note 7, at 16; Tyhurst, Canadian Competition Law and Policy, *supra* note 8, at 266; Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 90- 91; Wils, Optimal Antitrust Fines: Theory and Practice, *supra* note 725, at 191- 192; Noonan, The Emerging Principles of International Competition Law, *supra* note 11, at 158- 159.

behaviour that can also contain some variations of hardcore cartels.

Let us assume there is no competition law in the jurisdiction, that the two businesses, A and B, decide to fix prices and sell one loaf of bread for two dollars, and that the consumers are aware of this. In this case, if consumers consent to buy the loaf of bread for two dollars, there is no stealing. Consumers (with sufficient political power) can require authorities to provide a different economic structure through competition or by limiting market prices to change their situation. The situation differs if businesses A and B, however, present a misleading reality to gain an advantage by, for example, claiming that the loaf of bread is being sold at a competitive price of two dollars, while, in competitive reality, it is "worth" one dollar. This situation may be considered stealing by deception,[1071] which constitutes the crime of fraud.

Fraud

Fraud is a crime that includes the moral wrongfulness of stealing and deception.[1072] It traditionally includes deception as "'false or fraudulent pretenses, representations, or promises' for the purpose"[1073] of obtaining money, property, or something with economic value, such as service or other advantages.[1074]

[1071] See more about the limits of deception in the next subchapter 5.2.5. "Fifth approach – Hardcore cartels as deception."

[1072] Green, Lying, Cheating, and Stealing, *supra* note 745, at 151- 152.

[1073] Green, Lying, Cheating, and Stealing, *supra* note 745, at 150.

[1074] Green, Lying, Cheating, and Stealing, *supra* note 745, at 149; see in Canada Section 380(1) of Canada Criminal Code, *supra* note 44: "Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service"; see also section 380(2) of Canada Criminal Code, *supra* note 44: "Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, with intent to defraud, affects the public market price of stocks, shares, merchandise or anything that is offered for sale to the public is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years." Manning, Mewett & Sankoff, Criminal Law, *supra* note 46, Part IV — Specific Offences: Chapter 23 — Fraud, Forgery and Other Offences Relating to Trade and Commerce: III. Fraud, particularly para 23.99-23.100.

Fraud is broader than the mere stealing of property and includes other advantages to the offender, even without the victim being economically deficient.[1075] Accordingly, deceiving consumers into thinking that the businesses are competing, while in reality they are engaging in cartel activity to obtain money from customers or supply them with less innovation or less service, can meet the requirement of fraud. Here, cartel members obtain illegal money from consumers or have other advantages, such as spending less money on innovation or providing services and enjoying the reputation of the "competitive" businesses in the eyes of the consumers.

In conclusion, the competitive market is a right granted by a jurisdiction and not a property owned by consumers. Thus, the moral wrongfulness of stealing provides a weak rationale for criminalizing hardcore cartels. Some factual elements of hardcore cartels, however, can still meet the requirements of stealing and the legal elements of fraud, but those are limited to certain factual circumstances.

5.2.5. Fifth approach – Hardcore cartels as deception

In deception, cartel members deliberately mislead the public and the authorities by presenting themselves as obeying competition rules.[1076] A deception is an act of communication through which the communicator intends to deceive, and it is not an innocent mistake. In addition, communication requires an affirmative act or a failure to carry out an affirmative act that one has an obligation to carry out. It is not considered deception, however, if a person does not correct the false beliefs of someone else unless the person is obligated to do so.[1077]

Lying is part of deception but involves a narrower behaviour. In lying, the statement is 1)

[1075] Green, Lying, Cheating, and Stealing *supra* note 745, at 153.
[1076] Tyhurst, Canadian Competition Law and Policy, *supra* note 8, at 271.
[1077] Green, Lying, Cheating, and Stealing, *supra* note 745, at 76.

literally false, which means it is clearly and independently false without referring to the speaker's intention; 2) derived from a verifiable assertion, which means that the statement's veracity can be checked.[1078] Deception can also be misleading and carried out through the use of other diverse forms, such as a question, command, opinion, facial expression, or "leading the listener to believe something false by saying something that is either true or has no truth value."[1079] Both acts, lying and misleading, are part of deception and are considered moral wrongfulness, but misleading is still conceived as less wrongful than lying.[1080]

Caron Beaton-Wells describes hardcore cartels as deception. She argues that hardcore cartelists present themselves as competitors that set their prices independently or claim that their products are of a certain quality compared to other products; thus, it involves the communication of a message in which the communicator intends to mislead and cause consumers and uninvolved competitors to believe something untrue. The case is even more apparent in bid-rigging, as the cartel parties agree in advance to submit agreed tenders, while the whole concept and the legal requirement of the bid are to submit tenders independently. Thus, they mislead by pretending that they are independent tenders when the reality is the opposite.[1081]

Peter Whelan also suggests seeing hardcore cartels as deception. He illustrates this suggestion with three scenarios. In the first, the "cartelist expressly states to his customer that he has colluded."[1082] This case entails no deception because the cartel is telling the truth.[1083]

The second scenario is when the cartel "expressly states to his customer that he has not

[1078] Green, Lying, Cheating, and Stealing, *supra* note 745, at 77.
[1079] Green, Lying, Cheating, and Stealing, *supra* note 745, at 77- 78.
[1080] Green, Lying, Cheating, and Stealing, *supra* note 745, at 78- 79.
[1081] Beaton-Wells, Capturing the Criminality of Hard-Core Cartels, *supra* note 954, at 699- 700.
[1082] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 101.
[1083] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 101.

colluded."[1084] This is a clear-cut deception, as the cartelist has made a false statement and misled the customer.[1085]

The third scenario is when the "cartelist does not expressly state that cartelization has (or has not) occurred, but nonetheless fails to disclose its occurrence to his customer."[1086] In this case, the message of the cartelists is simply that goods or services are available for sale, but it is neutral regarding whether these are being sold at competitive prices or there was collusion.[1087] Customers, however, may assume that businesses follow market competition rules.[1088] Thus, according to the third scenario, deception may occur when the cartelist offers goods or services at cartelized prices but customers believe that the products are being offered at competitive prices.[1089]

Deception is also an important factor the EU uses to distinguish legal and desirable purchase agreements from buyers' cartels that are prohibited.[1090] In purchase agreements, the purchasers do not enter into a secret agreement with other purchasers but negotiate independently with suppliers.[1091] In addition, through negotiation, it should be clear to the supplier that a purchaser is negotiating on behalf of a joint group of purchasers.[1092] When there are buyers' cartels that use deception and secrecy, however, suppliers are not aware that they dealing with several buyers, which is likely to restrict competition. Still, it is clarified that the element of secrecy is

[1084] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 101.
[1085] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 102.
[1086] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 101.
[1087] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 102- 103.
[1088] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 103- 104.
[1089] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 103- 105.
[1090] European Commission, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, *supra* note 586, at 56- 57, para 279- 282.
[1091] European Commission, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, *supra* note 586, at 56, para 280.
[1092] European Commission, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, *supra* note 586, at 56, para 282(a); see also OECD, Purchasing Power and Buyers' Cartels – Note by the European Union, *supra* note 594, at 8- 9.

neither objectively restricting competition nor required for establishing a buyers' cartel.[1093]

Deception is not required as a necessary element to prohibit hardcore cartels, nor should it be the cornerstone for criminalizing hardcore cartels, as doing so can lead to undesirable results. For example, when cartelists expressly tell their customers they have colluded, no deception has occurred because they are telling the truth.[1094] Therefore, cartel members can theoretically avoid punishment by declaring that they have committed hardcore cartel conduct when the law prohibits them from doing so.

It is even more problematic from an international perspective: for example, in the case of cartels operating in jurisdictions that do not have competition regulations (the home country) and that trade with jurisdictions that have competition regulations (the import country). In these cases, the cartelists can declare in their home jurisdiction that they colluded and thus avoid committing deception. The cartel should still, however, be enforced in the importing country under its competition rules, even in the absence of deception. This is essential to avoid a situation where cartelists avoid punishment by choosing their standard of behaviour instead of the standard which was determined by the authority to prohibit hardcore cartels and prevent harm to the society.

Therefore, the element of secrecy (nonetheless, an active deception) is not typically required as part of hardcore prohibition.[1095] For example, in the Beef Industry Development Society case, the European Court of Justice recognized that an agreement among beef businesses

[1093] European Commission, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, *supra* note 586, at 56, para 282(a); OECD, Purchasing Power and Buyers' Cartels – Note by the European Union, *supra* note 594, at 9.

[1094] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 101.

[1095] See further in Whish & Bailey, Horizontal Guidelines on Purchasing Agreements: Delineation between by Object and by Effect Restrictions, *supra* note 579, at 63- 64; see, for example, in Canada article 45 (1) to Canada Competition Act that does not refer to deception, *supra* note 25.

in Ireland to reduce their processing capacity by 25% restricted competition, despite the agreement's being known to the public.[1096] Another example is the case of taxi businesses in Norway that had transparent joint bidding, but was recognized as illegal bid-rigging that restricted competition.[1097] When the cartel is public, however, there is less harm because the cartel members do not invest resources in keeping it secret and maintaining it, nor do the authorities invest resources to detect and investigate the cartel. On the other hand, the objective harm to society (e.g., customers, markets) remains and justifies prohibition and punishment.

Canadian law also clarifies that secrecy is not necessary to conduct price-fixing, market allocation, or output restriction, and these activities are also enforced under section 45 of the Canadian Competition Act in case the "agreement is overt."[1098] The case of bid-rigging that is known to the person who called for the bids, however, does not fall under the criminal prohibition of section 47 of the Canadian Competition Act, but it may be assessed under section 90.1 in case it may substantially lessen or prevent competition.[1099]

Another aspect to consider is that deception requires an affirmative act and is not considered a deception if the person or business does not correct the false beliefs of someone else.[1100] Whelan finds that, when a cartel offers goods or services[1101] and "does not expressly state that cartelization has (or has not) occurred, but nonetheless fails to disclose its occurrence to his

[1096] The Court of Justice of the European Union- Third Chamber, *Competition Authority v. Beef Industry Development Society*, Case C-209/07 (2008) online: https://curia.europa.eu/juris/liste.jsf?language=en&num=C-209/07

[1097] EFTA Court, *Ski Taxi Ski SA v Staten v. The Norwegian Government, represented by the Competition Authority,* Case E-3/16 (2016), para 88–102, online: https://eftacourt.int/wp-content/uploads/2019/01/3_16_Judgment_EN.pdf?x97696

[1098] Competition Bureau Canada, Competitor Collaboration Guidelines, *supra* note 25, at 15.

[1099] See Sections 47 and 90.1 to the Canada Competition Act, *supra* note 25; Competition Bureau Canada, Competitor Collaboration Guidelines, *supra* note 25, at 10.

[1100] Green, Lying, Cheating, and Stealing, *supra* note 745, at 76.

[1101] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 103.

customer,"[1102] it should be seen as a deception. He explains that customers can assume that the businesses are following the competition rules in the market and believe that the products are being offered at competitive prices.[1103] Andreas Stephan supports this argument with strong empirical evidence that shows an established customer's assumption (in the United Kingdom, Germany, Italy, and the United States) that the prices are competitive and are being calculated independently.[1104]

A deception is an act (or omission to do an affirmative act that one has a duty to do) of communicating a misleading message.[1105] Customers "in free market societies are entitled to assume that the prices of the goods and services they purchase have been determined by the forces of competition."[1106] In this case, there are grounds for considering a continuing act.[1107] The act is engaging in hardcore activity (for instance, conspiracy for price-fixing) without disclosing it, and one of its outcomes is deceiving customers. Simply put, offenders who engage in hardcore cartel activity are responsible for its consequences, including the misleading of customers.

If, however, this approach is seen as an undesirable extension of the conduct of hardcore cartels to cover the future outcome of deceit, then there is a place to consider the omission of disclosing the existence of cartel. Omission, or the failure to act, requires a duty to act.[1108] An omission of disclosure can be established on common law duty when the offender engages in a

[1102] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 101.
[1103] Whelan, The Criminalization of European Cartel Enforcement *supra* note 16, at 105.
[1104] Stephan, An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation, *supra* note 725, at 644.
[1105] Green, Lying, Cheating, and Stealing, *supra* note 745, at 76.
[1106] *R. v. Maxzone Auto Parts (Canada) Corp*., 2012 FC 1117, para 54; Tyhurst, Canadian Competition Law and Policy, *supra* note 8, at 271.
[1107] Manning, Mewett & Sankoff, Criminal Law, *supra* note 46, Part II — General Principles of Liability: Chapter 3 — The Physical Element: III. Omissions, para 3.53- 3.55.
[1108] Manning, Mewett & Sankoff, Criminal Law, *supra* note 46, Part II — General Principles of Liability: Chapter 3 — The Physical Element: III. Omissions, para 3.37.

positive act and then fails to take subsequent action to prevent the victim from being harmed.[1109] Furthermore, the duty to act is established in the hardcore cartel prohibition itself, which prohibits this conduct due to its harmful effect. Here, the conduct of the offender in engaging in a hardcore cartel puts customers at a harmful loss, which necessitates a duty to act and establishes the omission of disclosure. This is, however, more of a technicality debate because hardcore cartel prohibition does not include the requirement of deception.

Another important consideration in this context is the application of the "caveat auditor" principle, which states that a listener is responsible for verifying that a statement is true before believing it.[1110] Stuart Green adopts this principle and deems it as similar to the principle of "caveat emptor," which puts an obligation on the customers to assess the quality of goods before buying them.[1111] This principle, however, should be considered regarding the physical quality of the product (for example, if the product is in good condition, as "we have the best products in the market") or the factual part of the statement (that the products are being sold at the best prices). It is undesirable to require the customer to ask the business: "Are you selling the products with respect to competition law?" It is also undesirable for the jurisdiction to enact a statutory act that implies a legally binding warranty of the fitness of the product or a guarantee of satisfaction, where the seller declares that the product was produced and is being sold in abidance to all laws. Prohibitions against hardcore cartels should be respected because they are a prohibition in the jurisdiction and not part of a warranty between the buyer and the seller. Thus, the "caveat auditor" principle should not apply to legal assessment, unlike factual assessment.

[1109] Manning, Mewett & Sankoff, Criminal Law, *supra* note 46, Part II — General Principles of Liability: Chapter 3 — The Physical Element: III. OMISSIONS, para 3.40, 3.48 & 3.51.
[1110] Green, Lying, Cheating, and Stealing, *supra* note 745, at 78- 79.
[1111] Green, Lying, Cheating, and Stealing, *supra* note 745, at 78- 79.

Finally, deception has a limited scope, as it requires an interaction between the victims and the cartel. In this case, deception can occur when cartelists deceive customers who buy from the cartel under the condition of being misled and unaware of the cartel's conduct. Deception does not occur when there is no interaction, however, such as when customers do not buy from the cartel because the prices are too expensive, when customers do not enjoy variety in the market, or when their freedom of choice is limited. In addition, the deceiving concept does not protect other public interests when there is no deceptive conduct or interaction with the victims or the relevant authorities that was misleading.

Therefore, although deceiving is an important concept, it remains a limited one. Moreover, deception is not a necessary element to prohibit hardcore cartels, as the main reason for prohibiting hardcore cartels is to prevent objective harm. Nonetheless, the action of deceiving can cause more subjective harm to customers who were deceived and to enforcement harm, as it is more challenging to expose and enforce the law against undeclared cartels.[1112]

5.2.6. A common thread – Lack of consent

Cheating and disobedience are similar in that both involve breaking the rules, but cheating occurs among horizontal relationships, and disobedience can also occur vertically. In cheating, we discuss violating competition rules where the victims are the other competitors. In disobedience, however, the wrong is against the sovereign authority, which is charged with the duty to protect the public interest, a concept that includes customers, competitors, and the market in general. Deception is the conduct of misleading; therefore, it refers to a particular victim who has been deceived. All these concepts of moral wrongfulness are unfair or unjust in the matter of receiving wrongful gain

[1112] See above about the different kinds of harm under subchapter 5.1. "Harm in transnational cartels."

from the victim under exploitation.

The common thread among the moral wrongfulness concepts discussed above is the lack of consent. When there is disobedience, the offender acts against the consent of the sovereign that represents the interests of the public. When exploitation exists, there is manipulation or other forms of using the victims' circumstances to achieve an unfair advantage against their true consent and interests.[1113] In the case of cheating, there is a breaking of the agreed-upon rules without the consent of those who are playing according to the rules. In the case of deceiving and stealing or fraud, there is an act of misleading and preventing the victim from expressing his or her true consent.

5.3. *Mens rea* in transnational cartels

The *mens rea* element refers to the offender's mental state while committing the crime, namely committing the crime purposely, knowingly, recklessly, and negligently.[1114] In a broader sense, *mens rea* refers to the concept of "culpability," which also includes the absence of potential defences, such as insanity, intoxication, or necessity.[1115]

Offenders are responsible for their acts when they voluntarily break the law and act with knowledge, intention, or recklessness. Negligence is also considered because a person is not aware of what they should be aware, based on reasonable-person standards, due to the person's capacity and fair opportunity to be aware. Although this level of *mens rea* may attract controversy because it is not always consistent with the assumption that the offender has the free choice to violate the

[1113] Although exploitation can also happen with consent when the offender uses the victim's circumstances and takes advantage of him, see further in subchapter 5.4.3. "Legal moralism and the exploitation principle."

[1114] Green, Lying, Cheating, and Stealing, *supra* note 745, at 30- 31; Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 105, 107- 108.

[1115] Green, Lying, Cheating, and Stealing, *supra* note 745, at 30- 31.

law or not, it has been suggested that the offender be blamed for failing to act as a reasonable person (i.e., to be aware where they should be aware).[1116] Nonetheless, all such variations of *mens rea* attribute the crime to the offender, as the harm is not due to an accident but is the offender's fault or results from the offender's choice to take an unreasonable risk.[1117] Furthermore, at all levels of *mens rea*, the *actus reus* (the act, circumstances, and consequences of the offence) and the harm are the same.[1118] Still, the intention is more blameworthy than recklessness, which is more blameworthy than negligence.[1119] Therefore, *mens rea* determines the offender's level of responsibility for the harm.[1120]

Different types of wrongfulness may require different degrees of *mens rea*. For example, for an act to be considered cheating, the offender must violate the rules with the intent to receive an unfair disadvantage.[1121] The same is true for exploitation, which requires an intent to benefit from the exploitation.[1122] In deception, it is required that the offender intended for the victim to believe something untrue.[1123] Stealing and fraud also require intent.[1124] Disobedience does not require intent, however, and can be settled with knowledge or negligence of the conduct and

[1116] Bayles, Character, Purpose, and Criminal Responsibility, *supra* note 820, at 10-11; Arenella, Character, Choice and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments, *supra* note 738, at 70-71 & 74- 75; See further discussion on negligence in the Canadian criminal law at Manning, Mewett & Sankoff, Criminal Law, *supra* note 46, Part II — General Principles of Liability: Chapter 4 — The Mental Element: VI. Objective Standards in Criminal Law: (b) The Move to Criminal Negligence, para 4.111- 4.128.

[1117] Hart, Punishment and Responsibility: Essays in the Philosophy of Law, *supra* note 734, at 36- 39; Duff, Harms and Wrongs, *supra* note 768, at 21; Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 34, 105- 108; Ripstein, Equality, Responsibility, and the Law, *supra* note 772, at 135- 139 & 167.

[1118] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 34 & 107- 108.

[1119] Green, Lying, Cheating, and Stealing, *supra* note 745, at 30; Bayles, Character, Purpose, and Criminal Responsibility, *supra* note 820, at 8; Frase, Just Sentencing: Principles and Procedures for a Workable System, Studies in Penal Theory and Philosophy, *supra* note 846, at 8.

[1120] Green, Lying, Cheating, and Stealing, *supra* note 745, at 34.

[1121] Green, Lying, Cheating, and Stealing, *supra* note 745, at 57.

[1122] Green, Lying, Cheating, and Stealing, *supra* note 745, at 95.

[1123] Green, Lying, Cheating, and Stealing, *supra* note 745, at 76.

[1124] Green, Plagiarism, Norms, and the Limits of Theft Law, *supra* note 1043, at 90 & 150.

circumstances or the probability of the results.

Hardcore cartels can require a default *mens rea* of reckless or knowledge and the intention to enter into an agreement.[1125] This, however, can change from jurisdiction to jurisdiction. Nonetheless, on a theoretical level, the required *mens rea* to justify criminalization depends on both on the definition of hardcore cartel used and each of the moral wrongfulness bases discussed in this chapter: cheating, exploitation, stealing, deception, or disobedience. This is also related to the main approach to criminalization. Choosing legal moralism as the justification for criminalization supports the moral wrongfulness of exploitation, which requires intent.

Choosing utilitarian or legal liberalism approaches to criminalization, however, will emphasize the need to prevent harm. In this case, it is sufficient moral wrongfulness to choose disobedience, which can settle with knowledge or reckless or negligence. Negligence, however, is a low level of *mens rea* and renders the offender far less blameworthy than other *mentes reae*. Therefore, negligence is typically used to prevent serious harm to important sociolegal interests in society, such as death.[1126] Accordingly, the sovereign should determine whether, in the case of hardcore cartels, there is justification to settle for such a low degree of *mens rea* and justify prohibition and punishment because of the severe results of the violation or to require a higher degree of knowledge and intent, with or without the occurrence of a specific result.

[1125] See, for example, in Canada Section 45 to the Canadian Competition Law, *supra* note 25; Tyhurst, Canadian Competition Law and Policy, *supra* note 8, at 285- 287 & 301.

[1126] Manning, Mewett & Sankoff, Criminal Law, *supra* note 46, Part II — General Principles of Liability: Chapter 4 — The Mental Element: VI. Objective Standards in Criminal Law: (b) The Move to Criminal Negligence, para 4.113- 4.115.

5.4. Criminalizing transnational cartels based on national criminal law

Transnational cartels are transnational crimes that are criminalized based on national criminal law. There are different theoretical approaches with different valid justifications, including utilitarianism, legal liberalism, legal moralism, and legal perfectionism (character). In the following sections, these approaches are applied to the situation of transnational cartels.

5.4.1. Utilitarianism and preventing mischief

In utilitarianism, the object of the law is to prevent mischief and promote good, happiness, and positive consequences to the community.[1127] In this matter, utilitarianism protects public interests, such as the market, economy, international reputation, and international relations with foreign powers or communities.[1128] Utilitarianism also protects private interests, such as private property and reputation.[1129] As discussed under the subchapter on harm, transnational cartels cause severe harm to public interests, such as to the market and economy, as well as to private interests. Therefore, the utilitarian theory provides solid justification for the authority to intervene to prevent mischief and harmful conduct.

Utilitarian approaches typically include disobedience because a law is needed to prohibit the conduct and adequately conveys to the public the prohibition and the potential sanction to effectively deter potential offenders and prevent mischief.[1130] Therefore, utilitarianism includes

[1127] Bentham, Chapter I Of the Principle of Utility, *supra* note 735, at 11- 13; Bentham, Chapter XIV Of the proportion between punishment and offence, *supra* note 738, at 165; Honderich, Punishment: The Supposed Justifications, *supra* note 809, at 92, see also there at 86- 111.

[1128] Bentham, Chapter XIII Cases Unmeet for Punishment, *supra* note 738, at 164; Bentham, Chapter XVI Division of Offences, *supra* note 739, at 196.

[1129] Bentham, Chapter XIII Cases Unmeet for Punishment, *supra* note 738, at 158; Bentham, Chapter XVI Division of Offences, *supra* note 739, at 193, 196, 201 & note Vi.

[1130] Bentham, Chapter XIII Cases Unmeet for Punishment, *supra* note 738, at 160.

guilt, where it sees the offender as capable of avoiding committing the prohibited offence.[1131]

Nevertheless, utilitarianism does not require strong moral wrongfulness, such as cheating or deception. Still, utilitarianism considers the moral wrongfulness of the offender in punishment as an aggravating factor that increases censure. This consideration can be valid for utilitarianism due to its interest in imposing criminal conviction with censure in cases where the public believes the offender deserves it, thus creating a stronger deterrence effect.[1132]

In addition, punishment is inappropriate in utilitarianism if it is too expensive or produces more mischief than it prevents.[1133] Moreover, punishment is unnecessary when the mischief can be prevented or stopped without punishment or by less costly means.[1134] Thus, a community can consider further practical considerations that may prevent mischief and promote good with less cost involved and consider other enforcement mechanisms, such as monetary sanctions or administrative procedures.

Under utilitarianism, we can analyze the literature prohibiting hardcore cartels or other anticompetitive conduct using law and economics methodology. For example, William Landes's important work argues for the prohibition and punishment of cartels based on a law and economics approach. He suggests prohibiting hardcore cartels that cause more harm to consumers than they produce gain to producers.[1135] He also discusses different examples of competition violations that should be prohibited under certain circumstances, including the case of joint ventures, monopolies,

[1131] Rosen, Utilitarianism and the Punishment of the Innocent, *supra* note 807, at 25 & 32; von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 42; Christopher, Deterring Retributivism: The Injustice of "Just" Punishment, *supra* note 804, at 871- 872.

[1132] Arenella, Character, Choice and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments, *supra* note 738, at 62- 63.

[1133] Bentham, Chapter XIII Cases Unmeet for Punishment, *supra* note 738, at 163.

[1134] Bentham, Chapter XIII Cases Unmeet for Punishment, *supra* note 738, at 159.

[1135] Landes, Optimal Sanctions for Antitrust Violations, *supra* note 924, at 653.

and predatory pricing.[1136] A further focus of utilitarianism can be seen as calculating the harm of the crime and the enforcement costs for determining the best enforcement policy and sentencing. For example, based on law and economic methodology, Richard Posner discusses ways to justify prohibition and sanctions, considering the harm of the violation and the best sentencing strategy.[1137]

This kind of analysis can support legislatures in adopting a competition policy and prohibition against hardcore cartels from a utilitarian perspective. It is desirable, however, to understand the utilitarian argument based on a two-stage analysis. In the prohibition stage, the considerations are whether the conduct causes more harm to society than it promotes good and happiness, with other practical considerations that may also support prohibiting the conduct. This stage should be accomplished by the sovereign that constitutes prohibitions that fit the public interest and whom the people ought to obey. In the punishment stage, utilitarianism suggests ways to suppress such conduct in the future, either by rehabilitation, incapacitation, or deterrence. I analyze the stage of utilitarian punishment more comprehensively in chapter 7.

5.4.2. Legal liberalism and the harm principle

The main focus of legal liberalism is to prevent harm to others, either private harm or harm to important public institutions, including a person's welfare, sound economy, freedom of choice, and prosperity.[1138] As discussed broadly above under the subchapter on harm, transnational cartels

[1136] Landes, Optimal Sanctions for Antitrust Violations, *supra* note 924, at 662- 672.
[1137] Richard A. Posner "An Economic Theory of Criminal Law" (1985) 85 Columbia Law Review 1193.
[1138] Hart, Punishment and Responsibility: Essays in the Philosophy of Law, *supra* note 734, at 22-23; Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 11-12, 26 33- 34, 37, 42, 63, 105, 112- 113 &188; Harcourt, The Collapse of the Harm Principle, *supra* note 745, at 114, 120- 122, 129 & 138; Green, Lying, Cheating, and Stealing, *supra* note 745, at 42-43.

cause significant harm to the market, economy, and efficiency, in addition to other private interests of customers, as they reduce their welfare.

Bruce Wardhaugh suggests that the harm principle based on legal liberalism should be limited to the "market as an institution used by society to distribute goods and services."[1139] He argues that private harm related to consumers should not be protected by criminal law.[1140] According to his approach, the harm principle under legal liberalism should be a limited concept to avoid prohibiting conduct that may cause an unnecessary loss of liberty.[1141] He acknowledges, however, that the harm principle protects institutional interests that belong to or benefit individuals.[1142]

More specifically, he argues that the harm principle does not cover losses to consumers, such as having to pay more for products than they would have in case there had been no cartel[1143] or being unable to buy goods because they are too expensive.[1144] He points out several problems that support his argument. The first is that consumers' losses rely on defining property rights based on the market. Property rights, however, are legal rights that are defined prior to engaging in a market transaction (buying from the cartel) and do not depend on the market to define the price (what the customer paid to the cartel in comparison to what the customer would have paid if there had been competition).[1145] The second argument against the consumers' right to competitive prices

[1139] Bruce Wardhaugh "A Normative Approach to the Criminalisation of Cartel Activity" (2012) 32:3 Legal Studies (Society of Legal Scholars) 369, at 390.

[1140] Wardhaugh, A Normative Approach to the Criminalisation of Cartel Activity, *supra* note 1139, at 370-371 & 386- 394.

[1141] Wardhaugh, A Normative Approach to the Criminalisation of Cartel Activity, *supra* note 1139, at 375, and more broadly at 375- 386.

[1142] Wardhaugh, A Normative Approach to the Criminalisation of Cartel Activity, *supra* note 1139, at 377, and more broadly at 390- 394.

[1143] Wardhaugh, A Normative Approach to the Criminalisation of Cartel Activity, *supra* note 1139, at 386.

[1144] Wardhaugh, A Normative Approach to the Criminalisation of Cartel Activity, *supra* note 1139, at 387.

[1145] Wardhaugh, A Normative Approach to the Criminalisation of Cartel Activity, *supra* note 1139, at 386.

is that it assumes that market prices are always fair prices, while violating the market rules is unfair. He argues, however, that the fair-price assumption is not universal or absolute since, for example, prices of goods can rise significantly after a natural disaster when sellers take advantage of the victims and sell them goods at unfair prices.[1146] Finally, customers purchase of a product from a cartelist as part of a voluntary exchange is more like to their experience with a bad bargaining process than being a victim of theft.[1147] Accordingly, although the customer has less money, the harm remains a vague concept, which raises skepticism about whether a criminal sanction should be used to protect the customer's interests.[1148]

I suggest seeing the situation differently and recognizing the private harm to customers and others, where harm is the process of wrongful harm (which is prohibited). Harm based on legal liberalism includes a variety of setbacks to the victim's interests[1149] and does not have a specific threshold, such as being above X harm or a way to determine what is a "criminal" harm,[1150] except for relevant supplementary considerations of the sovereign (for example immediate harm versus remote harm).[1151] A person has several interests, including the welfare interest of how much the person gains and loses, as well as his or her freedom of choice.[1152]

Although I agree with Wardhaugh's arguments that customers have no prior legal right to

---

[1146] Wardhaugh, A Normative Approach to the Criminalisation of Cartel Activity, *supra* note 1139, at 386-387.

[1147] Wardhaugh, A Normative Approach to the Criminalisation of Cartel Activity, *supra* note 1139, at 387.

[1148] Wardhaugh, A Normative Approach to the Criminalisation of Cartel Activity, *supra* note 1139, at 387-388.

[1149] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 105.

[1150] Harcourt, The Collapse of the Harm Principle, *supra* note 745, at 114- 116 & 183- 185. There, Harcourt points out that conducts that used to be considered immoral but harmless, such as prostitution, pornography, and public drinking, are now argued to be harmful to others or self, which justifies prohibition based on the harm principle and due to a better understanding of their negative consequences.

[1151] See the above discussion in subchapter 5.1. "Harm in transnational cartels."

[1152] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 33- 34, 37, 112- 113 & 188.

the price of a product,[1153] the amount the customers pay when there is a cartel is higher than the amount that they would have paid had the market been competitive. In this case, the customers have legal property rights over their money even if they do not have property rights over the product or its price prior to buying it. In this case, customers have less money in the factual sense, and, therefore, they have received a setback in their interests (harm). Moreover, when consumers are unable to buy products because they are too expensive, they cannot gain from the variety that exists in the market, and their freedom of choice is limited, which is considered as a harm that justifies protection.[1154]

Furthermore, I agree with Wardhaugh's argument that customers have no absolute right to fair prices.[1155] When there are competition rules, however, then customers have the right to be treated in an environment that respects competition rules and the right to enjoy the benefits of this process. I also find Wardhaugh's example about rising prices after a natural disaster[1156] a good example to contradict his point. If sellers raise prices after a natural disaster, it is a clear example of exploitation (which can also be prohibited by legal moralism even in the absence of harm),[1157] yet it is not wrongful harm because no rules prohibit such exploitative behaviour.

Individual interests, however, can be promoted by meditating on some act or policy that

[1153] See the above discussion in subchapter 5.2.4. "Fourth approach – Hardcore cartels as stealing and fraud (obtaining something)"

[1154] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 33- 34, 37, 112- 113 & 188.

[1155] Although jurisdiction may promote fair practice requirements- see, for example, the EU effort in promoting good commercial conduct and fair dealing in agriculture and food chain, see further the European Commission, Unfair trading practices in the food chain, online: https://agriculture.ec.europa.eu/common-agricultural-policy/agri-food-supply-chain/unfair-trading-practices_en

[1156] Wardhaugh, A Normative Approach to the Criminalisation of Cartel Activity, *supra* note 1139, at 386-387.

[1157] See the above subchapter 5.2.3. "Third approach- Hardcore cartels as exploitations," and below subchapter 5.4.3. "Legal moralism and the exploitation principle."

improves that person's interests,[1158] also through competition rules. Therefore, when an offender breaks the competition rules, the harm is also *wrongful* harm.[1159] This wrongful harm justifies protection according to legal liberalism and prohibition if the authority thinks that practical considerations support this.[1160]

Wardhaugh's last argument is that customers buy the products voluntarily, which is similar to their experience when they have gone through a bad bargaining process, rather than being victims of theft.[1161] Here, I suggest focusing on the victims' consent. In addition to the objective economic harm, wrongful harm causes a violation of the victim's autonomy.[1162] In the case of deception, cartelists manipulate and mislead consumers, which violates their autonomy. Furthermore, when the offender breaks the law (cheating and disobedience), it causes harm to other competitors and consumers' autonomy because, through such an act, the offender is denying their rights in society.[1163]

When a hardcore cartel is known to the public and customers pay for the product with consent, it eliminates an important criminal element. Still, the consent should be carefully examined because it is not likely that customers are willing to pay an extra amount of money or receive a lower-quality product because of the cartel. Most likely, customers are not aware of all the information, or they may have no other choice but to buy the product out of necessity due to their circumstances but without a true will to do so. This is because "it is impossible for a person

[1158] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 42.
[1159] See further discussion in subchapter 5.2.1. "First approach- Hardcore cartel as disobedience."
[1160] See further discussion in subchapter 5.1. "Harm in transnational cartels."
[1161] Wardhaugh, A Normative Approach to the Criminalisation of Cartel Activity, *supra* note 1139, at 387.
[1162] Duff, Harms and Wrongs, *supra* note 768, at 22- 26, 30, 42 & 44.
[1163] See above in subchapter 5.2.1. "First approach- Hardcore cartel as disobedience;" Ripstein, Equality, Responsibility, and the Law, *supra* note 772, at 134 & 147- 149.

to consent to being treated unjustly (wronged) by another."[1164]

Nevertheless, if there is true consent, then no harm has been done according to legal liberalism.[1165] It is like two boxers who harm each other in a match or a person who tattoos another (and "harms" his skin) with the tattooed person's consent. In those cases, the harm falls into paternalistic grounds, which is not a good reason to justify criminalization based on legal liberalism.[1166] Therefore, although there is harm as a matter of the setback of interests (the customer pays more money or receives low-quality products), it is not *wrongful* harm.[1167]

Still, it does not mean that the conduct should not be punished when it has broken the rules. The legislature is interested in protecting a sound economy and markets based on the jurisdiction's competition policy and rules. Thus, if a specific group of customers gives consent to a cartel, it does not mean that it covers all public interest. In other words, there is no public consent for the conduct if it is prohibited by the law. Thus, the public harm of affecting the economy and market remains and justifies enforcement. The relevant authority can still provide exemptions or cancel the hardcore cartel prohibition in its jurisdiction if it represents the public interests. In cases where there is a legal justification for the conduct, the effect of the conduct is not considered harmful under the harm principle.[1168]

The harm principle provides a sound rationale for criminalizing conduct, but it is up to legislators to decide whether criminal prohibition is desirable. Such decisions can be based on

[1164] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 115.
[1165] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 105 & 115- 116.
[1166] Feinberg, The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing, *supra* note 756, at 214- 215; see in general Feinberg, The Moral Limits of the Criminal Law Volume 3: Harm to Self, *supra* note 826.
[1167] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 115.
[1168] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 34- 35, 105- 107 & 219.

practical and other supplementary considerations.[1169] For example, minor harm can be excluded from criminal enforcement if the enforcement will cause more harm than it prevents.[1170] In addition, legislators may consider the practical costs of criminal enforcement, such as police resources, court facilities, or prison facilities.[1171]

5.4.3. Legal moralism and the exploitation principle

Legal moralism supports criminalizing conduct because it is immoral, even if it is harmless.[1172] This approach has been opposed, particularly by legal liberalism, which criticizes the ability of a state to criminalize conduct just because it is immoral if it causes no harm.[1173] Such an approach, however, can find support in jurisdictions with religious or moral influence that see fit to support criminalizing immoral conduct.

Joel Feinberg recognizes legal moralism, which allows criminalizing conduct based on "the need (1) to preserve a traditional way of life, (2) to enforce morality, (3) to prevent wrongful gain, and (4) to elevate or perfect human character."[1174] Feinberg adopts the exploitation principle under legal moralism, where exploitation is wrongful because it is unjust or unfair gain.[1175] Therefore, it can be a sound and relevant reason to support criminalization based on legal moralism.[1176]

[1169] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 187; see further discussion in subchapter 5.1. "Harm in transnational cartels."

[1170] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 189.

[1171] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 10.

[1172] Feinberg, Some Unswept Debris from the Hart-Devlin Debate, *supra* note 745.

[1173] See above legal moralism under the chapter of criminal responsibility; Harcourt, The Collapse of the Harm Principle, *supra* note 745, at 125.

[1174] Feinberg, The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing, *supra* note 756, at 3-4.

[1175] Feinberg, The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing, *supra* note 756, at 199.

[1176] Feinberg, The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing, *supra* note 756, at 210 & 213.

The exploitation principle can justify criminalizing exploitation conduct, such as insider trading and tax evasion. These crimes are prohibited mainly by the harm principle under legal liberalism.[1177] According to Feinberg, however, the exploitation principle can, on its own, justify criminal enforcement based on pure moralism to prevent unjust gain. This can happen even when it is not necessary to prevent unfair loss (or the setback of interests)[1178] or when individuals give their consent to harm, as in the case of commercial fortune-telling.[1179] Still, the legislature may not bother criminalizing such conduct based on practical considerations, such as based on the cost–benefit considerations of enforcement.[1180]

Transnational cartels can be criminalized under this approach, based on the illegal gain of the cartel members that they make from deceiving customers, cheating on other competitors, and, more broadly, breaking the law in society while others are obeying the law. All those variations of moral wrongfulness make the cartel's profit unjust and unfair gain. Hardcore cartels still commit harmful conduct to customers, other competitors, the market, and the public in general. Thus, although this kind of behaviour represents exploitive injustice, it is covered by the harm principle, which has a stronger justification for prohibiting hardcore cartels.

As presented in the previous subchapter, we can consider the rare situation where consumers consent to buy a product that is the outcome of the cartel, which eliminates the wrongful harm to private interests. Still, in cases where hardcore cartels are legally prohibited in a

[1177] Feinberg, The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing, *supra* note 756, at 211.

[1178] Feinberg, The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing, *supra* note 756, at 211- 213.

[1179] Feinberg, The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing, *supra* note 756, at 225.

[1180] Feinberg, The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing, *supra* note 756, at 225- 226.

jurisdiction, the harm to the public's economy and market justifies criminalizing the conduct based on legal liberalism. Nonetheless, it is also justified to be prohibited and punished based on legal moralism, as hardcore cartels involve exploitation and unfair gain to the cartel members. In this case, legal moralism can support preventing immoral conduct even when there is consent or no wrongful harm.[1181]

5.4.4. Legal perfectionism and character

The character approach justifies criminalization based on the person's good or bad character, motives/emotions, and general attitude.[1182] Under this approach, a society can consider practical considerations, such as harmful consequences to society and the utility of enforcement.[1183]

In the case of transnational cartels, criminalizing conduct can be based on the bad character of the offenders who commit such crimes because of their monetary greed. It is hard, however, to imagine a comprehensive approach that could justify criminalizing transnational cartels solely based on character and as a replacement for the harm principle or the utilitarian approach, but it can be a justification for harsher sanction for the offender's bad character.[1184]

The focus on the offender's motivation or bad character may lead to arguments that create a contradictory approach to criminalizing transnational cartels. For example, it is harder to characterize corporate conduct in terms of good or bad character, yet most cartels are established between businesses that carry legal responsibility but without good or bad character. Therefore,

[1181] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 12- 13; Feinberg, The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing, *supra* note 756, at 4, 26 &176.

[1182] See further discussion above in subchapter 4.1.3. "Overview of national criminal law theories."

[1183] Bayles, Character, Purpose, and Criminal Responsibility, *supra* note 820, at 7- 8.

[1184] Feinberg, Some Unswept Debris from the Hart-Devlin Debate, *supra* note 745, at 251-254; Murphy, Legal Moralism and Liberalism, *supra* note 773, at 79- 80 & 82- 83.

this approach has a critical limitation in rationalizing criminal enforcement against businesses. Christopher Harding suggests understanding the EU's enforcement system against hardcore cartels as a quasi-criminal law[1185] of strong legal enforcement using an administrative monetary sanction against businesses.[1186] The focus is on the economic outcome and calculating the economic damage rather than the offender's motivation or immoral character.[1187] On the other hand, the main beneficiary of the illegal gain is the business itself, not the individual.[1188] Therefore, it can be argued that the individual should not be punished because the profit from the cartel goes to the business and not to the individual.[1189] Accordingly, this can create a contradictory justification for criminalization, as the business itself has no bad character and the individual has no greed to gain illegal money.

Although such an argument can seem to lessen the justification to criminalize transnational cartels, it still can be argued based on legal perfectionism that individuals have a motive to take part in hardcore cartels because, eventually, they gain an advantage from committing the crime, either through being promoted, receiving higher wages or receiving praise from the business, or at least gaining an "illicit pleasure" from committing the crime."[1190] In addition, in the legal sphere, individual motives and bad character can be attributed to the business.[1191]

[1185] Christopher Harding "The System of EU Antitrust Law: Characteristics, Safeguards, and Differences from Traditional Criminal Law" (2019) 90:2 Revue Internationale de Droit Pénal (RIDP) 85, at 91.

[1186] Harding, The System of EU Antitrust Law, *supra* note 1185, at 95.

[1187] Harding, The System of EU Antitrust Law, *supra* note 1185, at 97- 99.

[1188] Wirz, Imprisonment for Hard Core Cartel Participation, *supra* note 613, at 109.

[1189] OECD, Cartels: Sanctions Against Individuals (2007), *supra* note 844, at 24.

[1190] Davis, How to Make the Punishment Fit the Crime, *supra* note 776, at 743.

[1191] See, for example, the discussion in Ferran, Corporate Attribution and the Directing Mind and Will, *supra* note 48. In Canada, the corporate liability for crimes relies on Sections 22.1 and 22.2 of the Canada Criminal Code, *supra* note 44.

5.4.5. Mixed justifications for a criminal prohibition against transnational cartels

Criminal law has various legitimate justifications for prohibiting and punishing the conduct. Each approach is valid in itself and has a legitimate and solid standing even without elements from other approaches. Thus, an argument against the criminal character of a transnational cartel based on the arguments of one criminal law approach against another criminal law approach should not be the focus of this issue. Therefore, if one approach is chosen, it is sufficient to prove its requirement to justify criminal enforcement without dismissing it by using elements from other approaches. For example, if we use a utilitarian approach to prevent harm, there is no need to include the moral wrongfulness out of a fairness or justice requirement, as required by legal liberalism. If we choose legal liberalism, there is no requirement for a specific bad character, such as greed to gain illegal money, as required by legal perfectionism. The existence of all the relevant elements of different legal approaches in transnational cartels can strengthen the consensus on the need to prohibit and criminalize the conduct. If one or more elements are missing, however, it does not mean that it is undesirable or unjustified to prohibit the conduct according to one of the criminal law approaches.

Nevertheless, it is more likely that different jurisdictions find justifications for criminalizing transnational cartels based on different approaches. For example, a jurisdiction can consider legal liberalism and legal perfectionism as relevant approaches to criminalization and combine the harm and the offenders' bad character to justify criminalizing hardcore cartels. In this case, different elements of crimes can be relevant to criminalization, including moral wrongfulness (disobedience, cheating, deceiving, exploitation), the offender's bad character (greed), and the risk or occurrence of harm.

I must underscore that, in cases where the conduct is not recognized as a crime based on

customary law or the general principles of law,[1192] a sovereign state is free to choose to prohibit transnational cartels based on the criminal approach it sees as desirable to its culture and economic structure.

I think the most convincing arguments are those presented by legal liberalism and utilitarianism to prevent harm to public and private interests. The harm principle prevails in the criminal debate over other arguments, and I also find the harm principle more convincing to serve as the main reason for prohibiting harmful conduct. Other approaches, such as legal moralism and legal perfectionism (character), also acknowledge the principle of harm and the need to justify punishment not just based on a person's moral wrongfulness or bad character when there is no harm to society.[1193] However, if those approaches allow an offender to be punished in the absence of harm or the risk of harm to protect a sociolegal interest important to society then those approaches are not convincing, and I suggest refraining from their use.

I suggest understanding transnational cartels mainly as an action of breaking the law that is typically accompanied by exploitation and possibly accompanied by cheating and deception. Competition law, particularly from a global perspective, is diverse and has different goals, including the protection of competition process, consumers welfare, the efficient use of resources, and other secondary goals. Such diverse goals are covered by the concept of disobedience but cannot be fully expressed via cheating, which protects competitors that have a horizontal relationship. Likewise, the concept of deception (including stealing and fraud) is limited and can happen as a way for cartel members to avoid the law by keeping the cartel secret while they deceive

[1192] See the discussion above in subchapter 3.9. "Legal status of transnational cartels."

[1193] For legal moralism, see Harcourt, The Collapse of the Harm Principle, *supra* note 745, at 115- 116. For character, see Bayles, Character, Purpose, and Criminal Responsibility, *supra* note 820, at 7- 8; Feinberg, The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing, *supra* note 756, at 311 & 316.

their customers.

Disobedience constitutes a sufficient basis for moral wrongfulness and, as such, fulfills one of the three recognized thresholds by which conduct can be characterized as criminal. Moreover, disobedience protects society from objective economic harm. Breaking the law also affects people's autonomy,[1194] as it is an act in which the offender denies the victim's right to fair terms of interaction.[1195] Deception and cheating, however, have an element of secrecy, where the victims (customers or competitors) are not aware of the real circumstances of the interaction or are denied the ability to choose based on their full will. Thus, I assume that such behaviour causes more harm to victims' autonomy than mere disobedience does.

Furthermore, hardcore cartels organized through deception or cheating are harder to discover because the offenders engage in hardcore cartels secretly to avoid enforcement and get away with their conduct. This is another important harm that makes the hardcore cartel conduct more serious and more difficult to suppress, like an offender that commits murder and destroys all the evidence or cybercrimes that seem to attack from "nowhere."

Nonetheless, hindering victims' autonomy and making the offence harder to discover does not reduce the objective harm to the economy, market, or consumer welfare to the level of not prohibiting it. The assumption is that hardcore cartels are harmful and justify prohibition, regardless of the harm to the victim's autonomy or the additional harm caused by not being able to discover them. In addition, we can assume that, in a strong competitive economy with an efficient enforcement mechanism, hardcore cartels that are public (known to the authorities and

[1194] Duff, Harms and Wrongs, *supra* note 768, at 22-26, 30 & 42- 44.
[1195] Ripstein, Equality, Responsibility, and the Law, *supra* note 772, at 134 & 147- 149.

customers) can be stopped either by boycotts by customers or by active enforcement of the authorities. Those are circumstances, however, that are subject to change: for example, when customers have no other choice but to buy from the cartel or when the enforcement in the jurisdiction is not effective.

Nevertheless, a jurisdiction can recognize a gradual scale of harm. At a basic level, transnational cartels cause harm with no benefit to the market. Further aggravating elements can be the duration of the violation, the size of the relevant businesses, and the estimated damage.[1196] An additional kind of harm is that which can occur to the victim's autonomy. Another kind of harm is when the hardcore cartel is organized secretly and cannot be discovered or effectively enforced. Thus, there is a scale of harm severity, but the basic objective harm to the market, economy, and consumer welfare provides a good justification for the authority to prohibit the conduct.

It may be argued that it is not sufficient to rely on only the harmful consequences of cartels to justify their criminal enforcement.[1197] Angus Macculloch, for example, emphasizes the need to show that the cartel is not just a technical breach of the law but a "serious affront" to society's values,[1198] and criminalization requires additional elements, such as cheating.[1199] The opposite approach suggests neglecting the moral argument from the competition offences. Andreas Stephan argues, based on the deterrence approach, that the harmful consequences of hardcore cartels on the economy and society are a sufficient threshold that requires a strong criminal sanction as a

[1196] See, for example, the Maxzone Auto Parts case, *supra* note 1106.
[1197] Macculloch, The Cartel Offence: Defining an Appropriate 'Moral Space', *supra* note 1010, at 75- 79.
[1198] Macculloch, The Cartel Offence: Defining an Appropriate 'Moral Space', *supra* note 1010, at 84.
[1199] Macculloch, The Cartel Offence: Defining an Appropriate 'Moral Space', *supra* note 1010, at 87- 89.

necessary tool to deter such conduct.[1200] As such, moralism should not be a relevant factor in determining the criminal character of hardcore cartels and is, in fact, considered an "unhelpful distraction."[1201]

I support Stephan's view on this matter, not just out of a deterrence approach but also based on legal liberalism, which protects society from harm or the risk of harm[1202] to important institutions, such as the economy and market, and to private interests. The objective economic harm to the market or customers, either by disobedience or other moral wrongfulness, is the same harm that justifies prohibition and punishment.

This does not, however, dismiss other arguments that require a strong moral wrongfulness, such as legal moralism, or where a jurisdiction or scholar chooses a criminal approach based on the harm principle but with strong moral wrongfulness. In this case, I think exploitation provides a better concept than cheating, which is limited to the case of breaking the law against other competitors.[1203] Exploitation provides a more fluid concept than cheating does and offers a solid basis for moral wrongfulness. It focuses on the offender's benefits or advantage from engaging in hardcore cartel behaviour and securing a better position than that to which the offender would otherwise be entitled under the pressure of competition. Exploitation occurs when cartelists break the law while other competitors are adhering to competition policy and customers and the general

[1200] Stephan, Why Morality Should be Excluded from the Cartel Criminalisation Debate, *supra* note 155, at 132 & 137; see also Andreas Stephan "Hear No Evil, See No Evil: Why Antitrust Compliance Programmes May Be Ineffective at Preventing Cartels" (2009) SSRN, at 11, online: http://www.ssrn.com/abstract=1432340

[1201] Stephan, Why Morality Should be Excluded from the Cartel Criminalisation Debate, *supra* note 155, at 127.

[1202] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 11; Ripstein, Equality, Responsibility, and the Law, *supra* note 772, at 134; Green, Lying, Cheating, and Stealing, *supra* note 745, at 34; Finkelstein, Is Risk a Harm, *supra* note 955.

[1203] See above the limitations of cheating and the broader concept of exploitation under subchapters 5.2.2. "Second approach- Hardcore cartels as cheating," and subchapter 5.2.3. "Third approach- Hardcore cartels as exploitation."

public are obeying the law of society. Therefore, I suggest seeing the exploitation concept as a broad and proper concept by which to view hardcore cartels and support the argument for their criminalization.

Nevertheless, cheating, deception, and exploitation provide a higher level of moral wrong and deserve more punishment, as the offender is more blameworthy.[1204] Furthermore, there is a strong basis on which to argue that hardcore cartels are typically organized with strong moral wrongfulness. Naked cartels are considered harmful and in no need of further examination.[1205] Similarly, we can see clear evidence of high moral wrongfulness in such conduct. Offenders typically engage in such conduct to exploit victims and gain illegal and unjustified money. In addition, to avoid being exposed by the authorities or the customers or other competitors, hardcore cartels are typically done secretly and through deception or cheating. Therefore, there is solid evidential grounds on which to argue that hardcore cartels include a high level of moral wrongfulness, which reflects the level of blameworthiness of the offender and can justify more punishment.

Lastly, criminal law requires that the crime be attributed to the offender, as the harm is not due to an accident but is the offender's fault.[1206] This applies based on different levels of *mens rea*. Intention is more blameworthy than recklessness, which is more blameworthy than negligence.[1207] On the different levels of *mens rea*, however, the actual economic harm to the market and customer

[1204] Feinberg, Some Unswept Debris from the Hart-Devlin Debate, *supra* note 745, at 251-253; Murphy, Legal Moralism and Liberalism, *supra* note 773, at 78.

[1205] OECD, Recommendation of the Council Concerning Effective Action against Hard Core Cartels (2019), *supra* note 26, at 3; see further references under footnote 28.

[1206] Hart, Punishment and Responsibility: Essays in the Philosophy of Law, *supra* note 734, at 36- 39; Duff, Harms and Wrongs, *supra* note 768, at 21; Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 34, 105- 108.

[1207] Bayles, Character, Purpose, and Criminal Responsibility, *supra* note 820, at 8; Frase, Just Sentencing: Principles and Procedures for a Workable System, Studies in Penal Theory and Philosophy, *supra* note 846, at 8.

welfare remains the same harm, which justifies prohibiting and punishing the conduct.

Harm, moral wrongfulness, and the level of *mens rea* are matters of scale and severity. I think the basic objective harm to the market and customer welfare, with moral wrongfulness of disobedience and knowledge, are sufficient and desirable thresholds by which to prohibit the conduct. The adequate sanction to be used to enforce the prohibition remains a sentencing question. At the same time, determining the kind and amount of punishment does not mean that this process is carried out only through litigation in court.

It is possible that a legislature prohibits different categories of hardcore cartels. For example, different anticompetitive conduct deserves an administrative monetary sanction to keep order in the competition system. A basic category of criminal prohibition covers hardcore cartel conduct (price-fixing, output restrictions, market allocation, and bid-rigging). Another category with more severe punishment can prohibit hardcore cartel conduct that involves aggravation circumstances, such as high moral wrongfulness (exploitation) and culpability (intent) or a specific harm threshold above X effect on the market.

Furthermore, this can be a matter of policy enforcement. For example, although the United States prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal,"[1208] it focuses only on hardcore cartels in its criminal enforcement: "[t]o increase transparency and create certainty for businesses, the Division focuses its criminal enforcement efforts narrowly, on only per se conduct, or hardcore cartel activity: price-fixing, bid-rigging, and

[1208] Section 1 to Sherman Act, *supra* note 30.

market or customer allocations."[1209]

Those considerations reflect the preferred policy of the jurisdiction regarding what kind of conduct to prohibit, which is based on not only criminal law theories but also on other practical considerations. Under these considerations, legislatures may consider the social utility of criminalization, the private and public interest, public view and support, economic considerations, the cost of enforcement, constitutional considerations, the offender's rights, clear legal rules, transparency, and other considerations related to the theoretical and practical aspects of enforcement in each jurisdiction. From this understanding, conduct can have sufficient justification to be criminally prohibited in the jurisdiction, but it may not be prohibited due to other practical considerations.

In conclusion, I suggest seeing criminal law theories as a justification for prohibiting conduct that is enforced and punished by the authority. All the above-mentioned criminal law theories provide solid and complete justifications for prohibiting transnational cartels and punishing offenders. The criminal law theories, however, do not clearly answer the question of the kind and amount of sanction, whether a criminal sanction, such as imprisonment, another less severe sanction, such as a criminal fine, or an administrative monetary sanction. Those aspects should be discussed further according to sentencing theories.

[1209] OECD, Criminalisation of cartels and bid rigging conspiracies – Note by the United States, *supra* note 585, at 2.

6. Chapter 6 Punishing transnational cartels

In chapter 5 I presented several justifications and theoretical bases for prohibiting and punishing transnational cartels. Jurisdictions, however, typically impose several sanctions in hardcore cartel cases, whether through criminal or administrative procedures. In this chapter, I discuss the different sanctions used against transnational cartels and categorize them as punishment. Furthermore, I acknowledge the punitive character of the administrative sanctions typically used against transnational cartels. Therefore, I point out the potential loss of some of the offenders' procedural safeguards while using an administrative sanction, although it is punitive.

6.1. Sanctions against transnational cartels

Sanctions against transnational cartels comprise monetary and non-monetary sanctions. Monetary sanctions are financial sanctions imposed by public entities, such as competition authorities, tribunals, or courts, and these sanctions can be imposed in administrative or criminal procedures. Monetary sanctions can also be imposed against both businesses and individuals.[1210]

A non-monetary sanction against a business can include disqualification from bidding on public contracts if the business is involved in bid-rigging. This sanction can be imposed through administrative or criminal procedures and has a substantial deterrent effect.[1211] Another non-monetary sanction can include the publication of adjudications of competition law violations, which has a reputational effect. Sanctions that have a reputational effect may have a deterrent

[1210] OECD, Review of the 1998 OECD Recommendation Concerning Effective Action against Hard Core Cartels, (2019), *supra* note 14, at 63; ICN, Defining Hard Core Cartel Conduct—Effective Institutions, Effective Penalties, *supra* note 20, at 74-75.

[1211] OECD, Review of the 1998 OECD Recommendation Concerning Effective Action against Hard Core Cartels, (2019), *supra* note 14, at 63; ICN, Defining Hard Core Cartel Conduct—Effective Institutions, Effective Penalties, *supra* note 20, at 74-75.

consequence, as the reputational damages can be larger than a monetary sanction.[1212]

The non-monetary sanction against an individual includes, most remarkably, imprisonment. In addition, it can include a temporary or indefinite prohibition from managerial positions or from serving as an officer of a public company.[1213] Moreover, it can include community service or publication of one's violation of the competition law, which has a reputational effect.[1214] These sanctions, however, have a weaker deterrent effect than imprisonment.[1215]

Therefore, sanctions against hardcore cartels can vary, including those resulting from administrative and criminal procedures. Are these different types of sanctions, however, considered punishment?

6.2. Defining punishment

Punishment can be broadly defined as "any consequence of a violation of the law which entails an unfavourable effect for the wrongdoer."[1216] H.L.A. Hart defines punishment based on five elements:[1217]

> (i) It must involve pain or other consequences normally considered unpleasant. (ii) It must be for an offence against legal rules. (iii) It must be of an actual or supposed offender for the offence. (iv) It must be intentionally administered by human beings other than the offender. (v) It must be imposed and administered by an authority

[1212] OECD, Review of the 1998 OECD Recommendation Concerning Effective Action against Hard Core Cartels, (2019), *supra* note 14, at 63.
[1213] OECD, Review of the 1998 OECD Recommendation Concerning Effective Action against Hard Core Cartels, (2019), *supra* note 14, at 63.
[1214] ICN, Defining Hard Core Cartel Conduct—Effective Institutions, Effective Penalties, *supra* note 20, at 74-75.
[1215] OECD, Review of the 1998 OECD Recommendation Concerning Effective Action against Hard Core Cartels, (2019), *supra* note 14, at 63.
[1216] Satzger, Definition and Scope of "Criminal" Sanctions, *supra* note 886, at 265.
[1217] Hart, Punishment and Responsibility: Essays in the Philosophy of Law, *supra* note 734, at 5.

constituted by a legal system against which the offence is committed.

Ted Honderich defines punishment as "an authority's infliction of a penalty, something intended to cause distress or deprivation, on an offender or someone else found to have committed an offence, an action of the kind prohibited by the law." In addition, to be considered an offence, the offender would have to have "actually broken a rule out of intention or negligence, somehow freely and responsibly, or broken certain rules without that, or have occupied such a position as employer with respect to a rule breaker in either of the preceding senses."[1218]

Peter Whelan discusses punishment in the context of hardcore cartels, defining it as including several criteria: 1) it involves an offence against the legal rules; 2) it is imposed by the legitimate authority against an offender for his or her offence; 3) it involves consequences to the offender that causes the offender pain or an unpleasant experience.[1219]

Based on the above criteria, we can categorize different types of sanctions used in hardcore cartels cases as punishment. This kind of punishment causes pain or unpleasant consequences to the offender; imprisonment deprives the offender of his or her liberty, monetary sanctions deprive one of property, and publication deprives the offender of his or her good name and reputation. In addition, it is used for an offence: violating the law. It is used against an offender for his offence. Furthermore, sanctions against hardcore cartels are imposed on the offender by an authority and in a legal system that aims to enforce the offence.

Still, administrative sanctions or an authority response against those who violate the law are conducted outside typical criminal procedures and can have other functions that fall outside of

[1218] Honderich, Punishment: The Supposed Justifications, *supra* note 809, at 15.
[1219] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 9.

punishment for an offence. Accordingly, understanding this type of administrative sanction requires further clarification.

6.3. Administrative sanctions against transnational cartels

6.3.1. What is an administrative sanction?

An administrative sanction is a public sanction imposed by an administrative authority as a response for violating the law. I distinguish the term *administrative sanction* from civil procedures in the domain of hardcore cartels to avoid a misunderstanding between punishment as a response to violating a prohibition and the civil law process of compensating victims for any incurred damages due to the violation. Thus, I refer to the monetary sanction imposed by an administrative authority, such as a competition authority or tribunal, which is out of the realm of criminal procedures and does not aim to compensate the victim for damages incurred as an administrative sanction.[1220]

In addition, the administrative sanction, as discussed here, differs from other administrative procedures that aim to prevent future damage to the public, such as cancelling a license for a factory that causes pollution or ordering a construction business to clean the debris at a site after building houses. Examples of other administrative procedures would be when a competition authority or tribunal orders a business to do or not to do something to avoid lessening competition in the market.[1221] In these cases, the authority functions as an administrative body to prevent further damage to the public in the future (e.g., pollution, risk to the public from building construction, or

[1220] The OECD also distinguishes monetary sanctions from other compensation for damages paid to harmed parties by a cartel, see OECD, Review of the 1998 OECD Recommendation Concerning Effective Action against Hard Core Cartels, (2019), *supra* note 14, at 61.

[1221] See, for example, Section 90.1 of the Canada Competition Act, *supra* note 25.

lessening competition).

6.3.2. Administrative sanction of a criminal nature

An administrative sanction can be used as a sanction against an offence that is criminal in nature and has a serious punitive consequence to the offender yet can also be used to encourage compliance with the law to maintain a public mechanism, such as a tax system. Therefore, the line between being punitive in nature and administrative in nature can be blurry.

Many times, it is hard to distinguish between criminal and noncriminal sanction. Criminal sanction can be defined in the national penal law, but the official label for the sanction, be it a criminal or administrative sanction, is not always enough. In addition, there is a place to examine some other merits unique to the criminal sanction, such as the associated censure,[1222] the function of the criminal record, and the public process of proving the offence in court.[1223]

If the administrative sanction is punitive and aims to deter the offender by having a "major impact on the legal, social, reputational, and financial interests of the affected persons," then it has a punitive consequence similar to that of a criminal sanction and should be examined further.[1224] For example, in the Engel case, the European Court of Human Rights provided criteria with which to examine the nature of the procedures, even if they are labelled as administrative procedures. Those criteria are: 1) the classification of the offence in domestic law as criminal; 2) the nature of

[1222] Satzger, Definition and Scope of "Criminal" Sanctions, *supra* note 886, at 275.
[1223] Satzger, Definition and Scope of "Criminal" Sanctions, *supra* note 886, at 267- 268.
[1224] Lorena Bachmaier Winter "New Crime Control Scenarios and the Guarantees in Non-Criminal Sanctions: Presumption of Innocence, Fair Trial, Rights, and the Protection of Property" (2019) 90:2 Revue Internationale de Droit Pénal (RIDP) 299, at 301 & 331; Mehmet Arslan "Principal Questions About Administrative Criminal Sanctioning Regimes in the European Convention on Human Rights" (2019) 90:2 Revue Internationale de Droit Pénal (RIDP) 281, at 284; Satzger, Definition and Scope of "Criminal" Sanctions, *supra* note 886, at 275.

the offence; and 3) the severity of the sanction.[1225] If those criteria apply, the offender is entitled to safeguard procedures presented in Article 6(1) of the European Convention of Human Rights (ECHR).[1226]

In the *Guindon v. Canada,*[1227] the Canadian Supreme Court discussed the merits of an administrative sanction that is considered as a sanction imposed for an "offence," which justifies applying the procedural safeguards of Section 11 of the Canadian Charter of Rights and Freedoms.[1228] The court distinguished between administrative nature and punitive nature based on a test with two parts: the nature of the proceedings and the penal consequences.[1229]

The first part refers to the nature of the proceeding. It is considered a criminal proceeding "when it is aimed at promoting public order and welfare within a public sphere of activity." It is considered administrative when it is "primarily intended to maintain compliance or to regulate conduct within a limited sphere of activity." It is also emphasised that the focus should not be on the conduct itself but on the purpose of the proceeding to render the offender accountable for having violated the public interest.[1230]

[1225] European Court of Human Rights, *Engel and others v. Netherland*s, Joined Cases 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (1976), para 82 online: https://hudoc.echr.coe.int/tur#{%22itemid%22:[%22001-57479%22]}; See further discussion on those criteria in Arslan, Principal Questions About Administrative Criminal Sanctioning Regimes In the European Convention on Human Rights, *supra* note 1224, at 281; Winter, New Crime Control Scenarios and the Guarantees in Non-Criminal Sanctions, *supra* note 1224, at 299-300 & 305; Satzger, Definition and Scope of "Criminal" Sanctions, *supra* note 886, at 277.

[1226] European Convention of Human Rights (ECHR) (1950), online: https://www.echr.coe.int/documents/d/echr/convention_ENG; see further discussion below subchapter 6.3.4. "Offenders' rights and procedural safeguards."

[1227] *Guindon v. Canada*, 2015 SCC 41; in that case, the court discussed a penalty for false statement under Section 163.2 of (Canada) Income Tax Act R.S.C., 1985, c. 1 (5th Supp.), totalling CAD 546,747. The court concluded that the administrative sanction was of an administrative nature for encouraging compliance with the law and not a punitive sanction for an offence.

[1228] Canada Charter of Rights and Freedoms, *supra* note 268.

[1229] Guindon case, *supra* note 1227, para 44; The test was developed and discussed in *R. v. Wigglesworth*, 1987 2 SCR 541 and *Martineau v. M.N.R.,* 2004 SCC 81.

[1230] Guindon case, *supra* note 1227, para 45.

The second part is the penal consequences. Criminal penal consequences include imprisonment.[1231] It may also include a monetary penalty:

> when it is, in purpose or effect, punitive. Whether this is the case is assessed by looking at considerations such as the magnitude of the fine, to whom it is paid, whether its magnitude is determined by regulatory considerations rather than principles of criminal sentencing, and whether stigma is associated with the penalty.[1232]

Monetary penalty, however, may be of an administrative nature to maintain "'internal discipline within [a] limited sphere of activity.'"[1233] Therefore, to examine the core nature of the administrative sanction, the focus should not be only on the label that the state gives the sanction but also on the merits of the offence as protecting important sociolegal interests, as well as the primary function of the sanction.

It should be noted that this type of punitive administrative sanction is also recognized in the international domain. The UN, for example, allows targeted sanctions to address the threat to international peace and security under Chapter VII of the Charter of the United Nations.[1234] Targeted sanctions typically include economic restrictions to freeze funds and economic assets but can also include other restrictions, such as travel bans.[1235] Such sanctions are used to attack various illegal behaviours, such as terrorism, misappropriation of state funds by former senior state officials, and illegal trade in natural resources.[1236] It is used against foreign governments, groups,

---

[1231] Guindon case, *supra* note 1227, para 46 & 76.

[1232] Guindon case, *supra* note 1227, para 76.

[1233] Guindon case, *supra* note 1227, para 46.

[1234] Benjamin Vogel "Targeted Sanctions Against Economic Wrongdoing at the UN and EU level" (2019) 90:2 Revue Internationale de Droit Pénal (RIDP) 129, at 129; Chapter VII of the United Nations Charter, *supra* note 179; United Nations Security Council, Sanctions, UN website, online: https://www.un.org/securitycouncil/sanctions/information

[1235] Vogel, Targeted Sanctions Against Economic Wrongdoing at the UN and EU level, *supra* note 1234, at 130- 132.

[1236] Vogel, Targeted Sanctions Against Economic Wrongdoing at the UN and EU level, *supra* note 1234, at 129- 130.

businesses, or individuals that provide economic support to a government, regardless of the nature of their commercial activity.[1237] Different jurisdictions, including the EU,[1238] the United States,[1239] and Canada,[1240] have a similar concept of targeted sanctions, mainly to protect human rights and other interests. This kind of practice, however, can provoke conflicts between the states imposing the sanction to the states where the offender is resident.[1241]

6.3.3. Classifying administrative sanctions against transnational cartels as punitive

Distinguishing the nature of the offence and the penal consequences is somewhat determined by the specific legal system and its criteria. With some exceptions,[1242] imprisonment as a punishment[1243] is easier to categorize as a criminal sanction, as it is typically imposed through criminal procedures.[1244] In the case of punishment against hardcore cartels, imprisonment can be imposed only through criminal procedures.[1245]

[1237] Vogel, Targeted Sanctions Against Economic Wrongdoing at the UN and EU level, *supra* note 1234, at 132.

[1238] The EU allows targeted sanctions to address threats to international peace or objectives of the Common Foreign and Security Policy under Title V of the Treaty on European Union [2012/C 326/01]; see also European Union sanctions, online: https://www.eeas.europa.eu/eeas/european-union-sanctions_en; see also Vogel, Targeted Sanctions Against Economic Wrongdoing at the UN and EU level, *supra* note 1234, at 129, 136 & 152- 154.

[1239] The US is also well known for using targeted sanctions against other countries and individuals for several causes and based on different programs. See on this matter The Office of Foreign Assets Control ("OFAC") of the US Department of the Treasury, online: https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information

[1240] Canada also has different programs for target sanctions, mainly to protect human rights. See examples of Canadian sanctions legislation online: https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/legislation-lois.aspx?lang=eng

[1241] See recent discussion on a conflict between Iran and the US at International Court of Justice, *Islamic Republic of Iran v. United States of America* (2023), ICJ General list No 164, online: https://www.icj-cij.org/case/164

[1242] For example, in the Engel case, *supra* note 1225, imprisonment was imposed as a disciplinary punishment in military procedures.

[1243] An argument can arise regarding using imprisonment in administrative procedures, such as preventing terror threats or used as detention in initial criminal procedures due to the offender's risk to the public. This type of imprisonment is not considered punishment because it is not serving for an offence against legal rules; see above in subchapter 6.2. "Defining punishment."

[1244] Satzger, Definition and Scope of "Criminal" Sanctions, *supra* note 886, at 267; Wouter P.J. Wils "Is Criminalization of EU Competition Law the Answer?" (2005) 28:2 World Competition 117, at 118; Guindon case, *supra* note 1227, para 76.

[1245] OECD, Sanctions in Antitrust Cases-Background Paper by the Secretariat, *supra* note 725, at 31- 32.

Nonetheless, based on the above tests, the administrative sanction typically used against hardcore cartels, most notably monetary sanctions, should be seen as a criminal in nature. As clarified under the criminalization chapter, the hardcore cartel prohibition protects the important social interest of effective competition in the market.[1246] In addition, hardcore cartels are not a matter of deviation from the order in a complex system, such as a delay of notification about a merger, but rather conduct harmful to the public.[1247] Therefore, there is an established basis on which to prohibit it criminally and not "maintain compliance … within a limited sphere of activity."[1248] Accordingly, the prohibition should be recognized as a criminal in nature.

Furthermore, administrative sanctions in the domain of hardcore cartels are punitive and include high monetary sanctions and severe effects on the offender. Administrative sanctions can also include publishing the decision regarding involvement in a hardcore cartel on the accused businesses' websites, which has a reputational effect. Thus, an administrative sanction in the domain of hardcore cartels is punitive in nature and has a deterrence effect.[1249]

The EU provides a notable example of the use of an administrative sanction serving as a punitive sanction against hardcore cartels. The EU enforcement was designed to be used at a supranational level without a theoretical basis but rather as a pragmatic response to practical needs.[1250] In the past, many countries did not recognize criminal responsibility for legal entities. Accordingly, they used administrative rather than criminal sanctions. Although the situation has

[1246] This is also recognized in the EU; see Arslan, Principal Questions About Administrative Criminal Sanctioning Regimes in the European Convention on Human Rights, *supra* note 1224, at 282- 283.

[1247] See further under subchapter 5.1. "Harm in transnational cartels."

[1248] Guindon case, *supra* note 1227, para 45.

[1249] OECD, Sanctions in Antitrust Cases-Background Paper by the Secretariat, *supra* note 725, at 9; Shaffer, Criminalizing Cartels: A Global Trend, *supra* note 21, at 305; Stephan, An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation, *supra* note 725, at 623 & 645; Wils, Optimal Antitrust Fines: Theory and Practice, *supra* note 725, at 198.

[1250] Harding, The System of EU Antitrust Law, *supra* note 1185, at 85.

changed and many countries now recognize the criminal responsibility of legal entities, the general preference remains to use administrative sanctions against legal entities.[1251] In addition, some countries still do not recognize the criminal responsibility of legal entities and assign criminal accountability only to individuals.[1252]

Therefore, for political and legal reasons, the sanctions against hardcore cartels at the EU level have remained administrative sanctions against businesses.[1253] Administrative sanctions have, however, been recognized in the EU as punitive in nature.[1254] For example, in *Société Stenuit v. France*, the European Court of Human Rights discussed the French authorities' imposition of a monetary sanction against businesses for bid-rigging, although the court's judgement did not include a detailed opinion, as the relevant businesses decided to withdraw the case after reaching an agreement with the authorities. Still, the court referred to the European Commission of Human Rights opinion that found that the French procedures violated the offender's rights presented in Article 6(1) of the ECHR.[1255]

Furthermore, the *Société Stenuit* decision was supported in *Jussila v. Finland*, which discussed a case of tax charges without an oral hearing. In that case, the court recognized in principle the application of Article 6 to the ECHR, where the sanction functioned as a criminal sanction based on the Engel case criteria, including "competition law."[1256] Moreover, *in A. Menarini Diagnostics Srl v. Italy*, the court discussed a monetary sanction of EUR 6 million

[1251] Satzger, Definition and Scope of "Criminal" Sanctions, *supra* note 886, at 270.
[1252] Satzger, Definition and Scope of "Criminal" Sanctions, *supra* note 886, at 270.
[1253] Harding, The System of EU Antitrust Law, *supra* note 1185, at 90.
[1254] See also Winter, New Crime Control Scenarios and the Guarantees in Non-Criminal Sanctions, *supra* note 1224, at 305- 306.
[1255] European Court of Human Rights, *Société Stenuit v. France*, Case 11598/85 (1992), para 6-7, online: file:///C:/Users/leyad061/Downloads/001-57760.pdf
[1256] European Court of Human Rights, *Jussila v. Finland*, Case 73053/01 (2006), para 43.

imposed by the Italian competition authority against a business for violating competition law. The court recognized the punitive aspect of the monetary sanction and, accordingly, the application of Article 6 to the ECHR on the case.[1257]

According to this reality, the EU enforcement against hardcore cartels can be seen as a semantic labelling of administrative enforcement for the reality of criminal enforcement, where different administrative mechanisms replace other criminal mechanisms. For example, the commission's directorate general case initiator replaces the prosecutor; the commission inspectors replace the police; the commission decision-taker replaces the trial court/sentencer; and the court of First Instance or Court of Justice replaces the review or appellate court.[1258]

6.3.4. Offenders' rights and procedural safeguards

The extensive enforcement power to investigate and impose high monetary penalty requires an acknowledgment of the seriousness of the procedures and criminal merit of the sanction, which justifies guaranteeing appropriate legal protections and determining a high standard of proof similar to that of criminal procedures: beyond a reasonable doubt.[1259] The natural form is the criminal process that was designed to punish an offender but simultaneously developed solid offenders' rights. Administrative sanctions, however, include fewer procedures and may violate rights that are usually protected in criminal procedures.[1260] Thus, administrative sanctions raise legal arguments about the desired focal point of enforcement and defendants' rights.[1261]

[1257] European Court of Human Rights A. *Menarini Diagnostics Srl v. Italy*, Case 43509/08 (2011), online: file:///C:/Users/leyad061/Downloads/002-385.pdf

[1258] Harding, The System of EU Antitrust Law, *supra* note 1185, at 91.

[1259] Harding, The System of EU Antitrust Law, *supra* note 1185, at 89- 90; Imelda Maher "Competition Law Fragmentation in a Globalizing World" (2015) 40:2 Law & Social Inquiry 553, at 565.

[1260] Abraham S. Goldstein "White-Collar Crimes and Civil Sanctions" (1991) 101 Yale Law Journal 1895, at 1899; Arslan, Principal Questions About Administrative Criminal Sanctioning Regimes in the European Convention on Human Rights, *supra* note 1224, at 281.

[1261] Harding, The System of EU Antitrust Law, *supra* note 1185, at 90.

There is a basis for arguing that a defendant's criminal safeguards should be guaranteed when administrative enforcement is used for punishment and as an alternative to criminal enforcement.[1262] Such safeguards include, among others, adequate search and investigation procedures, adequate procedures in seizing property, a fair trial, the right against self-incrimination, the presumption of innocence, access to evidence, examining witnesses, the standard of proof beyond a reasonable doubt, and the *ne bis in idem* principle.[1263] Such an argument is primarily based on society's perspective on human and civil rights.[1264]

International law guarantees fundamental defendants' rights that should be provided in criminal procedures. Those include Articles 10 and 11 of the Universal Declaration of Human Rights,[1265] which are recognized as customary law and general principles of law.[1266] Also included is Article 14 of the International Covenant on Civil and Political Rights,[1267] which also has a binding power on states.[1268] Still, a formal interpretation of those conventions has determined that criminal safeguards are guaranteed when the conduct is defined as a criminal offence based on national or international law. For example, Article 11.2 of the Universal Declaration of Human Rights, declares that:

> No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law.

[1262] Arslan, Principal Questions About Administrative Criminal Sanctioning Regimes in the European Convention on Human Rights, *supra* note 1224, at 281; Winter, New Crime Control Scenarios and the Guarantees in Non-Criminal Sanctions, *supra* note 1224, at 299.

[1263] This principle prohibits prosecuting the offender twice for the same act and aims to protect two main interests. First is the offender's right not to be prosecuted twice for the same conduct and not to be exposed to a criminal conviction after being acquitted. Second, it protects the judiciary system from having conflicting decisions on the same matter. See Michiel Luchtman "*Ne Bis in Idem* at The Interface of Administrative and Criminal Law Enforcement-Sufficiently Connected in Substance, Time and Space?" (2019) 90:2 Revue Internationale de Droit Pénal (RIDP) 335, at 337- 340.

[1264] See, for example, Section 11 of the Canada Charter of Rights and Freedoms, *supra* note 268.

[1265] United Nations, Universal Declaration of Human Rights, *supra* note 264.

[1266] See above in subchapter 2.2.3. "General principles of law," and footnote 264.

[1267] United Nations, International Covenant on Civil and Political Rights, *supra* note 266.

[1268] See above in subchapter 2.2.3. "General principles of law," and footnote 266.

In addition, Article 15 to the International Covenant on Civil and Political Rights, clarifies:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, … 2. for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Therefore, because transnational cartels are not considered international crimes or transnational crimes recognized by general principles of law, they remain a matter of national criminal law. When transnational cartels are not recognized as crimes in the national criminal law but are considered administrative violations, there seems to be no binding power to the mentioned conventions on the relevant states when they impose administrative sanctions.[1269] Thus, providing procedural safeguards remains a matter for each society to determine when applying administrative sanctions.

Here also, the EU acknowledges the need to ensure procedural safeguards in administrative enforcement that include punitive and deterrent sanctions.[1270] The EU enforcement system against hardcore cartels is based on Regulation 1/2003.[1271] Under Articles 20 and 21, the competition commission has extensive research power to gather information, conduct unannounced on-site inspection, enter properties and businesses, examine books and other records, and more. Under Article 19, the commission can interview an individual or legal entity to collect information and make a statement. Article 27 ensures a proper process of hearing the parties before making a decision and allows the parties to access the file and the relevant evidence. In addition, there is a

[1269] For example, criminal safeguards do not apply in the case of targeted sanctions in case they are used by the UN, but more limited safeguards. See further in Vogel, Targeted Sanctions Against Economic Wrongdoing at the UN and EU level, *supra* note 1234.

[1270] Arslan, Principal Questions About Administrative Criminal Sanctioning Regimes in the European Convention on Human Rights, *supra* note 1224, at 284; see also the discussion above at pages 233- 235.

[1271] Regulation No 1/2003, *supra* note 510.

right to appeal the commission's decision to the EU General Court, whose judgement can be appealed before the Court of Justice to review the decision.[1272] Based on Article 2, however, the burden of proof "shall rest on the party or the authority alleging the infringement" and does not set the standard of proof beyond a reasonable doubt, as is typical in criminal procedures.[1273]

Regulation 1/2003 does not define specific defendants' rights. Still, because of the punitive character of the administrative sanctions in the domain of hardcore cartels,[1274] procedural safeguards are applied as recognized in Article 6 of the ECHR[1275] and "to the general principle of Community law of the right to a fair hearing," including "equal treatment or the protection of legitimate expectations."[1276] Article 6 of the ECHR ensures the right to a fair trial, and institutional

[1272] Article 31 to Regulation No 1/2003, *supra* note 510; Contribution by the European Union, para 3.1 in Organisation for Economic Co-operation and Development (OECD), Global Forum on Competition, Competition and Sanctions in Antitrust Case (2016), online: https://www.oecd.org/daf/competition/competition-and-sanctions-in-antitrust-cases.htm

[1273] The Court of Justice of the European Union- Third Chamber, *British Plasterboard v. Commission*, Case T-53/03, (2008), para 64 online: https://curia.europa.eu/juris/document/document.jsf;jsessionid=D2BC8DFA5315162F503C53118BC3390C?text=&docid=67378&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2422916, states, "It is apparent from that case-law that the Court must reject the applicant's assertion that the Commission must adduce proof 'beyond reasonable doubt' of the existence of the infringement in cases where it imposes heavy fines."; see further on this matter in Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 121- 124.

[1274] See the previous subchapter 6.3.3. "Classifying administrative sanctions against transnational cartels as punitive;" Harding, The System of EU Antitrust Law, *supra* note 1185, at 90- 91.

[1275] Article 6 of the ECHR, *supra* note 1226; Article 6 of the ECHR guarantees the right to a fair trial and orders the following: "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly, but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. 3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

[1276] The Court of Justice of the European Union- Grand Chamber, *Dansk Rørindustri a.o. v. Commission*, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P, C-213/02 P, (2005), para 66 & 211 online: https://curia.europa.eu/juris/liste.jsf?language=en&num=C-189/02

guarantees include an independent and impartial tribunal established by law to determine the criminal charges against the offender.[1277] In addition, an administrative monetary sanction must be examined by the judiciary system to correct any legal or procedural errors and examine its justifications and proportionality.[1278]

Judiciary scrutiny, however, examines the administrative procedure from an administrative perspective, as well as whether the administrative authority did its duty reasonably. It may differ from the criminal procedure, in which the court is neutral from interests, decides whether the level of evidence is sufficient to convict the offender, and actively protects the offender's rights through this process. An administrative tribunal also has different procedures than criminal procedures, so the general examination may not be as comprehensive as it would be for a criminal case.[1279]

6.3.5. Punishment and securing procedural safeguards

Administrative sanctions can have severe consequences for the offender. Still, they do not include imprisonment, the harsh stigma of the criminal sanction, or a criminal record. Those are critical aspects that make an administrative sanction in general less severe than a criminal sanction. Businesspeople will most likely be ready to pay a high monetary penalty but not to spend one day in jail or have a criminal record that seriously affects their future careers or even their image in the eyes of their peers and community. Those are considerable differences between criminal and administrative sanctions, which provide a different degree of punishment and suggest a convincing justification for different sanctions. Accordingly, it can be argued that, in such cases, a legitimate and fair deal has been made between the state and the defendant. The defendant receives a less-

[1277] Arslan, Principal Questions About Administrative Criminal Sanctioning Regimes in the European Convention on Human Rights, *supra* note 1224, at 281- 285.

[1278] OECD, Sanctions in Antitrust Cases-Background Paper by the Secretariat, *supra* note 725, at 28.

[1279] Arslan, Principal Questions About Administrative Criminal Sanctioning Regimes in the European Convention on Human Rights, *supra* note 1224, at 286.

severe sanction in this type of administrative sanction but loses some of the safeguards of criminal procedures.[1280]

I think, however, that the extensive enforcement mechanism and the harsh sanction given in administrative enforcement require careful use and should limit the authorities' power and discretion. They also require guaranteeing the full scope of defendants' procedural rights. A more moderate solution can be giving the offender the right to shift the enforcement from administrative to criminal enforcement. If the offender prefers to pay the administrative monetary penalty, he or she is seen as admitting to having engaged in the prohibited conduct and taking responsibility, although without a criminal conviction or the risk of imprisonment. On the other hand, if the offender chooses not to pay the administrative monetary penalty, the authorities must prove the case through criminal procedures. The offender will be entitled to better procedural safeguards that limit the authorities' power, although the offender faces the risk of criminal sanction, including imprisonment and criminal record.

The important aspect of such a procedure is that the authorities plan the investigations (adequate collection of the evidence) and prepare the evidence to a sufficient standard of proof, as is required in a criminal procedure (beyond a reasonable doubt). Such procedures exist in what is known as "conditional enforcement" or a "remediation agreement." Conditional enforcement can be a process in which the authority imposes an administrative sanction against the offender, and, if the offender refuses to pay or requests to be prosecuted, then the process then shifts to a criminal prosecution. A remediation agreement can be a process in which the offender in criminal procedures enters into an agreement with the authorities to pay a penalty and admits to having

[1280] Winter, New Crime Control Scenarios and the Guarantees in Non-Criminal Sanctions, *supra* note 1224, at 333.

committed a criminal violation, but without pleading guilty or being convicted.[1281]

All in all, although administrative sanctions are typically more moderate in comparison to criminal sanctions, such as imprisonment, it is necessary to acknowledge that an administrative sanction is a punitive sanction. In addition, administrative sanctions come at the cost of defendants' sacrificing some of their safeguards in the process of punishment, which is not in line with the broad global consensus to acknowledge necessary safeguards when using punishment, although the concept is officially limited to criminal punishment.[1282]

[1281] See, for example, Israel's different procedures of this kind in Khalid Ghanayim "Alternative Investigation and Sanctioning Systems for Corporate and Corporate-Related Crime in Israel" (2019) 90:1 Revue Internationale de Droit Pénal (RIDP) 165, at 171- 179. In the United Kingdom, see Alan Doig "Non-conviction Financial Sanctions, Corporate Anti-Bribery Reparation and their Potential Role in Delivering Effective Anti-Corruption Pay-Back: The Emerging UK Context" in Liz Campbell & Nicholas Lord (eds.) C*orruption in Commercial Enterprise: Law, Theory and Practice* (Taylor & Francis, 2018) 257. In the United States, Andrea Amulic "Humanizing the Corporation While Dehumanizing the Individual: The Misuse of Deferred-Prosecution Agreements in the United States" (2017) 116:1 Michigan Law Review 123. In Canada, Connor Bildfell "Justice Deferred? Why and How Canada Should Embrace Deferred Prosecution Agreements in Corporate Criminal Cases" (2016) 20:2 Canadian Criminal Law Review 161; see also, Part XXII.1 to Canada Criminal Code, *supra* note 44.

[1282] Articles 10 and 11 of the United Nations, Universal Declaration of Human Rights, *supra* note 264; Article 14 of the United Nations, International Covenant on Civil and Political Rights, *supra* note 266.

7. Chapter 7 Deterrence-based justifications for punishing transnational cartels

In the utilitarian approach, we should consider the profit of the offence and its mischief.[1283] Thus, the cartel's illegal profit and the harm it causes to the market, competition, customers, and other protected interests are relevant criteria for prohibiting the conduct.[1284] With regard to the punishment stage, utilitarianism suggests four distinct approaches to punishing an offender: rehabilitation, incapacitation, specific deterrence, and general deterrence.

Most utilitarian approaches are straightforward in providing punishments suitable for specific offenders. For example, rehabilitation can suggest treatment for a manager who tends to engage in hardcore cartels because this individual strongly believes that his business can profit by committing financial crimes. Incapacitation can remove managers from their positions for longer periods to prevent the individuals from reoffending. Specific deterrence can suggest harsher sanctions against a manager with previous convictions for committing hardcore cartels if the previous punishment failed to prevent him or her from reoffending.

The discussion in this chapter focuses on general deterrence, the most common approach to punishment in the domain of hardcore cartels among competition authorities worldwide.[1285] The discussion starts by presenting some relevant features of general deterrence, including its basic assumption, the role of proportionality, and the probability of imposing sanctions. Next, the main discussion of law and economic methodology is presented. Although this methodology is not

[1283] Bentham, Chapter XIV Of the proportion between punishment and offence, *supra* note 738, at 172- 173.

[1284] See the discussion on prohibiting conduct based on utilitarianism in subchapter 5.4.1. "Utilitarianism and preventing mischief."

[1285] ICN, Defining Hard Core Cartel Conduct—Effective Institutions, Effective Penalties, *supra* note 20, at 3& 52; ICN, Setting of Fines for Cartels in ICN Jurisdictions (2017), *supra* note 486, at 5- 6; Terry Calvani & Torello H. Calvani "Cartel Sanctions and Deterrence" (2011) 56:2 Antitrust Bulletin 185, at 186; Wirz, Imprisonment for Hard Core Cartel Participation, *supra* note 613, at 92; Stephan, An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation, *supra* note 725, at 624; Connor, The Impact of International Cartels, *supra* note 616, at 12.

applied in this thesis, it should not be ignored because it plays a broad role in this domain. Following this is a discussion of the relevant considerations regarding transnational cartels as they operate in the international domain. Lastly, I discuss and draw conclusions about the proper sanction to use against transnational cartels, whether imprisonment or another alternative sanction. Choosing the sanction of imprisonment necessitates the criminalization of transnational cartels, as imprisonment, as a punishment against hardcore cartel violations, can only be used in criminal procedures.

7.1. Principal feature of general deterrence approaches

The basic idea in general deterrence is that the sanction should outweigh the expected illegal gain.[1286] Under perfect "lab circumstances," the authorities can detect all transnational cartels in the market, calculate the profit of each cartel, seize the illegal profit, and impose extra sanctions that make the crime undesirable for the offender. Therefore, deterrence is not just "pricing" the crime by imposing a sanction that cancels out the illegal gain but also adding an extra sanction to deter the offender.[1287]

To establish an effective deterrence and a realistic threat that outweighs the illegal gain of the cartel, the sanction should be enhanced by: 1) the severity of the sanction, 2) the certainty of the sanction by increasing the probability of detection and conviction, and 3) the speed at which it is imposed after the offence has occurred.[1288] Accordingly, punishment should increase in scale in

[1286] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 39; Gregory J. Werden "Sanctioning Cartel Activity: Let the Punishment Fit the Crime" (2009) 5:1 European competition journal 19, at 28; OECD, Sanctions in Antitrust Cases-Background Paper by the Secretariat, *supra* note 725, at 5.

[1287] See, for example, Wils, Optimal Antitrust Fines: Theory and Practice, *supra* note 725, at 190 & 193.

[1288] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 40.

proportion to how short it falls of the certainty of punishing the offender. In addition, punishment should increase in scale in proportion to the length of time between the crime and its subsequent punishment.[1289]

The OECD also recognizes the above principles for deterrence sanctions against hardcore cartels and identifies the relevant factors for effective deterrence as:[1290]

> (i) there is a reasonable probability that unlawful conduct will be detected; (ii) there is some degree of certainty that the sanction will be imposed; (iii) the sanction will be imposed relatively swiftly; and (iv) the potential sanction is perceived to be severe, making cartels unprofitable and not a tolerated cost of doing business.

7.1.1. Proportionality

Utilitarianism, unlike retributivism, has no proportionality principle inherent to its theory. Utilitarianism, however, has several rules for the proportionality between the offence and its punishment.[1291] First, the value of the punishment should exceed the profit made from the offence. Otherwise, punishment would be ineffective at preventing mischief and be meaningless to the offender and thus cruel to both the public and the offender.[1292] Second, the greater the harm of the offence, the greater the justification for the expense of achieving punishment.[1293] Third, when two offences compete, the punishment for the greater offence should convince a person to prefer the

[1289] Bentham, Chapter XIV Of the proportion between punishment and offence, *supra* note 738, at 170.

[1290] OECD, Review of the 1998 OECD Recommendation Concerning Effective Action against Hard Core Cartels, (2019), *supra* note 14, at 61; see also OECD, Criminalisation of Cartels and Bid Rigging Conspiracies: A Focus on Custodial Sentence, *supra* note 18, at 9; ICN, Defining Hard Core Cartel Conduct—Effective Institutions, Effective Penalties, *supra* note 20, at 3; Hwang Lee "Antitrust Fines in the Era of Globalization" (2016) OECD's Global Forum on Competition: Sanctions in Antitrust Case, on 1-2 December 2016. DAF/COMP/GF(2016)10, at 3-4, online: https://one.oecd.org/document/DAF/COMP/GF(2016)10/en/pdf

[1291] Bentham, Chapter XIV Of the proportion between punishment and offence, *supra* note 738.

[1292] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 54; Bentham, Chapter XIV of the proportion between punishment and offence, *supra* note 738, at 166- 168.

[1293] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 55; Bentham, Chapter XIV Of the proportion between punishment and offence, *supra* note 738, at 168.

less-harmful offence.[1294] Fourth, the punishment should be adjusted so that each aspect of the harm will motivate offenders to restrain themselves from committing or completing the offence.[1295] Fifth, the punishment should be no more than is necessary to encourage individuals to comply with the rules.[1296] Sixth, punishment can affect different people differently, so the amount of punishment that affects an individual should consider that individual's circumstances and correspond to the amount of punishment intended for similar offenders.[1297]

7.1.2. Low probability of detection and enforcement

A key problem in applying general deterrence is the low probability of exposing hardcore cartels.[1298] The probability of discovering active cartels is estimated at just 10–33%.[1299] Although there are insufficient data to support this percentage, it remains an acceptable figure for estimating the probability of detection in this domain.[1300] In addition, conviction rates can vary. For example, John Connor shows that, in the United States, 80% of cartel indictments end in guilty pleas, but, when cases go to criminal litigation, the authorities establish guilt in less than half of the cases.[1301]

[1294] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 55; Bentham, Chapter XIV Of the proportion between punishment and offence, *supra* note 738, at 168.

[1295] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 55; Bentham, Chapter XIV Of the proportion between punishment and offence, *supra* note 738, at 165 & 168.

[1296] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 55; Bentham, Chapter XIV Of the proportion between punishment and offence, *supra* note 738, at 169.

[1297] Bentham, Chapter XIV Of the proportion between punishment and offence, *supra* note 738, at 165 & 169.

[1298] Calvani & Calvani, Cartel Sanctions and Deterrence, *supra* note 1285, at 190.

[1299] Connor, Optimal Deterrence and Private International Cartels, *supra* note 927, at 9 & 21; Wils, Is Criminalization of EU Competition Law the Answer? *supra* note 1244, at 139- 140.

[1300] Connor & Lande, The Size of Cartel Overcharges: Implications for U.S. and EC Fining Policies, *supra* note 925, at 987- 988.

[1301] Connor, Optimal Deterrence and Private International Cartels, *supra* note 927, at 10.

7.2. Determining optimal sanctions based on the law and economics approach

7.2.1. Law and economics methodology

One of the most commonly used methodologies in utilitarianism is the law and economics approach. The focus of this thesis is not to develop an optimal sanction based on the law and economics approach. Nonetheless, this branch of literature is pivotal and contributes to the discussion, as it concludes that deterring hardcore cartels requires an extremely high monetary sanction, which has other negative social effects.

Law and economics methodology can be simplified as the "economic analysis of law."[1302] Its approach is to provide a method of analyzing deterrence by applying economic principles.[1303] Law and economics methodology, at its core, is straightforward to understand. It analyzes human choices from an economic point of view.[1304] The idea behind this methodology is that people are rational and are "seeking to maximize their expected utility"[1305] in an environment with limited resources and under conditions of scarcity and obstacles.[1306] To make this idea work, a person (or economic actor, such as a business) is assumed to choose the best option that meets this person's preferences according to his or her expectations (rational self-interest). This approach also assumes that expectations are based on an optimal amount of information available to the person.[1307]

A prominent deterrence model based on the law and economics methodology was established by G.S. Becker.[1308] According to Becker, a person will commit a crime if the expected

[1302] Pacces & Visscher, Methodology of Law and Economics, *supra* note 124, para 1.
[1303] Pacces & Visscher, Methodology of Law and Economics, *supra* note 124, para 2.5.
[1304] Pacces & Visscher, Methodology of Law and Economics, *supra* note 124, para 1.
[1305] Pacces & Visscher, Methodology of Law and Economics, *supra* note 124, para 1.
[1306] Trebilcock, An Introduction to Law and Economics, *supra* note 125, at 125.
[1307] Pacces & Visscher, Methodology of Law and Economics, *supra* note 124, para 2.1.
[1308] Gary S. Becker, "Crime and Punishment: An Economic Approach" (1968) 76:2 Journal of Political Economy 169.

net benefits of the offence exceed the net benefit of behaving lawfully.[1309] Thus, punishment should outweigh the crime's benefit and consider the probability of the offender's being detected, convicted, and punished.[1310]

A law and economics approach in punishment, however, does not accurately reflect deterrent theory, as law and economics concerns promoting efficient penalties and considering the costs of enforcement and the benefits from the offender's point of view rather than society's. It considers the offender's benefits and designs a punishment to outweigh them. This can lead to the possibility of certain serious crimes' not being punished or being punished less severely than certain less-severe crimes.[1311]

7.2.2. Optimal sanctions based on law and economics

Designing sanctions based on general deterrence against hardcore cartels has traditionally used a widely accepted law and economics approach.[1312] William Landes discusses the option to prohibit and design optimal sanctions to deter inefficient competition activity and maintain efficient activity. He explains:

> The standard economic rationale for making a cartel illegal is not that it charges too high a price or that it redistributes income from consumers to cartel members, but that it restricts

[1309] Becker, Crime and Punishment: An Economic Approach, *supra* note 1308, at 176. One of his discussions focuses on the question: "how many offenses should be permitted and how many offenders should go unpunished?" He discusses the mischief and the required resources to prohibit and enforce this mischief (there at 170 & 209). Becker suggests prohibiting conduct if it causes more social loss (harm) than the costs of enforcement, including some competition violations, regardless of whether the activity is unlawful (see there at 205- 207). It should be clarified that based on this model, different kinds of punishment can be converted to their equivalent monetary equivalent (there at 180). For example, "the cost of an imprisonment is the discounted sum of the earnings foregone, and the value placed on the restriction on consumption and freedom" (there at 179). However, this also varies from person to person as the, for example, different offenders can earn more money outside the prison (there at 180).

[1310] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 41.

[1311] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 41.

[1312] OECD, Criminalisation of Cartels and Bid Rigging Conspiracies: A Focus on Custodial Sentence, *supra* note 18, at 8; Connor, Optimal Deterrence and Private International Cartels, *supra* note 927, at 7- 8.

> output, causing a deadweight or efficiency loss … a loss to consumers without an offsetting gain to producers. To prevent this loss, one can penalize cartel members by an amount sufficient to deter them from organizing a cartel in the first instance.[1313]

In his work he assumes that "all parties are risk neutral; enforcement costs, including legal fees, court costs, and time costs, are zero; the penalty is a monetary fine; and, provisionally, the probability of apprehension and conviction is fixed and equal to one."[1314] Landes also assumes that the monetary sanction should exceed the cartel's net harm to others but not excessively so to avoid deterring efficient activity.[1315] *Efficient activity* refers to proper competition activity in the market.[1316]

Landes suggests that the optimal sanctions imposed against an offender should equal the violation's expected net harm to others divided by the probability of apprehension and conviction.[1317] The net harm in hardcore cartels is the overcharge in prices and the reduction in output, which cause reduced welfare (deadweight loss).[1318] The monetary sanction must be equal to the net harm, assuming that enforcement costs are zero. If there is also an enforcement calculation, the net harm should include the enforcement costs per case.[1319] For example, if the cartel's overcharge is $100, the deadweight loss is $50, and the enforcement costs per case are

---

[1313] Landes, Optimal Sanctions for Antitrust Violations, *supra* note 924, at 653.

[1314] Landes, Optimal Sanctions for Antitrust Violations, *supra* note 924, at 653- 654.

[1315] Landes, Optimal Sanctions for Antitrust Violations, *supra* note 924, at 656.

[1316] Landes demonstrates efficient competition activity in the following example: "Suppose a group of firms pump oil from a common pool, and no firm has a property right to the oil until it is removed from the ground. This example illustrates a well-known economic problem: in the absence of property rights to a scarce resource, competition carries production beyond the efficient level because no firm takes account of the external technical diseconomies it imposes on other firms. Here an agreement among firms to restrict output and raise price can lead to a more efficient output level. At the same time, if firms are free from antitrust liability, they may restrict output even further, possibly yielding a less efficient outcome than the pre cartel equilibrium. An antitrust penalty equal to the net harm will give firms an incentive to restrict output, but only to the efficient level." Landes, Optimal Sanctions for Antitrust Violations, *supra* note 924, at 658.

[1317] Landes, Optimal Sanctions for Antitrust Violations, *supra* note 924, at 657, he explains: "The optimal fine or damage rule must be modified when the probability of apprehension and conviction is less than one and enforcement costs are positive. In such circumstances, the fine would equal net harm (which includes enforcement costs per case) divided by the probability of apprehension and conviction."

[1318] Landes, Optimal Sanctions for Antitrust Violations, *supra* note 924, at 653 & 656.

[1319] Landes, Optimal Sanctions for Antitrust Violations, *supra* note 924, at 657.

$10, then the net harm is $160. Assuming that the probability of detection is one third, the monetary sanction should be $480, based on the formula ($100 + $50 + $10) / 0.333 = $480.[1320]

John Connor and Robert Lande examined the effectiveness of punishment based on William Landes's punishment model.[1321] Connor and Lande, however, showed that net harm in hardcore cartel offences is not just the wealth transfer from consumers to cartel members (the cartel's overcharge and deadweight loss). The following factors should be also included in assessing the harm: market allocative inefficiency (the misallocation of resources that occurs when market power is exercised in the raising of prices above competitive levels), the high prices that uninvolved businesses charge because the hardcore cartel has produced an "umbrella effect" of high uncompetitive prices in the market, the loss of inventions and quality products because cartels have created a disincentive for businesses to innovate and offer a variety of quality products, and, finally, the actual value of the illegal profit when it occurs, since monetary sanctions do not typically include an interest adjustment. Therefore, this harm must be modified to present values in the optimal sanction formula under the "net harm." It is not always possible, however, to calculate the harm based on these criteria.[1322]

In addition, Connor and Lande suggest that the actual "net harm" be multiplied by the percentage of the cartel's detection and conviction more than just once to make the sanction effective.[1323] They conclude that punishment against hardcore cartels in the EU and United States is far too low from an optimal-deterrence perspective due to low detection and the low rate of

[1320] Landes, Optimal Sanctions for Antitrust Violations, *supra* note 924, at 657.

[1321] Connor & Lande, The Size of Cartel Overcharges: Implications for U.S. and EC Fining Policies, *supra* note 925, at 984- 985; Connor & Lande, Cartel Overcharges and Optimal Cartel Fines, *supra* note 925, at 2203.

[1322] Connor & Lande, The Size of Cartel Overcharges: Implications for U.S. and EC Fining Policies, *supra* note 925, at 985- 986; Connor & Lande, Cartel Overcharges and Optimal Cartel Fines, *supra* note 925, at 2203- 2204.

[1323] Connor & Lande, The Size of Cartel Overcharges: Implications for U.S. and EC Fining Policies, *supra* note 925, at 987- 988; Connor & Lande, Cartel Overcharges and Optimal Cartel Fines, *supra* note 925, at 2204- 2205.

successful enforcement.[1324] In addition, not all a cartel's damages and their entire duration of operation are considered when calculating the "net harm" of the cartel.[1325] Based on Connor and Lande, cartels generate at least two or three times and, in other cases, five times the harm presumed by U.S. sentencing guidelines.[1326]

Another study by Emmanuel Combe and Constance Monnier analyzed 64 convicted cartels in the EU from 1975 through 2009. The authors concluded that the EU monetary sanctions were moderate and fell below the optimal level of deterrence monetary sanctions.[1327] They also show, however, that half the imposed monetary sanctions fell below the business's actual illicit gain. Thus, monetary sanctions fell below optimal deterrence, even considering the 100% probability of detection.[1328]

Wouter Wils also discusses optimal sanction and concludes that monetary sanctions should be 150% of the annual turnover of the product relevant to the violation.[1329] He assumes that price-fixing cartels increase prices on average by 10%. He also points out that available data from the time of the study show a 20% price increase.[1330] He assumes, based on different data and literature from the time of the study, that price-fixing cartels last five years[1331] and that the probability of detection and punishment can be as low as 13% and, in Europe, is not above 33%.[1332] Thus,

[1324] Connor & Lande, The Size of Cartel Overcharges: Implications for U.S. and EC Fining Policies, *supra* note 925, at 1020.

[1325] Connor & Lande, The Size of Cartel Overcharges: Implications for U.S. and EC Fining Policies, *supra* note 925, at 1020-1021.

[1326] Connor & Lande, Cartel Overcharges and Optimal Cartel Fines, *supra* note 925, at 2217.

[1327] Emmanuel Combe & Constance Monnier "Fines against hard core cartels in Europe: The myth of overenforcement" (2011) 56:2 Antitrust Bulletin 235.

[1328] Combe & Monnier, Fines against hard core cartels in Europe: The myth of overenforcement, *supra* note 1327, at 267.

[1329] Wils, Is Criminalization of EU Competition Law the Answer? *supra* note 1244.

[1330] Wils, Is Criminalization of EU Competition Law the Answer? *supra* note 1244, at 139.

[1331] Wils, Is Criminalization of EU Competition Law the Answer? *supra* note 1244, at 139.

[1332] Wils, Is Criminalization of EU Competition Law the Answer? *supra* note 1244, at 139- 140.

assuming that a price-fixing cartel results in a minimum profit of 10% of the annual turnover, with five years of operation and a 33% of probability of detection, to achieve deterrence, the minimal monetary sanctions should be 150% of the annual turnover in the products relevant to the competition violation.[1333]

In a later article, Wils refers to William Landes's model for the optimal sanction as the "internalization approach," where the "optimal fine equals the net harm … The optimal fine thus set makes the offender internalize all the costs and benefits of the violation, thus leading the offender to commit the 'efficient violations' whose total benefits exceed the total costs while deterring 'violations.'"[1334] Such an approach does not require that the optimal monetary sanction exceed the offender's benefit but be equal to it; as such, it is a matter of "pricing" the illegal activity.[1335] Wils suggests, however, that "the optimal fine should exceed the expected gain from the violation multiplied by the inverse of the probability of a fine being effectively imposed."[1336] This because it is not sufficient just to prohibit the conduct as Landes's model suggests by affixing a "price" to the illegal activity. Rather, there is a need to deter the conduct by designing a sanction that exceeds the expected gains and the probability of imposing it.[1337]

I agree with Wils's approach as a matter of legality and certainty. In the first stage, the legislature and the relevant authorities should determine what kind of activity is efficient and prohibit what is inefficient. It should not be left to the offenders to internalize the costs and choose, based on their calculations, what are efficient or inefficient violations. This is the discussion I present above under the criminalization section, where the jurisdiction has a utilitarian justification

[1333] Wils, Is Criminalization of EU Competition Law the Answer? *supra* note 1244, at 140.
[1334] Wils, Optimal Antitrust Fines: Theory and Practice, *supra* note 725, at 191.
[1335] Wils, Optimal Antitrust Fines: Theory and Practice, *supra* note 725, at 192.
[1336] Wils, Optimal Antitrust Fines: Theory and Practice, *supra* note 725, at 190- 191.
[1337] Wils, Optimal Antitrust Fines: Theory and Practice, *supra* note 725, at 191.

for prohibiting hardcore cartel activities because they cause harm to society without recognizable good. In the second stage of enforcing the prohibitions, however, the aim is to punish the offender and deter the offender and others from (re-)offending.

Still, based on the law and economics approach, an optimal monetary sanction focuses on the offender's perspective, as it assumes that a person will commit a crime if the expected net benefit the offence exceeds the net benefit of behaving lawfully.[1338] Thus, the sanction eliminates these benefits and adds an extra amount of sanction that makes the offence undesirable.[1339] The benefits can be equal to the "net harm" described by William Landes as the overcharge in prices and the reduction in output.[1340] Both aspects benefit the cartel in generating illegal profit or saving expenses.

John Connor and Robert Lande suggest including other kinds of harm to society (that do not benefit the cartelists). Such harms include market allocative inefficiency, high uncompetitive prices by other businesses, fewer innovations, and other general harm to the public.[1341] Considering the general harm to the public is adequate based on the law and economics approach of prohibiting any conduct that causes more harm to society than good, taking into account the cost of enforcement.[1342] This type of harm, however, has less to do with actually determining the sanction needed to deter the offender. The basic assumption, based on law and economics, is that the sanction should exceed the benefits of the crime to the offender. In this case, the "net harm" is what is equal to the offender's benefits, while other enforcement harm or other general harm to

[1338] Becker, Crime and Punishment: An Economic Approach, *supra* note 1308, at 176.
[1339] Wils, Optimal Antitrust Fines: Theory and Practice, *supra* note 725, at 190 & 193.
[1340] Landes, Optimal Sanctions for Antitrust Violations, *supra* note 924, at 653 & 656.
[1341] Connor & Lande, The Size of Cartel Overcharges: Implications for U.S. and EC Fining Policies, *supra* note 925, at 985- 986; Connor & Lande, Cartel Overcharges and Optimal Cartel Fines, *supra* note 925, at 2203- 2204.
[1342] Becker, Crime and Punishment: An Economic Approach, *supra* note 1308, at 205- 207; see also the criminalization discussion in subchapter 5.4.1. "Utilitarianism and preventing mischief."

the public is not part of this benefit. Therefore, these types of harm are not directly present in the offender's calculation of whether to commit a crime. Nonetheless, these types of harm are relevant to the general considerations of utilitarian punishment to assure that more harmful conduct is punished harder than less-harmful conduct so that the offender will choose the latter.[1343]

7.2.2.1. The assumption of rationality

A basic assumption for general deterrence based on law and economics is that individuals are rational beings who calculate the cost compared to the benefits of their acts and the probability of punishment.[1344] Thus, they will be deterred from committing a crime if they assume that they will be caught and the sanction will cancel their profit and lead to their punishment. Businesses often fail to behave rationally, however, and ignore the likelihood of detection and conviction.[1345]

One important critique against the law and economics approach comes out of the behavioural law approach, which claims that there are fundamental errors in the underlying assumptions of the economic approach that cause inaccurate predictions. The behavioural law approach aims "to explore the implications of actual (not hypothesized) human behaviour for the law. How do 'real people' differ from homo economicus"[1346] by using other social disciplines that explain the people's behaviour more accurately?

Three different assumptions have led to this conclusion by behavioural law. First is the

[1343] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 55; Bentham, Chapter XIV Of the proportion between punishment and offence, *supra* note 738, at 168.

[1344] Connor, Global Antitrust Prosecutions of International Cartels, *supra* note 37, at 579; Anthony Gray "Criminal Sanctions for Cartel Behaviour" (2008) 8:2 QUT Law Review 364, at 368- 369.

[1345] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 39 & 44; Lee, Antitrust Fines in the Era of Globalization, *supra* note 1290, at 4.

[1346] Christine Jolls, Cass R. Sunstein & Richard Thaler "A Behavioral Approach to Law and Economics" (1998) 50 Stanford Law Review 1471, at 1476.

matter of "bounded rationality," as people have limited cognitive abilities (memory problems, analyzing processes); thus, people's decisions are made within the boundaries of those limits.[1347] One claim, for example, is that people underestimate future events[1348] with negative outcomes and tend to optimize their outcomes more than the statistical average.[1349] People also tend to be overconfident about their abilities, which optimizes their ability to overcome future obstacles.[1350]

Second is the matter of "bounded willpower," as some of our decisions go against our long-term interests (such as to smoke or eat fast food).[1351] People cannot always accurately process the available information and knowledge, and, thus, they underestimate the related risks.[1352] For example, the law and economics methodology typically assumes that criminal activity can be deterred if the expected costs of those acts exceed the offender's expected benefits. Criminals, however, have a clear priority for the present and its immediate benefits; they also consider the deferred costs (punishment) less.[1353] Moreover, criminals do not believe that the authorities will catch them.

Third is "bounded self-interest," as people are willing to sacrifice their narrow interests for other values and norms in which they believe.[1354] For example, people are willing to "sacrifice their material well-being to help those who are being kind" or "punish those who are being unkind."[1355]

[1347] Jolls, Sunstein and Thaler, A Behavioral Approach to Law and Economics, *supra* note 1346, at 1477.
[1348] Pacces & Visscher, Methodology of Law and Economics, *supra* note 124, para 5.1.
[1349] Jolls, Sunstein and Thaler, A Behavioral Approach to Law and Economics, *supra* note 1346, at 1541.
[1350] Pacces & Visscher, Methodology of Law and Economics, *supra* note 124, para 5.1.
[1351] Jolls, Sunstein and Thaler, A Behavioral Approach to Law and Economics, *supra* note 1346, at 1479.
[1352] Jolls, Sunstein and Thaler, A Behavioral Approach to Law and Economics, *supra* note 1346, at 1542.
[1353] Jolls, Sunstein and Thaler, A Behavioral Approach to Law and Economics, *supra* note 1346, at 1539-1540.
[1354] Jolls, Sunstein and Thaler, A Behavioral Approach to Law and Economics, *supra* note 1346, at 1479.
[1355] Jolls, Sunstein and Thaler, A Behavioral Approach to Law and Economics, *supra* note 1346, at 1494.

Accordingly, in the case of transnational cartels, offenders can exaggerate the cartel's potential gain and underestimate the probability of being caught and sanctioned.[1356] Thus, designing the sanction should consider the offender's approach and determine that the sanction exceeds the benefit of the illegal activity while considering the subjective offender's perspective.[1357]

7.2.2.2. Calculating the relevant factors

General deterrence based on the law and economics approach considers the cartel's expected gains and the probability of detection. Assessing and proving the benefits derived from the cartel and determining the probability of detection can be difficult, however, even for experts.[1358] In addition, from a social perspective, the benefits of punishment should exceed the costs of enforcement (such as detecting, investigating, prosecuting, and enforcing). Still, collecting empirical data to support a conclusion on this matter is exceptionally challenging.[1359] The calculation problem is more critical in the law and economic approach, as this approach aims to find a precise sanction based on an economic calculation, whereas such precision is not required for the general deterrence approach.[1360]

In conclusion, the main flaw in the law and economics approach is the offender's irrationality in overestimating the potential gain and underestimating the probability of being

[1356] Wils, Optimal Antitrust Fines: Theory and Practice, *supra* note 725, at 194- 195.
[1357] Wils, Optimal Antitrust Fines: Theory and Practice, *supra* note 725, at 190 & 193.
[1358] ICN, Defining Hard Core Cartel Conduct—Effective Institutions, Effective Penalties, *supra* note 20, at 3 & 74; Wils, Optimal Antitrust Fines: Theory and Practice, *supra* note 725, at 206- 207.
[1359] OECD, Criminalisation of Cartels and Bid Rigging Conspiracies: A Focus on Custodial Sentence, *supra* note 18, at 10.
[1360] Wils, Optimal Antitrust Fines: Theory and Practice, *supra* note 725, at 193.

caught and sanctioned.[1361] Added to this are the complexities in calculating the relevant criteria in economic values.[1362] The optimal sanction based on the law and economics approach, however, can be measured in general, and the approach remains useful as a basic guideline for determining the needed amount of sanction.[1363]

7.3. Specific considerations when punishing transnational cartels

7.3.1. Under-deterrence

The apparent problem in transnational cartels is under-deterrence from a global perspective. First, transnational cartels operate in multiple markets; thus, illegal gain can be generated simultaneously from different markets, which increases the chance of high profits.

Furthermore, we can assume that the probability of detection in transnational cartels is not higher than in the case of domestic cartels, which is estimated to fall between 10% and 33% at the highest.[1364] Transnational cartels provide a more challenging case, however, because many of their operations occur outside the jurisdiction that prosecutes the cartel. In addition, it is harder to complete the investigation, collect evidence, interview witnesses, and achieve a conviction. Thus, transnational cartels are harder to detect and punish than domestic cartels.[1365] Moreover, in the case of criminal enforcement and where the offender resides in another country, there is a need to

[1361] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 39 & 44; Wils, Optimal Antitrust Fines: Theory and Practice, *supra* note 725, at 194- 195.

[1362] Wils, Optimal Antitrust Fines: Theory and Practice, *supra* note 725, at 193.

[1363] Wils, Optimal Antitrust Fines: Theory and Practice, *supra* note 725, at 208.

[1364] Connor, Optimal Deterrence and Private International Cartels, *supra* note 927, at 21; Wils, Is Criminalization of EU Competition Law the Answer? *supra* note 1244, at 139- 140.

[1365] Connor, Global Enforcement Directed at International Cartels: A Concise Introduction and Summary, *supra* note 547, at 5; Connor, Global Antitrust Prosecutions of International Cartels, *supra* note 37, at 586- 587; Lee, Antitrust Fines in the Era of Globalization, *supra* note 1290, at 4; Bhattacharjea, Export Cartels—A Developing Country Perspective, *supra* note 58, at 333; Fox, Linked-In: Antitrust and the Virtues of a Virtual Network, *supra* note 414, at 154; Basedow, International Antitrust: From Extraterritorial Application to Harmonization, *supra* note 62, at 1042.

extradite the offender and impose the sentence. Nevertheless, there are fewer opportunities to do so than to impose sanctions on domestic cartels, as foreign offenders can stay out of the jurisdiction as fugitives.[1366]

In addition, active enforcement on the global level is limited. The United States, EU, and Canada are considered the leading authorities on dealing with transnational cartels,[1367] and their investigations and enforcement exceed those of other countries.[1368] Typically, authorities enforce crimes in their jurisdictions without taking into account the interests of other jurisdictions.[1369] Countries consider whether transnational cartels negatively affect their own markets and have no interest in spending resources against transnational cartels that do not affect them but significantly harm other countries.[1370] As Eleanor Fox describes it, "This is the 'not my problem' problem."[1371]

Moreover, when countries impose sanctions, they typically consider sanctions from their point of view to deter violations in their jurisdictions.[1372] Hence, a sanction may deter cartels in their jurisdictions, but it will not be sufficient to do so globally, as the illegal behaviour is profitable from the cartel's perspective because it operates in other markets where there is no enforcement.[1373] As a result, such sanctions would not prevent those cartels from continuing their

[1366] John M. Connor "Problems with Prison in International Cartel Cases Symposium: Cartel Penalties: Effective Deterrents or License Fees" (2011) 56:2 Antitrust Bulletin 311, at 313.

[1367] Connor, Global Antitrust Prosecutions of International Cartels, *supra* note 37, 580 & 601. For original data on the historical patterns of the prosecution in those countries, see there at 586- 591.

[1368] Gal, Antitrust in a Globalized Economy, *supra* note 11, at 28; for example, in an investigation that Connor conducted revealed that 'Asian penalties represent only 3% of the world total and an even smaller percentage of the prosecuted cartels' affected sales.' at, Connor, Global Antitrust Prosecutions of International Cartels, *supra* note 37, at 593.

[1369] Budzinski, International Antitrust Institutions *supra* note 360, at 122.

[1370] Gal, Antitrust in a Globalized Economy, *supra* note 11, at 43.

[1371] Eleanor M. Fox "Antitrust Without Borders: From Roots to Codes to Networks" (2015) E15 INITIATIVE paper, at 6, online http://e15initiative.org/wp-content/uploads/2015/09/E15-Competition-Fox-FINAL.pdf

[1372] Gal, Antitrust in a Globalized Economy, *supra* note 11, at 42.

[1373] Evenett, Levenstein & Suslow, International Cartel Enforcement: Lessons from the 1990s, *supra* note 16, at 1237; Levenstein & Suslow, Contemporary International Cartels and Developing Countries, *supra* note 15, at 832-833.

anticompetitive conduct internationally.[1374] Therefore, in many cases, transnational cartels in other geographic areas remain unpunished.[1375]

Accordingly, the common view is that the current enforcement policies fail to optimally deter transnational cartels because those policy calculations are based on domestic markets and do not include sufficient sanctions.[1376] Thus, it is suggested that harsher sanctions are needed, where the total monetary sanction should be at least four times the expected transnational cartel profits.[1377]

7.3.2. Over-deterrence

Over-deterrence is a theoretical problem and can arise when there are double or multiple punishments in more than one jurisdiction against the same conduct. The calculation of monetary sanction varies among jurisdictions, and it can be influenced by the duration of the illegal conduct. For example, in Colombia it is the calculation of the sale values in the affected market in the last financial year. In Germany, it is the calculation of the sale values in the affected market throughout duration of the violation.[1378]

Some jurisdictions, including Hungary, Malaysia, Mexico, Singapore, the Slovak Republic, South Africa, and the United Kingdom, calculate the business's turnover based on the

[1374] Gal, Antitrust in a Globalized Economy, *supra* note 11, at 9.

[1375] Connor, Optimal Deterrence and Private International Cartels, *supra* note 927, at 18.

[1376] Evenett, Levenstein & Suslow, International Cartel Enforcement: Lessons from the 1990s *supra* note 16, at 1237; Connor, Global Antitrust Prosecutions of International Cartels, *supra* note 37, at 576; Connor, Global Enforcement Directed at International Cartels: A Concise Introduction and Summary, *supra* note 547, at 3; Connor, Optimal Deterrence and Private International Cartels, *supra* note 927, at 30.

[1377] Connor, Optimal Deterrence and Private International Cartels, *supra* note 927, at 30.

[1378] OECD, Sanctions in Antitrust Cases-Background Paper by the Secretariat, *supra* note 725, at 11-12 & 15.

value of sales or volume of affected commerce in the specific market related to the violation.[1379]

Other authorities, however, consider global turnover as one of the main criteria for assessing monetary sanctions in a cartel.[1380] For example, the EU commission guidelines set a monetary sanction of up to 10% of the business' global turnover in the business year.[1381] Other jurisdictions consider the global market at some percentage or for some duration, including Brazil, India and Turkey.[1382] When several countries calculate the global turnover and impose a monetary sanction for the same conduct, it can cause excessive monetary sanctions.[1383]

In addition, there is a place to consider that a rising number of jurisdictions have developed the required skills to investigate complex transnational cartels and are more involved in enforcement against transnational cartels than before.[1384] For comparison, in 1990, only three competition authorities (the United States, the EU, and Canada) convicted transnational cartels, while now the number is higher, as 75 jurisdictions have conducted enforcement against transnational cartels, including South Korea, South Africa, Brazil, Columbia, Mexico, Peru, and Chile.[1385] Although not all those jurisdictions are sufficiently active: for example, competition

[1379] OECD, Review of the 1998 OECD Recommendation Concerning Effective Action against Hard Core Cartels, (2019), *supra* note 14, at 62; OECD, Sanctions in Antitrust Cases-Background Paper by the Secretariat, *supra* note 725, at 11.

[1380] OECD, Sanctions in Antitrust Cases-Background Paper by the Secretariat, *supra* note 725, at 5 & 11; Lee, Antitrust Fines in the Era of Globalization, *supra* note 1290, at 18; The EU, for example, can take into account up to 10% of total turnover in the preceding business year, see Article 23 Regulation No 1/2003, *supra* note 510.

[1381] Article 23 to the Council Regulation No 1/2003 (2003), *supra* note 510; see also Guidelines on the method of setting fines imposed pursuant to Article 23 to the Council Regulation (EC) No 1/2003 (2003), online: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32003R0001;

[1382] OECD, Sanctions in Antitrust Cases-Background Paper by the Secretariat, *supra* note 725, at 12.

[1383] Lee, Antitrust Fines in the Era of Globalization, *supra* note 1290, at 18.

[1384] OECD, Sanctions in Antitrust Cases-Background Paper by the Secretariat, *supra* note 725, at 7; Connor, Global Enforcement Directed at International Cartels: A Concise Introduction and Summary, *supra* note 547, at 5.

[1385] Connor, Global Enforcement Directed at International Cartels: A Concise Introduction and Summary, *supra* note 547, at 4- 7; World Bank, Fixing Markets, Not Prices: Policy Options to Tackle Economic Cartels in Latin America and the Caribbean, *supra* note 10, at 9.

authorities in Asia,[1386] Latin America,[1387] and Africa[1388] play a smaller role in prosecuting transnational cartels. This, however, can theoretically raise the problem of over-deterrence: when the accumulating monetary sanctions imposed by different jurisdictions exceed the profit from the cartel and the probability of exposing the cartel, which causes excessive punishment and over-deterrence.[1389]

7.3.3. General deterrence against transnational cartels

The main aim of enforcement against transnational cartels from the perspective of the enforcing jurisdiction is to prevent the harm of the transnational cartel from affecting its jurisdiction and not to enforce justice against the blameworthy offender. Thus, general deterrence is the natural choice of jurisdictions against transnational cartels.[1390]

General deterrence from a jurisdiction perspective should focus on designing a sanction to deter the transnational cartel from its specific jurisdiction. Otherwise, if a jurisdiction enforces the law against a transnational cartel based on all the transnational cartel's harm committed in the world, there is a risk of punishing when there is no jurisdiction or legitimacy to punish for crimes and harm that happen outside the jurisdiction. Transnational cartels remain transnational crimes

[1386] An investigation that was conducted by Connor revealed that 'Asian penalties represent only 3% of the world total and an even smaller percentage of the prosecuted cartels' affected sales." See Connor, Global Antitrust Prosecutions of International Cartels, *supra* note 37, at 591 & 593; Connor, The Impact of International Cartels, *supra* note 616, at 20.

[1387] Connor also concludes that Latin American countries "play a small role in punishing international cartels" in John M. Connor, "Latin America and the Control of International Cartels" (2008) (conference paper) Unpublished, at 54, available online https://www.researchgate.net/publication/269811374_Latin_America_and_the_Control_of_International_Cartels; Connor, The Impact of International Cartels, *supra* note 616, at 21.

[1388] Connor, The Impact of International Cartels, *supra* note 616, at 21.

[1389] OECD, Cartels: Sanctions Against Individuals (2007), *supra* note 844, at 13- 14; Lee, Antitrust Fines in the Era of Globalization, *supra* note 1290, at 17- 18.

[1390] ICN, Setting of Fines for Cartels in ICN Jurisdictions (2017), *supra* note 486, at 5- 6; and further references above at footnote 1285.

with national, not universal, jurisdiction.

Punishing based on global profit could cause over-deterrence if multiple jurisdictions punish a cartel for the same conduct and each jurisdiction considers the cartel's global profit. Nevertheless, when a country imposes sanctions against a transnational cartel to deter it from its own jurisdiction, it can cause under-deterrence from a global perspective, as the cartel can still operate in other markets. As a hypothetical example, a transnational cartel can assume that, if it operates in six jurisdictions, then there is a chance that it will be prosecuted just in one or two jurisdictions. Thus, the cartel can still enjoy illegal profit in the other markets. In this case, from the transnational cartel's perspective, and to manage risk and profit, it would still be profitable and encouraging to engage in cartel behaviour.[1391] Assuming that the sanction can deter the cartel from the specific jurisdiction, however, it should be sufficient from the perspective of the jurisdiction to achieve deterrence. This is the right path; otherwise, if one jurisdiction imposes a monetary sanction that considers all the cartel's illegal profit from all the markets, then this jurisdiction sets itself up as the global enforcer. No jurisdictions have been chosen to be the global enforcer, however, and they do not have the world's trust.[1392] Further mechanisms can be employed through international treaties to coordinate the sanctions on transnational cartels or ensure that the national jurisdiction has a legitimate justification for enforcing its law against the offender.

Nevertheless, this does not mean that it is inappropriate for a jurisdiction to consider the business's global turnover when calculating the desirable punishment. This situation can be viewed as a jurisdiction considering a global turnover to indicate the business's profit from illegal activity.

[1391] Evenett, Levenstein & Suslow, International Cartel Enforcement: Lessons from the 1990s, *supra* note 16, at 1237.

[1392] Fox, International Antitrust and the Doha Dome, *supra* note 13, at 924.

Given such an illegal profit, the monetary sanction aims to deter the business from committing a transnational cartel that affects its jurisdiction. In other words, to deter a transnational cartel from further harming a specific jurisdiction, the offender must be deterred from committing the crime itself. Even if the illegal profit was generated from other markets, it might still be the only way to achieve sufficient deterrence. This understanding is different from the perception of a jurisdiction basing punishment on the global profit of the cartel because it wants to be the global enforcer or prevent the cartel from operating in all other jurisdictions. Instead, the jurisdiction considers the total illegal profit of the transnational cartel to deter it from an illegal operation that has a direct negative effect on its markets.

From the offender's perspective, there are grounds for opposing punishment from several jurisdictions simultaneously based on the principle of *ne bis in idem*, which protects the offender from a punishment more than once for the same conduct. This principle does not apply, however, when a jurisdiction punishes the offender for conduct against the jurisdiction and aims to deter the offender from causing harm to its jurisdiction. The cartel conduct should not be understood as one physical act of conduct, but rather multiple instances of conduct against multiple jurisdictions that may occur through a single act (for example, instead of stabbing five people, the offender kills them by exploding a bomb). Accordingly, when jurisdictions punish an offender simultaneously for the same act with the aim of deterring the offender from causing harm to their own jurisdictions, then each jurisdiction is deterring the offender separately from its jurisdiction.[1393]

[1393] See, The Court of Justice of the European Union- Fourth Chamber, *Archer Daniels Midland v. Commission*, Case T-224/00, ECR II-2597, (2003), para 85 to 103 online: https://curia.europa.eu/juris/liste.jsf?language=en&num=T-224/00. In that case, the US, EU, and Canadian authorities punished the offender for committing a transnational cartel. There, the European Court [Court of First Instance (Fourth Chamber)] rejected the claim of Ne Bis in Idem as "That being so, the principle non bis in idem cannot, a fortiori, apply in the present case because the procedures conducted and penalties imposed by the Commission on the one hand

The phenomena of under- and over-deterrence problems are primarily issues that arise in connection with enforcement by different jurisdictions, a topic beyond the limits of this research. Based on general deterrence, however, a country should focus on developing a sanction that deters transnational cartels from operating within its jurisdiction, which may require efforts that extend beyond its borders that deters a transnational cartel from operating at all, including in other jurisdictions.

7.4. Assessment of deterrence-based justifications of sanctions

Utilitarianism, as a basis for criminalization (i.e., prohibiting conduct when it is harmful) or as a justification for punishment (i.e., punishing offenders to prevent offending), has no requirement or preference for either a criminal or administrative sanction. Utilitarianism does consider, however, that punishment is evil and that it is needless in cases where the mischief could be prevented without punishment or by using a less-harmful method.[1394] In addition, a criminal sanction is not always the most powerful tool for influencing people's behaviour.[1395] Accordingly, utilitarianism can support an administrative sanction as long as the sanction can realistically prevent harm. There are no theoretical requirements for choosing either sanction, however, and it remains a practical consideration that each jurisdiction should make based on its practical needs, with a preference for the less-expensive and less-harmful method.

Various sanctions are used against transnational cartels, including monetary and non-monetary sanctions against the involved businesses and individuals. Most sanctions against

---

and the American and Canadian authorities on the other clearly pursued different ends. The aim of the first was to preserve undistorted competition within the European Union and the EEA, whereas the aim of the second was to protect the American and Canadian markets." Para 90.

[1394] Bentham, Chapter XIII Cases Unmeet for Punishment, *supra* note 738, at 159.

[1395] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 39 & 44.

hardcore violations can be imposed through criminal or administrative procedures, while imprisonment can be imposed only through criminal procedures. Several scholars and different jurisdictions within the ICN and the OECD have discussed these practical considerations. Here, I present the main discussion on this aspect by presenting the leading sanctions in this domain and add some of my insights on the matter related to the main discussion of the thesis on the justifications for criminalizing transnational cartels in cases that call for imprisonment.

7.4.1. Sanctions against business

7.4.1.1. Monetary sanctions against business

7.4.1.1.1. Deterrent effect – Insufficient monetary sanctions

A monetary administrative sanction is the most widespread penalty against businesses involved in hardcore cartels.[1396] In addition, it is considered the most defended alternative sanction to imprisonment.[1397] Monetary sanctions pose several problems, however, the most notable being that they are insufficient when it comes to deterring transnational cartels.

The accepted view among scholars and authorities is that only a low percentage of hardcore cartels get exposed and lead to a sanction's being successfully imposed. In addition, hardcore cartels involve high profits, which can act as a strong incentive to establish them. In this light, those involved in hardcore cartels can, rationally or irrationally, see the sanction as arbitrary and have the false or accurate assumption that they will not be caught. Even when they are caught, the sanction may or may not outweigh the illegal profit, while many indications are that the current

[1396] ICN, Defining Hard Core Cartel Conduct—Effective Institutions, Effective Penalties, *supra* note 20, at 58.

[1397] Kahan, What Do Alternative Sanctions Mean, *supra* note 886, at 617.

monetary sanctions are far below the optimal level of deterrence.[1398] Moreover, no statistical evidence shows that monetary administrative sanctions are sufficient to deter cartels.[1399] When monetary sanctions are imposed, such monetary sanctions can be seen as merely a payment, similar to taxes or license fees, made to allow cartel activity rather than a deterrence of it.[1400]

Suppose we accept the argument that monetary sanctions are insufficient to deter cartels. In that case, the monetary sanction cannot prevent mischief, and it would be considered "cruel punishment" to the public and the offender him- or herself according to the utilitarian approach, because this type of punishment is ineffective at preventing the crime and, thus, is useless.[1401]

7.4.1.1.2. Deterrent effect – Excessive monetary sanctions and negative consequences

Higher monetary sanctions cannot always resolve the problem of insufficient monetary sanctions, as they can cause negative social effects. Considering the low probability of punishing a cartel and the high number of gains from a cartel, the minimum monetary sanction for deterrence needs to be significantly high, which may exceed the ability of the involved businesses to pay.[1402] The inability to pay can arise if the business has no liquid assets or its annual turnover has already been distributed as part of the firm's expenses, such as via salaries, taxes, and dividends.[1403]

More importantly, excessive monetary sanctions can bankrupt businesses and reduce the

[1398] OECD, Cartels: Sanctions Against Individuals (2007), *supra* note 844, at 10; Calvani & Calvani, Cartel Sanctions and Deterrence, *supra* note 1285, at 187 & 198; Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 47- 55 and the references there; Connor & Lande, The Size of Cartel Overcharges: Implications for U.S. and EC Fining Policies, *supra* note 925, at 1020; Combe & Monnier, Fines against hard core cartels in Europe: The myth of overenforcement, *supra* note 1327, at 267.

[1399] See, for example, the EU opinion on Contribution by the European Union, para 3.1 in OECD, Global Forum on Competition, Competition and Sanctions in Antitrust Cases, *supra* note 1272.

[1400] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 50.

[1401] Bentham, Chapter XIV Of the proportion between punishment and offence, *supra* note 738, at 166- 168.

[1402] Lee, Antitrust Fines in the Era of Globalization, *supra* note 1290, at 196.

[1403] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 52.

number of players in the market, paradoxically resulting in less competition and higher prices.[1404] Moreover, bankruptcy has a negative social effect on employees, suppliers, customers, creditors, and tax authorities.[1405] In the case of a hardcore cartel based on more than one business, the risk of negative social effects can increase due to the involvement of several businesses in a cartel and can be affected by high monetary sanctions.[1406]

A punitive response for a business that claims insolvency is that a "measure taken by a Community authority [that] results in the insolvency or liquidation of a particular undertaking is not precluded as such by Community law."[1407] Some jurisdictions, however, may consider a business's inability to pay.[1408] In addition, many jurisdictions have a statutory maximum limit for monetary sanctions, which is meant to avoid excessively high monetary sanctions that may cause bankruptcy and keep the relevant businesses active in the market despite the violation.[1409] Still, at the end of the process, a maximum upper limit for monetary sanctions may fall below the optimal deterrence level.[1410]

7.4.1.1.3. Deterrence effect – Targeting the main responsible parties

One of the assumptions is that monetary sanctions on a business will incentivize it to supervise

[1404] ICN, Defining Hard Core Cartel Conduct—Effective Institutions, Effective Penalties, *supra* note 20, at 4; Evenett, Levenstein & Suslow, International Cartel Enforcement: Lessons from the 1990s, *supra* note 16, at 1236; Calvani & Calvani, Cartel Sanctions and Deterrence, *supra* note 1285, at 191; Wirz, Imprisonment for Hard Core Cartel Participation, *supra* note 613, at 99; Andreas Stephan "The UK Cartel Offence: Lame Duck or Black Mamba?" (2008) SSRN, at 6 online: http://www.ssrn.com/abstract=1310683

[1405] Wils, Optimal Antitrust Fines: Theory and Practice, *supra* note 725, at 197; Wils, Is Criminalization of EU Competition Law the Answer? *supra* note 1244, at 140-141.

[1406] Wils, Optimal Antitrust Fines: Theory and Practice, *supra* note 725, at 204.

[1407] From the opinion of Advocate- The Court of Justice of the European Union- Fourth Chamber, *SGL Carbon v. Commission*, C-328/05 P (2007), online: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-328/05; the opinion was approved by Judgment of the Court at *SGL Carbon v. Commission*, C-328/05 P (CJEU 10 May 2007), available online <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-328/05>

[1408] ICN, Setting of Fines for Cartels in ICN Jurisdictions (2017), *supra* note 486, at 34- 36.

[1409] OECD, Sanctions in Antitrust Cases-Background Paper by the Secretariat, *supra* note 725, at 20 & 23.

[1410] Connor, Optimal Deterrence and Private International Cartels, *supra* note 927, at 22.

and prevent its employees from committing cartels. This has not proven effective, however, because the monetary sanctions imposed on businesses are often not severe enough to convince businesses to develop and maintain a sufficient program to monitor their employees and prevent them from committing hardcore cartels.[1411]

In addition, businesses do not have suitable sanctions to use against their employees even if they are caught, as the sanctions are limited to firing them.[1412] Moreover, employees can enjoy the gain of the offence in the short term and move to new employers once the violation has been detected.[1413] For example, in 2023 a Canadian court imposed a record fine of CAD 50 million on a bread business for price-fixing conduct that resulted in two prices increase on bread products in 2007 and 2011. When the sanction was imposed in 2023, however, the senior leadership responsible for the price-fixing were no longer working for the business.[1414] Likewise, the ability of shareholders to effectively control the management of the businesses is questionable when the shares are dispersed.[1415] Thus, the monetary sanction's burden can fall on employees and shareholders unconnected to the cartel activity, while those who enjoyed its profit are no longer connected to the businesses.[1416]

Another argument is that the businesses sanctioned by monetary sanctions will pay it with

---

[1411] OECD, Cartels: Sanctions Against Individuals (2007), *supra* note 844, at 10; OECD, Review of the 1998 OECD Recommendation Concerning Effective Action against Hard Core Cartels, (2019), *supra* note 14, at 61; Wirz, Imprisonment for Hard Core Cartel Participation, *supra* note 613, at 98.

[1412] OECD, Cartels: Sanctions Against Individuals (2007), *supra* note 844, at 18- 19; Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 46.

[1413] OECD, Review of the 1998 OECD Recommendation Concerning Effective Action against Hard Core Cartels, (2019), *supra* note 14, at 61- 62; Wils, Is Criminalization of EU Competition Law the Answer? *supra* note 1244, at 32; Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 46.

[1414] Competition Bureau Canada, Canada Bread sentenced to $50 million fine after pleading guilty to fixing wholesale bread prices, *supra* note 631; R. v. Canada Bread Company Limited, *supra* note 631; It should be mentioned that the fine was imposed under a leniency program and within a plea agreement.

[1415] OECD, Cartels: Sanctions Against Individuals (2007), *supra* note 844, at 18- 19; Wils, Is Criminalization of EU Competition Law the Answer? *supra* note 1244, at 141.

[1416] Wirz, Imprisonment for Hard Core Cartel Participation, *supra* note 613, at 99.

revenues from future customers so that the public ends up paying the monetary sanction.[1417] This argument is not very strong because it assumes that the businesses can sell their products at higher prices and cover the loss caused by the monetary sanction. In competitive markets, however, the business (in cases where it learnt the lesson and obeyed the law) will have to sell its products at competitive prices to continue to run its business. Thus, it will have to pay the monetary sanction from its profits, which has a deterrent effect. Still, this argument enhances the fluidity of the monetary sanction: for instance, the penalized business can pay the monetary sanction over a long period (for example, by taking a loan), and the payment burden can fall on other shareholders who were not involved in the cartel or did not benefit from the cartel's illegal profit. Thus, the monetary sanction can affect others who were not directly responsible for the cartel.

7.4.1.1.4. The deterrence effect – Adjusting the monetary sanction and equal treatment

To successfully deter a business, monetary sanctions should cancel out the illegal profit and add the extra value of a monetary sanction as punishment. The authority should consider the defendant's ability to pay and calculate the extra added value accordingly. For example, a small business can suffer economically from or even be bankrupted by a high monetary sanction of $100,000, but the same monetary sanction is barely a consideration for a large and rich business.[1418] Thus, an effective sanction should involve a sophisticated analysis of the defendant's economic ability to determine how much it may affect the firm and adjustment of the monetary sanction according to the offender's ability to pay.[1419] This approach is used principally in punishment, as monetary sanctions are typically based on the business's turnover. This is

[1417] Calvani & Calvani, Cartel Sanctions and Deterrence, *supra* note 1285, at 193.

[1418] Laura Kerrigan "The Decriminalization of Administrative Law Penalties - Civil Remedies, Alternatives, Policy, and Constitutional Implications Project" (1993) 45 Administrative Law Review 367, at 371.

[1419] Kerrigan, The Decriminalization of Administrative Law Penalties, *supra* note 1418, at 371.

insufficient, however, as the sanction should affect the business based on its actual financial abilities, including its cash reserves from previous years.

There is a fairness-based counterargument that it is unfair to impose different monetary sanctions on different businesses for the same conduct because they have different assets or liquid money. From a utilitarian perspective, however, the same monetary sanction imposed on different businesses may achieve different deterrence effects. Thus, differing abilities to pay justify different treatment or different amounts of monetary sanctions to achieve the same desirable deterrence results.[1420] In any case, determining the monetary sanction needs to be based on the business's relevant data, such as its turnover, and respect the principle of non-discrimination.[1421]

7.4.1.2. Censure, shaming, and the reputational effect against businesses

Censure is not deemed a justice requirement under the utilitarian approach, but the expressive condemnation of punishment has a deterrence effect.[1422] Dan Kahan, for example, focuses on shaming methods for punishing the offender. The first method is stigmatizing publicity, which aims to humiliate and censure offenders for their conduct by publishing their conviction and names in newspapers or on television or other media.[1423] The second method is literal stigmatization, which aims to stigmatize the offender with a mark or symbol, such as wearing a t-shirt that declares the offender's crime.[1424] The third method is self-debasement, which is a ritual aimed at discouraging the offender, such as ordering the offender to stand in a public space with a sign

[1420] Bentham, Chapter XIV Of the proportion between punishment and offence, *supra* note 738, at 165 & 169.

[1421] Wils, Optimal Antitrust Fines: Theory and Practice, *supra* note 725, at 205.

[1422] Kahan, What Do Alternative Sanctions Mean, *supra* note 886, at 602- 604; Andreas Stephan "Beyond the Cartel Law Handbook: How Corruption, Social Norms and Collectivist Business Cultures Can Undermine Conventional Enforcement Tools" (2008) SSRN, at 13- 14, online: http://www.ssrn.com/abstract=1277205

[1423] Kahan, What Do Alternative Sanctions Mean, *supra* note 886, at 631- 632.

[1424] Kahan, What Do Alternative Sanctions Mean, *supra* note 886, at 632.

describing the offender's crime.[1425] The fourth method is contrition, which orders offenders to publish their convictions, including a description of their crimes, and apologize for committing them.[1426] Kahan argues that these methods are an essential supplementary component to imprisonment and monetary sanctions and have a strong deterrence effect.[1427]

A business that has been censured by the public loses its reputation, has fewer customers to buy its products, and therefore can be deterred. Such a reputational effect can be accomplished without criminal sanction, however. For example, competition authorities can publish the competition violation in the jurisdiction's media or order the business to publish it on its website, which can have a severe reputational and deterrent effect on the involved business.[1428]

There is, however, no empirical evidence for the deterrent effect of shaming.[1429] In addition, there is no way to determine the necessary amount of shaming or to classify it based on severity degrees.[1430] Finally, shaming can have a different effect in different societies or on different offenders.[1431]

Therefore, it is possible that a market can punish the business for the cartel by boycotting products from the involved businesses, but there is no guarantee that this punishment will occur at all or that it will be of large-enough quantity or last long enough to outweigh the potential profit from cartel activity. Hence, this sanction can be used as a supplement to other accountable sanctions.

[1425] Kahan, What Do Alternative Sanctions Mean, *supra* note 886, at 633.
[1426] Kahan, What Do Alternative Sanctions Mean, *supra* note 886, at 634.
[1427] Kahan, What Do Alternative Sanctions Mean, *supra* note 886, at 630- 631, 641, 649- 651 & 653.
[1428] OECD, Sanctions in Antitrust Cases-Background Paper by the Secretariat, *supra* note 725, at 35.
[1429] Kahan, What Do Alternative Sanctions Mean, *supra* note 886, at 638.
[1430] Kahan, What Do Alternative Sanctions Mean, *supra* note 886, at 640.
[1431] Kahan, What Do Alternative Sanctions Mean, *supra* note 886, at 642- 643.

7.4.1.3. Debarment against businesses

Another punishment is preventing a business from trading in the market or cancelling its license to engage in a business activity. For example, a public institution can prohibit a business that engaged in bid-rigging from future bidding opportunities in public procurement.[1432] This type of sanction is best explained by incapacitation,[1433] which prohibit offenders from reoffending by directly preventing them from engaging in the conduct, as its obvious advantage is that the market protects itself from potential offenders. Nonetheless, this type of punishment includes a deterrence effect, as the business cannot operate in the market and enjoy its profit. This may not be enough, however, to deter the business from reoffending in other markets or manipulating the system by working through other businesses. In addition, the market may lose valuable players. Thus, such debarment ends up punishing the public alongside the cartel.

7.4.2. Sanctions against individuals

7.4.2.1. Monetary sanctions against individuals

Hardcore cartels are engaged in by individuals who act on behalf of businesses. Accordingly, based on common sense, a direct sanction against them is needed to prevent them from engaging in cartel behaviour.[1434] This is even more evident in case other sanctions fail to prevent the business from engaging in transnational cartels,[1435] which provides stronger justifications to punish the individual responsible for the conduct.

[1432] OECD, Sanctions in Antitrust Cases-Background Paper by the Secretariat, *supra* note 725, at 6 & 35.
[1433] See above in subchapter 4.2.2.2 "Incapacitation."
[1434] OECD, Review of the 1998 OECD Recommendation Concerning Effective Action against Hard Core Cartels, (2019), *supra* note 14, at 62; Wirz, Imprisonment for Hard Core Cartel Participation, *supra* note 613, at 97.
[1435] See comprehensive discussion above in subchapter 7.4.1.1. "Monetary sanctions against business."

Typically, optimal deterrence against a business should consider the offence's wrongful gain and the probability of detection. In the case of an individual, however, it is harder to determine the person's wrongful gain from the cartel activity. It could be a job promotion or a rise in salary, but such rewards can also be due to high performance and not from involvement in cartel activity. Therefore, it is more challenging to determine the optimal sanction against an offender based on the benefits potentially reaped by the offender.[1436]

The second question is whether monetary sanctions alone are sufficient to deter individuals similar to the threat of imprisonment.[1437] This issue is controversial, however, as it is believed that the optimal monetary sanction to deter individuals would be extremely high and beyond the individual's ability to pay.[1438] In addition, there is no way to guarantee that the individual alone will carry the burden of the sanction, as the business can compensate this person by paying the monetary sanction or offering some other reward.[1439]

7.4.2.1.1. Efficiency – Considering neglected costs

Administrative monetary sanctions are desirable because they save resources, compensate society, and punish the offender.[1440] They are preferable for authorities because of their efficiency, enabling jurisdictions to use them in a broader scale than criminal sanctions, which are limited to criminal procedures. They are considered easy, fast, and flexible sanctions.[1441] Administrative monetary

[1436] OECD, Cartels: Sanctions Against Individuals (2007), *supra* note 844, at 23; Wirz, Imprisonment for Hard Core Cartel Participation, *supra* note 613, at 98- 99.

[1437] OECD, Cartels: Sanctions Against Individuals (2007), *supra* note 844, at 25.

[1438] OECD, Cartels: Sanctions Against Individuals (2007), *supra* note 844, at 25.

[1439] OECD, Sanctions in Antitrust Cases-Background Paper by the Secretariat, *supra* note 725, at 9; Calvani & Calvani, Cartel Sanctions and Deterrence, *supra* note 1285, at 192; Wils, Is Criminalization of EU Competition Law the Answer?, *supra* note 1244, at 146.

[1440] Becker, Crime and Punishment: An Economic Approach, *supra* note 1308, at 208.

[1441] Kerrigan, The Decriminalization of Administrative Law Penalties, *supra* note 1418, at 374- 377; Anthony Ogus "Better Regulation- Better Enforcement" in S. Weatherill, (ed.) *Better Regulation* (Hart Publishing, 2007) 107.

sanctions are also less costly to the authority because they require a lower standard of proof, fewer procedural safeguards, less evidence disclosure, and in general fewer procedures than the criminal process.[1442]

In contrast, the costs of criminal enforcement require criminal investigation, the effort to collect sufficient evidence, a high standard of proof, prosecution, enforcement, complicated procedures against offenders in court, and imprisonment, as well as the cost of taking productive individuals out of the economy and the cost of imprisonment.[1443] These are valid considerations and are the main arguments supporting administrative sanctions rather than criminal ones. Consequently, countries may not adopt a criminal sanction because it may require resources that are unavailable and eventually lead to a lack of enforcement, or the expected benefits from enforcement may not justify the high costs.[1444]

I think the administrative sanction should be seen from another perspective. The administrative sanction is used in the case of hardcore cartels as a punitive action and to deter the offender. Thus, it has a clear punitive aspect; accordingly, it must provide the offender with all the procedural safeguards granted in the criminal process. The procedural safeguards that aim to protect offenders in the criminal process can be adjusted and granted in administrative procedures as well. It is a matter of legal technicality, as a jurisdiction can order all the procedural safeguards

[1442] Gray, Criminal Sanctions for Cartel Behaviour, *supra* note 1344, at 368; Kerrigan, The Decriminalization of Administrative Law Penalties, *supra* note 1418, at 375- 377; OECD, Criminalisation of Cartels and Bid Rigging Conspiracies: A Focus on Custodial Sentence, *supra* note 18, at 10; OECD, Sanctions in Antitrust Cases-Background Paper by the Secretariat, *supra* note 725, at 6; Wirz, Imprisonment for Hard Core Cartel Participation, *supra* note 613, at 109; Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 74.

[1443] ICN, Defining Hard Core Cartel Conduct—Effective Institutions, Effective Penalties, *supra* note 20, at 4; OECD, Criminalisation of Cartels and Bid Rigging Conspiracies: A Focus on Custodial Sentence, *supra* note 18, at 10; OECD, Sanctions in Antitrust Cases-Background Paper by the Secretariat, *supra* note 725, at 6 & 32; Wirz, Imprisonment for Hard Core Cartel Participation, *supra* note 613, at 109; Whelan, The Criminalization of European Cartel Enforcement *supra* note 16, at 74.

[1444] OECD, Cartels: Sanctions Against Individuals (2007), *supra* note 844, at 24.

of the criminal process to be granted in the administrative process. Thus, the responsibility of proving the case beyond a reasonable doubt remains on the authority to bear, and the costs of detection, investigation, and prosecution are assumed to be as similar as possible to those of a complete criminal process—or a plea-agreement process, or conditional enforcement agreement if the offender decides to switch his or her procedures from an administrative to a criminal process.[1445] These considerations reduce the practical advantages of the administrative sanction compared to the criminal sanction.

This burden on the authorities may lead to less-successful enforcement.[1446] The offender safeguards, however, are designed to protect a defendant from unfair treatment by the authorities and prevent illegitimate punishment. Accordingly, a society that believes in the defendant's right to a fair trial and treatment should not sacrifice the defendants' procedural safeguards to reduce the costs of enforcement. Only when those safeguards are granted should the efficiency of the administrative sanction be considered in light of the criminal sanction.

To conclude, the insufficiency of monetary sanctions to deter cartels requires the consideration of alternative sanctions. In addition, due to the requirements to hold a fair trial, ensure procedural safeguards, and prove the violation beyond a reasonable doubt while imposing administrative sanctions, the administrative sanction's efficiency decreases compared to criminal sanctions. This requires that, rather than simply using the most efficient sanction, authorities choose the right one.

[1445] See above discussion in 6.3.5. "Punishment and securing procedural safeguards."
[1446] OECD, Cartels: Sanctions Against Individuals (2007), *supra* note 844, at 25.

7.4.2.2. Disqualification against individuals

Another meaningful method for dealing with offenders is through director disqualification.[1447] Disqualification is similar to debarment and is best explained by incapacitation,[1448] yet it includes a clear deterrence effect, as the employee is disqualified from work and cannot earn a salary or gain professional acknowledgement from the same position. Disqualification can be achieved through criminal or administrative procedures. Its effectiveness depends on the director's plans and how close he or she is to retirement, in which case the offender can be compensated with a generous retirement package.[1449] In addition, the director could also work in other positions within the same business.[1450] Despite these factors, director disqualification has a strong deterrence effect and is more effective than monetary sanctions against individuals.[1451]

7.4.2.3. Imprisonment and criminal record against individuals

Imprisonment and the establishment of a criminal conviction record can be achieved only through the criminal process. Imprisonment cannot be imposed against businesses but against individuals. Transnational cartels, however, are created by individuals who work for a business, and the business' criminal liability is mainly based on the liability of the individuals who work on behalf of the business.[1452] Although individuals may not gain the entire profit from the illegal cartel as the business does, they are praised, gain advantage from participating in unlawful conduct, and are directly involved in the cartel's activity and conduct. Thus, it is a natural and required response of

[1447] OECD, Sanctions in Antitrust Cases-Background Paper by the Secretariat, *supra* note 725, at 33.
[1448] See above in subchapter 4.2.2.2 "Incapacitation."
[1449] OECD, Sanctions in Antitrust Cases-Background Paper by the Secretariat, *supra* note 725, at 33.
[1450] OECD, Sanctions in Antitrust Cases-Background Paper by the Secretariat, *supra* note 725, at 6.
[1451] Wils, Is Criminalization of EU Competition Law the Answer? *supra* note 1244, at 147.
[1452] In Canada, the rules governing organizational liability are set out in Sections 22.1 and 22.2 of the Canada Criminal Code, supra note 44; see further discussion in subsection 1.2. "Definition and scope of the thesis" and footnotes 44 & 46.

the authority to punish such individuals when they violate the law.[1453] This is similar to the logic of punishing offenders who commit other types of crimes for the advantage of others, such as an individual who smuggles drugs for the profit of the drug cartel, a businessperson who enables the business platform to others to launder money proceeds from illegal activity, or an accountant who helps others engage in tax evasion.

7.4.2.3.1. The most effective sanction

Imprisonment is a credible threat against individuals and the most powerful deterrent for individuals, including business executives.[1454] It is also argued that the criminal stigma and emotional trauma associated with short-term imprisonment serve as sufficient deterrence for white-collar criminals.[1455] In addition, a criminal record has consequences for the individual's future and career.[1456] Most importantly, considering the low probability of exposing cartels and the potential high illegal gain, the administrative monetary sanction and other sanctions are insufficient to deter offenders. Thus, imprisonment against individuals is a critical punishment for achieving adequate deterrence.[1457]

[1453] OECD, Cartels: Sanctions Against Individuals (2007), *supra* note 844, at 18.

[1454] OECD, Review of the 1998 OECD Recommendation Concerning Effective Action against Hard Core Cartels, (2019), *supra* note 14, at 63; Wils, Is Criminalization of EU Competition Law the Answer? *supra* note 1244, at 143.

[1455] OECD, Criminalisation of Cartels and Bid Rigging Conspiracies: A Focus on Custodial Sentence, *supra* note 18, at 9- 10.

[1456] OECD, Cartels: Sanctions Against Individuals (2007), *supra* note 844, at 20.

[1457] OECD, Review of the 1998 OECD Recommendation Concerning Effective Action against Hard Core Cartels, (2019), *supra* note 14, at 62; OECD, Sanctions in Antitrust Cases-Background Paper by the Secretariat, *supra* note 725, at 32; Werden, Sanctioning Cartel Activity: Let the Punishment Fit the Crime, *supra* note 1286, at 30- 31; Wils, Is Criminalization of EU Competition Law the Answer? *supra* note 1244, at 28- 31; Stephan, The UK Cartel Offence: Lame Duck or Black Mamba, *supra* note 1404, at 6; John C. Coffee "'No Soul to Damn: No Body to Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment" (1981) 79:3 Michigan Law Review 386, at 390; Caron Beaton-Wells & Christine Parker "Justifying criminal sanctions for cartel conduct: a hard case" (2013) 1:1 Journal of Antitrust Enforcement 198, Part II; Lee, Antitrust Fines in the Era of Globalization, *supra* note 1290, at 11-12; Wirz, Imprisonment for Hard Core Cartel Participation, *supra* note 613, at 91 & 96; Wils, Is Criminalization of EU Competition Law the Answer? *supra* note 1244, at 140-141. In addition to the negative consequences of the fine,

7.4.2.3.2. Efficiency in enforcement

Imprisonment can be a credible threat against individuals and makes the leniency program more effective, as it provides a severe sanction and makes the risk of detection significantly high. In this case, different cartel members are strongly incentivized to expose the cartel and cooperate with the authorities in return for receiving immunity that prevents their imprisonment.[1458] This is an important aspect of imprisonment, as it exposes cartels and makes enforcement more effective. It also makes the enforcement cheaper and eventually makes the monetary sanction more moderate and successful, as exposure rates will be higher.

The other factor is the cost of imprisonment. It is a matter of each jurisdiction to decide whether the costs of imprisonment against cartel offenders justify prohibiting transnational cartels and are worth the effective enforcement of imprisonment. The argument that imprisonment is too costly is not convincing, however, because many societies use imprisonment for less serious offences, such as stealing.

The argument that society may lose a productive person while the offender is in prison is also unconvincing. Society does not want an offender who is not sufficiently deterred to do business in their market, as the person may reoffend. In addition, prison time for white-collar crimes can be minimal but still has a strong deterrence effect. It assumes that business executives

Wils supports imprisonment based on the fact that fines do not deter individuals. After all, imprisonment improves leniency programs because imprisonment has a strong deterrence effect and because imprisonment has a strong moral message, see there at 140- 144.

[1458] OECD, Review of the 1998 OECD Recommendation Concerning Effective Action against Hard Core Cartels, (2019), *supra* note 14, at 61; Wils, Is Criminalization of EU Competition Law the Answer? *supra* note 1244, at 142; Wirz, Imprisonment for Hard Core Cartel Participation, *supra* note 613, at 97 & 103; Werden, Hammond & Barnett, Deterrence and detection of cartels, *supra* note 942, at 217- 218.

are more vulnerable to prison time and the associated stigma of a criminal conviction.[1459]

Furthermore, while imprisonment can cause some individuals to leave the market, it will cause others to stay in the market and play according to its rules. The alternative sanction of high-deterrence monetary sanctions can cause the whole business to leave the market. Excessive monetary sanctions can cause businesses to go bankrupt and reduce the number of players in the market, resulting in less competition.[1460]

7.4.2.3.3. Direct affect

Imprisonment differs from other kinds of sanctions in its ability to directly affect the main responsible for committing the crime. Businesses and employees have different incentives and interests; thus, monetary sanctions against businesses may not always deter employees from engaging in transnational cartels. Managers may be interested in the cartel's profit, but they are not directly affected by the monetary sanctions imposed on the business. In addition, they may no longer even work for the business when the cartel is detected and sanctioned.[1461]

Furthermore, there is a widespread consensus that a monetary sanction against an individual is ineffective because it is difficult to prevent the business from reimbursing the

[1459] OECD, Cartels: Sanctions Against Individuals (2007), *supra* note 844, at 23; Bryan Allison "Does Prison Work for Cartelists? The View from Behind Bars, Interview with Michael O'Kane" (2011) 56:2 Antitrust Bulletin 483.

[1460] ICN, Defining Hard Core Cartel Conduct—Effective Institutions, Effective Penalties, *supra* note 20, at 4; Evenett, Levenstein & Suslow, International Cartel Enforcement: Lessons from the 1990s, *supra* note 16, at 1236; Calvani & Calvani, Cartel Sanctions and Deterrence, *supra* note 1285, at 191; Wirz, Imprisonment for Hard Core Cartel Participation, *supra* note 613, at 99; Stephan, The UK Cartel Offence: Lame Duck or Black Mamba, *supra* note 1404, at 6; Coffee, No Soul to Damn: No Body to Kick, *supra* note 1457, at 390.

[1461] OECD, Criminalisation of Cartels and Bid Rigging Conspiracies: A Focus on Custodial Sentence, *supra* note 18, at 8.

individual.[1462] Thus, imprisonment eliminates the option of compensating the employees[1463] and produces a sufficient disutility against the employees that outweighs the expected gain from the conduct.[1464]

7.4.2.3.4. Consensus on the need for imprisonment

It should be noted that no systematic empirical evidence exists that imprisonment against individuals has a sufficient deterrent effect or that the benefit of imprisonment exceeds the additional costs the system must bear to apply it.[1465] Despite this, many OECD countries accept on faith that imprisonment is an effective tool to prevent individuals from participating in hardcore cartels and, as such, has a valuable deterrence effect.[1466] This is based on the limits of the financial penalty on businesses.[1467] In addition, imprisonment can prevent businesses from reimbursing offenders with financial advantages.[1468] Finally, the risk of imprisonment has deterred some transnational cartels from operating in highly profitable markets, such as the United States, suggesting that this kind of sanction does effectively achieve deterrence.[1469]

[1462] OECD, Cartels: Sanctions Against Individuals (2007), *supra* note 844, at 12 & 19- 20; OECD, Review of the 1998 OECD Recommendation Concerning Effective Action against Hard Core Cartels, (2019), *supra* note 14, at 62; Wirz, Imprisonment for Hard Core Cartel Participation, *supra* note 613, at 98- 99; Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 52.

[1463] OECD, Criminalisation of Cartels and Bid Rigging Conspiracies: A Focus on Custodial Sentence, *supra* note 18, at 9; Werden, Hammond & Barnett, Deterrence and detection of cartels, *supra* note 942, at 212; Imelda, Competition Law Fragmentation in a Globalizing World, *supra* note 1259, at 563; Wirz, Imprisonment for Hard Core Cartel Participation, *supra* note 613.

[1464] Wirz, Imprisonment for Hard Core Cartel Participation, *supra* note 613, at 97.

[1465] OECD, Review of the 1998 OECD Recommendation Concerning Effective Action against Hard Core Cartels, (2019), *supra* note 14, at 63; Connor, Problems with Prison in International Cartel Cases Symposium: Cartel Penalties: Effective Deterrents or License Fees, *supra* note 1366, at 314.

[1466] OECD, Cartels: Sanctions Against Individuals (2007), *supra* note 844, at 10- 11.

[1467] Werden, Sanctioning Cartel Activity: Let the Punishment Fit the Crime, *supra* note 1286, at 30- 31, there he suggests imposing imprisonment instead of a monetary sanction due to its limits; Wirz, Imprisonment for Hard Core Cartel Participation, *supra* note 613, at 107.

[1468] Wirz, Imprisonment for Hard Core Cartel Participation, *supra* note 613, at 97 & 105- 106.

[1469] OECD, Review of the 1998 OECD Recommendation Concerning Effective Action against Hard Core Cartels, (2019), *supra* note 14, at 66; Wirz, Imprisonment for Hard Core Cartel Participation, *supra* note 613, at 100-101; Wils, Is Criminalization of EU Competition Law the Answer? *supra* note 1244, at 143-144.

7.5. Conclusions based on the general deterrence approach

From a general deterrence perspective, it is up to each jurisdiction to decide what sanction fits its system, be it a criminal sanction, such as imprisonment, or an administrative monetary sanction. The claim that a specific sanction is the most effective deterrent for a transnational cartel needs to be established in a particular jurisdiction and consider the relevant considerations, such as the cartel's profit, probability of detection, consequences, and so on.

Monetary sanction appears to be insufficient to deter transnational cartels for several reasons. First, there is a low probability of exposing the cartel and achieving a conviction in addition to the high profit from different markets. Second, evidence and witnesses can be abroad in a transnational cartel, which tremendously complicates the procedures of proving the violation. Third, the time that elapses between engaging in cartel behaviour before being exposed and then convicted of a crime and having it enforced can vary from jurisdiction to jurisdiction, but it generally appears to be a lengthy process. Thus, the sanction should be relatively severe to outweigh the low probability of punishment, the long period between the committing of the crime and the actual imposition of the sanction, and the illegal advantage of committing the crime. Therefore, the general deterrence argument for transnational cartels supports a severe sanction and favours imprisonment.

It is more complex, however, for international enforcement to impose monetary or non-monetary sanctions against offenders, as offenders can live outside the jurisdiction and the businesses' assets can be abroad. This is even worse if we consider the imprisonment sanction because its enforcement would require extradition, which is not always possible due to legal and

procedural obstacles between different jurisdictions.[1470]

A further consideration is that different countries may have better legal infrastructures than others to achieve more success in enforcement. Such infrastructures could include widespread Mutual Legal Assistance Treaties and diplomatic relationships. In this case, when the authority has the ability to impose different sanctions, it may prefer imprisonment, which has a better enforcement effect. If, however, imprisonment has low success because of the international dimension and the possibility that the offender will remain a fugitive, an administrative sanction can achieve better results than no enforcement. For example, if the offender has assets in the relevant jurisdiction, available remedies include the administrative sanction or forfeiture of the offender's assets or even the seizure of their property until they surrender to face criminal charges in the country.[1471] It is a matter for each jurisdiction to choose, based on its circumstances, the desirable sanction and its enforcement ability.

Imprisonment provides a strong threat against the offender and it is recommended to be an important enforcement tool in each country's arsenal. It also aligns with the OECD recommendation of a combination of sanctions to achieve an adequate deterrent effect.[1472] Monetary sanctions against businesses are necessary, but there is a broad agreement among competition authorities that they are not sufficient to deter hardcore cartels.[1473] Accordingly, additional methods of enforcement are needed, including the disqualification of managers, the publication of findings of violations of the law, and bans from participating in public tenders for

[1470] Connor, Problems with Prison in International Cartel Cases Symposium: Cartel Penalties: Effective Deterrents or License Fees, *supra* note 1366, at 313.

[1471] Stefan D. Cassella "Nature and Basic Problems of Non-Conviction-Based Confiscation in the United States" (2019) 90:2 Revue Internationale de Droit Pénal (RIDP) 195, at 207- 208.

[1472] OECD, Recommendation of the Council Concerning Effective Action against Hard Core Cartels (2019), *supra* note 26, Section II.5.

[1473] OECD, Sanctions in Antitrust Cases-Background Paper by the Secretariat, *supra* note 725, at 31.

public contract biddings.[1474] There is also a need for the imprisonment of the responsible person for cartel activity.[1475]

7.5.1. Improving detection and enforcement

General deterrence should not neglect the need to solve detection and enforcement problems. Based on the low probability of being caught and convicted, the severity of the sanction should be increased to pose a credible threat of punishment. The type of sanction chosen, however, should still be acceptable to society. For example, in the western United States in the nineteenth century, it was socially acceptable to impose a death sentence on horse thieves, which reflects the low probability of punishment.[1476] In modern days, such an approach cannot even be considered, as it causes more suffering than it prevents. Punishment is evil[1477] and, in this situation, can also be cruel because jurisdictions can invest more resources in developing adequate detection and investigation programs that make the exposure higher and the punishment more moderate.

The quantum of sanction has a strong connection with the probability of its being imposed. In cases where the probability of detecting the crime and imposing the sanction is low, the sanction should be high. On the other hand, if the probability of detection and punishment is high, the sanction can be moderate (usually by adjusting the financial penalty).[1478] On the other hand, offenders are risk-takers and are more deterred by the probability of conviction than by punishment

[1474] OECD, Sanctions in Antitrust Cases-Background Paper by the Secretariat, *supra* note 725, at 5- 6.

[1475] OECD, Cartels: Sanctions Against Individuals (2007), *supra* note 844, at 10; OECD, Sanctions in Antitrust Cases-Background Paper by the Secretariat, *supra* note 725, at 31; Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 69.

[1476] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 67.

[1477] Bentham, Chapter XIII Cases Unmeet for Punishment, *supra* note 738, at 158.

[1478] Wils, Optimal Antitrust Fines: Theory and Practice, *supra* note 725, at 195.

when convicted.[1479]

Thus, for practical considerations, jurisdictions must invest resources in exposing cartels, such as leniency programs, police officers, experts, and enforcement strategies, to facilitate enforcing the law.[1480] If jurisdictions achieve higher detection and enforcement rates, the need for harsher sanctions is reduced. In this case, the deterrence effect will have more of an effect not because of the sanctions but because of high rate of exposing and punishing hardcore cartels. A situation where potential offenders know that there is a considerable risk of them being caught and reliable possibility to be punished can have a significant deterrence effect.

Transnational cartels are more challenging than domestic ones and require multiple cooperation.[1481] Therefore, close cooperation between jurisdictions is required, with the aim of establishing a sophisticated mechanism of enforcement that might achieve enforcement success against transnational cartels equivalent to that against domestic cartels. Even then, however, there is a low probability of detecting transnational cartels, as with domestic cartels. Thus, a harsh sanction, such as imprisonment, is needed for the same reasons it is for domestic cartels.

7.5.2. Sanctions against hardcore cartels with low harm and culpability

The previous discussion focused on typical transnational cartels, which are accompanied by deception, cheating, exploitation, and a high level of culpability (*mens rea* and the bad character of greed). These factors highly motivate offender to commit the crime and hinder the ability of the

[1479] Becker, Crime and Punishment: An Economic Approach, *supra* note 1308, at 178.
[1480] Becker, Crime and Punishment: An Economic Approach, *supra* note 1308, at 174; von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 46.
[1481] Connor, Global Antitrust Prosecutions of International Cartels, *supra* note 37, at 576.

enforcement authorities to impose the sanction, which justifies imprisonment as the main sanction for addressing such conduct.

Under the criminalization section, I presented various justifications for prohibiting and punishing transnational cartels. I suggest that disobedience is a sufficient legal requirement to justify prohibiting and punishing transnational cartels because it prevents objective harm (harm to markets and customers). Based on general deterrence, however, this form of conduct does not necessarily justify imprisonment and can be suppressed by monetary sanctions. As discussed, effective deterrence is enhanced by the severity of the sanction to outweigh the benefit of the crime, the probability of detection and conviction, and the speed at which it is imposed after the offence has occurred.[1482] These criteria, however, differ when transnational cartels are known to the public or are done with low culpability.

This conclusion is based on practical considerations. When transnational cartels involve deception and cheating, they occur in secrecy to mislead the authorities, customers, and other competitors. This secrecy is a main factor that reduces the chances of the authorities' exposing the cartel and imposing the sanction. Therefore, both objective harm and enforcement harm occur. When, however, there is no secrecy and the transnational cartel is known to the public, the enforcement harm is reduced significantly, and it is much easier to enforce the law against the cartel. In this case, imprisonment may be unnecessary if the monetary sanction is sufficient to suppress the transnational cartel.

One can also consider, however, that, in the case of transnational cartels, it is more complicated to impose the sanction due to the involvement of multiple authorities and the need to

[1482] See above in subchapter 7.1. "Principal feature of general deterrence approaches."

collect evidence from abroad and extradite the offender. This may raise serious obstacles that reduce the possibility of applying a sanction, which also justifies harsher punishment. On the other hand, countries that have administrative sanctions are not willing to extradite a fugitive in their jurisdiction to a country that uses a criminal sanction. Therefore, in this situation, other practical factors should be considered that may suggest settling with non-criminal sanctions.

At the same time, these practical considerations can change when circumstances change. For example, if countries adopt an enforcement treaty that makes enforcement more practical and more like that used in cases of domestic cartels, then the probability of imposing the sanction is high. Therefore, if the cartel is public, a moderate sanction, such as monetary sanction that exceeds the profit of the illegal cartel, seems sufficient to address the violation.

The same considerations apply when transnational cartels are established with low culpability, such as through negligence or with no greed to gain illegal money. In this case, the objective harm to the markets and other customers occurs and justifies prohibiting the conduct and punishing the offender to prevent such behaviour. In addition, offenders remain responsible and accountable for their conduct.[1483] When, however, the offender commits the offence due to lack of proper judgement or negligence and has no desire to gain illegal money, then the offender has much less motivation to violate the law. In this case, a moderate sanction can be sufficient to make the offender choose a careful behaviour that ensures that the rules are being followed.

The monetary sanction can be imposed either through a criminal procedure, which carries a criminal conviction, or through an administrative procedure. The administrative sanction, however, would be punitive and not administrative in nature. This because the violation itself is

[1483] See the above discussion in subchapter 5.3. "*Mens rea* in transnational cartels."

an offence that aims to protect an important public interest to promote effective competition. In addition, the sanction should be punitive to address the wrong done to society and not just to maintain internal discipline within the mechanism.[1484] Therefore, a jurisdiction that applies administrative sanctions should ensure safeguarding procedures.[1485]

[1484] See further discussion under subchapter 5.1. "Harm in transnational cartels," and subchapter 6.3.2. "Administrative sanction with a criminal character;" see also Guindon case, *supra* note 1227, para 44- 46, & 76.

[1485] See the above discussion in subchapter 6.3.2. "Offender's rights and procedural considerations."

8. Chapter 8 Desert-based justifications for punishing transnational cartels

Many countries prefer general deterrence as their primary approach to enforcement against hardcore cartels.[1486] Other countries may demand a retribution approach as the leading sentencing aim in their national criminal law.[1487] Therefore, when national criminal law orders the use of retribution objectives in sentencing procedures, the criminal authorities and courts must apply it in their criminal enforcement against crimes, including transnational cartels. When the enforcement against transnational cartels is an administrative enforcement, however, the national criminal law does not apply to the situation, and the competition authority can use administrative sanctions based on the deterrence approach.

This chapter discusses the main considerations and acceptable methods for calculating a sanction based on retributivism. It then discusses some specific considerations for retributivism when applying it to transnational cartels. Lastly, I assess the proper sanction for transnational cartels and consider whether it should be either a criminal or administrative sanction.

8.1. Principal feature of desert-based approaches – the proportionality principle

There are several approaches to explain why retributivism punishes an offender. This can be because the offender deserves punishment for having committed the offence, to cancel the offender's unfair advantage from the offence, or to censure the offender for committing the offence.[1488]

[1486] See ICN, Setting of Fines for Cartels in ICN Jurisdictions (2017), *supra* note 486, at 5- 6; and further references on footnote 1285.

[1487] For example, Israel has a structured sentencing guide that establishes the retribution approach and proportionality as the leading sentencing objective in criminal enforcement. See Israel Penal Law, *supra* note 334, (Amendment No 113, 2012), Sections 40(1)- 40(7); Further reading, Roberts and Gazal-Ayal, Statutory Sentencing Reform in Israel, *supra* note 908.

[1488] See above subchapter 4.2.3. "Retributivist approaches to sanctions."

All retribution approaches agree that the quantum of punishment should be proportionate to the relative seriousness of the crime.[1489] The proportionality principle aims to provide justice considerations with a central role in punishment.[1490] It allows society to label the offender with the offence and punishment that fit the severity of the offender's actions but also protect the offender from being sanctioned by a punishment out of proportion to what this individual deserves based on the severity of the crime.[1491] The proportionality principle plays a central role in many jurisdictions.[1492] The EU also recognizes this principle even when punishing hardcore cartels with administrative sanctions.[1493]

The proportionality principle and the seriousness of the crime depend on the degree of harm that resulted from the offence and the offender's culpability.[1494] With respect to harm, we can consider the actual harm or the risk of harm that has been caused to the market, the economy, customers, the jurisdiction's economic reputation, the country's international relations, the victims' autonomy, and other recognized types of harms. Culpability includes various factors, which include the offender's *mens rea* (knowledge is more serious than negligence; intent to cheat or deceive is more serious than recklessness). It also includes the offender's ability to obey the law (whether there is an excuse, such as a misunderstanding of the law or fact). Finally, it can entail

[1489] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 102.

[1490] von Hirsch & Ashworth, Proportionate Sentencing: Exploring the Principles, *supra* note 873, chapter 1, at 4.

[1491] von Hirsch & Ashworth, Proportionate Sentencing: Exploring the Principles, *supra* note 873, chapter 1, at 4-5.

[1492] von Hirsch & Ashworth, Proportionate Sentencing: Exploring the Principles, *supra* note 873, chapter 1, at 1.

[1493] Article 49 of the European Union, Charter of Fundamental Rights of the European Union 2012/C 326/02 (7 December 2000 and 1 December 2009), online: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT; Contribution by the European Union, para 2.1 in OECD, Global Forum on Competition, Competition and Sanctions in Antitrust Cases, *supra* note 1272; Elisabetta Rosi "Economic Crimes and Proportionality of Sanctions" (2020) 91 Revue Internationale de Droit Pénal (RIDP) 133, at 135.

[1494] von Hirsch & Ashworth, Proportionate Sentencing: Exploring the Principles, *supra* note 873, chapter 1, at 4.

the offender's motives and bad character, such as a motive to gain illegal money due to one's own greediness.[1495]

In retributivism, punishment for a specific prohibition may vary by society.[1496] In addition, retributivism does not provide a method for calculating the quantum of punishment—whether it should be one year, 10 years, or 20 years. Based on the proportionality principle, however, a severe crime should receive severe punishment, and a less-severe crime should receive a lighter punishment.[1497] Accordingly, each jurisdiction can compare a specific prohibition to other prohibitions in its criminal system and determine the range of sentencing on that basis. For example, murder is more severe than armed robbery, and robbery is more severe than stealing.[1498]

8.2. Specific considerations for punishing transnational cartels

8.2.1. Censure

Punishing from a retribution perspective is tied to the existence of a society in which the offender deserves the condemnation of the community. Therefore, to have a censure against transnational cartels, there is a need to understand the world as one community with shared values and a broad consensus of what is considered right and wrong and what deserves blameworthiness. Transnational cartels are not an international crime, however, and are not recognized as a crime against the entire world that threatens the vital interests of the international community as a whole or shocks humanity's conscience due to a severe threat to international peace or security.[1499] In addition, transnational cartels are not recognized as general principles of law, where many

[1495] See further in Frase, Just Sentencing: Principles and Procedures for a Workable System, Studies in Penal Theory and Philosophy, *supra* note 846, at 8; von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 143.

[1496] Davis, How to Make the Punishment Fit the Crime, *supra* note 776, at 737.

[1497] Davis, How to Make the Punishment Fit the Crime, *supra* note 776, at 739- 742.

[1498] Christopher, Deterring Retributivism: The Injustice of "Just" Punishment, *supra* note 804, at 891- 893.

[1499] See above under subchapter 4.1.1. "Classifying transnational cartels."

jurisdictions around the world prohibit or criminalize them.[1500]

Furthermore, there are disparities concerning the need to associate transnational cartels with strong moral wrong and censure them. There is some historical support from ancient societies, including ancient China, Babylonia, ancient Greece, Rome, ancient Judaic and Islamic societies, and medieval societies that viewed cartel-type behaviour as morally reprehensible and a type of fraud perpetuated upon the public.[1501] In modern days, hardcore cartels can be seen as morally ambiguous.[1502] In some parts of the world, hardcore cartels have not always seen as deserving of strong moral disapproval or as problematic business behaviour and were once treated favourably.[1503] For example, in the early 20th century, cartels were tolerated and even encouraged in Europe.[1504]

Similar disparities also exist in the literature and terminology used against hardcore cartels. One approach claims that hardcore cartels are immoral and can be considered equivalent to "thieves in well-dressed suits."[1505] The opposite approach suggests that, instead of focusing on the moral argument, we should focus on the harm to the economy and society.[1506]

Therefore, although there is a consensus on the negative effect of transnational cartels and

[1500] See above in subchapter 2.3.3. "General principles of law."

[1501] Gray, Criminal Sanctions for Cartel Behaviour, *supra* note 1344, at 373 and the reference there; Connor, Global Enforcement Directed at International Cartels: A Concise Introduction and Summary, *supra* note 547, at 3.

[1502] Beaton-Wells, Capturing the Criminality of Hard-Core Cartels, *supra* note 954, at 677; Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 25; Maurice E. Stucke "Morality and Antitrust" (2006) 2006 Columbia Business Law Review 443, at 444.

[1503] Harding, Business Cartels as a Criminal Activity: Reconciling North American and European Models of Regulation, *supra* note 157, at 403 & 407; Tyhurst, Canadian Competition Law and Policy, *supra* note 8, at 271.

[1504] Wirz, Imprisonment for Hard Core Cartel Participation, *supra* note 613, at 93.

[1505] Calvani, Cartel penalties and damages in Ireland: criminalization and the case for custodial sentences, *supra* note 1041, at 271.

[1506] Stephan, Why Morality Should be Excluded from the Cartel Criminalisation Debate, *supra* note 155, at 127; see also Stephan, Hear No Evil, See No Evil, *supra* note 1200, at 11.

the need to prohibit them,[1507] no consensus has been reached on their moral wrongfulness or the need to censure them as criminal conduct.[1508] In fact, most countries that prohibit hardcore cartels use noncriminal enforcement in response to violations.[1509] Thus, it is hard to argue for the existence of universal moral wrongfulness[1510] or other features that warrant censure from the international community as a whole or to argue that most countries have a consensus to do so.

Nevertheless, punishment based on the retributive principle, such as an everyday judgment of praise and blame, can exist between a specific jurisdiction (that considers transnational cartels wrongful and deserving of censure) and a foreign individual or business. In some cases, there is an established legitimate basis for a country to extend its national criminal law against a foreign transnational cartel because it operates within, invests in, or trades with its territorial jurisdiction.[1511] In these scenarios, it is a fair expectation for the relevant foreign business to respect the society's values and jurisdiction's rules and obeys its laws. Otherwise, a censure of the community against those who break the law is desirable.

In some cases, however, there is no grounds for a jurisdiction to extend its criminal law to a foreign citizen. In those cases, applying the jurisdiction's criminal law against a foreign citizen with no basis would be like punishing the innocent, as the criminal norm of the jurisdiction does not apply to this person. Therefore, there is no criminal offence or censure. Further discussion on

[1507] ICN, Defining Hard Core Cartel Conduct—Effective Institutions, Effective Penalties, *supra* note 20, at 10; Fox, Competition Policy: The Comparative Advantage of Developing Countries, *supra* note 21, at 82; Drexl, International Competition Policy after Cancún, *supra* note 21, at 428; WTO, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, *supra* note 15, para 47- 64; Shaffer, Criminalizing Cartels: A Global Trend, *supra* note 21, at 305; Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 90 and the references there.

[1508] OECD, Criminalisation of Cartels and Bid Rigging Conspiracies: A Focus on Custodial Sentence, *supra* note 18, at 13.

[1509] See above in subchapter 3.7. "National law source."

[1510] Tyhurst, Canadian Competition Law and Policy, *supra* note 8, at 271.

[1511] See further about extraterritorial jurisdiction in subchapter 3.9. "The legal status of transnational cartels."

the issue of extending criminal law against innocent foreigners is presented in chapter 9 ("Areas for further research").

8.2.2. Harm according to global turnover

A main factor in retributivism punishment is the harm of the offence. Some jurisdictions use the business's turnover as a proxy for the cartel's illegal gain or presume the cartel's damage to consumers and the market.[1512] Most jurisdictions refer to the relevant turnover of the cartel in their markets. Some jurisdictions, however, calculate the business's global turnover.[1513] Global turnover can be a problematic calculation if the aim is to punish the cartel for all the harm it has caused in all jurisdictions. The retribution approach focuses on justice considerations and proportionality to the crime, taking into account the culpability of the offender and the harm caused by the conduct, while the harm should be that which the cartel has caused in the specific jurisdiction and not in others. In this case, the jurisdiction has no territorial jurisdiction over harm that has occurred in other places in the world, and to do so would be akin to punishing the innocent.

Still, when an offender lives in a jurisdiction and causes harm to its and other countries' markets, the jurisdiction can argue that the offender's conduct has caused harm to its international relations, trade, and reputation, which justifies considering this kind of harm when determining the punishment.

[1512] OECD, Sanctions in Antitrust Cases-Background Paper by the Secretariat, *supra* note 725, at 11.
[1513] OECD, Sanctions in Antitrust Cases-Background Paper by the Secretariat, *supra* note 725, at 5 & 11.

8.3. Assessment of desert-based justifications for sanctions

8.3.1. Severity of the crime and proportional sanction

Transnational cartels can be associated with deception, cheating, and exploitation with the intent to gain financial advantage because of greed. Therefore, all those forms of transnational cartels deserve punishment, cancelling out the offence's advantage, and strong censure. In addition, disobedience warrants retributive punishment because the offender deserves it. This is based on moral considerations of "rightness and fairness" of punishment against an offender who has violated society's rules.[1514] Disobedience can also be a sufficient justification for punishing the offender because of an "unfair advantage." Based on this approach, the offender gains an unfair advantage over law-abiding citizens by committing the offence, and the purpose of sentencing is to remove or cancel out that unfair advantage.[1515] In addition, societies may see the act of disobedience as itself justifying censure and condemnation to recognize the severity of violating the law and address the offender for the wrong committed against his fellow citizens.[1516]

The immoral wrongfulness of disobedience, however, does not necessarily require criminal punishment just because the person has disobeyed the law. For example, a person who disobeys the law and crosses the street at a red light may deserve an enforcement response to correct such behaviour, but it is not usually acceptable to punish such behaviours with criminal sanction. Furthermore, a person who participated in a protest against the government may have disobeyed

[1514] See, for example, Michael Moore, who argues that those who committed crimes deserve to be punished (and suffer) because of moral considerations, see Moore, The Moral Worth of Retribution, *supra* note 876, at 104-105, 111- 118 & 150.

[1515] Davis, How to Make the Punishment Fit the Crime, *supra* note 776, at 744- 745.

[1516] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 116 & 126- 127; see Duff, Crime, Prohibition, and Punishment, *supra* note 893, at 101.

the law in several aspects, but that individual has a fundamental right to protest that may outweigh the wrongfulness of the disobedience.

Still, the severity of the disobedience offence is not just based on its moral wrongfulness but on its harm and culpability components.[1517] Transnational cartels are illegal *per se*, with no social advantage, and cause severe harm to the victim's jurisdiction. In addition, transnational cartels are accompanied by high culpability of knowledge and, in most cases, with specific intent to cheat, deceive, exploit, and gain illegal money. Retributivism does not, however, suggest a fixed sentencing for crimes, and sentencing remains to be determined by comparing the severity of the specific crime to similar crimes in the same jurisdiction.

Different jurisdictions have different accepted punishments in their criminal codes, specific guidelines, or court precedents to determine the appropriate punishment based on their values and social norms. For example, country A can require a death penalty for murder based on the Hammurabi rule of "an eye for an eye, and a tooth for a tooth," while other countries require a life sentence with an option for a parole, and other jurisdictions a limited time of 20 years in prison. It is a matter for each society to determine the severity of a punishment that fits the severity of the offence. One country can see economic crimes as harmful, reprehensible crimes that warrant anywhere from one to 10 years in prison, whereas a second country would not consider an economic violation to justify a criminal sanction.

Jurisdictions may adopt a decriminalization approach to violations that protect societal systems, such as roads, taxes, and the environment, and apply the criminal sanction to the most

[1517] See above subchapter 8.1. "Principal feature of desert-based approaches – the proportionality principle;" Frase, Just Sentencing: Principles and Procedures for a Workable System, Studies in Penal Theory and Philosophy, *supra* note 846, at 8.

severe violations of bodily harm, such as murder, rape, or assault. A country can decide that economic crimes, including transnational cartels, do not merit the strong censure of a criminal conviction but rather a more moderate condemnation that can exist within an administrative sanction. Such adjudication can also occur at the end of a criminal procedure, where the court can conclude that, although the offender committed a criminal violation, it will not sentence the offender with a criminal conviction but rather a monetary sanction or order the offender to do social service commensurate with the severity of the violation.

Determining a proportionate sanction in transnational cartel cases can be done by comparing the violation to similar ones, particularly in the economic field. For example, in Canada, tax evasion results in between 12 months to five years of imprisonment.[1518] Laundering proceeds of crime merits 10 years of prison.[1519] Fraud crime results in 14 years in prison.[1520] These types of crimes can be a good starting point for comparing the crimes of transnational cartels, which in Canada warrant 14 years of imprisonment.[1521]

8.3.2. Considering a criminal sanction

Retributivism partly answers the question of whether the sanction must be a criminal or can be an alternative sanction. Neither the approach that argues that offenders deserve punishment for their wrongdoing nor the approach that argues for the cancellation of "unfair advantage" explain why the state imposes criminal sanction and "not a neutral form of disadvantage or sanction."[1522] These approaches do not substantially explain the difference between a criminal sanction and an

[1518] Section 239, Income Tax Act, *supra* note 1227.
[1519] Section 462.31, Canada Criminal Code, *supra* note 44.
[1520] Section 380, Canada Criminal Code, *supra* note 44; see also a similar comparison between fraud and hardcore cartels at Maxzone Auto Parts case, supra note 1106, para 56.
[1521] Section 45(1) of the Canada Competition Act, *supra* note 25.
[1522] von Hirsch & Ashworth, Proportionate Sentencing: Exploring the Principles, *supra* note 873, chapter 2, at 13.

administrative sanction or advocates imposing only a criminal sanction. Other approaches, however, advocate for a criminal sanction.

8.3.2.1. The censure's approach

Retributivism, in its censure approach,[1523] was developed to explain the justification for the state to impose a criminal sanction to punish individuals for their offences. The focus is on censure or disapproval of the offender and punishment as hard treatment.[1524] This approach explains why a state decides to impose a criminal sanction with blame rather than imposing other sanctions that may be more neutral or less severe.[1525]

Even the censure approach, however, recognizes other forms of censure not conducted through typical criminal procedures. An example would be a university authority's sanction against academic misconduct.[1526] In the same way, we can refer to a sanction imposed in a military disciplinary proceeding.[1527] Although an administrative sanction does not have the same level of strong censure as the criminal sanction, it can still attribute blame to the offender and address the public. Thus, while Andrew von Hirsch and Andrew Ashworth's censure approach suggests the need for a criminal sanction, a society can develop an administrative sanction with a sufficient censure effect that can be used to blame or stigmatize those who violate the law.[1528] Despite this,

[1523] See above in subchapter 4.2.3.3. "Desert theory approach- Censure and the communicative function of the sanction."

[1524] von Hirsch & Ashworth, Proportionate Sentencing: Exploring the Principles, *supra* note 873, chapter 2, at 12- 13 & 17.

[1525] von Hirsch & Ashworth, Proportionate Sentencing: Exploring the Principles, *supra* note 873, chapter 2, at 13 & 17.

[1526] von Hirsch & Ashworth, Proportionate Sentencing: Exploring the Principles, *supra* note 873, chapter, at 19 & 21- 22.

[1527] See, for example, the Engel case, where a sanction was imposed in a military disciplinary proceeding, but the court concluded that it was criminal in nature. Thus, the offender deserves the criminal procedures safeguards- Engel case, *supra* note 1225.

[1528] See further discussion below in subchapter 8.3.3. "Considering an administrative sanction with censure and hard treatment."

the principle is that a criminal sanction has stronger societal condemnation than an administrative sanction.[1529]

8.3.2.2. Censure for mala in se crimes

R.A. Duff argues that the kind of sanction depends on the difference between *mala in se* and *mala prohibita*. According to Duff, the difference between *mala in se* and *mala prohibita* depends on whether the conduct endangers or causes harm to a primary protected interest.[1530] For example, violating traffic rules but still driving safely is considered *mala prohibita,* but violating traffic rules and driving unsafely while endangering others is considered *mala in se*.[1531] Duff argues for dealing with *mala in se* offences through criminal law and emphasizes the censure aspect of punishment rather than dealing with them through civil suits for damages or condemnations.[1532] Duff argues, however, that *mala prohibita* crimes can be handled outside the realm of criminal law but suggests prohibiting and punishing them through criminal law for practical reasons, as criminal law is the most efficient means of reducing their frequency.[1533] In addition, when a person replaces society's safety standard, that individual takes an unjustified risk and deserves the censure of the criminal law.[1534] Moreover, when the prohibition in the law determines unfairness in the activity, such as in insider-trading activity, the unfairness toward others is a good reason to be subject to criminal law.[1535] In such cases, punishment should be a matter of criminal sanction and include public censure and not be a matter of administrative sanction.[1536] Duff does not, however, discuss whether

[1529] See, for example, in the domain of hardcore cartels: OECD, Cartels: Sanctions Against Individuals (2007), supra note 844, at 20; Wirz, Imprisonment for Hard Core Cartel Participation, *supra* note 613, at 108.
[1530] Duff, Crime, Prohibition, and Punishment, *supra* note 893, at 102- 104.
[1531] Duff, Crime, Prohibition, and Punishment, *supra* note 893, at 103.
[1532] Duff, Crime, Prohibition, and Punishment, *supra* note 893, at 101- 102.
[1533] Duff, Crime, Prohibition, and Punishment, *supra* note 893, at 102- 103.
[1534] Duff, Crime, Prohibition, and Punishment, *supra* note 893, at 104.
[1535] Duff, Crime, Prohibition, and Punishment, *supra* note 893, at 105.
[1536] Duff, Crime, Prohibition, and Punishment, *supra* note 893, at 105.

retributivism can accept administrative sanction for practical considerations in cases of *mala prohibita* crimes.[1537]

Transnational cartels cause direct harm to the economy, the market, consumers, and competitors and render no advantages to the public. In addition, they are conducted with high culpability and for the purpose of gaining illegal money. Based on Duff's definition, this kind of behaviour is considered *mala in se*, as it endangers and causes harm to primary protected interests, similar to how driving unsafely and endangering others is considered *mala in se*. Therefore, according to Duff's approach, transnational cartels do deserve criminal punishment.

8.3.2.3. Censure and the principle of last resort

Criminal sanction remains the society's "strongest weapon" for preventing severe law violations.[1538] Accordingly, some sentencing approaches suggest that criminal sanction should be used as a last resort.[1539] The last-resort principle argues that, in liberal societies, criminal sanction should be used last because society should prefer sanctions that impose fewer costs on human liberty.[1540] Thus, a criminal sanction can be used only after attempting to use other alternatives to prevent the violations.[1541] Nevertheless, because the criminal sanction is the primary sanction that the authority uses to enforce prohibition, it is suggested that the last-resort principle applies to wholly preventive crimes that do not require censure or condemnation.[1542] When the criminal offence requires censure, the criminal sanction remains the only accepted sanction under the

[1537] Duff, Crime, Prohibition, and Punishment, *supra* note 893, at 106.
[1538] Satzger, Definition and Scope of "Criminal" Sanctions, *supra* note 886, at 265- 266.
[1539] Douglas Husak "The Criminal Law as Last Resort" (2004) 24:2 Oxford Journal of Legal Studies 207, at 208. Still, this principle is not solid in the Anglo-American system, see there at 208.
[1540] Calvani & Calvani, Cartel Sanctions and Deterrence, *supra* note 1285, at 187.
[1541] Husak, The Criminal Law as Last Resort, *supra* note 1539, at 214- 215.
[1542] Husak, The Criminal Law as Last Resort, *supra* note 1539, at 226- 227.

principle of retributivism by which to achieve retribution sanction or express censure.[1543]

It should be noted, however, that there is no clear distinction between wholly preventive crimes and others that should be censured. According to Husk, previous distinctions between *mala in se* and *mala prohibita* or between regulatory and non-regulatory crime do not provide a clear distinction "because no theorist has ever succeeded in providing an adequate account of them."[1544] Thus, Husk suggests, "simply say that some offences are non-stigmatizing and wholly preventive in function." In those cases, the principle of the last resort should be considered.[1545]

Transnational cartels should be considered stigmatized conduct based on Husk's approach. This is due to the direct harm to primary protected interests and the typical high culpability associated with such crime, as reflected in high knowledge of the negative consequences and the specific intent to gain illegal money. Therefore, the last-resort principle should not be applied in the case of transnational cartels but rather a criminal sanction with censure.

8.3.3. Considering an administrative sanction with censure and hard treatment

Although retributivism provides a strong argument supporting criminal sanction, there is a basis for arguing that several retributivist approaches (arguably all of them) can tolerate an administrative sanction that includes censure, as in the case of university or military disciplinary procedures.[1546] We can also consider a society that develops an administrative sanction with sufficient censure to address illegal behaviour and stigmatizes illegal conduct in society's eyes.

Different degrees of censure severity can also be considered. The imprisonment sanction

[1543] Husak, The Criminal Law as Last Resort, *supra* note 1539, at 221- 224.
[1544] Husak, The Criminal Law as Last Resort, *supra* note 1539, at 226.
[1545] Husak, The Criminal Law as Last Resort, *supra* note 1539, at 226.
[1546] See above in subchapter 8.3.2.1. "The censure's approach."

stands at the highest censure level; it entails a strong labelling condemnation and conveys a unique moral message.[1547] This is because imprisonment takes away the offender's liberty, which is highly valued in our societies, making imprisonment the strongest censure, superior to other sanctions.[1548]

For lower degrees of censure, we can consider other criminal sanctions, such as probation, community service, and conditional sentences. These sanctions express less censure than imprisonment.[1549] Criminal fines fall under these types of censure, as they include a criminal conviction and record with future consequences but are not as stigmatizing as imprisonment.[1550] Fines can be perceived as having different degrees of censure in different societies.[1551] Thus, it may be argued that they are much less stigmatizing than imprisonment and send a message that lacks sufficient condemnation or that fines act to "price" the illegal conduct instead of punishing the offender for violating the law.[1552] Thus, adding an expressive dimension to punishment, such as publication, can strengthen the necessary lacking condemnation dimension and render fines as stronger punishment tools.[1553]

In less severe cases, society can judge that the conduct or actor does not deserve a criminal conviction at all. In such cases, administrative sanction can be an option. The administrative sanction may fail to express the same public moral condemnation of a criminal sanction.[1554] A society can, however, develop an administrative sanction that includes a unique shaming

---

[1547] OECD, Sanctions in Antitrust Cases-Background Paper by the Secretariat, *supra* note 725, at 32; Wils, Is Criminalization of EU Competition Law the Answer? *supra* note 1244, at 119.

[1548] Dan M. Kahan "Social Meaning and the Economic Analysis of Crime" (1998) 27:2 Journal of Legal Studies 609, especially at 616; Kahan, What Do Alternative Sanctions Mean, *supra* note 886, at 649 & 652.

[1549] Kahan, What Do Alternative Sanctions Mean, *supra* note 886, at 606.

[1550] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 24.

[1551] For example, in Western European nations, fines can be seen as more censure and criminal than in the United States, see Kahan, What Do Alternative Sanctions Mean, *supra* note 886, at 624.

[1552] Kahan, What Do Alternative Sanctions Mean, *supra* note 886, at 618 & 620- 623.

[1553] Kahan, What Do Alternative Sanctions Mean, *supra* note 886, at 630- 631, 649- 651 & 653.

[1554] Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 51 & 55; Kerrigan, The Decriminalization of Administrative Law Penalties, *supra* note 1418, at 371- 372.

punishment.[1555] For example, the administrative sanction in the case of transnational cartels can include publishing the violation in the media or forcing the involved business to publish the violation on its website, which can have a reputational effect.[1556] Thus, it can be argued that a particular society can recognize an administrative sanction that includes a censure and shaming element against those who violate the law.

Hard treatment is another critical aspect of retributivism punishment. It is used to make the offender "suffer," eliminate his or her unfair advantage, and supplement the threat and prevention considerations within the framework of a censuring institution.[1557] For the purpose of this discussion, we agree that administrative sanction can include different kinds of hard treatment, such as a monetary sanction, disqualifying the manager from working in the same role for a period of time, or cancelling the business license to work in a specific domain. Thus, the administrative sanction can fulfill the hard-treatment condition but with less severity overall than criminal sanctions. Here as well, the hard treatment represents the quantum of punishment, which is determined by proportionality.

Accordingly, there is a wide spectrum of censure and hard treatment that different sanctions can provide. At the top of the scale is imprisonment. Beneath that are other criminal sanctions and criminal fines with a criminal conviction. Lastly, there are administrative sanctions that can be perceived in different societies as including censure. What quantum of censure and hard treatment fits the crime, however, remains a question of proportionality and how the crime compares to other relevant crimes as viewed in a specific jurisdiction.

[1555] See, for example, Kahan, Social Meaning and the Economic Analysis of Crime, *supra* note 1548, at 617; Kahan, What Do Alternative Sanctions Mean, *supra* note 886, at 630- 631, 649- 651 & 653.

[1556] OECD, Sanctions in Antitrust Cases-Background Paper by the Secretariat, *supra* note 725, at 35.

[1557] See above further discussion under subchapter 4.2.3. "Retributivist approaches to sanctions."

The bottom line is that retributivism supports punishment, first and foremost, based on proportionality. If a country treats economic crimes, such as tax evasion, money laundering, business fraud, and other crimes, using criminal sanctions, then there is no justification for treating transnational cartels differently.

9. Chapter 9 Areas for further research

Criminalization based on other legal theories

The thesis discusses criminalizing transnational cartels following an international law framework. As I conclude that transnational cartels are not international crimes, the focus shifts to national criminal law, adopting the criminal law theories that exist in the Anglo-American legal system. Different jurisdictions, however, may criminalize conduct based on different theoretical grounds that are acceptable in their legal systems. Some other legal systems include the Germanic, Hindu, Islamic, and Romance legal families.[1558] Discussing the theoretical basis for each legal system goes far beyond the scope of this study and is a topic for further research.

Extraterritorial jurisdiction

Further research could focus on the justifications for extending national criminal law to foreign offenders. This attracts challenges of legitimacy, sovereignty, and legality. Traditionally, each state has jurisdiction over its territory due to state sovereignty.[1559] Under the territorial jurisdiction principle, the state has jurisdiction over a crime committed under its territory or some element of the offence that causes a harmful effect to its territory.[1560] One important justification for the extraterritorial principle is when a state claims jurisdiction beyond its territorial borders to protect or prevent harm to its vital national interest.[1561] Different jurisdictions worldwide have adopted different extraterritorial jurisdictions while dealing with competition, the most famous

[1558] United Nations, General Assembly, International Law Commission, Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, *supra* note 248, para 52.
[1559] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 53.
[1560] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 67.
[1561] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 73.

being the effect doctrine and the implementation doctrine.[1562]

The state's perspective

The effect doctrine is considered an extreme approach of extraterritorial jurisdiction, which is controversial in international law.[1563] Furthermore, it has led to much international dispute.[1564] Countries like Britain, Canada, France, Australia, and South Africa once opposed the U.S. extraterritorially approach. Some objections included diplomatic protests, blocking cooperation and evidence, and prohibiting local firms from complying with foreign awards.[1565] In addition, the Swiss federal government once threatened to complain about the U.S. effect doctrine to the International Court of Justice.[1566]

The controversial arguments regarding the effect doctrine, however, were not brought to the ICJ. This may have been due to the growing acceptance of the effect doctrine among states and the belief that the ICJ is not qualified to discuss complicated issues regarding competition law, particularly in the absence of international competition rules.[1567] No international customary law, however, prohibits applying law over extraterritorial jurisdiction when there is a direct effect on a state territory or interest.[1568]

Still, states have not ceded their sovereignty over transnational crimes to an international

[1562] See further discussion under subchapter 3.9. "The legal status of transnational cartels."

[1563] Davison & Johnson, An Exploration of the Evolution of the EU's Twin-Track Approach, *supra* note 662, at 88; Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 67.

[1564] Noonan, The Emerging Principles of International Competition Law, *supra* note 11, at 5.

[1565] Noonan, The Emerging Principles of International Competition Law, *supra* note 11, at 524- 526 & 536-537; Sweeney, International Governance of Competition and the Problem of Extraterritorial Jurisdiction, *supra* note 69, at 353- 354; Evenett, Levenstein & Suslow, International Cartel Enforcement: Lessons from the 1990s, supra note 16, at 1237- 1238, and footnote 25; Davidow, The UNCTAD Restrictive Business Practice Code, *supra* note 708, at 588.

[1566] Noonan, The Emerging Principles of International Competition Law, *supra* note 11, at 488- 489.

[1567] Noonan, The Emerging Principles of International Competition Law, *supra* note 11, at 489.

[1568] Currie & Rikhof, International and Transnational Criminal Law, *supra* note 39, at 55 & 67; see also Lotus case, *supra* note 711.

jurisdiction[1569] or consented to allowing or trusting other states to enforce competition law in their jurisdictions.[1570] Thus, when a country extends its national criminal law to another country's territory, it affects the other country's national sovereignty and violates its right to self-determination by disrupting its adopted economic policy.[1571]

The individual's perspective

Extending national criminal law over a foreign citizen can lead to criminal enforcement over a foreign citizen who lives in a jurisdiction with administrative enforcement or no prohibition against cartels.[1572] This causes a criminal prohibition to be applied against the offender, however, and violates the international principle of legality.[1573] It also casts doubt on the legitimacy of the law's application and punishment of a person by a foreign authority.[1574] Enforcing criminal law must be just and limited against a properly convicted offender for an offence prohibited by a legitimate authority.[1575] Little attention has been paid, however, to the question of criminal liability and the justification for applying the rules against foreign offenders.[1576] Some of my thoughts on various situations are as follows:

[1569] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 30.

[1570] Fox, International Antitrust and the Doha Dome, *supra* note 13, at 924.

[1571] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 35; Noonan, The Emerging Principles of International Competition Law, *supra* note 11, at 3- 6, 488- 489 & 524- 525; Budzinski, International Antitrust Institutions, *supra* note 360, at 122; Bradford, Antitrust Law in Global Markets, *supra* note 60, at 283.

[1572] Ezrachi, & Kindl, Cartels as Criminal, *supra* note 21, at 241.

[1573] See comprehensive discussion on Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press, 2008); Article 11 to United Nations, Universal Declaration of Human Rights, *supra* note 264; Article 15 to United Nations, International Covenant on Civil and Political Rights, *supra* note 266; Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 39- 40, 249- 250 & 425- 426; Boister, Transnational Criminal Law, *supra* note 39, at 958.

[1574] Honderich, Punishment: The Supposed Justifications, *supra* note 809, at 9- 12.

[1575] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 103- 104; Hart, Punishment and Responsibility: Essays in the Philosophy of Law, *supra* note 734, chapter 1; Green, Lying, Cheating, and Stealing, *supra* note 745, at 63.

[1576] Boister, Transnational Criminal Law, *supra* note 39, at 958; Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 427; Noonan, The Emerging Principles of International Competition Law, *supra* note 11, at 370- 372.

According to social contract theory, punishment is legitimate against a citizen who promises to obey the law, by consent, elections, or residency.[1577] Such an assumption, however, does not apply in cases where a country applies its law to a foreign citizen. An important alternative is the fair play theory, which suggests that a person who chooses to benefit from the government, such as by receiving services or enjoying the country's infrastructure, is thereby subject to a duty of fair play to their fellow citizens and the duty to obey the laws that govern their lives together.[1578]

The first situation is when a cartel from country A, affects the market and citizens of country B. The enforcement can be by country A's applying its law against its citizens. In this case, country A has an interest in preventing its citizens (or businesses) from committing crimes against foreign countries to protect its reputation and international relations. This situation can be explained by social contract theory, and no issues arise.

The second situation is when a cartel from country A affects the market and citizens of country B. The enforcement is carried out by country B. Here, country B can apply its prohibitions against a foreign citizen based on the fair play theory. This can happen when the offender from country A enjoys the fruits of country B, as it operates in, or invests in, or trades with country B. In this case, the cartel from country A is under the direct jurisdiction of country B, which applies its prohibition, similar to a tourist from country A visiting country B.

The third situation is when the cartel in country A operates in country A and a business from country B imports to its country the products from country A, or a business from country B

[1577] Green, Lying, Cheating, and Stealing, *supra* note 745, at 115- 116; see also the references at footnote 975.

[1578] Green, Lying, Cheating, and Stealing, *supra* note 745, at 116- 117; This theory was suggested by HLA Hart and developed further by John Rawls, see H.L.A. Hart "Are There Any Natural Rights?" (1955) 64 Philosophical Review 175; John Rawls "Obligation and the Duty of Fair Play" in Sidney Hook (ed.) *Law and Philosophy* (New NYU Press, 1964) 3; see also recent discussion on Justin Tosi, Rethinking the Principle of Fair Play, *supra* note 980.

trades in country A and is affected by the cartel that operates in country A. This situation raises legitimacy and legality problems if country B enforces its law against the cartel in country A.

The first scenario is that country A has a prohibition against cartels in its territory. Here there is a criminal prohibition that applies to the offender in country A. In this case, country B can use its court and under its jurisdiction apply the prohibition from country A against an offender from country A. This process is known as the *recharacterization process*, where a new tribunal (the court from country B) applies a relevant rule against the offender (the rules in country A or rules recognized by general principles of law or customary law).[1579]

The second scenario is when country A has no prohibition against cartels in its territory. The operation of cartel A in the jurisdiction of country A would not violate any rules, and there is no act of law-breaking. In this case, there are two separate grounds for deeming the cartel in country A innocent.

The first ground is substantive innocence because, when a business from country B operates in or imports from country A, it gives its consent to buy or deal with the cartel from country A. Based on legal liberalism, harm with consent is not a wrongful harm.[1580] In addition, there is no mischief that concerns the society according to the utilitarian approach.[1581]

The second ground is legal innocence, because there is no applicable rule against cartels in country A that applies to the cartel from country A. Moreover, if country B has a legal rule against cartels, it is illegitimate to apply it to country A's jurisdiction if the cartel in country A does not

[1579] Gallant, The Principle of Legality in International and Comparative Criminal Law, *supra* note 1573, at 276- 277, 391 & 394.
[1580] Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, *supra* note 733, at 105.
[1581] Bentham, Chapter XIII Cases Unmeet for Punishment, *supra* note 738, at 159.

operate in (invest in or trade with) country B's jurisdiction. If a business from country B imports the product from country A to country B and benefits from doing so, then the importing business should be sanctioned but not the cartel in country A.

Sentencing theories oppose punishing the innocent. Retributivism adopts the distribution principle, which justifies punishment only against an offender for the offence committed.[1582] In addition, most utilitarian theorists avoid justifying punishing innocent people because this practice is not considered punishment.[1583] Utilitarianism, however, does not include the principle of the distribution of punishment, which restricts punishment to those convicted adequately as part of its theory.[1584] It has been suggested that few utilitarianism approaches can support punishing the innocent.[1585]

At least one utilitarian approach claims that "punishment is justified by the fact that it prevents offences economically *and for no other reason*."[1586] Preventing offences economically does not refer to financial costs but costs and profit in terms of satisfaction, which concerns the amount of "happiness, fulfilment, anxiety, deprivation, misery, suffering."[1587] The *prevention of offences economically* includes the following three conditions:

[1582] Hart, Punishment and Responsibility: Essays in the Philosophy of Law, *supra* note 734, at 5-6, 9, 12; von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 42- 43; Moore, The Moral Worth of Retribution, *supra* note 876, at 111- 118; Christopher, Deterring Retributivism: The Injustice of "Just" Punishment, *supra* note 804, at 850- 860, 869, 876, & 881- 885; Davis, How to Make the Punishment Fit the Crime, *supra* note 776, at 731.

[1583] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 42; Rosen, Utilitarianism and the Punishment of the Innocent, *supra* note 807, at 25 & 32; Bentham, Chapter XIII Cases Unmeet for Punishment, *supra* note 738, at 159- 160; Christopher, Deterring Retributivism: The Injustice of "Just" Punishment, *supra* note 804, at 872- 873.

[1584] von Hirsch, Ashworth & Roberts, Principled Sentencing: Readings on Theory and Policy, *supra* note 161, at 42- 43.

[1585] Christopher, Deterring Retributivism: The Injustice of "Just" Punishment, *supra* note 804, at 874, also 862, 871 & 877 and references there.

[1586] Honderich, Punishment: The Supposed Justifications, *supra* note 809, at 92, see also there at 86- 111.

[1587] Honderich, Punishment: The Supposed Justifications, *supra* note 809, at 86.

> (1) it does indeed reduce offences, (2) despite causing dissatisfaction to the offender, it gives rise to a greater total balance of all kinds of satisfaction than would occur as a result of offences if it were not imposed, and (3) there is no other punishment that would prevent the offences as effectively at a cost of less distress.[1588]

Although the punishment practice of "prevent[ing] offences economically" can justify punishing the innocent, it is hard to provide an argument for more satisfaction in punishing the wholly innocent.[1589] For example, punishing the innocent may not be justified if it causes too much distress to the offender,[1590] affects the institution's credibility, or causes more loss than gains.[1591] These considerations for "preventing offences economically" may change, however, in case a country punishes a foreigner to protect its interests although there is no applicable prohibition on the foreigner.

A country has the legitimate right to protect its market against an individual who affects its interests and causes harm to its markets. In the international sphere, countries use the "carrot or stick" method against foreign individuals to achieve goals in the international domain, as in the case of targeted sanctions.[1592] In addition, a country can exert political pressure on another country to enact prohibitions against hardcore cartels and enforce them in its jurisdiction. A country can also enact a law that prohibits businesses in its jurisdiction or any other business that trades in its jurisdiction from buying or selling products from foreign hardcore cartels. Other kinds of protection can be through international trade law, which prevents a business from entering its market.[1593] In addition, a country can withdraw from Most Favored Nation (MFN) treatment. For

[1588] Honderich, Punishment: The Supposed Justifications, supra note 809, at 88.
[1589] Honderich, Punishment: The Supposed Justifications, supra note 809, at 104.
[1590] Honderich, Punishment: The Supposed Justifications, supra note 809, at 89.
[1591] Honderich, Punishment: The Supposed Justifications, supra note 809, at 94 & 97.
[1592] See above pages 231- 232, and footnotes 1234- 1240.
[1593] Andrew Guzman "Competition Law and Cooperation: Possible Strategies" in Andrew T. Guzman *Cooperation, Comity, and Competition Policy* (Oxford University Press 2011) 345, at 345- 346.

example, Canada was the first country to withdraw the MFN from Russia and Belarus due to the invasions of Russia into Ukraine and Russia's involvement in Belarus.[1594]

Cooperation

Competition authorities around the world acknowledge the need for close cooperation and coordination to achieve effective enforcement of competition in a globalized world.[1595] Since 2014, more than 85 new cooperation agreements have been signed by competition authorities.[1596] There are problems, however, related to practical issues of cooperation,[1597] differences in legal systems,[1598] and the differing enforcement abilities of different countries.[1599] Further research could focus on developing enforcement mechanisms based on the following principles:

First, the establishment of a treaty-based enforcement; this would establish a legal commitment and increase coordination among countries. Second, the encouragement of

[1594] Simon Lester "Canada Revokes MFN Status of Russia and Belarus", (March 03, 2022) International Economic Law and Policy Blog, online: https://ielp.worldtradelaw.net/; see also Shell, Trade Legalism and International Relations Theory, *supra* note 1, at 856; Article XXI of the World Trade Organization (WTO), General Agreement on Tariff and Trade (GATT) (1994), online: https://www.wto.org/english/docs_e/legal_e/gatt47.pdf; Article XIV of the World Trade Organization (WTO), General Agreement on Trade in Services (GATS) (1994), online: https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm; and Article 73 of the World Trade Organization (WTO), Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (1994), online: https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm

[1595] Capobianco & Nagy, Developments in International Enforcement Co-operation in the Competition Field, *supra* note 633, at 583.

[1596] OECD, International Co-operation on Competition Investigations and Proceedings: Progress in Implementing the 2014 OECD Recommendation, *supra* note 482, at 33.

[1597] ICN, International Cooperation and Information Sharing (2013), *supra* note 633, at 15; OECD, Criminalisation of Cartels and Bid Rigging Conspiracies: A Focus on Custodial Sentence, *supra* note 18, at 36.

[1598] United Nations Conference on Trade and Development (UNCTAD), Enhancing International Cooperation in the Investigation of Cross-Border Competition Cases: Tools and Procedures, TD/B/C.I/CLP/44, (2017), at 6 online: https://unctad.org/meetings/en/SessionalDocuments/ciclpd44_en.pdf; ICN, Cooperation between Competition Agencies in Cartel Investigations (2007), *supra* note 637, at 24; Capobianco & Nagy, Developments in International Enforcement Co-operation in the Competition Field, *supra* note 633, at 569; Whelan, The Criminalization of European Cartel Enforcement, *supra* note 16, at 284.

[1599]OECD, International Co-operation on Competition Investigations and Proceedings: Progress in Implementing the 2014 OECD Recommendation, *supra* note 482, at 67; ICN, International Cooperation and Information Sharing (2013), *supra* note 633, at 14; UNCTAD Enhancing International Cooperation in the Investigation of Cross-Border Competition Cases: Tools and Procedures, *supra* note 1598, at 3; Capobianco & Nagy, Developments in International Enforcement Co-operation in the Competition Field, *supra* note 633, at 570- 571; Bradford, Antitrust Law in Global Markets, *supra* note 60, at 315.

enforcement in the offender's jurisdiction; this would resolve problems of different sanctions (administrative v. criminal), mutual legal assistance, and extradition. I assume that, as long as each jurisdiction can supress its residents from offending against other jurisdictions, the other jurisdictions will not complain. Third, the empowerment of small or developing countries that have a weak enforcement ability to establish a regional authority; this may solve the problem of weak enforcement in developing and small countries. Fourth, the establishment of a shared extraterritorial jurisdiction for all the treaty members' states and encouragement of a collective enforcement of the treaty member states against a foreign citizen who is a resident of a non-member state; this option would remarkably expand the jurisdiction of states and their enforcement abilities. Fifth, the development of a monitoring mechanism to ensure proper enforcement of the enforcement mechanism; this would motivate country members to enforce the law based on their agreement in an adequate manner.

10. Chapter 10 Conclusion

This thesis is based on a conceptual approach and focuses on criminalizing transnational cartels following the transnational criminal law framework. The *first* stage of the discussion is based on international law and whether transnational cartels are prohibited according to international norms. All indications lead to the conclusion that the mere existence of transnational cartels is not an international crime and has no universal jurisdiction. In addition, there is no suppression treaty that addresses them. Thus, they are transnational crimes with domestic concern. The basis for criminalizing transnational conduct is national criminal law. Accordingly, a *second* stage of analysis is required based on domestic criminal law theories.

As no specific criminal approach applies to all jurisdictions, it remains a matter for each jurisdiction to determine. The harm principle of legal liberalism, the mischief based on utilitarianism, the exploitation principle (unfair gain) and deception based on legal moralism, and the greed and bad character based on the legal perfectionism all provide valid and independent arguments for prohibiting transnational cartels criminally. These criminal law theories are well established approaches in the Anglo-American legal system, but they may not enjoy the same popularity in Germanic, Islamic, or other legal systems.

Furthermore, different jurisdictions may prefer just one criminal law theory or a mix of two, but not all of them. Legal liberalism, a theory that advocates for a person's freedom and liberal way of life provided that the individual does not harm others, is a plausible theory for many Western countries.[1600] Legal liberalism, however, does not necessarily apply to traditional societies

[1600] Feinberg, The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing, *supra* note 756, at 333.

that may use criminal law based on moralism and to protect their traditional way of life.[1601] Still, there is considerable opposition to a state's ability to criminalize morally wrongful conduct just because it is immoral if it does no harm, as some legal-moralism approaches suggest.[1602]

Some forms of liberalism may insist on applying legal liberalism to different societies and nations regardless of their traditional or modern pluralistic diversity.[1603] International law, however, supports the principle of equal sovereignty and self-determination.[1604] Those principles promote countries' right to develop their political, economic, legal, and cultural characteristics themselves without the intervention of other countries.[1605]

Different societies in different jurisdictions may have unique perspectives regarding what is considered a desirable or undesirable act that can justifiably be prohibited by national criminal law.[1606] One community may prohibit consuming marijuana, while others will allow it under certain conditions or without conditions. In addition, there is no uniformity in how criminal offences are designed. This may be explained by criminal law theories relying on social norms, which may differ between jurisdictions.[1607] Either way, transnational cartels should be understood in the context of the fact that different states have different approaches regarding prohibiting and

[1601] Feinberg, The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing, *supra* note 756, at 333.

[1602] See particularly Hart, Immorality and Treason, *supra* note 787, at 83; Hart, Law, liberty and morality, *supra* note 787; Harcourt, The Collapse of the Harm Principle, *supra* note 745, at 125; Green, Lying, Cheating, and Stealing, *supra* note 745, at 42- 43.

[1603] Feinberg, The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing, *supra* note 756, at 333- 338.

[1604] Articles 1 & 2 to the United Nations Charter, *supra* note 179; See also above subchapter 2.1.1. "Rightful membership."

[1605] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 35; Fidler, Revolt Against or From Within the West? TWAIL, *supra* note 717, at 39- 40.

[1606] Broude & Teichman, Outsourcing and Insourcing Crime: The Political Economy of Globalized Criminal Activity, *supra* note 117, at 813; Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 423.

[1607] OECD, Criminalisation of Cartels and Bid Rigging Conspiracies: A Focus on Custodial Sentence, *supra* note 18, at 13.

criminalizing them. This dynamic is not unusual in the transnational crime domain, which can be based on specific jurisdiction policy.[1608]

Still, the accumulating interest of many jurisdictions worldwide and the dedicated attention of the major international organizations indicate a growing interest in prohibiting transnational cartels under international mechanisms, be they suppression conventions or effective soft law. The wide consensus to prohibit transnational cartels and the strong criminal law justifications to punish such conduct, however, do not clearly answer which sanction is required to be used. This calls for a *third* stage of analysis based on sentencing theories.

The main sentencing approaches are retributivism, which supports justice considerations, and utilitarianism, which focuses on preventing future crimes. On theoretical grounds, it is difficult to determine which sentencing theories fit all societies worldwide, as with the challenges of choosing a specific criminal law theory. It is a matter for each society to choose, not one of international law. The retributivism theory, however, seems to have less to do with punishing foreign citizens unconnected to the victim society. As discussed, retributivism is based on fair interaction among society's members or punishment of the offender for moral reasons, with the aim of censuring that individual. Those considerations are less relevant when it comes to punishing a foreign citizen. Utilitarianism has no such conflict, as its main aim is to use punishment as an instrument to prevent mischief, regardless of who commits the offence. Therefore, punishment against transnational cartels, and transnational crimes in general, is typically based on deterrence justifications rather than justice considerations.[1609]

[1608] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 24.
[1609] Boister, An Introduction to Transnational Criminal Law, *supra* note 39, at 422 & 424.

None of the theoretical sentencing arguments, however, determine that the sanction must be a criminal sanction. General deterrence carries no preference for the kind of sanction as long as it deters the conduct, while retributivism approaches usually rely on the proportionality principle to determine the type of sanction. Nonetheless, retributivism and utilitarianism provide a framework for determining the preferable sanction.

According to general deterrence, the relevant considerations are practical in nature. Based on such considerations, monetary sanctions, whether criminal or administrative, seem to be insufficient to deter transnational cartels due to their high profit and low probability of exposure. In those circumstances, a strong argument based on practical considerations supports imprisonment as the primary sanction for effective deterrence against transnational cartels.

The retribution argument also supports imprisonment based on proportionality grounds. Transnational cartels deserve censure and hard treatment proportional to the severity of the crime and comparable to that given for similar crimes in the same jurisdiction. Such crimes include tax evasion, money laundering, theft, and other business fraud. Those economic crimes, however, are typically more limited in their effect on the economy than transnational cartels', which are usually conducted with a higher volume of activity and have a broader economic effect. In any case, treating transnational cartels less severely than other economic crimes is unjustified. Thus, if the specific society treats economic crimes with criminal sanctions, then there are more robust justifications for treating transnational cartels with criminal sanctions as well.

The appropriate sanction against cartels remains a historical, political, social, and economic

question for each jurisdiction.[1610] From a deterrence perspective, similar rules and sanctions can work differently in different societies. One example is the acceptance of the competition concept in a society and the severity of the sanction. If the competition concept fits a society's values, the sanction for violating the rule can be moderate and still be effective because the general public will typically obey the law. On the other hand, if the competition concept is far from society's values, it may require a more severe sanction to achieve an adequate enforcement level.[1611] From the retributivist perspective, it is evident from different state views that the sanction depends on each society's social background and norms.[1612] At the same time, imprisonment for transnational cartels can be perceived as inconsistent with society's social and legal norms.[1613]

Except for about 35 countries, most states worldwide address hardcore cartels outside the realm of criminal law.[1614] This includes the EU competition authority, one of the largest economic centres in the world, which acts against hardcore cartels by applying administrative sanctions.[1615] It should be mentioned, however, that the European Commission has already expressed that imprisonment against an individual is desirable for deterrence purposes, but it acknowledges that there is no broad consensus among the European member states on this sanction.[1616]

[1610] William E. Kovacic "Competition Policy and Cartels: The Design of Remedies" in Katalin J. Cseres, Maarten Pieter Schinkel, Floris O.W. Vogelaar, (eds.) *Criminalization of Competition Law Enforcement* (Elgar Publishing, 2006) 41, at 41.

[1611] Alvarez & Horna, Implementing Competition Law and Policy in Latin America, *supra* note 550, at 95.

[1612] OECD, Cartels: Sanctions Against Individuals (2007), *supra* note 844, at 36- 46.

[1613] OECD, Sanctions in Antitrust Cases-Background Paper by the Secretariat, *supra* note 725, at 6 & 32; OECD, Review of the 1998 OECD Recommendation Concerning Effective Action against Hard Core Cartels, (2019), *supra* note 14, at 66; OECD, OECD Competition Trends 2022, *supra* note 74, at 15, 68 & Figure 7.14; Wirz, Imprisonment for Hard Core Cartel Participation, *supra* note 613, at 109.

[1614] Shaffer, Criminalizing Cartels: A Global Trend, *supra* note 21, at 305.

[1615] The Treaty on the Function of the European Union 2007, Articles 101, *supra* note 509; see an overview at Connor, Global Antitrust Prosecutions of International Cartels, *supra* note 37, at 583; Wils, Is Criminalization of EU Competition Law the Answer? *supra* note 1244; OECD, Cartels: Sanctions Against Individuals (2007), *supra* note 844, at 42- 43.

[1616] OECD, Cartels: Sanctions Against Individuals (2007), *supra* note 844, at 42- 43.

Accordingly, at the end of the day, it is a matter of each jurisdiction's decision about how to deal with transnational cartels. Still, this thesis removes some of the ambiguity associated with criminal enforcement against transnational cartels and recognizes the criminal character of transnational cartels based on several well-established criminal law theories. Furthermore, it offers a framework for determining the desirable sanction against those cartels and suggests a strong argument in favour of imprisonment based on retributivism and general deterrence, which countries are advised to adopt if it aligns with their legal systems.

The thesis used three stages of analysis. The first stage focused on international law. The second stage focused on national criminal law, and the third stage focused on sentencing theories. This three-stage analysis led to the conclusion that imprisonment, which can be imposed as punishment against transnational cartels through criminal procedures alone, is a recommended sanction against transnational cartels. Therefore, the answer to the thesis question is that transnational cartels should be criminalized and suppressed through the criminal sanction of imprisonment.

Bibliography

Legislation

Supranational

Common Market for Eastern and Southern Africa, COMESA Competition Regulations (2004), online: https://comesacourt.org/wp-content/uploads/2020/01/COMESA-Competition-Regulations-December-2004.pdf

East African Community Competition Act (2006), online: https://www.eacompetition.org/laws/category/competition-act

European Union, Charter of Fundamental Rights of the European Union 2012/C 326/02 (7 December 2000 and 1 December 2009), online: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT

European Union, Council Regulation (EC) No 1/2003 (2003), online: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32003R0001

Rome Statute of the International Criminal Court (1998), online https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf

Statute of the International Court of Justice (1945), online: https://www.icj-cij.org/statute#:~:text=1.,exercises%20civil%20and%20political%20rights

United Nations Charter (1945), online: https://www.un.org/en/about-us/un-charter/full-text

World Trade Organization (WTO), General Agreement on Tariff and Trade (GATT) (1994), online: https://www.wto.org/english/docs_e/legal_e/gatt47.pdf

World Trade Organization (WTO), General Agreement on Trade in Services (GATS) (1994), online: https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm

World Trade Organization (WTO), Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (1994), online: https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm

Canada

Charter of Rights and Freedoms, Part I of the Constitution Act, 1982

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

Criminal Code, R.S.C., 1985, c. C-46

Interpretation Act, R.S. 1985, c. I-21

Income Tax Act R.S.C., 1985, c. 1 (5th Supp.)

Foreign Extraterritorial Measures Act R.S.C., 1985, c. F-29

Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24

Other jurisdictions

(England) Sentencing Act 2020

(Israel) Penal Law-1977

(Israel) Economic Competition Law, 5748-1988

(New Zealand) Sentencing Act 2002

(U.S.) Sherman Antitrust Act 1890, Title 15 to the United States Code

Treaties/ Conventions

African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (is not in force), online: https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights

Andean Community, Decision 608 on the Rules for the Protection and Promotion of Competition in the Andean Community (normativa andina) (2005), online: http://www.sice.oas.org/trade/junac/decisiones/dec608s.asp

Canada- United States- Mexico Agreement (CUSMA) (2019), online: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/index.aspx?lang=eng

Canada-Costa Rica Free Trade Agreement (2002), online: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/costa_rica/fta-ale/background-contexte.aspx?lang=eng

Caribbean Community, Revised Treaty of Chaguaramas Establishing the Caribbean Community, CARICOM Single Market and Economy (2001), online: https://caricom.org/treaties/revised-treaty-of-chaguaramas-establishing-the-caricom-including-csme/

Community of Central Africa, Treaty Establishing the Economic and Monetary Community of Central Africa (1999), online: https://www.wipo.int/wipolex/en/treaties/details/296

Economic Community of West African States (ECOWAS) Revised Treaty (2010), online: https://ecowas.int/wp-content/uploads/2022/08/Revised-treaty-1.pdf; Supplementary Act A/SA.1/06/08, online: https://ecowas.int/wp-content/uploads/2022/09/Regional-Competition-policy-Framework.pdf

European Union, The Treaty on the Function of the European Union 2007 (2007; entered into force on 1 December 2009,) C 326/342, online: https://eur-lex.europa.eu/EN/legal-content/summary/treaty-on-the-functioning-of-the-european-union.html#:~:text=The%20TFEU%20is%20one%20of,details%20of%20the%20EU%20institutions; European Union, Consolidated Versions of the Treaty on the Functioning of the European Union (2016/C 202/01), online: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12016ME%2FTXT;

European Convention of Human Rights (ECHR) (1950), online: https://www.echr.coe.int/documents/d/echr/convention_ENG

EU-Chile Interim Trade Agreement (2022), online: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/text-agreement_en

EU-Canada Comprehensive Economic and Trade Agreement (2016), online: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/canada/eu-canada-agreement_en

EU-Mexico Economic Partnership, Political Coordination and Cooperation Agreement (1997), online: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mexico_en

EU-Israel Association Agreement (1995), online: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/israel_en

Eurasian Economic Union, Treaty on the Eurasian Economic Union (2015), online copy from the WTO website: https://www.wto.org/english/thewto_e/acc_e/kaz_e/wtacckaz85_leg_1.pdf

HCCH, Hague Convention on the Recognition and Enforcement of Foreign Judgements in Civil or Commercial Matters (2019), online: https://assets.hcch.net/docs/806e290e-bbd8-413d-b15e-8e3e1bf1496d.pdf

The Southern Common Market (MERCOSUR), Protocol of the Defense of Competition (1996), version in English online: http://www.ftaa-alca.org/Wgroups/WGCP/English/cpa/cpa3_e.asp

United Nations, Paris Agreement (12 December 2015; entered into force on 4 November 2016), online: https://unfccc.int/sites/default/files/english_paris_agreement.pdf

United Nations, Convention against Transnational Organized Crime, General Assembly Resolution 55/25 (15 November 2000; entered into force on 29 September 2003), online: https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf;

United Nations, International Convention for the Suppression of the Financing of Terrorism (15 December 1997; entered into force on 10 April 2002), online: https://treaties.un.org/doc/db/terrorism/english-18-11.pdf

United Nations, Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (20 December 1988; entered into force on 11 November 1990), online: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=VI-19&chapter=6

United Nations, International Covenant on Civil and Political Rights, - General Assembly resolution 2200A (XXI) (16 December 1966; entered into force on 23 March 1976), online: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights;

United Nations, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984; entered into force on 26 June 1987), online: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading

United Nations, International Convention on the Suppression and Punishment of the Crime of Apartheid (30 November 1973; entered into force on 18 July 1976), online: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-7&chapter=4&clang=_en

United Nations, Universal Declaration of Human Rights, - General Assembly resolution 217 A (10 December 1948), online: https://www.un.org/en/about-us/universal-declaration-of-human-rights

Vienna Convention on the Law of Treaties (23 May 1969; entered into force on 27 January 1980), online: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

West African Monetary and Economic Union, Treaty of the West African Monetary and Economic Union (WAEMU) (1994), online: http://www.uemoa.int/en/amended-treaty

Jurisprudence

Supranational

International Centre for Settlement of Investment Disputes, United Parcel Service of America Inc. v. Government of Canada, (2002), ICSID Case No. UNCT/02/1, online: https://www.italaw.com/sites/default/files/case-documents/ita0884.pdf

International Court of Justice, Islamic Republic of Iran v. United States of America (2023), ICJ General list No 164, online: https://www.icj-cij.org/case/164

International Court of Justice, Equatorial Guinea v. France (2018), ICJ General List No 163 (Preliminary Objections), online: www.icj-cij.org/files/case-related/163/163-20180606-JUD-01-00-EN.pdf

International Court of Justice, Belgium v. Senegal (2012), ICJ General List No 144, online: www.icj-cij.org/docket/files/144/17064.pdf

International Court of Justice, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (1986), ICJ Reports 1986, online: https://www.icj-cij.org/public/files/case-related/70/070-19860627-JUD-01-00-EN.pdf

International Court of Justice, North Sea Continental Shelf (Federal Republic of Germany, Denmark; Federal Republic of Germany/Netherlands) (1969), ICJ Reports 1969, online: https://www.icj-cij.org/sites/default/files/case-related/52/052-19690220-JUD-01-00-EN.pdf

Nazi Conspiracy and Aggression: Opinion and Judgment (The Nuremberg Trials) (Washington, United States Government Printing Office, 1947), online: https://www.jewishvirtuallibrary.org/the-nuremberg-trials

Permanent Court of International Justice, Lotus case, The Case of the S.S. Lotus, France v. Turkey (1927), PCIJ Judgement N. 9, online: https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_A/A_10/30_Lotus_Arret.pdf

Opinions/Decisions

International Court of Justice, Western Sahara, Advisory Opinion, [1975] ICJ Rep 39, online: https://www.icj-cij.org/case/61

International Criminal Court, Situation in the State of Palestine ICC-01/18, online: https://www.icc-cpi.int/palestine

International Criminal Court, Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine (3 March 2021), online: https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-respecting-investigation-situation-palestine

United Nations, Status of Palestine in the UN/non-member observer State status – GA resolution, Resolution of the General Assembly 67/19 (29 November 2012), online: https://www.un.org/unispal/document/auto-insert-187149/

United Nations, The General Assembly Resolution Number 35/63 Restrictive business practices, (5 December 1980), online: https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/390/82/IMG/NR039082.pdf?OpenElement

United Nations, Committee on Information from Non-Self-Governing Territories, *Report of the Committee on Information from Non-Self-Governing Territories*, UN General Assembly, 18th Sess, Supp No 14, UN Doc A/5514 (1963) Annex III, online: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N63/149/40/PDF/N6314940.pdf?OpenElement.

World Trade Organization, General Council Decision, Doha Development Agenda WT/L/579 1(g) (1 August 2004), online: https://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm

Canada

R. v. Canada Bread Company Limited, 2023 ONSC 3790

Mohr v National Hockey League, 2022 FCA 145

Rakuten Kobo Inc v. Canada (Commissioner of Competition), 2018 FC 64

Guindon v. Canada, 2015 SCC 41

R. c. Pétroles Global Inc., 2013 QCCS 4262

R. v. Maxzone Auto Parts (Canada) Corp., 2012 FC 1117

Martineau v. M.N.R., 2004 SCC 81

R. v. Nova Scotia Pharmaceutical Society, 1992 2 SCR 606

R. v. Wigglesworth, 1987 2 SCR 541

R. v. Libman, 1985 2 SCR 178

European Area

EFTA Court, Ski Taxi Ski SA v Staten v. The Norwegian Government, represented by the Competition Authority, Case E-3/16 (2016), online: https://eftacourt.int/wp-content/uploads/2019/01/3_16_Judgment_EN.pdf?x97696

European Court of Human Rights A. Menarini Diagnostics Srl v. Italy, Case 43509/08 (2011), online: file:///C:/Users/leyad061/Downloads/002-385.pdf

European Court of Human Rights, Jussila v. Finland, Case 73053/01 (2006)

European Court of Human Rights, Société Stenuit v. France, Case 11598/85 (1992), online: file:///C:/Users/leyad061/Downloads/001-57760.pdf

European Court of Human Rights, Engel and others v. Netherlands, Joined Cases 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (1976), online: https://hudoc.echr.coe.int/tur#{%22itemid%22:[%22001-57479%22]}

The Court of Justice of the European Union- Grand Chamber Dansk Rørindustri a.o. v. Commission, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P, C-213/02 P, (2005), online: https://curia.europa.eu/juris/liste.jsf?language=en&num=C-189/02

The Court of Justice of the European Union- Fourth Chamber, Archer Daniels Midland v. Commission, Case T-224/00, ECR II-2597, (2003), online: https://curia.europa.eu/juris/liste.jsf?language=en&num=T-224/00

The Court of Justice of the European Union- Fourth Chamber, SGL Carbon v. Commission, C-328/05 P (2007), online: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-328/05; the opinion was approved by

Judgment of the Court at SGL Carbon v. Commission, C-328/05 P (CJEU 10 May 2007), available online <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-328/05>

The Court of Justice of the European Union- Third Chamber, British Plasterboard v. Commission, Case T-53/03, (2008), online: https://curia.europa.eu/juris/document/document.jsf;jsessionid=D2BC8DFA5315162F503C53118BC3390C?text=&docid=67378&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2422916

The Court of Justice of the European Union- Third Chamber, Competition Authority v. Beef Industry Development Society, Case C-209/07 (2008), online: https://curia.europa.eu/juris/liste.jsf?language=en&num=C-209/07

United States

United States v. Jindal, et al., No. 4:20-cr-00358 (2021), online: https://fingfx.thomsonreuters.com/gfx/legaldocs/gkvlgdrjgpb/USA-mazzant-order-2021-11-29.pdf

United States v. G4S Secure Solutions NV, Information, Case 1:21- CR-00432 (2021), online: https://www.justice.gov/opa/press-release/file/1406351/download

Verizon Communications v. Law Offices of Curtis v. Trinko, LLP, 540 US 398 (2003), online: https://supreme.justia.com/cases/federal/us/540/398/

Secondary Sources: Books

Ashworth, Andrew & Jeremy Horder. *Principles of Criminal Law* (7ed., Oxford University Press, 2013)

Ashworth, Andrew & Julian Roberts (eds.). *Sentencing Guidelines: Exploring the English Model* (Oxford University Press, 2013)

Bentham, Jeremy. *An Introduction to the Principles of Morals and Legislation* (1789): in J.H. Burns and H.L.A. Hart (eds.) *The Collected Works of Jeremy Bentham: An Introduction to the Principles of Morals and Legislation* (Clarendon Press, 1996)

Boister, Neil. *An Introduction to Transnational Criminal Law* (2nd ed., Oxford University Press, 2018)

Clark, Ian. *Legitimacy in International Society* (Oxford University Press, 2005)

Currie, Robert and Joseph Rikhof. *International and Transnational Criminal Law* (3rd ed., Irwin Law Inc., 2020)

Duff, RA. *Punishment, Communication, and Community* (Oxford University Press, 2001)

Frase, Richard S. *Just Sentencing: Principles and Procedures for a Workable System, Studies in Penal Theory and Philosophy* (Oxford University Press, 2013)

Feinberg, Joel. *The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing* (Oxford University Press, 1990)

———. *The Moral Limits of the Criminal Law Volume 3: Harm to Self* (Oxford University Press, 1989)

———. *The Moral Limits of the Criminal Law Volume 2: Offense to Others* (Oxford University Press, 1988)

———. *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (Oxford University Press, 1987)

Franck, Thomas. *Fairness in International Institutions* (Oxford University Press, 1997)

Gal, Michal S. *Competition Policy for Small Market Economies* (Harvard University Press, 2003)

Gallant, Kenneth S. *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press, 2008)

Green, Stuart P. *Lying, Cheating, and Stealing: A Moral Theory of White- Collar Crime* (Oxford University Press, 2006)

Hart, H.L.A. *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd ed., Oxford University Press, 2008)

———. *Law, liberty and morality* (Stanford University Press, 1963)

Honderich, Ted. *Punishment: The Supposed Justifications* (Pluto Press, 2006)

Locke, John. *Second Treatise of Government* (Raleigh, NC, 1994)

Manning, Morris, Alan W. Mewett & Peter Sankoff. *Criminal Law* (5th ed., LexisNexis Canada Inc. 2015)

Morris, Norval, & Michael Tonry. *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* (Oxford University Press, 1990)

Noonan, Chris. *The Emerging Principles of International Competition Law* (Oxford University Press, 2008)

Rousseau, Jean Jacques. *Social Contract: Or, Principles of Political Law* (New York: Peter Eckler., 1893).

Ripstein, Arthur. *Equality, Responsibility, and the Law* (Cambridge University Press, 2001)

Sarat, Austin & Patricia Ewick (eds.). *The Handbook of Law and Society* (Wiley-Blackwell, 2015)

Simmons, John. A. *Moral Principles and Political Obligations* (Princeton University Press, 1979)

Stewart, James G. *Corporate War Crimes: Prosecuting the Pillage of Natural Resources* (Open Society Institute, 2011)

Stuart Mill, John. *On Liberty* (London, 1859)

Viotti, Paul R., & Mark V. Kauppi. *International Relations Theory* (6th ed., Rowman & Littlefield Publishers, 2019)

von Hirsch, Andrew, Andrew Ashworth & Julian Roberts (eds.). *Principled Sentencing: Readings on Theory and Policy* (3rd ed., Hart Publishing, 2009)

von Hirsch, Andrew & Andrew Ashworth (eds.). *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005)

Whelan, Peter. *The Criminalization of European Cartel Enforcement: Theoretical, Legal, and Practical Challenges* (Oxford University Press, 2014)

Wolfrum, Rüdiger &Volker Röben (eds.). *Legitimacy in International Law* (Springer, 2008)

Thirlway, Hugh. *The Sources of International Law* (Oxford University Press, 2014)

Tyhurst, John S. *Canadian Competition Law and Policy* (Irwin, 2021)

Tyler, Tom R. *Why People Obey the Law* (Princeton University Press, 2006)

Secondary Sources: Articles/ Book's chapter

Abbott, Kenneth W. "International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts" (1999) 93:2 The American Journal of International Law 361.

Abbott, Kenneth W., Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, & Duncan Snidal. "The Concept of Legalization" (2000) 54:3 International Organization, 401.

Allan, Joanna. "Natural Resources and Intifada: Oil, Phosphates and Resistance to Colonialism in Western Sahara" (2016) 21:4 The Journal of North African Studies 645.

Alvarez, Ana Maria & Pierre Horna. "Implementing Competition Law and Policy in Latin America: The Role of Technical Assistance" (2008) 83:1 Chicago-Kent Law Review 91.

Amulic, Andrea. "Humanizing the Corporation While Dehumanizing the Individual: The Misuse of Deferred-Prosecution Agreements in the United States" (2017) 116:1 Michigan Law Review 123.

Anderson, Robert D. Anna Caroline Müller & Nivedita Sen. "Competition Policy in WTO

Accessions: Filling in the Blanks in the International Trading System" in Alexei Kireyev & Chiedu Osakwe (eds.) *Trade Multilateralism in the Twenty-First Century* (1st ed. Cambridge University Press, 2017) 299.

Anderson, Robert D. & William E. Kovacic. "Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets" (2009) 18 Public Procurement Law Review 67.

Anderson, Robert D., William E. Kovacic, Anna Caroline Müller & Nadezhda Sporysheva. "Competition Policy, Trade and the Global Economy: An Overview of Existing WTO Elements, Commitments in Regional Trade Agreements, Some Current Challenges and Issues for Reflection" (2019) OECD, DAF/COMP/GF (2019) 11.

Andenaes, Johannes. "The Morality of Deterrence" (1969) 37 University of Chicago Law Review 649.

Arenella, Peter. "Convicting the Morally Blameless: Reassessing the Relationship between Legal and Moral Accountability" (1991-1992) 39 UCLA Law Review 1511.

———. "Character, Choice and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments" (1990) 7 Social Philosophy & Policy 59.

Arslan, Mehmet. "Principal Questions about Administrative Criminal Sanctioning Regimes in the European Convention on Human Rights" (2019) 90:2 Revue Internationale de Droit Pénal (RIDP) 281.

Aydin, Umut & Tim Büthe. "Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits" (2016) 79:4 Law and Contemporary Problems 1.

Basedow, Jurgen. "International Antitrust: From Extraterritorial Application to Harmonization" (2000) 60:4 Louisiana Law Review 1037.

Bayles, Michael D. "Character, Purpose, and Criminal Responsibility" (1982) 1 Law & Philosophy 5.

Beaton-Wells, Caron. "Capturing the Criminality of Hard-Core Cartels: The Australian Proposal" (2007) 31 Melbourne University Law Review 675.

Beaton-Wells, Caron & Christine Parker. "Justifying Criminal Sanctions for Cartel Conduct: A Hard Case" (2013) 1:1 J Antitrust Enforcement 198.

Beaton-Wells, Caron & Julie Clarke. "Deterrent Penalties for Corporate Colluders: Lifting the Bar" (2018) 37:1 University of Queensland Law Journal 107.

Becker, Gary S. "Crime and Punishment: An Economic Approach" (1968) 76:2 Journal of Political Economy 169.

Bell, John. “Legal Research and the Distinctiveness of Comparative Law” in M. Van Hoecke, (eds.) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing, 2011), 155.

Besson, Samantha. “Sovereignty” (2011) in Max Planck Institute for Comparative Public Law and International Law and Oxford Public International Law, online: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1472?prd=EPIL

Bhattacharjea, Aditya. “Who Needs Antitrust? Or Is Developing-Country Antitrust Different? A Historical Comparative Analysis” in Sokol D. Daniel, Thomas K. Cheng & Ioannis Lianos (eds.) *Competition Law and Development* (Stanford, 2013) 52.

———. “The Case for a Multilateral Agreement on Competition Policy: A Developing Country Perspective” (2006) 9:2 Journal of International Economic Law 293.

———. “Export Cartels—A Developing Country Perspective” (2004) 38:2 Journal of World Trade 331.

Bildfell, Connor. “Justice Deferred? Why and How Canada Should Embrace Deferred Prosecution Agreements in Corporate Criminal Cases” (2016) 20:2 Canadian Criminal Law Review 161.

Błachucki, Mateusz. “The Role of Soft Law in Functioning of Supranational Competition Networks” (2019) 1:133 Contemporary Central & East European Law 33.

Boister, Neil. “‘Transnational Criminal Law’?” (2003) 14:5 European Journal of International Law 953.

Bradford, Anu. “Antitrust Law in Global Markets” in Einer R. Elhauge (ed.) *Research Handbook on the Economics of Antitrust Law* (Elgar Publishing, 2012) 283.

———. “International Antitrust Negotiations and the False Hope of the WTO” (2007) 48 Harvard International Law Journal 383.

Broude, Tomer & Doron Teichman. “Outsourcing and Insourcing Crime: The Political Economy of Globalized Criminal Activity” (2009) 62:3 Vanderbilt Law Review 795.

Bryan, Allison. “Does Prison Work for Cartelists? The View from Behind Bars, Interview with Michael O’Kane” (2011) 56:2 Antitrust Bulletin 483.

Buchanan, Allen, & Robert O. Keohane. “The Legitimacy of Global Governance Institutions” (2006) 20:4 Ethics & International Affairs 405.

Budzinski, Oliver. “International Antitrust Institutions” in Roger D. Blair & Daniel D. Sokol (eds.) *The Oxford Handbook of International Antitrust Economics* (Oxford University Press, 2014) 119.

Calvani, Terry. “Cartel penalties and damages in Ireland: criminalization and the case for custodial sentences" in Katalin J. Cseres, Maarten Pieter Schinkel, & Floris O.W. Vogelaar, (eds.)

Criminalization of Competition Law Enforcement (Elgar Publishing, 2006) 270.

Calvani, Terry & Torello H. Calvani. "Cartel Sanctions and Deterrence" (2011) 56:2 Antitrust Bulletin 185.

Capobianco, Antonio & Aranka Nagy. "Developments in International Enforcement Co-operation in the Competition Field" (2016) 7:8 Journal of European Competition Law & Practice 566.

Cassella, Stefan D. "Nature and Basic Problems of Non-Conviction-Based Confiscation in the United States" (2019) 90:2 Revue Internationale de Droit Pénal (RIDP) 195.

Cavanagh, Edward D. "Whatever Happened to Quick Look?" (2017) 29 University of Miami Business Law Review 39.

Cejnar, Leela & Rachel Burgess. "The Globalization of Competition Law: Yes or No?" in Duns John, Arlen Duke & Brendan Sweeney (eds.) *Comparative Competition Law* (Elgar Publishing, 2015) 9.

Christopher, Russell L. "Deterring Retributivism: The Injustice of "Just" Punishment" (2002) 96:3 Northwestern University Law Review 843.

Coffee, John C. "'No Soul to Damn: No Body to Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment" (1981) 79:3 Michigan Law Review 386.

Collins Hoffman, Pierre-Christian & Guy Pinsonnault. "The Criminal Liability of Organizations for Economic Crimes" (2014) 27:1 Canadian Competition Law Review 79.

Combe, Emmanuel & Constance Monnier. "Fines Against Hard Core Cartels in Europe: The Myth of Overenforcement" (2011) 56:2 Antitrust Bulletin 235.

Connor, John M. "The Private International Cartels (PIC) Data Set: Guide and Summary Statistics, 1990- July 2016 (Revised 2nd Edition)" (2016), SSRN, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2821254

———. "Global Enforcement Directed at International Cartels: A Concise Introduction and Summary" (2016) OECD's Global Forum on Competition: Sanctions in Antitrust Case, on 1-2 December 2016. DAF/COMP/GF(2016)9, online: https://one.oecd.org/document/DAF/COMP/GF(2016)9/en/pdf

———. "Problems with Prison in International Cartel Cases Symposium: Cartel Penalties: Effective Deterrents or License Fees" (2011) 56:2 Antitrust Bulletin 311.

———. "The Impact of International Cartels" in Albert A. Foer, & Jonathan W. Cuneo (eds.) *The International Handbook on Private Enforcement of Competition Law*, (Elgar Publishing, 2010) 12.

———. "Global Antitrust Prosecutions of International Cartels: Focus on Asia" (2008) 31:4 World Competition 575.

———. “Latin America and the Control of International Cartels” (2008) (conference paper) Unpublished, online: https://www.researchgate.net/publication/269811374_Latin_America_and_the_Control_of_International_Cartels

———. “The Great Global Vitamins Conspiracy: Sanctions and Deterrence” (2008) SSRN, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103604

———. “Optimal Deterrence and Private International Cartels” (2006) SSRN, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103598

———. “Extraterritoriality of the Sherman Act and Deterrence of Private International Cartels” (2005) SSRN, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=611948

Connor, John M. & Robert H. Lande. “The Size of Cartel Overcharges: Implications for U.S. and EC Fining Policies” (2006) 51 Antitrust Bulletin 983.

Czako, Judith M. “The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices Recent Development” (1981) 13 Law and Policy in International Business 313.

Davidow, Joel. “The UNCTAD Restrictive Business Practice Code” (1979) 13 The International Lawyer 587.

Davis, Michael. “How to Make the Punishment Fit the Crime” (1983) 93:4 Ethics 726.

Davison, Leigh & Debra Johnson. “An Exploration of the Evolution of the EU’s Twin-Track Approach to the Achievement of Its International Competition Policy Goals” (2015) 36:1 Liverpool Law Review 73.

De Leon, Ignacio L. “What Features Measure Economic Competition in Developing Countries” in Michal S. Gal, Mor Bakhoum, Josef Drexl, Eleanor M. Fox, Walter J. Derenberg & David J. Gerber (eds.) *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Elgar Publishing, 2015) 31.

Devlin, Patrick. “Morals and the Criminal Law” in Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1965) 6.

Doig, Alan. “Non-conviction Financial Sanctions, Corporate Anti-Bribery Reparation and their Potential Role in Delivering Effective Anti-Corruption Pay-Back: The Emerging UK Context” in Liz Campbell & Nicholas Lord (eds.) *Corruption in Commercial Enterprise: Law, Theory and Practice* (London: Taylor & Francis, 2018) 257.

Drexl, Josef. “International Competition Policy after Cancún: Placing a Singapore Issue on the WTO Development Agenda” (2004) 27:3 World Competition 419.

Duff, RA. “Crime, Prohibition, and Punishment” (2002) 19:2 J Applied Philosophy 97.

———. “Harms and Wrongs” (2001) 5:1 Buffalo Criminal Law Review 13.

Dworkin, Gerald. “Devlin Was Right: Law and the Enforcement of Morality” (1998) 40:3 William & Mary Law Review 927.

Evenett, Simon J. “Competition Law and the Economic Characteristics of Developing Countries” in Michal S. Gal, Mor Bakhoum, Josef Drexl, Eleanor M. Fox, Walter J. Derenberg & David J. Gerber (eds.) *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Elgar Publishing, 2015) 15.

Evenett, Simon J. Margaret C. Levenstein & Valerie Y. Suslow. “International Cartel Enforcement: Lessons from the 1990s” (2001) 24:9 World Economy 1221.

Ezrachi, Ariel & Jiri’ Kindl. “Cartels as Criminal? The Long Road from Unilateral Enforcement to International Consensus” in Caron Beaton-Wells & Ariel Ezrachi (eds.) *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011.) 239.

Feinberg, Joel. “The Right to Disobey” (1989) 87:6 Michigan Law Review 1690.

———. “Some Unswept Debris from the Hart-Devlin Debate” (1987) 72 Syntheses 249.

Ferran, Eilis. “Corporate Attribution and the Directing Mind and Will” (2011) 127 Law Quarterly Review 239.

Fidler, David P. “Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law” (2003) 2:1 Chinese Journal of International Law 29.

Fikentscher, Wolfgang. “The Draft International Antitrust Code (DIAC) in the Context of International Technological Integration - The Institutional and Jurisdictional Architecture” (1996) 72:2 Chicago-Kent Law Review 533.

Finkelstein, Claire. “Is Risk a Harm” (2002) 151 Pennsylvania Law Review 963.

———. “Positivism and the Notion of an Offense” (2000) 88:2 California Law Review 335.

Fora, Andreea-Florina. “Regional Trade Agreements and Competition Policy. Case Study: EU, ASEAN and NAFTA” (2014) 23:1 Annals of the University of Oradea 86.

Fox, Eleanor M. “Competition Policy: The Comparative Advantage of Developing Countries” (2016) 79:4 Law and Contemporary Problems 69.

———. “Antitrust Without Borders: From Roots to Codes to Networks” (2015) E15 INITIATIVE paper, online http://e15initiative.org/wp-content/uploads/2015/09/E15-Competition-Fox-FINAL.pdf

———. “Linked-In: Antitrust and the Virtues of a Virtual Network” (2009) 43:1 The International Lawyer 151.

———. “International Antitrust and the Doha Dome” (2003) 43 Virginia Journal of International

Law 911.

———. “Harnessing the Multinational Corporation to Enhance Third World Development - The Rise and Fall and Future of Antitrust as Regulator” (1988) 10 Cardozo Law Review 1981.

Gal, Michal S. “Regional Competition Law Agreements: An Important Step for Antitrust Enforcement” (2010) 60 Toronto Law Journal 239.

———. “Free Movement of Judgments: Increasing Deterrence of International Cartels through Jurisdictional Reliance” (2010) 51 Virginia Journal of International Law 57.

———. “Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and Developing Jurisdictions” (2009) 33 Fordham International Law Journal 1.

———. “The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries” (2005), SSRN, online: https://ssrn.com/abstract=665181

Gardner, James A. “The Sociological Jurisprudence of Roscoe Pound” (1961) 7:1 Villanova Law Review 1.

Gerber, David J. “Adapting the Role of Economics in Competition Law- A Developing Country Dilemma” in Michal S. Gal, Mor Bakhoum, Josef Drexl, Eleanor M. Fox, Walter J. Derenberg & David J. Gerber (eds.) *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Elgar Publishing, 2015) 248.

Ghanayim, Khalid. “Alternative Investigation and Sanctioning Systems for Corporate and Corporate-Related Crime in Israel” (2019) 90:1 Revue Internationale de Droit Pénal (RIDP) 165.

Gifford, Daniel J. “The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry” (1996) 6:1 J Minnesota Global Trade 1.

Goldstein, Abraham S. “White-Collar Crimes and Civil Sanctions” (1991) 101 Yale Law Journal 1895.

Gray, Anthony. “Criminal Sanctions for Cartel Behaviour” (2008) 8:2 QUT Law Review 364.

Green, Stuart P. “Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights,” (2002) 54 Hastings Law Journal 167.

Greenawalt, Kent. “Promise, Benefit, and Need: Ties that Bind Us to the Law” (1984) 18 Georgia Law Review 727.

Guzman, Andrew. “Competition Law and Cooperation: Possible Strategies” in Guzman, Andrew T. *Cooperation, Comity, and Competition Policy* (Oxford University Press, 2011) 345.

———. “The Case for International Antitrust” (2004) 22 Berkeley Journal of International Law 355.

———. “Is International Antitrust Possible?” (1998) 73 NYU Law Review 1501.

Harcourt, Bernard E. “The Collapse of the Harm Principle” (1999) 90:1 Journal of Criminal Law and Criminology 109.

Harding, Christopher. “The System of EU Antitrust Law: Characteristics, Safeguards, and Differences from Traditional Criminal Law” (2019) 90:2 Revue Internationale de Droit Pénal (RIDP) 85.

———. “Business Cartels as a Criminal Activity: Reconciling North American and European Models of Regulation” (2002) 9:4 Maastricht Journal of European and Comparative Law 393.

Hart, H.L.A. “Positivism and the Separation of Law and Morals” in Ronald Dworkin (ed.) *The Philosophy of Law* (Oxford University Press, 1977) 17.

———. “Immorality and Treason” in Ronald Dworkin (ed.) *The Philosophy of Law* (Oxford University Press:1977) 83.

———. “Are There Any Natural Rights?” (1955) 64 Philosophical Review 175.

Hayry, Heta. “Liberalism and Legal Moralism: The Hart-Devlin Debate and Beyond” (1991) 4:2 Ratio Juris 202.

Husak, Douglas. “The Criminal Law as Last Resort” (2004) 24:2 Oxford Journal of Legal Studies 207.

Hilpold, Peter. “Regulating International Competition Issues by Regional Trade Agreements: A Stepping Stone Towards a Plurilateral Trade Agreement?” in Christoph Herrmann, Markus Krajewski & Jörg Philipp Terhechte (eds.) *European Yearbook of International Economic Law (EYIEL), Vol 4 (2013)* (Springer Berlin Heidelberg, 2013) 71.

Hollman, Hugh M., William E. Kovacic & Andrew S. Robertson. “Building Global Antitrust Standards: the ICN’s Practicable Approach” in Ariel Ezrachi (ed.) *Research Handbook on International Competition Law,* (Elgar Publishing, 2012) 89.

Hovenkamp, Herbert. “Whatever Did Happen to the Antitrust Movement?” (2018) 94(2) Notre Dame Law Review 583.

Indig, Tamar and Michal S. Gal, “Lifting the Veil: Rethinking the Classification of Developing Economies for Competition Law and Policy” in Michal S. Gal, Mor Bakhoum, Josef Drexl, Eleanor M. Fox, Walter J. Derenberg & David J. Gerber (eds.) *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Elgar Publishing, 2015) 51.

Jolls, Christine. Cass R. Sunstein, and Richard Thaler. “A Behavioral Approach to Law and Economics” (1998) 50 Stanford Law Review 1471.

Jones, Alison & Rebecca Williams. “The UK Response to the Global Effort Against Cartels: Is Criminalization Really the Solution?” (2014) 2:1 J Antitrust Enforcement 100.

Joshua, Julian M., Peter D. Camesasca & Youngjin Jung. “Extradition and Mutual Legal Assistance Treaties: Cartel Enforcement’s Global Reach” (2008) 75:2 Antitrust Law Journal 353.

Kahan, Dan M. “Social Meaning and the Economic Analysis of Crime” (1998) 27:2 Journal of Legal Studies 609.

———. “What Do Alternative Sanctions Mean” (1996) 63 Chicago Law Review 591.

Kalman, Laura. “Legal Realism Now” 76:2 California Law Review 465.

Kampouridi, Ioulia “Arguments for the EU-US Convergence and against a Global Merger Control Regime” (2015) 38:1 World Competition 107.

Kerrigan, Laura J. et al. “The Decriminalization of Administrative Law Penalties - Civil Remedies, Alternatives, Policy, and Constitutional Implications Project” (1993) 45 Administrative Law Review 367.

Kovacic, William E. “Competition Policy and Cartels: The Design of Remedies" in Katalin J. Cseres, Maarten Pieter Schinkel, & Floris O.W. Vogelaar (eds.) *Criminalization of Competition Law Enforcement* (Elgar Publishing, 2006) 41.

Lafrance, Sebastien. “India, International Energy Law, and Transboundary” (5 April 2021), Indian Journal of Projects, Infrastructure, and Energy Law (IJPIEL), online: https://ijpiel.com/index.php/2021/04/05/india-international-energy-law-and-transboundary-environmental-harms/

———. “The Reception and Effectiveness of International Fundamental Rights in Some Selected ASEAN States” (2022) conference paper presented in “Legal Cooperation, Harmonization and Unification: An ASEAN Perspective” Melbourne Law School, online: https://law.unimelb.edu.au/centres/alc/news-and-events/legal-cooperation,-harmonization-and-unification-an-asean-perspective-online-conference/papers

Lande, Robert H. & John M. Connor. “Cartel Overcharges and Optimal Cartel Fines” (2008), SSRN, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1285455

Landes, William M. “Optimal Sanctions for Antitrust Violations” (1983) 50 University of Chicago Law Review 652.

Laprévote, François-Charles Sven Frisch, and Burcu Can, “Competition Policy within the Context of Free Trade Agreements” (E15 initiative on Strengthening the Global Trade and Investment System for Sustainable Development, September 2015).

Laprévote, François-Charles. “Competition Policy within the Context of Free Trade Agreements” (17 October 2019) OECD, DAF/COMP/GF(2019)5 online: https://one.oecd.org/document/DAF/COMP/GF(2019)5/en/pdf

Lee, Hwang. “Antitrust Fines in the Era of Globalization” (2016) OECD’s Global Forum on Competition: Sanctions in Antitrust Case, on 1-2 December 2016. DAF/COMP/GF(2016)10,

online: https://one.oecd.org/document/DAF/COMP/GF(2016)10/en/pdf

Lehrer, Christopher Garrett. "Ensuring Competition Law Enforcement Under International Trade Agreements" (2017) 26:2 Transnational Law & Contemporary Problems 449.

Lemaitre, Julieta. "Law and Globalism: Law without the State as Law without Violence" in Austin Sarat & Patricia Ewick (eds.) *The Handbook of Law and Society* (Wiley handbooks in criminology and criminal justice, 2015) 433.

Levenstein, Margaret & Valerie Y. Suslow. "Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy" (2004) 71:3 Antitrust Law Journal 801.

Lianos, Ioannis. "The Contribution of the United Nations to the Emergence of Global Antitrust Law" (2006) 15:2 Tulane Journal of International & Comparative Law 415.

Luchtman, Michiel, "*Ne Bis in Idem* at The Interface of Administrative and Criminal Law Enforcement-Sufficiently Connected in Substance, Time and Space?" (2019) 90:2 Revue Internationale de Droit Pénal (RIDP) 335.

Luna, Erik. "The Overcriminalization Phenomenon: The Politics of Crime" (2004-2005) 54 American University Law Review 703.

Macculloch, Angus. "The Cartel Offence: Defining an Appropriate 'Moral Space'" (2012) 8:1 European Competition Journal 73.

Maher, Imelda. "Competition Law Fragmentation in a Globalizing World" (2015) 40:2 Law & Social Inquiry 553.

Mather, Lynn. "Law and Society" in Robert E. Goodin, *The Oxford Handbook of Political Science* (Oxford University Pres, 2011) 290.

Martyniszyn, Marek. "Export Cartels: Is it Legal to Target your Neighbour? Analysis in Light of Recent Case Law" (2012) 15:1 Journal of International Economic Law 181.

McCorquodale, Robert & Penelope Simons, "Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law" (2007) 70 Modern Law Review 598.

Mitchell, Andrew D. "Broadening the Vision of Trade Liberalisation International Competition Law and the WTO" (2001) 24:3 World Competition 343.

Moore, Michael. "The Moral Worth of Retribution" in Michael Moore, *Placing Blame* (Oxford University Press, 2010) 104.

Murphy, Jeffrie G. "Legal Moralism and Liberalism" (1995) 37:1 Arizona Law Review 73.

Mutua, Makau. “What is TWAIL?” (2000) 94 Proceedings of the Annual Meeting (American Society of International Law) 31.

Ogus, Anthony. “Better Regulation- Better Enforcement” in S. Weatherill (ed.) *Better Regulation* (Hart Publishing, 2007) 107.

Okafor, Obiora Chinedu. “Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?” (2008) 10:4 International Community Law Review 371.

———. “Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective.” (2005) 43:1/2 Osgoode Hall Law Journal 171.

Okane, Michael. “Cartel Enforcement: A Product of Globalisation” in Valsamis Mitsilegas, Peter Alldridge, & Leonidas Cheliotis (eds.) *Globalisation, Criminal Law and Criminal Justice: Theoretical, Comparative and Transnational Perspectives* (Hart Publishing, 2015) 219.

Pacces, Alessio M. & Louis T. Visscher, “Methodology of Law and Economics” (2011) in Bart van Klink, & Sanne Taekema (eds.) *Law and Method: Interdisciplinary Research into Law*, Series Politika No. 4, (Mohr Siebeck, 2011) 85.

Pauwelyn, Joost, Ramses A. Wessel & Jan Wouters. “When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking” (2014) 25:3 European Journal of International Law 733.

Phan, Thanh. “Realism and International Cooperation in Competition Law” (2017) 40:1 Houston Journal of International Law 297.

Pistor, Katharina. “The Standardization of Law and its Effect on Developing Economies” (2002) 50:1 American Journal of Comparative Law 97.

Posner, Richard A. "An Economic Theory of Criminal Law" (1985) 85 Columbia Law Review 1193.

Quaid, Jennifer A. “Making Sense of the Shift in Paradigm on Cartel Enforcement: The Case for Applying a Desert Perspective” (2012) 58:1 McGill Law Journal 149.

Rawls, John. “Obligation and the Duty of Fair Play” in Sidney Hook (ed.), *Law and Philosophy* (NYU Press, 1964) 3.

Reitz, John C. “How to Do Comparative Law” (1998) 46 American Journal of Comparative Law 617.

Reiter, Keramet. “Domains of Policy: Law and Society Perspectives on Punishment and Social Control” in Austin Sarat & Patricia Ewick (eds.) *The Handbook of Law and Society* (Wiley handbooks in criminology and criminal justice, 2015) 228.

Roberts, Julian V. & Oren Gazal-Ayal. “Statutory Sentencing Reform in Israel: Exploring the Sentencing Law of 2012” (2013) 46:3 Israel Law Review 455.

Roberts, Julian V. & Anne Rafferty. “Sentencing Guidelines in England and Wales: Exploring the New Format” (2011) 9 Criminal Law Review 681.

Rosen, Frederick. “Utilitarianism and the Punishment of the Innocent: The Origins of a False Doctrine” (1997) 9:1 Utilitas 23.

Rosi, Elisabetta. “Economic Crimes and Proportionality of Sanctions” (2020) 91 Revue Internationale de Droit Pénal (RIDP) 133.

Runciman, Leslie. “The World Economic Conference at Geneva” (1927) 37:147 The Economic Journal 465.

Satzger, Helmut “Definition and Scope of “Criminal” Sanctions (ESP. for the Application of Specific Safeguards in Criminal Law)” (2019) 90:2 Revue Internationale de Droit Pénal (RIDP) 265.

Shaffer, Gregory, Nathaniel H. Nesbitt & Spencer Weber Waller. “Criminalizing Cartels: A Global Trend?” in Arlen Duke, John Duns & Brendan Sweeney (eds.) Comparative Competition Law, (Edgar Elgar, 2015) 301.

Shaffer, Gregory C. & Mark A. Pollack. “Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance” (2010) 94:3 Minnesota Law Review 706.

Shell, Richard G. “Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization” (1995) 44:5 Duke Law Journal 829.

Simmons, John A. “Consent, Free Choice, and Democratic Government” (1983- 1984) 18 Georgia Law Review 791.

Slaughter, Anne-Marie, Andrew S. Tulumello & Wood Stepan. “International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship” (1998) 92 American Journal of International Law 367.

Slaughter, Anne-Marie, “International Relations, Principal Theories” in Rüdiger Wolfrum (ed.) *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2011)

———. “Global Government Networks, Global Information Agencies, and Disaggregated Democracy” (2003) 24:4 Michigan Journal of International Law 1041.

———. “Liberal International Relations Theory and International Economic Law” (1995) 10 American University International Law Review 717.

Smith, Jeffrey J. “The Taking of the Sahara: The Role of Natural Resources in the Continuing Occupation of Western Sahara” (2015) 27:3 Global Change, Peace & Security 1.

Sokol, Daniel D. “Troubled Waters between U.S. and European Antitrust” (2017) 115 Michigan Law Review 955,

———. “International Antitrust Institutions” in Andrew T. Guzman (ed.) *Cooperation, Comity, and Competition Policy* (Oxford University Press, 2011)187.

———. “Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements” (2008) 83:1 Chicago-Kent Law Review 231.

Steel, Alex. “The Harms and Wrongs of Stealing: The Harm Principle and Dishonesty in Theft” (2008) 31:3 UNSW Law Journal 712.

Steinbaum, Marshall and Maurice E. Stucke. “The Effective Competition Standard: A New Standard for Antitrust” (2020) 87:2 University of Chicago Law Review 595.

Steinbock, Daniel J. “Designating the Dangerous: From Blacklists to Watch Lists” (2006) 30 Seattle University Law Review 65.

Stephan, Andreas. “An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation” (2017) 37:4 Legal Studies 621.

———. “Why Morality Should be Excluded from the Cartel Criminalisation Debate” (2012) 3:2 New Journal of European Criminal Law, 127.

———. “Hear No Evil, See No Evil: Why Antitrust Compliance Programmes May Be Ineffective at Preventing Cartels” (2009) SSRN, online: <http://www.ssrn.com/abstract=1432340>.

———. “Beyond the Cartel Law Handbook: How Corruption, Social Norms and Collectivist Business Cultures Can Undermine Conventional Enforcement Tools” (2008) SSRN, online: <http://www.ssrn.com/abstract=1277205>.

———. “The UK Cartel Offence: Lame Duck or Black Mamba?” (2008) SSRN, online: http://www.ssrn.com/abstract=1310683

Sterett, Susan M. “What is Law and Society?: Definitional Disputes” in Austin Sarat & Patricia Ewick (eds.) *The Handbook of Law and Society* (Wiley handbooks in criminology and criminal justice, 2015) 3.

Stucke, Maurice E. “Morality and Antitrust” (2006) 2006 Columbia Business Law Review 443.

Sweeney, Brendan. “International Governance of Competition and the Problem of Extraterritorial Jurisdiction” in Duns John, Arlen Duke & Brendan Sweeney (eds.) *Comparative Competition Law* (Elgar Publishing, 2015) 345.

Tosi, Justin. “Rethinking the Principle of Fair Play” (2018) 99 Pacific Philosophical Quarterly 612.

Trebilcock, Michael. “An Introduction to Law and Economics” (1997) 23 Monash University Law Review 123.

Valentine, Palmer Vernon. “From Lerotholi to Lando: Some Examples of Comparative Law Methodology” (2005) 53 American Journal of Comparative Law 261

Vogel, Benjamin. “Targeted Sanctions Against Economic Wrongdoing at the UN and EU level” (2019) 90:2 Revue Internationale de Droit Pénal (RIDP) 129.

Waller, Spencer Weber. “The Incoherence of Punishment in Antitrust” (2003) 78 Chicago-Kent Law Review 207.

———. “Neo-Realism and the International Harmonization of Law: Lessons from Antitrust” (1993) 42 Kansas Law Review 557.

Wardhaugh, Bruce. “A Normative Approach to the Criminalisation of Cartel Activity” (2012) 32:3 Legal Studies (Society of Legal Scholars) 369.

Werden, Gregory J. “Sanctioning Cartel Activity: Let the Punishment Fit the Crime” (2009) 5:1 European competition journal 19.

Werden, Gregory J. Scott D. Hammond & Belinda A. Barnett. “Deterrence and Detection of Cartels: Using All the Tools and Sanctions” (2011) 56:2 Antitrust Bulletin 207.

Wolfrum, Rüdiger. “Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations” in Rüdiger Wolfrum & Volker Röben (eds.) *Legitimacy in International Law* (Springer, 2008).

Wood, Diane P. “The Impossible Dream: Real International Antitrust” (1992) 1992 University of Chicago Legal Forum 277.

Wikstrom, Per-Olof H. “Deterrence and Deterrence Experiences: Preventing Crime through the Threat of Punishment.” in *International Handbook of Penology and Criminal Justice* (CRC Press, 2008) 345.

Wils, Wouter P.J. “Optimal Antitrust Fines: Theory and Practice” (2006) 29:2 World Competition 183.

———. “Is Criminalization of EU Competition Law the Answer?” (2005) 28:2 World Competition 117.

Winter, Lorena Bachmaier. “New Crime Control Scenarios and the Guarantees in Non-Criminal Sanctions: Presumption of Innocence, Fair Trial, Rights, and the Protection of Property” (2019) 90:2 Revue Internationale de Droit Pénal (RIDP) 299.

Wirz, Pascal. “Imprisonment for Hard Core Cartel Participation: A Sanction with Considerable Potential” (2016) 28:2 Bond Law Review 89.

Wu, William & Sarah Stirling-Moffet. “Canada Enters into Cooperation Framework with the Competition Enforcement Agencies of the “Five Eyes” Countries” (2020) online: https://mcmillan.ca/Files/225547_Canada_Enters_into_Cooperation_Framework_FINAL.pdf

Young Warren & Claire Browning. “New Zealand’s Sentencing Council” (2008) 4 Criminal Law Review 287.

Other sources

International institutions’ documents

Amnesty International, Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court (Amnesty International, 2017), online: https://www.amnesty.org/en/wp-content/uploads/2021/05/AFR0161372017ENGLISH.pdf

Competition and Markets Authority, G7, 2022 Compendium of Approaches to Improving Competition in Digital Markets (2022), online: https://www.gov.uk/government/publications/2022-compendium-of-approaches-to-improving-competition-in-digital-markets

Competition and Markets Authority, G7, 2021 Compendium of Approaches to Improving Competition in Digital Markets (2021), online: https://www.gov.uk/government/publications/compendium-of-approaches-to-improving-competition-in-digital-markets

International Competition Network (ICN), Framework for the Promotion of the Sharing of Non-Confidential Information, (continued operation), online: https://www.internationalcompetitionnetwork.org/portfolio/non-confidential-information-sharing/

International Competition Network (ICN), Setting of Fines for Cartels in ICN Jurisdictions (2017), online: http://old.internationalcompetitionnetwork.org/uploads/library/doc1127.pdf

International Competition Network (ICN), International Cooperation and Information Sharing (2013), online: https://www.internationalcompetitionnetwork.org/portfolio/international-cooperation/

International Competition Network (ICN), Anti-Cartel Enforcement Manual (2011), online: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_ACEMCaseResolution.pdf

International Competition Network (ICN), Cooperation between Competition Agencies in Cartel Investigations (2007), online: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_Cooperation.pdf

International Competition Network (ICN), Defining Hard Core Cartel Conduct—Effective

Institutions, Effective Penalties, Report Prepared by the ICN Working Group on Cartels (2005), online: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_BuildingBlocks.pdf

Organisation for Economic Co-operation and Development (OECD), OECD Competition Trends 2023, (2023), online: https://www.oecd-ilibrary.org/finance-and-investment/oecd-competition-trends-2023_bcd8f8f8-en

Organisation for Economic Co-operation and Development (OECD), Purchasing Power and Buyers' Cartels, (2022), online: https://www.oecd.org/daf/competition/purchasing-power-and-buyers-cartels-2022.pdf

Organisation for Economic Co-operation and Development (OECD), Purchasing Power and Buyers' Cartels – Note by the United States DAF/COMP/WD (2022)15, (2022), online: https://one.oecd.org/document/DAF/COMP/WD(2022)15/en/pdf

Organisation for Economic Co-operation and Development (OECD), Purchasing Power and Buyers' Cartels – Note by the European Union, DAF/COMP/WD(2022)16, (2022), online: https://one.oecd.org/document/DAF/COMP/WD(2022)16/en/pdf

Organisation for Economic Co-operation and Development (OECD), Purchasing Power and Buyers Cartels – Summaries of contributions, DAF/COMP/WD(2022)62 (2022) online: https://one.oecd.org/document/DAF/COMP/WD(2022)62/en/pdf

Organisation for Economic Co-operation and Development (OECD), OECD Competition Trends 2022 (2022), online: https://www.oecd.org/daf/competition/oecd-competition-trends-2022.pdf

Organisation for Economic Co-operation and Development (OECD), International Co-operation on Competition Investigations and Proceedings: Progress in Implementing the 2014 OECD Recommendation (2022), online: https://www.oecd.org/daf/competition/international-cooperation-on-competition-investigations-and-proceedings-progress-with-2014-recommendation.pdf

Organization for Economic Co-operation and Development (OECD), Recommendation of the Council for OECD Legal Instruments Further Combating Bribery of Foreign Public Officials in International Business Transactions (2021) (OECD/LEGAL/0378) (adopted on 25/11/2009; amended on 25/11/2021), online: https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0378

Organisation for Economic Co-operation and Development (OECD), Criminalisation of Cartels and Bid Rigging Conspiracies – Note by Canada, DAF/COMP/WP3/WD (2020)3 (2020), online: https://one.oecd.org/document/DAF/COMP/WP3/WD(2020)3/en/pdf

Organisation for Economic Co-operation and Development (OECD), Criminalisation of Cartels and Bid Rigging Conspiracies – Note by the United States, DAF/COMP/WP3/WD(2020)12, (2020), at 2 online: https://one.oecd.org/document/DAF/COMP/WP3/WD(2020)12/en/pdf

Organisation for Economic Co-operation and Development (OECD), Criminalisation of Cartels

and Bid Rigging Conspiracies: a Focus on Custodial Sentence, DAF/COMP/WP3(2020)1, (2020) online: https://one.oecd.org/document/DAF/COMP/WP3(2020)1/en/pdf

Organisation for Economic Co-operation and Development (OECD), OECD Competition Trends 2020 (2020) online: http://www.oecd.org/daf/competition/OECD-Competition-Trends-2020.pdf

Organisation for Economic Co-operation and Development (OECD), Recommendation of the Council Concerning Effective Action against Hard Core Cartels (2019), online: https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0452

Organisation for Economic Co-operation and Development (OECD), Review of the 1998 OECD Recommendation Concerning Effective Action against Hard Core Cartels (2019), online: https://www.oecd.org/daf/competition/oecd-review-1998-hard-core-cartels-recommendation.pdf

Organisation for Economic Co-operation and Development (OECD), Regional Competition Agreements- Inventory of Provisions in Regional Competition Agreements DAF/COMP/GF(2018)12, (2018), online: https://one.oecd.org/document/DAF/COMP/GF(2018)12/en/pdf

Organisation for Economic Co-operation and Development (OECD), Regional Competition Agreements: Benefits and Challenges, DAF/COMP/GF(2018)5, (2018), online: https://one.oecd.org/document/DAF/COMP/GF(2018)5/en/pdf

Organisation for Economic Co-operation and Development (OECD), Global Forum on Competition, Competition and Sanctions in Antitrust Cases, (2016), online: https://www.oecd.org/daf/competition/competition-and-sanctions-in-antitrust-cases.htm

Organisation for Economic Co-operation and Development (OECD), Sanctions in Antitrust Cases- Background Paper by the Secretariat, DAF/COMP/GF(2016)6, (2016) online https://one.oecd.org/document/DAF/COMP/GF(2016)6/en/pdf

Organisation for Economic Co-operation and Development (OECD), OECD Recommendation Concerning International Co-operation on Competition Investigations and Proceedings (2014), online: https://www.oecd.org/daf/competition/international-coop-competition-2014-recommendation.htm

Organisation for Economic Co-operation and Development (OECD), "Cartels: Sanctions Against Individuals" (2007) 9:3 OECD Journal of Competition Law and Policy 7.

Organisation for Economic Co-operation and Development (OECD), Hard Core Cartels: Third Report on the Implementation of the 1998 Council Recommendation (2005), Online: https://www.oecd.org/competition/cartels/35863307.pdf

Organisation for Economic Co-operation and Development (OECD), "The Benefits of Competition Law and Policy for Developed and Developing Countries" (2004) 6:1/2 OECD Journal of Competition Law and Policy 40.

Organisation for Economic Co-operation and Development (OECD), Cartel Sanctions against

Individuals DAF/COMP(2004)39, (2003-2004) online: https://www.oecd.org/competition/cartels/34306028.pdf

Organisation for Economic Co-operation and Development, The Objectives of Competition Law and Policy (2003), online http://www.oecd.org/daf/competition/2486329.pdf

Organisation for Economic Co-operation and Development (OECD), Trade and Competition: From Doha to Cancun (2003), online: https://www.oecd-ilibrary.org/industry-and-services/trade-and-competition_9789264102798-en

Organisation for Economic Co-operation and Development (OECD), Recommendation of the OECD Council Concerning Effective Action against Hard Core Cartels (1998), online: http://www.oecd.org/daf/competition/review-of-the-1998-oecd-recommendation-concerning-effective-action-against-hard-core-cartels.htm

Organisation for Economic Co-operation and Development (OECD), Glossary of Industrial Organisation Economics and Competition Law (by RS Khemani & DM Shapiro), (1993), online: https://www.oecd.org/regreform/sectors/2376087.pdf

Princeton Project on Universal Jurisdiction, The Princeton Principles on Universal Jurisdiction (Princeton University, 2001), online: https://lapa.princeton.edu/hosteddocs/unive_jur.pdf

United Nations, General Assembly, International Law Commission, General Principles of Law Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee on First Reading, A/CN.4/L.982 (2023) online: https://documents-dds-ny.un.org/doc/UNDOC/LTD/G23/100/48/pdf/G2310048.pdf?OpenElement

United Nations, General Assembly, International Law Commission, Third Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur, A/CN.4/753 (2022), online: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/321/79/pdf/N2232179.pdf?OpenElement

United Nations, General Assembly, International Law Commission, Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur, A/CN.4/741 (2022), online: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/093/44/pdf/N2009344.pdf?OpenElement

United Nations, General Assembly, International Law Commission, First Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur, A/CN.4/732 (2022), online: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/100/93/pdf/N1910093.pdf?OpenElement

United Nations, General Assembly, Report of the Secretary-General, The Scope and Application of the Principle of Universal Jurisdiction, A/65/181 (2010), online: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N10/467/52/PDF/N1046752.pdf?OpenElement

United Nations, Results of the 2nd Meeting of the Intergovernmental Expert Group to Prepare a Study on Fraud and the Criminal Misuse and Falsification of Identity: Report of the Secretary-

Genera, UN Doc No E/CN.15/2007/8/Add.2 (2007) online: https://digitallibrary.un.org/record/612652?ln=en;

United Nations, Fifth United Nations Congress on the Prevention of Crimes and the Treatment of Offenders (1975), online: https://www.unodc.org/documents/congress/Previous_Congresses/5th_Congress_1975/025_ACONF.56.10_Fifth_United_Nations_Congress_on_the_Prevention_of_Crime_and_the_Treatment_of_Offenders.pdf

United Nations, United Nations Conference on Trade and Employment, Havana Charter for an International Trade Organization UN Doc. E/807 (1948), online: https://www.wto.org/english/docs_e/legal_e/havana_e.pdf

United Nations, United Nations Conference on Trade and Development (UNCTAD), Report on the Working Group on Cross-Border Cartels - UNCTAD Secretariat Note (2021), online: https://unctad.org/system/files/information-document/ccpb_IGECOMP2021_Report_WG_Cross_Border_Cartels_en.pdf

United Nations, United Nations Conference on Trade and Development (UNCTAD), Guiding Policies and Procedures under Section F of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices UNCTAD/DITC/CPLP/MISC/2021/2, (2021) online: https://unctad.org/system/files/official-document/ditccplpmisc2021d2_en.pdf

United Nations Conference on Trade and Development (UNCTAD), Report of the Eighth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices UNCTAD TD/RBP/CONF.9/9 (2020) online: https://unctad.org/system/files/official-document/tdrbpconf9d9_en.pdf

United Nations Conference on Trade and Development (UNCTAD), Implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices: Note by the UNCTAD Secretariat, TD/RBP/CONF.9/3, (2020) online: https://unctad.org/system/files/official-document/tdrbpconf9d3_en.pdf

United Nations Conference on Trade and Development (UNCTAD), International Cooperation under Section F of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices: Adoption of the guiding policies and procedures: Note by the UNCTAD Secretariat, TD/RBP/CONF.9/5 (2020), online: https://unctad.org/meetings/en/SessionalDocuments/tdrbpconf5d1_en.pdf

United Nations Conference on Trade and Development (UNCTAD), Model Law on Competition, TD/RBP/CONF.5/7/Rev.3, (2010; revised on 1 June 2019), online: https://unctad.org/en/Docs/tdrbpconf5d7rev3_en.pdf

United Nations Conference on Trade and Development (UNCTAD), Enhancing International Cooperation in the Investigation of Cross-Border Competition Cases: Tools and Procedures, TD/B/C.I/CLP/44, (2017), online: https://unctad.org/meetings/en/SessionalDocuments/ciclpd44_en.pdf

United Nations, United Nations Conference on Trade and Development (UNCTAD), The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices in United Nations Conference on Trade and Development (UNCTAD), The United Nations Set of Principles and Rules on Competition, TD/RBP/CONF/10/Rev.2, (2000) online: https://unctad.org/en/Pages/DITC/CompetitionLaw/The-United-Nations-Set-of-Principles-on-Competition.aspx

World Bank, Antitrust and Digital Platforms: An analysis of Global Patterns and Approaches by Competition Authorities (2021), online: https://documents1.worldbank.org/curated/en/893381632736476155/pdf/Antitrust-and-Digital-Platforms-An-Analysis-of-Global-Patterns-and-Approaches-by-Competition-Authorities.pdf

World Bank, Fixing Markets, Not Prices: Policy Options to Tackle Economic Cartels in Latin America and the Caribbean, (2021), Online: https://openknowledge.worldbank.org/entities/publication/1456d220-1769-543f-b873-b0102a28ab54

World Bank Group, Breaking Down Barriers: Unlocking Africa's Potential Through Vigorous Competition Policy (2016), online: http://documents.worldbank.org/curated/en/243171467232051787/pdf/106717-REVISED-PUBLIC-Africa-Competition-Report-FINAL.pdf

World Trade Organization (WTO), Study on Issues Relating to a Possible Multilateral Framework on Competition Policy, Working Group on the Interaction Between Trade and Competition Policy, WT/WGTCP/W/228 (2003) (prepared by Simon J. Evenett), online: https://docs.wto.org/dol2fe/Pages/FE_Search/MultiDDFDocuments/46167/Q:/WT/WGTCP/W228-00.pdf;Q:/WT/WGTCP/W228-01.pdf;Q:/WT/WGTCP/W228-02.pdf;Q:/WT/WGTCP/W228-03.pdf/

World Trade Organization (WTO), Report (2003) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WT/WGTCP/7 (2003), online: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/WGTCP/7.pdf&Open=True

World Trade Organization (WTO), Report (2002) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WT/WGTCP/6 (2002), online: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=43538,12440,10034,1725,42759,51054,41459&CurrentCatalogueIdIndex=4&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True

World Trade Organization (WTO), Report (2001) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WT/WGTCP/5 (2001), online: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/WGTCP/5.pdf&Open=True

World Trade Organization (WTO), Report (2000) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WT/WGTCP/4 (2000), online:

https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/WGTCP/4.pdf&Open=True

World Trade Organization (WTO), Report (1999) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WT/WGTCP/3 (1999), online: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/WGTCP/3.pdf&Open=True

World Trade Organization (WTO), Report (1998) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WT/WGTCP/2 (1998), online: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/WGTCP/2.pdf&Open=True

Policies/Guidelines

Competition Bureau Canada, Guide to the 2022 amendments to the Competition Act, (24 June 2023), online: https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/guide-2022-amendments-competition-act#sec03

Competition Bureau Canada, Enforcement Guidelines on Wage-Fixing and no Poaching Agreements (30 May 2023), online: https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/enforcement-guidelines-wage-fixing-and-no-poaching-agreements

Competition Bureau Canada, What We Heard from the Competition and Green Growth Summit 2022, (20 September 2022, reported on the website on 10 January 2023), online: https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/what-we-heard-competition-and-green-growth-summit-2022

Competition Bureau Canada, Competition Bureau of Canada - 2021–22 Annual Report (12 October 2022), online: https://ised-isde.canada.ca/site/competition-bureau-canada/sites/default/files/attachments/2022/CB-AnnualReport-2021-2022-Eng.pdf

Competition Bureau Canada, Examining the Canadian Competition Act in the Digital Era (8 February 2022), online: https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/examining-canadian-competition-act-digital-era

Competition Bureau Canada, Environmental Claims and Greenwashing (2 December 2021), online: https://ised-isde.canada.ca/site/competition-bureau-canada/en/environmental-claims-and-greenwashing

Competition Bureau Canada, Competitor Collaboration Guidelines (6 May 2021), online: https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/competitor-collaboration-guidelines

Council of the European Union, AU-EU Expert Report on the Principle of Universal Jurisdiction, 8672/1/09/ REV 1, (16 April 2009), online: https://data.consilium.europa.eu/doc/document/ST%208672%202009%20REV%201/EN/pdf

European Commission, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, C/2023/4752, (21 July 2023) online: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2023.259.01.0001.01.ENG&toc=OJ%3AC%3A2023%3A259%3ATOC

European Commission, Competition Policy Brief 1/2021 - Policy in Support of Europe's Green Ambition (10 September 2021), online: https://competition-policy.ec.europa.eu/about/news/competition-policy-brief-12021-policy-support-europes-green-ambition-2021-09-10_en

European Commission, Unfair Trading Practices in the Food Chain, online: https://agriculture.ec.europa.eu/common-agricultural-policy/agri-food-supply-chain/unfair-trading-practices_en

Richard Whish and David Bailey, Horizontal Guidelines on Purchasing Agreements: Delineation Between by Object and by Effect Restrictions, Luxembourg, Publications Office of the European Union (2022), online https://competition-policy.ec.europa.eu/system/files/2022-03/kd0722013enn_purchasing_agreements.pdf

US Department of Justice, Identifying Sherman Act Violations, (updated February 2020), online: https://www.justice.gov/archives/jm/antitrust-resource-manual-2-antitrust-division-field-offices

US Department of Justice, Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation, (20 October 2016), online: https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals

United States Department of Justice, Antitrust Division & Federal Trade Commission, Antitrust Guidance for Human Resources Professionals (2016) online: https://www.justice.gov/atr/file/903511/download

United States Sentencing Commission, Guidelines Manual (2018), Part R — Antitrust Offences, online: https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf

Press and announcements

Competition Bureau Canada, NYK and “K” Line fined for international conspiracy to reduce competition in vehicle shipping services to Canada (23 August 2023), online: https://www.canada.ca/en/competition-bureau/news/2023/08/nyk-and-k-line-fined-for-international-conspiracy-to-reduce-competition-in-vehicle-shipping-services-to-canada.html

Competition Bureau Canada, Canada Bread sentenced to $50 million fine after pleading guilty to fixing wholesale bread prices (21 June 2023), online: https://www.canada.ca/en/competition-bureau/news/2023/06/canada-bread-sentenced-to-50-million-fine-after-pleading-guilty-to-fixing-wholesale-bread-prices.html

Competition Bureau Canada, Competition Bureau strengthens relationship with five foreign counterparts to enhance cross-border enforcement (2 September 2020), online : https://www.canada.ca/en/competition-bureau/news/2020/09/competition-bureau-strengthens-relationship-with-five-foreign-counterparts-to-enhance-cross-border-enforcement.html

European Commission, Summary of Commission Decision of 21 February 2018, Case AT.40009 — Maritime Car Carriers (6 September 2018), online: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018XC0906(01)&from=EN

European Commission, Commission fines Scania €880 million for participating in trucks cartel (27 September 2017), online: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_3502

European Commission, Commission fines truck producers € 2.93 billion for participating in a cartel (19 July 2016), online: https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2582

Simon Lester, "Canada Revokes MFN Status of Russia and Belarus", (3 March 2022) International Economic Law and Policy Blog, online: https://ielp.worldtradelaw.net/

United States, Department of Justice Office of Public Affairs, "Belgian Security Services Firm Agrees to Plead Guilty to Criminal Antitrust Conspiracy Affecting Department of Defense Procurement" (25 June 2021), online: https://www.justice.gov/opa/pr/belgian-security-services-firm-agrees-plead-guilty-criminal-antitrust-conspiracy-affecting#:~:text=G4S%20Secure%20Solutions%20NV%20(G4S,U.S.%20Department%20of%20Defense%20for

United States, Lighthizer Robert E. Ambassador of US, The President's 2018 Trade Policy Agenda, (March 2018), online: https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20I.pdf

United States, Scott D. Hammond, Director of Criminal Enforcement, Antitrust Division, US Department of Justice, "The Fly on The Wall Has Been Bugged — Catching an International Cartel in the Act," EU Competition Law Congress (Dublin- 15 May 2001).

Websites

Canadian Sanctions Legislations, online: https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/legislation-lois.aspx?lang=eng

Competition Bureau Canada, Cases of bid-rigging, price-fixing and other illegal agreements between competitors, online: https://ised-isde.canada.ca/site/competition-bureau-canada/en/bid-

rigging-price-fixing-and-other-agreements-between-competitors/cases-and-outcomes/cases-bid-rigging-price-fixing-and-other-illegal-agreements-between-competitors

East African Community Competition Authority, online: https://www.eacompetition.org/

European Union sanctions, online: https://www.eeas.europa.eu/eeas/european-union-sanctions_en

European Competition Network (ECN), online: https://competition-policy.ec.europa.eu/european-competition-network_en;

International Competition Network, Members, online: https://www.internationalcompetitionnetwork.org/members/?location=oceania

International Competition Network website: https://www.internationalcompetitionnetwork.org/;

International Competition Network (ICN), Anti-Cartel Enforcement Manual, (website) online: https://www.internationalcompetitionnetwork.org/working-groups/cartel/investigation-enforcement/

International Competition Network (ICN), Information Sharing Mechanisms, online: https://www.internationalcompetitionnetwork.org/working-groups/cartel/information-sharing/

Organisation for Economic Co-operation and Development (OECD), Recommendations and Best Practices on Competition Law and Policy, http://www.oecd.org/daf/competition/recommendations.htm

Organisation for Economic Co-operation and Development (OECD), Best Practice Roundtables on Competition Policy, Criminalisation of Cartels and Bid Rigging Conspiracies (9 June 2020), online: https://www.oecd.org/daf/competition/criminalisation-of-cartels-and-bid-rigging-conspiracies.htm

Organisation for Economic Co-operation and Development (OECD), OECD International Cartels Database (ICStats), online: https://qdd.oecd.org/subject.aspx?Subject=OECD_HIC

Organisation for Economic Co-operation and Development (OECD), Global Forum on Competition, online: https://www.oecd.org/competition/globalforum/

Organisation for Economic Co-operation and Development (OECD), Reports by the Competition Committee, online: https://www.oecd.org/daf/competition/reportsbythecompetitioncommittee.htm

Organisation for Economic Co-operation and Development (OECD), Best Practice Roundtables on Competition Policy, online: https://www.oecd.org/daf/competition/roundtables.htm

Organisation for Economic Co-operation and Development (OECD), Country Reviews of Competition Policy Frameworks, online: https://www.oecd.org/competition/countryreviewsofcompetitionpolicyframeworks.htm

Organisation for Economic Co-operation and Development (OECD), OECD Competition Trends, online: https://www.oecd.org/competition/oecd-competition-trends.htm

The Southern Common Market, MERCOSUR website, online: https://www.mercosur.int/en/

United Nations, History of the United Nations, online: https://www.un.org/en/about-us/history-of-the-un

United Nations Conference on Trade and Development (UNCTAD), Competition and Consumer Protection, online: https://unctad.org/Topic/Competition-and-Consumer-Protection

United Nations, Convention against Corruption, the Implementation Review Mechanism (IRM), online: https://www.unodc.org/unodc/en/corruption/implementation-review-mechanism.html

United Nations Conference on Trade and Development (UNCTAD), Working Group on International Cooperation on Competition Law Enforcement, online: https://unctad.org/Topic/Competition-and-Consumer-Protection/working-group-on-competition-law-enforcement

United Nations Conference on Trade and Development (UNCTAD), Working Group on Cross-Border Cartels, online: https://unctad.org/Topic/Competition-and-Consumer-Protection/working-group-on-cross-border-cartels

United Nations Conference on Trade and Development (UNCTAD), Fourth United Nations Conference to review all aspects of the set of multilaterally agreed equitable principles and rules for the control of restrictive business practices, online: https://unctad.org/meeting/fourth-united-nations-conference-review-all-aspects-set-multilaterally-agreed-equitable

United Nations Security Council, Sanctions, UN website, online: https://www.un.org/securitycouncil/sanctions/information

United States, Federal Trade Commission, Competition and Consumer Protection Agencies Worldwide, online: https://www.ftc.gov/policy/international/competition-consumer-protection-agencies-worldwide

United States, The Office of Foreign Assets Control ("OFAC") of the US Department of the Treasury, online: https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information

World Trade Organization (WTO), Regional Trade Agreements Database, online: http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx