

**Is Global Convergence of Competition Law the Answer? How East Asian
Challenges Demonstrate the Limitations of the Convergence Strategy**

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Abstract

There have been two prominent developments in transnational competition law over the last few decades: the global convergence of competition laws and the evolution of competition law in Asia. Curiously, research has seldomly focused on the interrelation between these two topics. This thesis examines the recent phenomenon of the global convergence of competition law regimes. The strategy whereby competition enforcement is becoming increasingly harmonized, at both the procedural and substantive levels, has received much scholarly acclamation in recent years. However, this research will cast doubt on the conventional wisdom that convergence is inherently positive, arguing instead that the case for competition harmonization may have been somewhat overstated. Through examination of the East Asian region, this thesis demonstrates the limitations of the strategy to converge global competition laws. Japan, South Korea, and China are salient examples of countries who have adopted a harmonized competition legislation, but due to the specific economic, political, and cultural contexts influencing each jurisdiction, have faced significant problems achieving the legal goals of competition law in practice. This thesis argues that there should be limits to the pursuit of global convergence in this area and emphasises the need to incorporate economic development considerations and cultural variations in future competition regimes.

Lay Summary

Competition laws promote or maintain market competition by regulating anti-competitive conduct by businesses. Over the past forty years, competition laws have proliferated across the globe and, as a result, concerns have been raised about inconsistent enforcement. Thus, global convergence of competition law is seen by many as the best, perhaps only, available strategy to reduce cross-jurisdictional conflicts. However, this research casts doubt on the conventional wisdom that convergence is an inherently positive development. First, the thesis details the mechanisms behind and extent of convergence in global competition. Then, through examination of the East Asian region, the thesis demonstrates the limitations of the strategy to converge global competition regulation. The thesis proposes that the unique economic, political, and cultural characteristics of an adopting jurisdiction must be, to some extent, incorporated into their competition law and, therefore, some regulatory diversity must be maintained across jurisdictions.

Preface

This dissertation is original, unpublished, independent work by the author, Thomas Martin.

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Chapter 1

1.1 Introduction

Studies of transnational competition law over the last few years have been dominated by discussion surrounding one topic: the global convergence of competition laws. Forty years ago, fewer than thirty jurisdictions had competition law, and in many of those jurisdictions enforcement was far from active.¹ Today, the regulatory landscape has shifted dramatically, with more than 130 jurisdictions having adopted some form of competition legislation.² In conjunction with this rapid proliferation of competition law came concern about inconsistent enforcement, and thus the strategy has been a drive to harmonize competition globally.³ Global convergence is seen by many as the most optimal, and perhaps only, available strategy to reduce cross-jurisdictional conflicts and minimize the potential for inconsistencies in enforcement.⁴ However, the case advocating the benefits of competition convergence may have been overstated. This thesis will, therefore, seek to reinforce a growing alternative view highlighting the fundamental inadequacies of the convergence strategy and make a case for maintaining regulatory diversity across jurisdictions.⁵

¹ Thomas K. Cheng, “*Convergence and Its Discontents: A Reconsideration of the Merits of Convergence of Global Competition Law*”, *Chicago Journal of International Law*, Vol. 12, (2012), 436.

² Brendan Sweeney, “*International Competition Law and Policy: A Work in Progress*,” 10 *Melb J Intl L* 58, (2009), 58.

³ Thomas K. Cheng, (n 1), 434.

⁴ David J. Gerber, “*Economic Development and Global Competition Law Convergence*”, in Daniel D. Sokol, Thomas K. Cheng and Ioannis Lianos, “*Competition Law and Development*”, *Stanford Scholarship Online*, (2013), 1.

⁵ Thomas K. Cheng, (n 1), 435.

This thesis is divided into five chapters. The first chapter is an introduction to the paper which clearly sets out the research objective and implications of the research.

Furthermore, chapter one provides a literature review, then outlines the conceptual framework and methodology behind the research, before acknowledging the limitations of the research project. Chapter two is an examination of the phenomenon of competition law convergence. It starts off by assessing the rapid proliferation of competition law over the last thirty years and describes how this, in turn, led to the adoption of a strategy to converge global competition enforcement. Next, chapter two describes the mechanisms that drive competition convergence and the key jurisdictions and organisations who set the agenda. Of particular focus is the voluntary nature of the strategy and how convergence in competition law has been promoted despite the lack of any “formal, binding international treaties”, as is normally the case in areas of legal harmonization.⁶ This chapter also discusses the extent of convergence in competition law across the world.

In chapter three, the thesis begins its examination of the East Asian region. Through a comprehensive analysis of Japan, South Korea and China, the thesis demonstrates the problems that exist with the strategy to converge competition laws globally. Chapter three begins by providing a recent economic history for each of Japan, South Korea, and China, which is necessary for understanding the unique economic characteristics of each jurisdiction. It then scrutinizes competition law in each of the three jurisdictions,

⁶ Ibid, 435.

how it was introduced, the contents of each legislation and how it has been enforced since enactment. Then in chapter four, the thesis outlines the challenges encountered by each of the three jurisdictions when applying competition law. It highlights how, in each of Japan, South Korea, and China, the economic, political, and cultural characteristics of the jurisdiction have significantly affected the implementation of competition law. By highlighting the challenges faced in the East Asian region, this research disputes the prevailing perception that harmonizing competition law has a universally positive impact. Finally, chapter five draws conclusions from the East Asian experience, thus criticizing the strategy of competition law convergence, as well as providing advice for countries developing a competition law. The thesis proposes that the unique economic, political, and cultural characteristics of an adopting jurisdiction must be, to some extent, incorporated into their competition law and, therefore, some regulatory diversity must be maintained across jurisdictions.

1.2 Research Objective

Through examination of the East Asian region, this thesis will demonstrate the problems with the current global competition convergence strategy. Japan, South Korea, and China will play a crucial role in the evolution of competition law on the global level.⁷ As noted by Gerber, the economic and political importance of this region will directly “condition the potential effectiveness of any strategy” to converge the global

⁷ David J. Gerber, “*Asia and Global Competition law Convergence*”, in Michael W. Dowdle, John Gillespie, and Imelda Maher, “*Asian Capitalism and the Regulation of Competition*” (Cambridge University Press, 2013), 36.

legal framework of economic markets.⁸ The author's objective here is to highlight the limits of the convergence strategy. This research will examine how the economic, political and cultural aspects at play in the East Asian region have severely limited the extent to which the converged competition law model, has been successful. The current strategy of harmonization fails to incorporate economic development considerations as well as cultural variations in market behavior.⁹ Indeed it is the author's belief that the strategy is averse to the preferred method of achieving legal goals. Ideally, states should begin with their perceived economic problems and develop legal tools specifically designed to solve them. Competition harmonization on the other hand, provides the solution as the starting point, with the encouragement to use legislation that has been successful in the United States or the European Union, rather than reflecting upon the economic realities of the jurisdiction in question.

1.3 Implications of Research

The hypothesis of this project is that the success of the strategy to converge global competition law has been severely limited in practice. Scholars have largely approached this debate from the lens of the multinational companies who stand to benefit from more consistent cross-border enforcement, without much consideration for the actual implications on the jurisdictions who adopt a converged competition regime. Therefore, this thesis will fill a literary gap, acting as an example of the difficulties encountered by countries such as Japan, South Korea, and China, as they have attempted to enforce

⁸ Ibid, 36.

⁹ Thomas K. Cheng, (n 1), 433.

competition legislation which has largely been transplanted from elsewhere. Further, with increasingly more economically developing countries beginning to introduce their own forms of competition law, namely numerous jurisdictions in Africa and South America, I want my research to act as a reference and a warning. Perhaps just transplanting U.S. competition law provisions to a country's unique economic circumstances, is not the best method for introducing regulations aimed at prohibiting future anticompetitive business behavior and thus ensuring a fair market.

1.4 Literature Review

The attempt to increase harmonization of competition law, at both the procedural and substantive levels, has been widely applauded in scholarly discussion on the area in recent years.¹⁰ Led by a host of international organizations, such as the Organisation for Economic Cooperation and Development (OECD) and the International Competition Network (ICN), the proponents for the convergence strategy have striven to develop a global consensus on the various aspects of competition law in an effort to encourage other jurisdictions to adopt these so-called "international best practices".¹¹ A popular argument among commentators is that the convergence of competition law is a necessary consequence of globalization, and thus it assists with minimizing instances of contradictory rules and decisions, in markets which are becoming increasingly more

¹⁰ Ibid, 433.

¹¹ Ibid, 434.

integrated.¹² The benefits for multinational companies are obvious, therefore, with converged competition enforcement leading to lower compliance costs for large firms whose operations span across multiple jurisdictions.¹³ The argument of the literature in support of the competition convergence strategy can be concisely summarized by the following statement: “Global markets with multinational corporations as participants require a global competition law.”¹⁴

However, it is the author’s opinion that the case for competition convergence may have been overstated. I want to shed a light on a growing, alternative view to the strategy of global competition law convergence. This research will add to literature produced by scholars such as David J. Gerber, who has aimed to highlight the fundamental tension between the goals of economic development and the strategy of global competition law convergence.¹⁵ Thomas K. Cheng is another who has attempted to reconsider the merits of convergence, arguing through his literature that there should be “limits to the pursuit of convergence”, and that “regulatory diversity across jurisdictions should be preserved.”¹⁶ With the literature largely in favor of the current strategy, I want my research to add to this gap in the literature and act as an example, highlighting the negative aspects and difficulties of competition convergence in practice. The thesis will add a unique perspective to the scholarly debate by looking at the actual implications of competition convergence on jurisdictions who have complied with the strategy.

¹² Barry J. Rodger, *Competition Policy, Liberalism and Globalization: A European Perspective*, 6 *Colum J Eur L* 289, (2000), 312.

¹³ *Ibid*, 313.

¹⁴ Thomas K. Cheng, (n 1), 455.

¹⁵ David J. Gerber, (n 4), 14.

¹⁶ Thomas K. Cheng, (n 1), 435.

1.5 Conceptual Framework

With regards to the conceptual framework within which the research will be situated, the author's outlook with regards to concepts, theoretical lenses, and interdisciplinary methodologies has shifted significantly. Rather than simply conducting this research project using the same approach I have used throughout my legal education, I will instead attempt to "map" my research and thereby develop a robust conceptual framework providing sound support for the conclusions of the thesis.¹⁷ The conceptual framework should give context to the research and justify the research question, by showing how the question arises from the gaps or tensions in the existing literature.¹⁸ To this end, the author will conduct the research through the lens of normative legal scholarship. Normative methods are defined generally by the Oxford dictionary as "a theoretical, prescriptive approach to sociological studies that has the aim of appraising or establishing the values and norms that best fit the overall needs and expectations of society."¹⁹ To apply this theoretical lens to the legal question on the global convergence of competition law that forms the basis of my thesis, I will rely on the work of Joseph William Singer. Singer, in his 2009 article, 'Normative Methods for Lawyers', provides four stages that lawyers and legal scholars use to adopt a normative legal argument. The first step is the orientation process, whereby the author adopts basic assumptions about human nature, society, and the good; framing the question

¹⁷ Mathias M. Siems and Daithi Mac Sithigh, "Mapping Legal Research", Cambridge Law Journal, (2012), 651.

¹⁸ Sanne Taekema, "Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice", Erasmus School of Law, Rotterdam, (2018), 2.

¹⁹ Oxford Reference, <https://www.oxfordreference.com/view/10.1093/oi/authority>, accessed 28 October 2019.

presented and telling the story.²⁰ Second in the process is what Singer calls ‘evaluative assertion’, which involves identifying legitimate human interests, needs, and wants that count as human value or moral demands.²¹ The third stage of a normative legal argument is perhaps the most pertinent step for my research, and that is contextualization. Contextualization involves interpreting conflicting values in a manner that renders them consistent by identifying the situations to which the values appropriately attach.²² The final stage of the normative approach is prioritization, where authors attempt to resolve conflicts among values by suitably impartial decision procedures.²³ The author will aim to incorporate elements from each of these four stages into the thesis, thereby, developing a detailed and structured theoretical lens for the research.

1.6 Methodology

In terms of methodology, the thesis will use a traditional doctrinal legal analysis of competition law in East Asia for the purposes of description and illustration. It makes sense to use this method initially to examine the essential features of the legislations and then combine and synthesise all the relevant elements to establish a correct and complete statement of how the competition convergence strategy has affected the statutes.²⁴ Despite its detractors, “doctrinal legal research still forms the basis for most,

²⁰ Joseph William Singer, “*Normative Methods for Lawyers*”, 56 *UCLA Law Review*, (2009), 950.

²¹ *Ibid*, 950.

²² *Ibid*, 951.

²³ *Ibid*, 951.

²⁴ Terry Hutchison, “*Doctrinal Research: Researching the Jury*”, in Dawn Watkins and Mandy Burton, “*Research Methods in Law*”, 2nd ed, (London Routledge, 2018), 13.

if not all legal research topics.”²⁵ The doctrinal analysis will be the starting point for my research, with it being argued that a legal scholar should commence any legal discussion by using this method to critically determine ‘what the law is’.²⁶ The doctrinal aspect of my methodology will fall under Singer’s first step for the normative theoretical lens, the orientation process at the beginning of the research. In terms of access to sources, this initial doctrinal study will most likely be the most straightforward method used for this research project. English translations have been produced and made readily available for the competition legislations for each of Japan, South Korea, and China, therefore access to the core materials is not an issue. Furthermore, there are large bodies of commentary on the equivalent legislations in both the United States and the European Union which I intend to use for the purposes of comparison.

However, the author recognizes that a strictly doctrinal approach would fail to take account of the contextual background of the topic, which lends itself to a more open interdisciplinary approach to research. By incorporating an interdisciplinary approach to the project, I will broaden the legal discourse, both in terms of the additional information it will provide to the thesis, and in terms of the conceptual framework within which the information can be evaluated.²⁷ As noted by Vick, an interdisciplinary approach has the advantage of addressing the problems in a wider context, allowing the researcher to engage with problems whose solutions can only be found through combinations of disciplinary approaches, such as the question at the heart of this research.²⁸ The

²⁵ Ibid, 10.

²⁶ Ibid, 39.

²⁷ Douglas W. Vick, “*Interdisciplinarity and the Discipline of Law*”, 31 *Journal of Law and Society*, (2004), 181.

²⁸ Ibid, 181.

historical, cultural, and economic contexts within which competition law has developed in East Asia are vital for developing a thorough understanding of the area. Therefore, the author will aim to draw from elements of socio-legal methodology, to help understand the 'law in action', and how cultural and historical influences have had an effect on the enforcement of competition law in the region. Elements from the method will be highly useful for this research, particularly when considering the contextualization focus of the normative theoretical lens. Socio-legal scholars focus on the "actual forces that produce law", as well as the notion that moral and cultural senses specific to a country are among the factors that determine the actual impact of laws.²⁹ For the socio-legal aspect of this thesis, access to sources becomes somewhat more challenging. The preferred method for studying the law in action is generally some form of original data collection. However, due to both the time constraints of an LLM program and the money that it would take to collect such data on the ground, especially in East Asia, any form of primary data collection or empirical socio-legal study will not be possible for this research project. For this project, I will be relying on readily available data from existing studies and applying it to the particular issue at hand. Fortunately, data relating to competition enforcement is regularly produced by organisations such as the Organisation for Economic Cooperation and Development (OECD). The author will also be relying on other secondary sources, such as the journal articles and books produced by scholars such as David J. Gerber, and Thomas K. Cheng, who have also begun to address this issue using a socio-legal methodology.

²⁹ Lawrence M. Friedman, "*Coming of Age: Law and Society Enter an Exclusive Club*", 1:1 Annual Review of Law and Social Science, (2005), 1.

Furthermore, law and economics is the methodology most widely employed in relation to antitrust/competition law research. In fact, competition law in the U.S. was built on the basis of classical microeconomic theory, so the development and interpretation of the competition provisions examined in this thesis must always make economic sense. Economic theory can help resolve this competition law issue by providing a methodology for the analysis of the legal reality to which the convergence strategy relates.³⁰ While a strictly economic methodological approach to this question would perhaps be desirable, I do not have sufficient expertise in economics nor the timescale under the LLM to conduct a full law and economics analysis on the convergence of competition law. However, as stated above, law and economics is the most widely employed method in studies of competition law generally, and in fact there are some studies on the convergence topic which specifically adopt this approach. Gerber's paper on the role of economics in competition law convergence,³¹ as well as more seminal books such as "Economic Theory and Competition Law", left me convinced of the need to incorporate theories from law and economics to support the argument of the thesis.³² I will therefore assess the impact of existing law and economic studies on competition convergence, and use elements of economic theory to reinforce the findings of the research project.

³⁰ Albert Sanchez-Graells, "Economic Analysis of Law, or Economically Informed Legal Research", in Dawn Watkins and Mandy Burton, "Research Methods in Law", 2nd ed, (London: Routledge, 2017), 170.

³¹ David J. Gerber, "Global competition law convergence: Potential roles for economics", in Theodore Eisenberg and Giovanni B. Ramello, "Comparative Law and Economics", Edward Elgar Publishing, (2016).

³² Josef Drexl, Laurence Idot and Joel Moneger, "Economic Theory and Competition Law" Edward Elgar Publishing, (2009).

To summarize, the author believes the interdisciplinary analytical framework that the thesis adopts, provides for a balance between what the legal strategy is, the difficulties it has faced in practice, and suggestions for what could be changed. A socio-legal methodology will be the predominant approach, with the research question requiring significant focus on the contexts which shape the application of competition law in East Asia. The economic, cultural, and historical contexts within which competition law operates in East Asia are crucial to an analysis of the impacts that convergence has had on the region, and a socio-legal method best enables a study to incorporate these factors. Furthermore, a traditional doctrinal analysis of the individual competition law legislations is necessary to assess the extent that these laws have been converged with competition regimes already existing in the United States and Europe. Finally, applying the economics-based theoretical underpinnings of competition law, as well as drawing from law and economics studies on the area, is vital to support the conclusions of the thesis.

1.7 The Limitations of the Research Project

Having discussed the objectives of the thesis, and the methods that will be utilised to achieve them, it is important before concluding this proposal to discuss the limitations of this research project. The biggest constraint on this project is the fact that the author will be unable to conduct any primary data collection due to the timing requirements of an LLM program. As previously discussed, this project would ideally be able to draw from some firsthand data which considers the impact of harmonized competition policy on the

courts, large corporations, small business owners, and consumers. However, this will not be possibly within the time frame of my master's program, so instead the thesis will rely on secondary data and sources which discuss the impact of competition convergence on the jurisdictions under examination. A second limitation of the project is the questions that will remain unanswered after the conclusions of the thesis have been reached. Competition law convergence is a strategy with global implications, and while my project focuses on its impact on a region, rather than a lone jurisdiction, questions will remain unanswered with regards to the overall impact of convergence. For example, this research will not necessarily be able to determine whether the experience of competition convergence in East Asia is a unique one, or whether the same problems have been encountered in other regions such as the European Union or South America. While more literature highlighting the problems with competition convergence is beginning to emerge, the author believes that this area requires further research. This thesis will add to a growing perspective, however more research is needed in order to truly determine whether the harmonization of competition legislations is a universally positive development. Finally, the methodology behind this research project is somewhat limited by its lack of a comprehensive economic analysis. Competition law is a topic that is often analysed under a purely economics-based methodological approach due to its nature. However, as discussed, this research project will mitigate against this by adopting a robust methodological framework which draws from elements of law and economics theory.

Conclusion

In conclusion, this section has introduced the objectives of the thesis, reviewed the relevant literature on the subject matter, attempted to outline the conceptual framework and methodology behind the research, and described the limitations of the project in its current form. The research will aim to question the conventional wisdom that the global convergence of competition law is an inherently positive strategy and will add to the growing perspective that the case for legal harmonization in this area has been overstated. The thesis will expose the realities of competition convergence by way of an in-depth analysis of three jurisdictions who have all, at different points, adopted a form of converged competition legislation. The evaluation of Japan, South Korea, and China will form the basis of the project's main argument; that some regulatory diversity must be maintained across jurisdictional boundaries, because a harmonized approach to competition enforcement fails to take into consideration the economic and cultural realities of states and, therefore, the affects are severely limited in practice. In terms of methodology, after taking classes on how to approach researching a thesis as part of the LLM course, the author has attempted to develop a robust framework that provides the most achievable methods for satisfying the research objectives. The thesis will be largely a socio-legal study focusing on the forces that have produced the law and its affect in action. However, a traditional doctrinal approach is incorporated to provide a grounded understanding of the relevant legislations, and elements from law and economic theory will be utilised to provide a more rounded evaluation of the issue. This section has also acknowledged the potential limitations of undertaking this project as

part of an LLM program, as well as highlighting the author's belief that the convergence of competition law is an area that needs further investigation before final conclusions can be made on its utility.

Chapter 2

2.1 The Phenomenon of Convergence

Convergence is perhaps the single most important development in international competition law in recent years. In the context of competition law, 'convergence' refers to the increasing harmonization between individual competition law systems in jurisdictions across the world. The rapid proliferation of competition law, evidenced by the fact that upwards of one hundred jurisdictions have adopted some form of competition legislation in the last forty years, has produced growing concerns about inconsistent competition enforcement.³³ In light of these concerns, global convergence has been proposed as the best, perhaps the only, available strategy for "reducing the conflicts, costs, and uncertainties that the current transnational competition law regime imposes on global economic activity."³⁴ The efforts to harmonize competition law have been led by established jurisdictions such as the United States and the European Union. Through organisations such as the Organisation for Economic Cooperation and Development (OECD) and the International Competition Network (ICN) an attempt has been made to establish a consensus on the different aspects of competition enforcement. The interjurisdictional convergence is centred upon what have been termed "international best practices" which are endorsed through a series of guidelines, recommendations, and papers.³⁵ By adopting these 'best practices', jurisdictions with

³³ Thomas K. Cheng, (n 1), 434

³⁴ David J. Gerber, (n 4), 1.

³⁵ Thomas K. Cheng, (n 1), 434.

developing competition regimes are effectively converging their approach towards that of the established competition jurisdictions.

At this juncture, it is important to define exactly what competition law is and explain the reasons behind its global significance. Competition laws “promote or maintain market competition by regulating anti-competitive conduct” by businesses.³⁶ Competition law consists of a normative framework of institutions and processes that are united by a core objective of preventing restraints on competitive markets. As noted by Dowdle, competition law also provides a public good because freely competitive and unrestrained markets are more valuable to society than markets distorted by anti-competitive practices.³⁷ It is also important to note that in the United States the term used for this area of the law is ‘antitrust law’, but the aims of the US legal regime remain largely the same as elsewhere.

Currently, the legal structure for dealing with transnational competition law disputes is jurisdictional. International public law grants each individual state the authority to take legal action against private actors who have attempted to restrain competition.

Essentially, in this system “national laws govern transnational markets”³⁸ Gerber notes that as a result, this system highlights any significant disparities between the competition regimes of jurisdictions operating within the same economic market.³⁹

These jurisdictional disparities in competition law rules and principles have often been

³⁶ Martyn D. Taylor, *International Competition Law: A New Dimension for the PTO 1* (Cambridge 2006), 1.

³⁷ David J. Gerber, (n 7), 38.

³⁸ David J. Gerber, (n 31), 211.

³⁹ *Ibid*, 211.

highlighted as a regulatory headache for multinational corporations operating across multiple jurisdictions. Decision-makers at multinational businesses have suggested that differences in competition enforcement between jurisdictions significantly increases the costs of transnational economic activity, with the regulatory uncertainty raising both planning and compliance costs.⁴⁰ Indeed, these concerns about inconsistent competition enforcement is nothing new and the setting up of global antitrust rules was first attempted through the 'Havana Charter' at the United Nations Conference on Trade and Employment in 1948, however, the charter never entered into force.⁴¹

From the 1990s onwards, economic markets have followed the globalization trend that has swept through society. The globalization of markets stems from the more general erosion of geographical and political barriers to trade as global business has become increasingly interconnected. However, the globalisation of economic markets has also exposed the limitations of competition laws that are tasked with protecting those markets. Furthermore, the number of jurisdictions with some form of competition law has dramatically increased in response to the globalisation of business. Forty years ago, fewer than thirty jurisdictions had competition law, whereas today, over 130 jurisdictions have adopted a form of competition enforcement.⁴² The globalisation of markets and the rapid proliferation of competition law which followed have had a few important impacts. Firstly, the sheer number of countries that have adopted new

⁴⁰ Ibid, 211.

⁴¹ UN Doc E/Conf 2/78 (1948) ("Havana Charter"), available online at http://www.wto.org/english/docs_e/legal_e/havana_e.pdf. For a discussion of the story behind the 'Havana Charter', see Susan A. Aaronson, "*Trade and the American Dream*", (University Press of Kentucky, 1996), 86-91. Later attempts at setting up such rules have also failed.

⁴² Brendan Sweeney, (n 2), 58.

competition regimes has “further increased the probability of jurisdictional conflicts among states, as well as the complexity, cost, and uncertainty of operating in transnational markets.”⁴³ In effect, pressure has intensified on the current system and attention has been focused on the disparities in competition enforcement between individual jurisdictions. This links in with the other important impact of the proliferation of competition law. With global competition law moving from a bipolar to a multi-polar world, there has been increasing concern that the growing number of competition authorities will enforce their competition laws inconsistently.⁴⁴ For multinational corporations the fear stemming from inconsistent competition enforcement is two-fold; considerably more planning being required for transnational economic activity and a further increase in compliance costs. The series of cases brought against Microsoft bear testimony to the fact that firms engaging in certain practices may end up being condemned for abuse of dominance under competition laws of different jurisdictions and, as a result, face a variety of remedies that are not necessarily consistent. Microsoft faced a series of competition law investigations by the European Union, the United States, and South Korea, who each scrutinised different elements of Microsoft’s abuse of dominance and imposed different sanctions or remedies.⁴⁵ Thus, businesses,

⁴³ David J. Gerber, (n 4), 16.

⁴⁴ Thomas K. Cheng, (n 1), 437.

⁴⁵ Microsoft faced competition law cases from the US, EU, and South Korea. For the US decision see *United States v. Microsoft Corporation*, 253 F.3d 34 (D.C. Cir. 2001). As far as remedies are concerned, in the US Microsoft was required to, first, disclose application programming interfaces that would permit software developers to interoperate with the Windows operating system with less difficulty, and second, disclose protocols that it employed to control communication between desktop PCs and servers. For the EU decision see *Microsoft v Commission*, Case T201/04, 2004 ECR II 271 (2004). In the EU, regarding interoperability, Microsoft was required, within 120 days, to disclose complete and accurate interface documentation. Furthermore, the Commission imposed a fine on Microsoft of €497 million. For the South Korean decision see *re Microsoft Corporation*, KFTC 2006-042. In South Korea, the KFTC required Microsoft to unbundle tied products and install Media Centre and Messenger Centre through which download links to competitors are provided. Furthermore, a fine of 32.49 billion won was levied.

lawyers, and policymakers could no longer content themselves with understanding only the competition laws of their own jurisdiction, instead, they must also be conversant in the laws of other regimes where competitive behaviour may also be regulated.⁴⁶ Therefore, the response of the international competition law community has been a coherent drive towards regulatory convergence.

2.2 The Mechanisms of Competition Convergence

The convergence of competition law has taken place at both the national and international levels. On the national level, Cheng highlights the considerable effort made by emerging competition jurisdictions to learn from the experiences of the more established jurisdictions, such as the US and the EU.⁴⁷ Cartel enforcement is one area of competition law singled out by Cheng for its pronounced convergence on the national level.⁴⁸ Until the 1990s, the US was the only jurisdiction that actively imposed criminal enforcement against cartels. However, this regulatory landscape has changed remarkably, with jurisdictions all over the world now rigorously imposing criminal sanctions on cartels. In fact, global cartel fines in 2019 alone amounted to \$6.1 billion, with the US only responsible for \$220 million of this overall figure.⁴⁹ Cheng notes that a

⁴⁶ Damien Geradin, “*The Perils of Antitrust and the Risks of Overregulation of Competitive Behaviour*”, (Chicago Journal of International Law, Vol. 10, Iss. 1, 2009), 191.

⁴⁷ Thomas K. Cheng, (n 1), 441.

⁴⁸ Ibid, 442.

⁴⁹ Morgan Lewis, “Global Cartel Enforcement Report, Year-End 2019”, (1 February 2020), <https://www.morganlewis.com/pubs/global-cartel-enforcement-report-year-end-2019>.

clear global consensus has emerged among jurisdictions on the competitive harms caused by cartels, as well as a consensus on a method of criminal enforcement spearheaded by the high fines.⁵⁰ To complement criminal cartel enforcement, leniency programs have also been widely adopted, even in jurisdictions for which such programs had previously been assumed unsuitable, such as Japan.⁵¹ Cartel enforcement is the area of competition law in which convergence has been the most prevalent and thorough.

On the international level, specific institutions ‘drive’ convergence by influencing the alignment between competition jurisdictions.⁵² Three international organisations in particular, the International Competition Network (ICN), the Organisation for Economic Cooperation and Development (OECD), and the United Nations Conference on Trade and Development (UNCTAD), have played crucial roles as the drivers of global convergence. UNCTAD was created by the United Nations in 1964 with a mandate to assist developing countries in the formulation and implementation of economic policies.⁵³ In response to the proliferation of competition law globally, UNCTAD has been active in international competition law for decades, with its focus on new authorities in developing countries.⁵⁴ UNCTAD’s most notable early competition law project was the development and maintenance of general principles for multinational corporations called the ‘Set of Principles and Rules on Competition’, (otherwise know

⁵⁰ Thomas K. Cheng, (n 1), 442.

⁵¹ Akinori Uesugi, “*How Japan is Tackling Enforcement Activities Against Cartels*”, (13 Geo Mason L Rev 349, 2005), 362.

⁵² David J. Gerber, (n 31), 210.

⁵³ David J. Gerber, “*Global Competition: Law, Markets, and Globalisation*”, Oxford Scholarship Online, (2010), 113.

⁵⁴ *Ibid*, 113.

as the 'UN Set') which was first adopted in 1980.⁵⁵ More recently, in addition to the UN Set, UNCTAD published the Model Law on Competition in 2010.⁵⁶ Cheng describes this as a “model competition code of sorts”, that is an attempt to address the needs of developing countries by guiding the evolution of their competition regimes.⁵⁷ UNCTAD's Model Law on Competition includes extensive commentary on the current practices of the established jurisdictions, as well as updates on the latest progress made by developing legislators.⁵⁸ UNCTAD's annual meetings bring together officials and experts from across the globe to focus on competition law issues in developing countries.⁵⁹

The Organization for Economic Cooperation and Development (OECD) was created in 1961 as the successor to the Organization for European Economic Cooperation. It is a 'club' of developed countries and, as noted by Gerber, OECD membership is seen by many as a coveted sign of economic and political success.⁶⁰ The OECD is effectively an economic policy think tank, in which experts and market leaders from member states “share information, discuss issues, and seek solutions and common positions on economic policy issues.”⁶¹ The OECD's Competition Committee has been very active in international competition law with peer review of jurisdictions central to its operations. Another central operation of the OECD is to publish recommendations and best practices on a wide variety of competition law and policy issues.⁶² On various

⁵⁵ Ibid, 114.

⁵⁶ UNCTAD, Model Law on Competition (2010), UN Doc TD/RBP/CONF.7/L.1-L.13 (2010).

⁵⁷ Thomas K. Cheng, (n 1), 443.

⁵⁸ Ibid, 443.

⁵⁹ Ibid, 443.

⁶⁰ David J. Gerber, (n 53), 112.

⁶¹ Ibid, 112.

⁶² Thomas K. Cheng, (n 1), 443.

occasions, the OECD has produced reports on competition legislations, merger review, regulated industries, cartel enforcement and the cooperation among member states.⁶³ Furthermore, the OECD's annual Global Forum on Competition Law bring together the officials and experts from many of the leading jurisdictions in competition enforcement. According to Marie-Laure Djelic and Sigrid Quack the OECD's Competition Committee "has worked particularly well as a forum for promoting soft convergence of competition policies among its members."⁶⁴

While UNCTAD and the OECD have both been acknowledged as 'drivers' of competition convergence, the organisation most widely credited for the success of the convergence strategy is the International Competition Network (ICN). UNCTAD and the OECD have both made steady contributions to the convergence strategy, however, since 2001, the ICN has brought widespread public and professional attention on issues in global competition law.⁶⁵ The ICN has, according to Gerber, "provided an institutional framework for convergence as a strategy."⁶⁶ Unlike other influential international organisations, such as the United Nations or World Trade Organization, the ICN is not a formal group. Instead, the ICN is an informal network consisting of 132 competition agencies from a total of 120 jurisdictions.⁶⁷ The ICN also has an annual meeting which is now the largest gathering of competition law officials, and with US and European participants tending to play central roles, it has become an influential platform for

⁶³ Ibid, 443.

⁶⁴ Marie-Laure Djelic & Sigrid Quack, 'Overcoming Path Dependency: Path Generation in Open Systems' (2007) 36 *Comp Soc* 161,178.

⁶⁵ David J. Gerber, (n 53), 115.

⁶⁶ Ibid, 115.

⁶⁷ The International Competition Network, (2020), <http://www.internationalcompetitionnetwork.org/>.

convergence. The ICN has, since its establishment, aimed at “addressing antitrust enforcement and policy issues of common interest and formulate proposals for procedural and substantive convergence through a result-orientated agenda and structure”.⁶⁸ The idea of convergence has been complemented by encouragement of “the dissemination of antitrust experiences and best practices” and promotion of the “advocacy role of the antitrust agencies”.⁶⁹ However, the ICN exerts its greatest influence through the recommended ‘best practices’ and other advisory papers produced by its working groups.⁷⁰ As stated on the ICNs website, its current working groups cover advocacy, agency effectiveness, cartels, mergers and unilateral conduct.⁷¹ Crucially, membership of these working groups are predominantly private practitioners from established jurisdictions.⁷² Convergence has been further elaborated by the ICN Steering Committee, which defined it as the “voluntary adoption of widely-accepted norms of competition policy, substantive standards, procedures and levels of institutional capacity.”⁷³ Since its inception, the ICN has certainly accelerated the process of convergence in international competition law.

Therefore, these international organisations promote and drive competition convergence through a number of key methods. Peer review, for example, facilitates convergence because the reviewers’ suggestions are shaped largely by the

⁶⁸ International Competition Network (ICN), ‘*Memorandum on the Establishment and Operation of the International Competition Network*’ (2001), available at www.internationalcompetitionnetwork.org/uploads/library/doc579.pdf.

⁶⁹ *Ibid*, 5.

⁷⁰ Thomas K. Cheng, (n 1), 444.

⁷¹ The International Competition Network, Working Groups, (2020), <http://www.internationalcompetitionnetwork.org/>.

⁷² Thomas K. Cheng, (n 1), 444.

⁷³ International Competition Network (ICN), (n 68), 5.

'international best practices' that are mostly drawn from the organisations and the established jurisdictions.⁷⁴ Meetings, such as the OECD's Annual Global Forum or the ICN's annual meeting, should not be overlooked for their roles in promoting convergence, Cheng suggests that discussions at these meetings generally focus on the practices of the established jurisdictions and, as a result, attendance at these meetings likely encourages officials from the emerging jurisdictions to emulate these practices.⁷⁵ In fact, many of the officials from emerging jurisdictions consider the annual meetings of the ICN and OECD to be key educational opportunities and therefore convergence is inevitable. However, the issuance of best practices and recommendation papers remains the most important way in which these international organisations promote convergence.⁷⁶ With the well-resourced enforcement agencies being the driving force, Steven Van Uytsel has argued that these organisations are in reality a substitute for the main competition-related idea merchants.⁷⁷ The established jurisdictions essentially create a model competition law regime through the 'best practice' guidelines and recommendations of the international organisations, and the emerging jurisdictions attempt to emulate this model. This emulating process is further enforced by peer reviews and by the socialisation at international competition conferences.⁷⁸ Finally, while efforts to develop binding international antitrust rules have remained unsuccessful, many states have engaged in bilateral cooperation

⁷⁴ Thomas K. Cheng, (n 1) 445.

⁷⁵ Ibid, 445.

⁷⁶ Ibid, 445.

⁷⁷ Steven Van Uytsel, "*Adopting competition law in Asia: an increasingly complex reality*", in Steven Van Uytsel, Shuya Hayashi and John O. Haley, "*Research Handbook on Asian Competition Law*" (Edward Elgar Publishing 2020), 15.

⁷⁸ Thomas K. Cheng, (n 1), 445.

agreements.⁷⁹ Pursuant to these agreements, the parties agree to cooperate in the context of international antitrust investigations, for example by notifying the other party of a pending enforcement action that could impact important interests.

2.3 The Extent of Convergence in Competition Law

The distinguishing factor between the international convergence promoted in competition law, compared with other areas of law, is the lack of a formally binding code or principles. The aforementioned international organisations, the ICN, the OECD, and UNCTAD, “promote convergence that is initiated on a voluntary basis by the jurisdictions themselves.”⁸⁰ Formal harmonisation through an organisation such as the WTO, as was proposed in the 1990s, would have marked a clear top-down imposition of principles. Whereas the international competition organisations have been careful to promote convergence of a soft rather than a hard kind, in an effort to emphasise its voluntary nature.⁸¹ Nevertheless, the soft, informal approach taken to competition convergence has not diminished the efficacy of the strategy. In fact, competition law uniquely stands out as an example of a field of law that has cultivated a degree of uniformity without resorting to formally binding legal instruments.⁸² For example, in what it calls its mission statement, the ICN advocates “the adoption of superior standards and

⁷⁹ See, for example, “*Agreement between the Government of the United States of America and The Commission of the European Communities Regarding the Application of Their Competition Laws*”, (1991), 30 ILM 1491.

⁸⁰ Thomas K. Cheng, (n 1), 450.

⁸¹ *Ibid*, 451.

⁸² *Ibid*, 451.

procedures in competition policy around the world, formulate proposals for procedural and substantive convergence, and seek to facilitate effective international cooperation to the benefit of member agencies, consumers and economics worldwide.”⁸³

So, what are the reasons behind the remarkable success of the competition convergence strategy, especially considering its voluntary nature? Thomas K. Cheng lists a number of salient reasons for the success of convergence in global competition law.⁸⁴ The first thing to note about competition law is that it is a highly technical and interdisciplinary area of law. In order to enforce competition law, a practitioner or judge must have a comprehensive knowledge of aspects of economics, accounting and business.⁸⁵ This interdisciplinary nature means competition law is wholly unfamiliar to most legal practitioners from outside of the field, or those who are new to the field.⁸⁶ Therefore, in light of the proliferation of competition, the fact that most jurisdictions only adopted their competition regimes over the last three or four decades, has meant that there has been a distinct lack of expertise and experience in the emerging jurisdictions.⁸⁷ These emerging jurisdictions have been readily seeking guidance and knowledge from the established jurisdictions, and thus, convergence has been a seemingly necessary consequence of developing such a technical field of law.⁸⁸ Furthermore, less mature enforcement agencies may not have enough experience to discuss and evaluate the proposals and very often there already exists a consensus

⁸³ International Competition Network (ICN), (n 68), 5.

⁸⁴ Thomas K. Cheng, (n 1), 451.

⁸⁵ Ibid, 451.

⁸⁶ Ibid, 451.

⁸⁷ Ibid, 451.

⁸⁸ Ibid, 451.

over any enforcement issues they may have encountered, so these jurisdictions are unable to make any profound contributions to the global competition discussion.⁸⁹

Another aspect that has facilitated convergence is the fact that competition law enforcement is predominantly administrative in nature.⁹⁰ As noted by Robert H. Lande and Joshua P. Davis, almost 90 per cent of US antitrust cases are brought by private parties.⁹¹ In the rest of the world, however, private action still plays a minimal role, with public enforcement authorities bringing the vast majority of global competition cases. The prominent role of public enforcement has given competition authorities “a powerful lever to steer development of the law” in their respective jurisdictions.⁹² If an authority believes that a particular business conduct should be legal, they can carefully select cases to encourage the judiciary to reach such a verdict.⁹³ In fact, in merger review few cases are litigated and, as such, the authorities have the final word on whether a merger may proceed.⁹⁴ Therefore, both the administrative nature of competition enforcement and the prominent role of enforcement authorities, are conducive to further convergence of competition law.⁹⁵ However, the European Commission has made concerted attempts to encourage private enforcement of competition law over the years, so this could be subject to change.⁹⁶

⁸⁹ Eleanor Fox, ‘*Linked-In: Antitrust and the Virtues of a Virtual Network*’ in Paul Lugard (ed.), ‘*The International Competition Network at Ten: Origins, Accomplishments and Aspirations*’ (Intersentia 2011) 105, 126.

⁹⁰ Thomas K. Cheng, (n 1), 451.

⁹¹ Robert H. Lande and Joshua P. Davis, “*An Evaluation of Private Antitrust Enforcement: 29 Case Studies, Interim Report for the American Antitrust Institute Private Enforcement Project*” (November 2006), 3.

⁹² Thomas K. Cheng, (n 1), 452.

⁹³ *Ibid*, 452.

⁹⁴ *Ibid*, 452.

⁹⁵ *Ibid*, 452.

⁹⁶ See, for example, European Commission, “*White Paper on Damages Actions for Breach of the EC Antitrust Rules*”, EC Doc COM (2008) 165 final (2008).

A further characteristic of competition law enforcement that has facilitated convergence is the reliance on 'best practices' and other guidelines. Guidelines are generally not legally binding and are largely produced by the international competition organisations with little or no national legislative involvement.⁹⁷ As a result, Cheng notes that the guidelines produced by international organisations can essentially be given 'direct effect' without being amended by domestic political compromise, which is a necessary feature of any legislative process.⁹⁸

A final facet of competition law that has facilitated convergence is the case-specific nature of the enforcement. Unlike most areas of regulation, competition law does not impose detailed ex ante regulation, and therefore, business conduct can only be determined anti-competitive or illegal ex post by the relevant authorities.⁹⁹ A good contrast can be found with banking regulation, where banks must know with what rules they must comply in advance or compliance becomes largely unfeasible.¹⁰⁰ As a consequence, Phillip R. Woods has suggested that banking regulation can only achieve convergence on a particular issue, if an explicit agreement is reached on the various national rules.¹⁰¹ The absence of detailed ex ante regulations negates the need for these complex negotiations in competition law and, thereby, has fostered an environment conducive to voluntary convergence.¹⁰² These various characteristics

⁹⁷ Thomas K. Cheng, (n 1), 452.

⁹⁸ Ibid, 452.

⁹⁹ Ibid, 453.

¹⁰⁰ Ibid, 453.

¹⁰¹ Phillip R. Wood, "*Law and Practice of International Finance 329*", Sweet and Maxwell, (2009), 352.

¹⁰² Thomas K. Cheng, (n 1), 453.

together explain why the voluntary convergence strategy and the strive for international regulatory harmonization has been so successful in competition law.

Chapter 3

3.1 The Economic History of East Asia

In Chapter two, the phenomenon of convergence in competition law was explained, along with the mechanisms that drive the convergence strategy, and the extent to which competition laws have been harmonized on a global scale in accordance with the aims of the strategy. This chapter, however, will begin this project's examination of the East Asian region, whereby, the problems with the global competition convergence strategy will be highlighted. Japan, South Korea, and China will play a crucial role in the evolution of competition law on the global level.¹⁰³ As noted by Gerber, the economic and political importance of this region will directly "condition the potential effectiveness of any strategy" to converge the global legal framework of economic markets.¹⁰⁴ As will be examined, this region has specific economic, political and cultural aspects that have severely impacted the application of competition law in each of the three jurisdictions. However, before delving into the intricacies of competition law in the region, it is necessary to provide a more general economic background for each of the three jurisdictions. As such the thesis will now provide a brief overview of the recent economic histories of South Korea, Japan, and China, identifying some common economic characteristics across the region that have impacted the application of competition law.

¹⁰³ David J. Gerber, (n 7), 36.

¹⁰⁴ Ibid, 36.

The Economic History of Japan

Japanese economic policy, as a whole, cannot be understood without some knowledge of the enterprises that were built up by the predominant business groups known as the 'Zaibatsu'.¹⁰⁵ These businesses played a vital role in the economic rise of Japan, and they had come to occupy a position in the Japanese economic and political sphere for which there was no parallel elsewhere at that time.¹⁰⁶ The word "zaibatsu" derives from the Japanese expression for a "wealthy clique" and refers to industrial and financial business companies that developed in Japan from the mid-1800s into the mid-1900s.¹⁰⁷ These companies developed as the newly formed government of Japan began to encourage economic growth following the Meiji Restoration of 1868. The Meiji Restoration had led to the overthrow of the decaying Tokugawa feudal system that had ruled Japan for the previous two centuries, with the country now embarking on a path towards capitalism and modernisation.¹⁰⁸ As noted by Namkoong, the Meiji government took the initiative in starting modern industries, quickly realising the importance of exporting, which Japan needed for the "purchase of modern machinery, to hire foreign advisors, and to send Japanese abroad for training".¹⁰⁹ A small number of entrepreneurs, closely associated with the newly emerged government, were prescribed

¹⁰⁵ Young Namkoong, "Impact of the Zaibatsu on Japan's Political Economy: Pre and Post War Period", (International Area Studies Review 9(2) June 2006), 1.

¹⁰⁶ Ibid, 1.

¹⁰⁷ Jennifer Beamer and Peter J. Seybolt, "Japanese Zaibatsu", (Cultural Sociology of the Middle East, Asia, & Africa: An Encyclopedia, Volume 3, SAGE Publications, 2012).

¹⁰⁸ Young Namkoong, (n 105), 1.

¹⁰⁹ Ibid, 2.

to “serve as a national instrument in the further development of Japanese industries”.¹¹⁰ The four main family companies were, Mitsui, Mitsubishi, Sumitomo, and Yasuda, and with the commendation of the ruling elite, these select few enterprises matured into the *zaibatsu*. The family-owned identity of these *zaibatsu*'s is of equivalence to the prevailing nature of Korean companies today, with Samsung group, for example, still largely controlled by the heirs of its founder, Lee Byung Chull.

From Jennifer Beamer's analytical account of the structure of the *zaibatsu*, clear comparisons with the structural organisation of the modern day Korean conglomerates can be drawn.¹¹¹ These “large family-controlled vertical monopolies” were instrumental in the industrialisation and modernisation of Japan.¹¹² The *zaibatsu*'s consisted of a central holding company, a wholly owned banking subsidiary, and interconnected industrial subsidiaries wielding significant dominance over specific market sectors.¹¹³ The leverage these companies were able to exert over the Japanese economy by the 1930's was immense and as noted by Beamer, at their peak, the big four *zaibatsu* presided over 50 percent of Japan's machinery and equipment market; 30 percent of the mining, chemical, and metal industries; and were responsible for 60 percent of the value on Japan's commercial stock exchange.¹¹⁴ A final element of the composition of the pre-war Japanese conglomerates, is that they were inextricably linked to the Japanese government and the *zaibatsu* leaders deemed close cooperation with the

¹¹⁰ Ibid, 3.

¹¹¹ Jennifer Beamer and Peter J. Seybolt, (n 107), 300.

¹¹² Ibid, 300.

¹¹³ Ibid, 301.

¹¹⁴ Ibid, 301.

state to be a necessary mechanism by which to procure state benefits.¹¹⁵ In developing Japan, Namkoong objectively describes the heads of the *zaibatsu* businesses as “political merchants”.¹¹⁶ Throughout the history of pre-war Japan, there is no doubt that the success of the “political merchant” *zaibatsu* leaders and the formation of Japanese capitalism, run parallel.¹¹⁷ A useful illustration of the extent of this political clout is Rikken Seiyukai, a political party which was effectively a branch of the Mitsui *zaibatsu*.¹¹⁸ Thus, the *zaibatsu*’s role in the industrialisation of Japan in the first half of the 20th century, and subsequent monopolisation of the pre-war economy, cannot be overstated and is of clear resemblance to the *chaebol*’s influence over modern Korea.

The Economic History of Korea: The development of the *Chaebol* economic monopoly

Following the culmination of the Second World War, the Soviet Union and the United States fostered the establishment of two states by partitioning Korea along the 38th Parallel: with the capitalist Republic of Korea in the south, and to the north the communist Democratic People’s Republic of Korea (DPRK). Upon partition, the DPRK inherited 80% of the industry, mining and electrical power generation,¹¹⁹ consigning

¹¹⁵ Michael J. Seth, “*South Korea’s Economic Development, 1948-1996*”, (OUP, 2017), 1.

¹¹⁶ Young Namkoong, (n 105), 11.

¹¹⁷ Tsunoyama Sakae, “*A Concise Economic History of Modern Japan*”, (Bombay: Vora & Co, 1965), 52.

¹¹⁸ Jennifer Beamer and Peter J. Seybolt, (n 107), 301.

¹¹⁹ Byoung-Lo Philo Kim, “*The Two Koreas in Development*” (New Brunswick, NJ, 1992), 66-67.

South Korea to the ranks of the world's poorest states.¹²⁰ During the years following its conception, Korea harboured an inordinate reliance on American aid, which accounted for a considerable proportion of its entire gross national product (GNP), and a sizeable 80% of the new government's revenues.¹²¹ According to Michael J. Seth the tumultuous 1948 to 1961 period is dismissed by a generation of Koreans as a time of "stagnation, inflation, corruption and dependence on foreign assistance".¹²² Nevertheless, fundamental societal reforms coupled with a high birth-rate during the tenure of President Syngman Rhee combined to provide the central foundations for Korea's later rapid economic expansion. The first integral societal change was the nationwide expansion of education. The years preceding 1960 saw enrolment in primary and secondary education increase three-fold and eight-fold respectively, with participation in higher education 10 times greater.¹²³ The dramatic increase in higher education enrolment led to an ever-increasing tide of South Korean students choosing to travel to the United States to acquire further expertise in a variety of disciplines, including economics. The second major societal change was the land reform of the 1950s which had a stabilising effect on the war-torn countryside. Crucially, as noted by John Lie, the traditional landowning class could begin to direct its focus towards industry and commerce.¹²⁴

¹²⁰ Michael J. Seth, (n 115), 1.

¹²¹ John Lie, "*Han Unbound: The Political Economy of South Korea*", (Stanford, CA: Stanford University Press, 1998), 56.

¹²² Michael J. Seth, (n 115), 2.

¹²³ *Ibid*, 3.

¹²⁴ John Lie, (n 121), 9.

In 1961, General Park Chung Hee's military government seized power in what would later be recognised as the watershed moment for the South Korean economy. Scholarly explanations for the Korean "economic miracle" under Park's stewardship are both numerous and varied. One theory proposed by academics is that the assurance of American aid, technical assistance, and military presence, was the vital factor in procuring foreign investment.¹²⁵ To illustrate the extent of the American influence, Jung-en Woo highlights that in the years 1946 to 1976, only Israel and South Vietnam received more than the \$12.6 billion dollars of U.S. economic assistance provided to Korea.¹²⁶ Other scholars heed the significance of the Park administration's concerted attempt to normalise relations with Tokyo in 1965. The following decade saw a ten-fold increase in trade between the two east-Asian neighbours, over which period Japan was supplying almost 60 percent of Korea's foreign technologies.¹²⁷ Korean strategists also found Japan's economic development to be a useful non-western model, with a consensus emerging among Korean business circles of this era to simply "do what the Japanese have done but do it faster and cheaper."¹²⁸

Whilst acknowledging these academic explanations as essential components, the author of this paper would contend that the salient factor behind the Korean economic miracle was the government's advocacy for private entrepreneurship. In 1961, the Promotional Committee for Economic Reconstruction was established by General Park,

¹²⁵ Michael J. Seth, (n 115), 13.

¹²⁶ Jung-en Woo, *Race to the Swift: State and Finance in the Industrialization of Korea*, (New York: Columbia University Press, 1997), 45.

¹²⁷ Stewart Peter Lone and Gavan McCormack, *Korea since 1850*. (Melbourne: Longman, 1994), 148.

¹²⁸ Byoung-lo Philo Kim, (n 119), 193.

with this planning board launching a program of rapid export-based industrialisation. Lee Byung Chull, the founder of Samsung Group, was appointed as chair of the committee, which was made up of twelve other prominent business figures. The Committee under Park's regime was effectively the beginning of an interminable and entwined partnership between the Korean government, and the country's entrepreneurial elite.¹²⁹ Park's administration created powerful incentives for the selected group of companies to develop target industries and increase exports. This preferential treatment was financed courtesy of the state's ownership of the banking system, and included tax benefits, low interest loans, import privileges, and even permission to borrow from foreign sources.¹³⁰ Consequently, a number of these businesses would grow into extensive conglomerates, beginning to wield their increasing dominance over the Korean economic markets. In response to the escalating influence of these family-owned, state sponsored corporations, the label of "*chaebol*" was contrived by Korean society, which translates as "wealth clan" or "money faction". Upon early evaluation, the relationship which was fostered between the Korean government and private entrepreneurship in the 1960s appeared to be an imitation of a formerly Japanese approach. In both structure and behaviour, the Korean *chaebol* which emerged, appeared noticeably comparable to the Japanese "*zaibatsu*" businesses which predominated the region in the earlier half of the 20th Century.¹³¹ This need not be surprising as not only was Korea a colony of Japan until the culmination of

¹²⁹Hyung- A Kim, "*Korea's Development under Park Chung Hee: Rapid Industrialisation 1961-79*", (London: Routledge, 2004), 87.

¹³⁰ U.S. Library of Congress, "*South Korea - Economic Development – Country Studies*", countrystudies.us/south-korea/15.htm.

¹³¹ Michael Wise, "*Korea – The Role of Competition Policy in Regulatory Reform*", (OECD, 2000), 5.

the Second World War, but both countries have adaptations of civil law deriving from the 19th Century German Civil Code. Michael J Seth highlights the extent to which each *chaebol* would deem close cooperation with the state to be essential, with a number of the *chaebol* leaders contributing generously to pro-government projects and political campaigns.¹³² The swift expansion of the most successful *chaebol* companies contributed markedly to the growth of Korea's economy, by generating new jobs, goods, and services.¹³³ The fact that the top 10 *chaebol* companies were growing at a rate three and a half times that of the national GDP, supports the author's theory that these businesses were the key driver of economic growth.¹³⁴ Furthermore, the current monopoly of the Korean economy can be explained by the subsequent horizontal augmentation of the largest *chaebol*, who began to branch out into a range of highly diversified business activities.

The Economic History of China

While similarities can be drawn between Japan and South Korea's economic development, China has an incredibly unique economic background that has led to an equally complicated adoption of competition regulation. Before we can understand the regulation of competition in China, however, there must first be an understanding of

¹³² Michael J. Seth, (n 115), 7.

¹³³ Ju Hyejung, "*Korean Chaebols: 1900 to Present*", (Cultural Sociology of the Middle East, Asia and Africa, Sage Publications, 2012), 2.

¹³⁴ Eun Mee Kim, "*Big Business, Strong State: Collusion and Conflict in South Korean Development 1960-1990*", (Albany: State University of New York Press, 1997), 51.

China's path of transition towards a market economy. Indeed, the dramatic take-off of the Chinese economy over the last forty years has had a significant impact on mankind as a whole, due to the fact that China is home to one-fifth of the earth's inhabitants and now the majority of them have climbed out of poverty.¹³⁵ The People's Republic of China was founded in 1949, and its economic development since can be divided into two periods; the pre-reform period and the post-reform period. When they came to power, the leaders of the Communist Party of China had fundamental long-range goals to transform China into a modern, powerful, and socialist nation. The new leadership set out a number of key economic objectives, namely, industrialization, improvement of living standards, narrowing of income differences, and production of modern military equipment. However, on several occasions, the economic policies were altered dramatically to respond to major changes in the economy, internal politics, international political and economic developments, and nationwide cultural reform. In the pre-reform period (1949-78), China's economic growth was extremely volatile, with the rate of growth ranging from 21.3 percent in 1958 to -27.3 percent in 1961, for example.¹³⁶ Therefore, by 1978, after the chaos of the Maoist Cultural Revolution had seen China's economic growth fall far behind the west, as well as their neighbours Japan and South Korea, it was concluded that the China needed to move away from the radical leftist version of a centrally planned economy. China's economic growth in the post-reform period has been driven by several important factors, such as, the development of the

¹³⁵ Yanrui Wu, "*China's Economic Growth: A miracle with Chinese characteristics*", Taylor & Francis Group, (2004), 1.

¹³⁶ Ibid, 1.

rural non-farming sector, massive inflow of foreign capital, structural transformation, reform-induced efficiency improvement and promotion of trade.¹³⁷

When assessing the application of competition law in China, it is important to bear in mind that, like South Korea and Japan, China began its journey from a very different starting point than most Western capitalist economies. In the capitalist west, the presumption is private ownership of property and productive resources, with state ownership only coming into the equation following market failures, or in the case of a natural monopoly, or for the provision of public goods.¹³⁸ In stark contrast, by the late 1970s when Chinese economic reform began, state ownership was omnipresent, with state-owned enterprises (SOEs) controlling 99.8% of the national economy in 1978.¹³⁹ When China began its “open door” policy in the late 1970s it was to all extents a centrally planned economy with close to no private ownership.¹⁴⁰ SOEs dominated practically every sector of the economy and they followed stringent government orders regarding what to produce, how much to produce, and the prices at which products should be sold.¹⁴¹ What followed since then has been, according to Thomas K. Cheng, a “gradual reduction of state presence in the economy and reform and restructuring of SOEs.”¹⁴²

¹³⁷ Ibid, 1.

¹³⁸ Thomas K. Cheng, “Competition and the State in China” in Daniel D. Sokol, Thomas K. Cheng and Ioannis Lianos, “*Competition and the State*”, Stanford Scholarship Online, (2014), 172.

¹³⁹ Bruce M. Owen et al., “*Antitrust in China: The Problem of Incentive Compatibility*”, 1 J. Competition L. & Econ. 123–48 (2005).

¹⁴⁰ Thomas K. Cheng, (n 138), 172.

¹⁴¹ Wentong Zheng, “*State capitalism and the regulation of competition in China*”, in Michael W. Dowdle, John Gillespie, and Imelda Maher, “*Asian Capitalism and the Regulation of Competition*” (Cambridge University Press, 2013), 148.

¹⁴² Thomas K. Cheng, (n 138), 172.

Since the beginning of this gradualist approach towards implementing a free-market and opening up to foreign trade and investment, China has been among the world's fastest-growing economies. With real annual gross domestic product (GDPP growth averaging 9.5% over the past 40 years, the World Bank has described the pace of China's economic rise as "the fastest sustained growth by a major economy in history."¹⁴³ Generally speaking, economists highlight two main reasons for China's rapid economic growth. Firstly, since the reforms began with the "open door" policy, there has been large scale capital investment, both from large domestic savings and the highest proportion of foreign investment globally.¹⁴⁴ The second factor is the rapid productivity growth (i.e increases in efficiency) that China has achieved through the reallocation of resources to more productive uses of in sectors that were historically heavily controlled by the government.¹⁴⁵ Given China's emergence as a global economic superpower and as a leading recipient of foreign capital investment and international trade, the enforcement of competition law in China is of global significance. However, as is the case in South Korea and Japan, the application of competition law in China has been dictated by broader political and economic implications, as well as historical intricacies, that are perhaps not adequately reflected in the strategy to convergence global competition enforcement.

¹⁴³ Wayne M. Morrison, "*China's Economic Rise: History, Trends, Challenges, and Implications for the United States*", Congressional Research Performance, (2014), 1.

¹⁴⁴ Ibid, 6.

¹⁴⁵ Ibid, 7.

Competition Law in East Asia

The different timeframes, contexts, and rates of economic development in the East Asian region mean that each of Japan, South Korea, and China have distinctive economic traits. However, in the context of competition law convergence, they are inextricably linked by the fact that, upon adoption of competition regulations, the economies of each of the three nations were at markedly different starting points than the capitalist western countries upon which much of the competition legislation was based. The large family-controlled vertical monopolies that were dominant in both Korea and Japan, and the widespread influence of state-owned enterprises in China, meant that East Asian economic structures were fundamentally different to the economies of the United States or Europe that have developed over centuries. Nevertheless, the role of East Asia in global competition development has attracted considerable attention primarily because of the dramatically increased economic importance of the region.¹⁴⁶ East Asian economies are now major components of global economic markets, and this increased importance has resulted in the generation of considerable political and economic leverage.¹⁴⁷ Accordingly, the proponents of the global competition convergence strategy are aware that the ever-increasing economic and political importance of this region will determine the efficacy of said strategy. Put simply, “without widespread support from Asian countries, no such strategy can be successful.”¹⁴⁸ Therefore, having outlined the context behind their economic development, the thesis

¹⁴⁶ David J. Gerber, (n 7), 36.

¹⁴⁷ Ibid, 36.

¹⁴⁸ Ibid, 36.

will now examine the process by which South Korea, Japan, and China adopted competition law. In each case, an effort will be made to explain the context behind the introduction of competition regulation, the content of the legislation, the enforcement of the regulations, as well as trends and similarities that are present across the three jurisdictions.

3.2 Competition Law in Japan

Japan was the first Asian country to import and enact a competition law, and it was initially met with scepticism and hostility.¹⁴⁹ It is important at this juncture to recognise that the democratisation process that led to the dissolution of the *zaibatsu* businesses, was stringently imposed on Japan. After the conclusion of The Second World War the allied occupational forces, led by the United States, made a concerted attempt to dismantle the conglomerates, thus preventing the resurgence of the pre-war structures of Japanese industry.¹⁵⁰ Economic advisors to both American Presidents Roosevelt and Truman warned of the monopolistic and restrictive business practices, and feared the re-emergence of militarism.¹⁵¹ The *zaibatsu* empires were divided up, with the stocks belonging to the parent companies put up for auction, and the subsidiary companies freed from under the umbrella of the parent organisations. However, one of

¹⁴⁹ Simon Vande Walle, “*Competition and competition law in Japan: between scepticism and embrace*”, in Michael W. Dowdle, John Gillespie, and Imelda Maher, “*Asian Capitalism and the Regulation of Competition*” (Cambridge University Press, 2013), 126.

¹⁵⁰ M Matsushita, “*International Trade and Competition Law in Japan*”, (OUP 1993), 76.

¹⁵¹ Jennifer Beamer and Peter J. Seybolt, (n 107), 301.

the principal reforms of the democratisation process was the introduction of a Japanese competition law.¹⁵² For the US occupation authorities, breaking up the *zaibatsu* was a 'surgical', one-time-only measure, and the enactment of a robust competition legislation was necessary in order to prevent excessive concentration in the future.¹⁵³ In Japan therefore, like many Asian countries, external pressures from foreign countries led to the introduction of competition law, with the Antimonopoly Act 1947 (the 'AMA').¹⁵⁴

The Japanese AMA was evidently modelled on the equivalent U.S antitrust legislation, predominantly the Clayton Act and the Sherman Act.¹⁵⁵ The new Act contained specific measures centred on dissolving the *zaibatsu* businesses, deconcentrating the economic power, and disbanding the private control bodies.¹⁵⁶ Per the instructions of the US occupation authorities, the AMA was originally stringently imposed in Japan, implementing rigid controls over mergers and acquisitions, and a prohibition on any "unreasonable differences in economic power" among companies in the Japanese market.¹⁵⁷ Furthermore, the Japanese Fair Trade Commission (JFTC), which was established with the sole-jurisdiction over the Act, strictly enforced the AMA from its initiation. The central player in Japan's new competition regime was the JFTC, which was the only administrative body that could enforce the new competition law directly.¹⁵⁸

¹⁵² Ping Lin, "*Competition Policy in East Asia: The Cases of Japan, People's Republic of China, and Hong Kong*", (JEL Classifications, December 2003), 3.

¹⁵³ T. A. Bisson, "*Zaibatsu Dissolution in Japan*", Westport, CT: Greenwood Press, (1976), 180.

¹⁵⁴ Ping Lin, (n 152), 15.

¹⁵⁵ Danny Abir, "*Monopoly and Merger Regulation in South Korea and Japan: A Comparative Analysis*", (13 International Tax & Business Law. 143, 1996), 161.

¹⁵⁶ Makoto Kurita, "*Effectiveness and transparency of competition law enforcement – causes and consequences of a perception gap between home and abroad on the anti-monopoly act enforcement in Japan.*" (Washington University Global Studies Review, Vol 3), 52.

¹⁵⁷ Ibid, 161.

¹⁵⁸ Simon Vande Walle, (n 149), 126.

The US authorities believed that concentrating enforcement in one independent agency was best for Japanese competition regulation and, as such, public prosecutors could only bring actions against anti-competitive behaviour on request of the JFTC.¹⁵⁹ Interestingly, the JFTC was modelled entirely on the US Federal Trade Commission by the occupation authorities and, as will be discussed later in the next chapter of this thesis, the JFTC would become very vulnerable to political pressure which limited the success of competition regulation in Japan.

On paper, the Antimonopoly Act was one of the strictest competition laws in the world at the time of its enactment, although, as Simon Vande Walle notes, only a few countries had competition law at that time.¹⁶⁰ Indeed, upon examination it is clear that the AMA was largely based on the existing American competition legislation. The AMA explicitly prohibited “unreasonable restraints of trade” and “private monopolisation”, which are provisions taken directly from the US Sherman Act.¹⁶¹ Furthermore, like the US Federal Trade Commission Act, the AMA also prohibited “unfair methods of competition”, such as boycotts, price discrimination, dumping, and exclusive dealing or tying contracts.¹⁶² According to Ping Lin, the AMA essentially has three main pillars, which have been clearly influenced by the US occupation authorities. The first pillar of the AMA is the prohibition of unreasonable restraints of trade, secondly, it prohibited the creation of

¹⁵⁹ The Antimonopoly Act, Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No. 54 of April 14, 1947), arts. 74(1) and 96(1).

¹⁶⁰ Simon Vande Walle, (n 149), 124.

¹⁶¹ Antimonopoly Act, (n 159), art. 3, and Sherman Antitrust Act, 15 USC.

¹⁶² Ibid, art. 2(6).

monopolies through mergers and cross-shareholdings and, thirdly, the AMA prohibited a list of what it deemed to be unfair business practices.¹⁶³

In terms of enforcement, Japan's engagement with its international model of competition law has been decidedly ambiguous and cyclical, depending on its economic performance.¹⁶⁴ Simon Vande Walle states that during times of prolonged economic growth, Japan's attitude was sceptical, even hostile, towards western styles of competition regulation, whereas, during times of economic stagnation the Japanese have been much more receptive to the legislation.¹⁶⁵ In April 1952, the allied occupation ended, and Japan regained its independence. Japan subsequently began two decades of rapid economic growth which saw the annual GDP growing at a staggering rate of 10 per cent on average.¹⁶⁶ For the fledging competition law that had been left behind by the Americans, the 1950s and 1960s were years of anaemic enforcement as the AMA became subordinate to Japan's industrial policymaking.¹⁶⁷ Therefore, during this period of rapid economic growth, Japan's industrial policy encouraged mergers between large companies and supported cartels, with politicians and big businesses both deeming the restrictive AMA as an obstacle to economic growth.¹⁶⁸ In the courts, there was an incredibly lenient approach towards vertical restraints, with essentially no penalty

¹⁶³ Ping Lin, (n 152), 4.

¹⁶⁴ Simon Vande Walle, (n 149), 123.

¹⁶⁵ Ibid, 123.

¹⁶⁶ Ibid, 126.

¹⁶⁷ Ibid, 127.

¹⁶⁸ Ibid, 127.

existing for anti-competitive vertical agreements.¹⁶⁹ As such, not only was the AMA anaemically enforced during this period, but it was also heavily amended. Amendments included authorizing certain kinds of cartels which led to a sharp rise in cartel numbers, and vertical price-fixing was permitted. After the initial strong enforcement, for the best part of two decades after allied occupation ended, the JFTC's administrative actions dwindled to a handful per year and there were no criminal actions.¹⁷⁰

Japan's period of rapid economic growth was abruptly halted by the oil shock of 1973. This coincided with a series of major corporate scandals and charges of corruption between the state and big businesses, which severely undermined public trust in corporate responsibility.¹⁷¹ Rumblings of support for stricter competition law grew louder and the JFTC finally felt that it had sufficient support for more aggressive enforcement of the AMA. Between 1973 and 1974, the JFTC took sixty-nine formal administrative actions, which represented a dramatic increase from the 1950s and 1960s.¹⁷² In 1974, the JFTC also initiated Japan's first criminal prosecution since the occupation for price fixing.¹⁷³ However, this period of more aggressive competition enforcement was short-lived as, by the end of the decade, inflation rates had returned to normal and the JFTC's influence, along with the regulatory role of competition law, had diminished.¹⁷⁴ During

¹⁶⁹ See, *K.K. Asahi shimbunsha et al. v. JFTC*, 2 Hanrei Jihō 8 (Tokyo High Ct, 9 March 1953) (holding that the prohibition on unreasonable restraints of trade only applies to horizontal agreements). The validity of this view was not questioned until, *Japan v. Toppan mīa et al.*, 840 Hanrei Taimuzu 81, 88 (Tokyo High Ct, 14 December 1993)

¹⁷⁰ Simon Vande Walle, (n 149), 129.

¹⁷¹ *Ibid*, 131.

¹⁷² Hiroshi Iyori and Akinori Uesugi: “*The Antimonopoly Laws and Policies of Japan*”, Federal Legal Publications, (1994), 214.

¹⁷³ *Japan v. Idemitsu Kōsan K.K.*, 28(2) Shinketsushū 299, 985 Hanrei Jihō 3, 8 (Tokyo High Ct., 26 September 1980).

¹⁷⁴ Simon Vande Walle, (n 149), 132.

the 1980s the JFTC once again toned-down enforcement and in the areas where clashes arose between competition law and existing practices, formal enforcement measures were largely avoided.¹⁷⁵ The AMA was largely redundant as many major Japanese manufacturers were already establishing a large degree of control through the so-called vertical *keiretsu*.¹⁷⁶

After a second, long period of economic growth Japan's so-called 'bubble economy' collapsed at the beginning of the 1990s, and a decade of economic stagnation followed.¹⁷⁷ As such, the 1990s and 2000s saw a renewed application and strengthening of competition law enforcement. Interestingly, at this juncture Japan's competition law began to converge even more towards EU and US models. This further competition convergence came about because of increasing outside pressure, particularly from the United States, who pushed the notion that a more Western style of competition law would be a means of returning to sustained economic growth.¹⁷⁸ In recognition of the pressure from the United States, the Japanese government once again implemented changes to strengthen competition enforcement. The structure and role of the JFTC began being strengthened in the late 1990's, and in 2003, the Government of Japan approved increases in the JFTC's staff and budgetary size.¹⁷⁹ This has led to antitrust investigations which encompass both economic and legal perspectives with incentives, including fixed-term contracts, attracting both economists

¹⁷⁵ Simon Vande Walle, (n 149), 132.

¹⁷⁶ Ibid, 132.

¹⁷⁷ Ibid, 133.

¹⁷⁸ Ibid, 133.

¹⁷⁹ Deirdre Shanahan, "*The Development of Antitrust in China, Korea and Japan*", (International Competition Law: Real World Issues and Strategies for Success, June 2005), 3.

and legal experts to the ranks of the JFTC.¹⁸⁰ However, most significantly for the purposes of this paper, the JFTC has conducted a comprehensive review of its enforcement measures, following recommendations from the U.S government.¹⁸¹ The Japanese Diet significantly increased the surcharge rate for violations of the AMA by large enterprises, from 6% to 15%.¹⁸² This surcharge system now presents a considerable punitive deterrent to anti-competitive practices by large Japanese conglomerates.

3.3 Competition Law in South Korea

Driven by the *chaebol*-led growth, the Korean economy had rapidly matured, leading to its emergence as a newly developed nation by the early 1980's.¹⁸³ However, the Korean economic market had succumbed to heavy monopolisation, with the majority of principal industries now dominated by a select few large conglomerates. Indeed, affording these selected companies a "virtual monopoly over capital", became the crucial driver of the new economy.¹⁸⁴ Thus, whilst exceptionally successful in transforming the Korean economy, Ohseung Kwon describes the ramifications of the state's interventionist policies as being both "numerous and diverse".¹⁸⁵ Firstly, Kwon provides that the favouritism of government policies had the negative repercussion of

¹⁸⁰ Ibid, 3.

¹⁸¹ Ibid, 4.

¹⁸² Ibid, 4.

¹⁸³ Youngsu Shin, "Economic Law: Focusing on the Monopoly Regulation and Fair Trade Act", (Korea Legislation Research Institute, 2013), 216.

¹⁸⁴ Ibid, 229.

¹⁸⁵ Ohseung Kwon, "Applying the Korean Experience with Antitrust Law to the development of competition law in China", (3 Wash. U. Global Stud. L. Rev 347, 2004), 348.

leaving economic power excessively concentrated.¹⁸⁶ Furthermore, the government's immoderate and persistent intervention in the domestic market, greatly impaired its functioning. Therefore, in a concerted effort to restore a more normative function to the market, the Korean government ratified the Monopoly Regulation and Fair Trade Act in 1981. The overarching objective of the MRFTA is succinctly outlined in Article 1 of the Act as, ensuring "fair and free competition by prohibiting the abuse of market dominating positions and the excessive concentration of economic power..."¹⁸⁷

The initial intention of the MRFTA, was to signal Korea's significant departure from the traditional government-led economy, toward a more market-oriented approach to private-initiative premised on competitive principles.¹⁸⁸ Kwon provides a useful division of the substantive objectives of the MRFTA by separating the Act into three distinct categories.¹⁸⁹ Firstly, the Act introduced regulations to promote and ensure free competition in the market, by placing restraints on business practices which have the capacity to restrict economic competition; such as monopolies, mergers and cartels.¹⁹⁰ With regards to monopolies, the Act forbids any anti-competitive or unfair practices by companies it deems to be in a "market dominant position", however it does not explicitly contain a prohibition on monopolisation.¹⁹¹ Secondly, the Act makes a concerted effort to prohibit, what it refers to as "unfair trades or practices", as an attempt to ensure free competition and fair trade. Article 23 of the MRFTA introduces a comprehensive list of

¹⁸⁶ Ibid, 348.

¹⁸⁷ Monopoly Regulation and Fair Trade Act, 1981, art. 1.

¹⁸⁸ Michael Wise, "*Korea – The Role of Competition Policy in Regulatory Reform*", (OECD, 2000), 5.

¹⁸⁹ Ohseung Kwon, (n 185), 349.

¹⁹⁰ MRFTA, (n 187), art. 3.

¹⁹¹ Ohseung Kwon, (n 185), 349.

business methods which would likely “hamper fair trade or restrain competition.”¹⁹²

Thirdly, Article 8 of the MRFTA does make a somewhat notable attempt at addressing the concentration of economic power in Korea.¹⁹³ There was a clear intention to regulate the business activities of the *chaebol* companies, especially with regard to their subsidiaries and holding companies, which clearly needed to be controlled if economic concentration was to be halted. In concurrence with the introduction of the MRFTA, the Korean government established the Korea Fair Trade Commission (KFTC) to be responsible for the enforcement of the Act. Under the jurisdiction of the Prime Minister, this “quasi-judicial regulatory agency” was composed of nine members, each selected on the basis of their specific knowledge and experience with regards to fair trade regulations.¹⁹⁴

Since its enactment in 1981, it is said that the Monopoly Regulation and Fair Trade Act has contributed to Korea’s attempted promotion of a market-oriented economy. Shin notes that scholars such as Michael Wise have lauded the Korean Fair Trade Commission as one of the most impressive examples of a competition authority developing over a short period of time.¹⁹⁵ Indeed, the KFTC is widely regarded as one of Asia’s most active, and on occasion toughest, competition regulatory authorities. It has, for much of the last decade, been among the foremost authorities in the world for fines imposed, and in 2016, the KFTC’s staggering US\$760m in fines charged was almost double the figure reached by the U.S. Department of Justice and Fair Trade

¹⁹² MRFTA, (n 187), art. 23.

¹⁹³ Ibid, art. 8.

¹⁹⁴ Youngsu Shin, (n 183), 230.

¹⁹⁵ Ibid, 234.

Commission.¹⁹⁶ Furthermore, the KFTC has been successful on an international level by monitoring cases of collusive conduct which have implications on Korean companies. It has deliberately investigated international cartels and vigorously enforced against abusive conduct by large multinational companies who are impacting the Korean market.¹⁹⁷ This international scope of the Commission was recently accentuated when it deemed Qualcomm, a Californian-based global company, to be abusing its market dominance, subsequently imposing a huge US\$900M fine.¹⁹⁸ As a result of its growing international reputation, the Global Competition Review acknowledged the KFTC as one of the top five “elite” global regulators for 2016, alongside the French, German, Japanese, and U.S authorities.¹⁹⁹

However, despite the internationally recognised successes of its regulatory body, the author of this thesis would contend that the MRFTA has predominantly failed with regards to its fundamental statutory objective; to diminish the concentration of economic power in Korea. In fact, the status of economic concentration by the *chaebol* conglomerates appears to be only increasingly serious. The overwhelming influence that these family-owned empires still exert is evidenced by the fact that sales revenue generated by Samsung, SK, Lotte, LG, and Hyundai, the top 5 *chaebol* companies, is worth more than half of Korea’s entire economy.²⁰⁰ As a result of its seemingly minimal impact on the economy’s monopolisation, the Act has received its fair share of criticism

¹⁹⁶ Freshfields Bruchaus Deringer, “*Antitrust in Asia – The business impact of fast evolving competition laws,*” (1/10/17), <https://www.freshfields.com/globalassets/our-thinking/antitrust-in-asia>, 67.

¹⁹⁷ Ibid, 67.

¹⁹⁸ Korea Fair Trade Commission, Case No. 2015SiGam2118, *In re Alleged Market Dominance of Qualcomm Inc.*, Decision No.2017-0-25 (Jan.20, 2017).

¹⁹⁹ Freshfields Bruchaus Deringer, (n 196), 67.

²⁰⁰ Karishma Vaswani, “*Is real reform possible at South Korea’s chaebols?*”, BBC News, (24/4/2017).

from both academia and wider business circles. Yang Myong Cho categorically argues that the MRFTA, in its current guise, can never fully succeed in converting Korea's monopolistic market into a competitive one, and further argues that it has failed to effectively reduce the concentration of economic power.²⁰¹

In terms of domestic enforcement, the Korean Fair Trade Commission was less than aggressive in using the newly enacted MRFTA to challenge abusive mergers or market-dominating positions.²⁰² This differs markedly from the initial approach of the JFTC in Japan, with Yi and Jung describing the enforcement, in particular with regards to abuse of market dominance, as being "anaemic".²⁰³ While in Japan the competition enforcement was cyclical and dependent on economic performance, Shin would argue that the KFTC had failed to aggressively enforce the provisions of the Act at all prior to the IMF Asian Financial crisis in 1997.²⁰⁴ If the MRFTA had been more diligently enforced from the outset, rather than as a reactionary policy in response to economic crisis, it may have more successfully generated market reform.

²⁰¹ Yang Myong Cho, "Assessment and Perspective of Korean Antitrust Law". J. Competition L. 12, (2002).

²⁰² Danny Abir, "Monopoly and Merger Regulation in South Korea and Japan: A Comparative Analysis", (13 International Tax & Business Law. 143, (1996), 160.

²⁰³ Sang-Seung Yi & Youngjin Jung, "A New Kid on the Block: Korean Competition Law, Policy, and Economics" (2011 CPI Journal, 3), 154.

²⁰⁴ Youngsu Shin, (n 183), 235.

3.4 Competition Law in China

China was the most recent major economic power to join the ever-expanding list of jurisdictions with competition laws when the Anti-Monopoly Law (AML) came into effect on 1st August 2008.²⁰⁵ As noted by Wendy Ng, when China first embarked on its ‘open-door’ policy and subsequent economic reforms, its legal system was virtually non-existent, having been largely dismantled during the Cultural Revolution.²⁰⁶ Since then, as China’s economy has rapidly evolved, increased importance has gradually been attached to establishing and improving laws in order to promote and support economic growth as well as the development of a market economy.²⁰⁷ Therefore, the introduction of competition law through the AML seemed like the logical next step in those law-making efforts. During the drafting of China’s AML, many established jurisdictions, including the US, the EU, Japan, and South Korea, offered technical advice to the Chinese government.²⁰⁸ According to Thomas K. Cheng, it was widely known at the time that there was a battle amongst these advisors to persuade China to follow their respective models.²⁰⁹ The two loudest voices in terms of technical assistance were the US and the EU and, as such, these jurisdictions were actively pushing for convergence to their own models. Therefore, while generally regarded as a modern competition law,

²⁰⁵ Anti-Monopoly Law of the People’s Republic of China, (2008).

²⁰⁶ Wendy Ng, “*Competition Law in China and the Importance of Context*”, in Wendy Ng, “*The Political Economy of Competition Law in China*”, Cambridge University Press, (2018), 3.

²⁰⁷ *Ibid*, 4.

²⁰⁸ H. Stephen Harris, “*The Making of Antitrust Law: The Pending Anti-Monopoly Law of the People’s Republic of China*”, 7 *Chi J Intl Law* 169 (2006), 175.

²⁰⁹ Thomas K. Cheng, (n 1), 447.

the AML is, to a large extent, a transplant of the competition law in large western economies.²¹⁰

On paper, China's AML is largely consistent in form and substance with the prevailing competition law 'best practices.' Much like the competition laws of the US and the EU, the AML contains provisions dealing with restraints or potential restraints on competition in three main areas: agreements in restraint of trade, abuse of dominant market position, and mergers.²¹¹ More specifically, as highlighted by Susan Beth Farmer, the AML's provisions concerning agreements in restraint of trade and abuse of dominant market position clearly borrow heavily from the Treaty on the Functioning of the European Union.²¹² Furthermore, the Anti-Monopoly Law's provisions on the regulation of mergers, "appear to be drawn from the European Union Merger Regulation", and a significant number of other provisions have clearly been influenced by US antitrust law.²¹³ Firstly, the AML regulates anticompetitive agreements, which are referred to as 'monopoly agreements' in chapter two of the legislation.²¹⁴ In chapters three and four of the AML, regulations are designed to prevent abuses of dominant market positions, and mergers, which are referred to as "concentrations of undertakings".²¹⁵ Together, these practices are defined by Article 3 of the AML as simply "monopolistic conduct".²¹⁶ While it is certainly the case that the AML has been made in the image of western competition

²¹⁰ Wentong Zheng, (n 141), 144.

²¹¹ Ibid, 144.

²¹² Susan Beth Farmer, "The Evolution of Chinese Merger Notification Guidelines: A Work in Progress Integrating Global Consensus and Domestic Imperatives", *Tulane Journal of International and Comparative Law*, 18 (2009): 1–92, 6.

²¹³ Ibid, 43.

²¹⁴ AML, (n 205), ch.II.

²¹⁵ Ibid, ch.III and ch.IV.

²¹⁶ Ibid, art.3.

laws, it would be remiss not to acknowledge there are also some provisions that have been tailored to address China-specific matters. For example, some effort has been made to address the China-specific problem of ‘administrative monopoly’, which is “the abuse of administrative power to restrict competition” and includes exercises of administrative power that impede the free flow of goods within China’s internal market or competition in particular industries or sectors.²¹⁷

As acknowledged by Wendy Ng, “the development, adoption and subsequent implementation and enforcement of the AML has garnered substantial attention and commentary from academics, lawyers, government officials, economists, businesses and media outlets in China and beyond.”²¹⁸ In terms of enforcement, commentators have observed that the decisions made under the AML are increasingly being framed in a language that is consistent with the international ‘best practices’ of competition law in convergence with the approaches that are adopted in the United States and the European Union.²¹⁹ Furthermore, there is a recognition that AML decisions, in areas of competition law such as the regulation of mergers, are reflective of a growing analytical understanding and sophistication.²²⁰ However, both the contents of the legislation itself, and the enforcement of the AML have attracted some criticism from competition law commentators.

²¹⁷ Xiaoye Wang, ‘Highlights of China’s New Anti-Monopoly Law’ (2008) 75 Antitrust Law Journal 133,148.

²¹⁸ Wendy Ng, (n 206), 4.

²¹⁹ Ibid, 5.

²²⁰ Ibid, 5.

One of the main criticisms from both Chinese and foreign commentators is centred on the effectiveness of the current enforcement structure for competition law. Under the AML, enforcement responsibilities are divided among three existing ministries: China's Ministry of Commerce (MOFCOM) which is responsible for merger enforcement; the National Development and Reform Commission (NDRC) which is responsible for price-related non-merger conduct; and the State Administration for Industry and Commerce (SAIC) which is responsible for non-price-related non-merger conduct.²²¹ A further organisation, the Anti-Monopoly Commission was established with the remit of organising, coordinating and guiding China's competition policy.²²² Given that competition law knowledge and expertise is still scarce in China, the divided enforcement structure, with the distribution of resources spread across three ministries, is seen as inefficient and administratively costly.²²³ There is also a concern that there is a potential for jurisdictional conflicts or inconsistent decision-making to occur if there is inadequate coordination and cooperation between the three ministries as they could perhaps take differing approaches to matters such as market definition and competitive assessment.²²⁴

Another main concern regarding the introduction of competition law in China was the extent to which the AML would be applied to the state-owned enterprises. As discussed in the economic history section SOE's were once omnipresent in the Chinese economy,

²²¹ Ibid, 12.

²²² Ibid, 12.

²²³ Xiaoye Wang and Adrian Emch, "Five years of implementation of China's Anti-Monopoly Law – achievements and challenges", *Journal of Antitrust Enforcement*, Vol 1, Issue 2, (October 2013), 268, and US Chamber of Commerce – "Competing Interests in China's Competition Law Enforcement: China's Anti-Monopoly Law Application and the Role of Industrial Policy", (2014), 8.

²²⁴ US Chamber of Commerce, (n 206), 8, and Wendy Ng, (n 189), 12.

and while it is true that reforms have brought about a gradual reduction of state presence in the economy, SOE's are still prevalent in modern China. Therefore, when the AML was first enacted there were concerns that SOE's would be exempt from the provisions of the legislation or enjoy special treatment under the AML.²²⁵ Indeed Article 7 of the AML recognises and protects the state's controlling position in the national economy and simply states that SOE's must not abuse their dominance.²²⁶ Sceptics were worried that Article 7 would give the various enforcement authorities too much discretion in the way that the AML is applied (or not) to SOE's, thus potentially providing an exemption for SOE's from the operation of the AML.²²⁷ While the author recognises the need for China-specific provisions in the AML that acknowledge the importance of SOE's to the Chinese economy, Article 7 left the various competition regulators in China with too much discretion. The AML has been enforced against SOE's but at a much lower level to other businesses, and it has evidently been applied more leniently or weakly against SOE's.²²⁸

Conclusion

In conclusion, after examining both the economic history of the region and the adoption of competition regulation in each of the three jurisdictions, some common themes emerge regarding competition law in East Asia. Firstly, each of South Korea, Japan,

²²⁵ Wendy Ng, (n 206), 8.

²²⁶ AML, (n 205), art.7.

²²⁷ Bruce M. Owen, Su Sun and Wentong Zheng, "China's Competition Policy Reforms: The Anti-monopoly Law and Beyond" (2008) 75 Antitrust Law Journal 231, 246.

²²⁸ Wendy Ng, (n 206), 8.

and China have distinctive economic backgrounds due to the unique timeframes, contexts, and the rates of economic development in the East Asian region. However, in the context of competition law, they are inextricably linked by the fact that, upon adoption of competition regulations, the economies of each of the three jurisdictions were at markedly different starting points that the capitalist western countries upon which much of the competition legislation was based. The large family-controlled vertical monopolies that were dominant in both Korea and Japan, and the widespread influence of state-owned enterprises in China, meant that East Asian economic structures were fundamentally different to the economies of the United States or Europe that have developed over centuries. The second common theme that emerges is the fact that the adoption of competition law throughout East Asia was influenced by foreign political pressure and is still influenced by the global competition convergence strategy today. The Antimonopoly Act in Japan, the Monopoly Regulation and Fair Trade Act in Korea, and the Anti-Monopoly Law in China, were all evidently modelled on the prevailing 'western-style' competition legislations in the United States and European Union. Furthermore, the global strategy to converge competition law has seen competition enforcement in the East Asian region increasingly being framed in a language that is consistent with the international 'best practices' that emanate from the US and the EU. A final common theme that emerges from this chapter is that the three East Asian jurisdictions in question have been inconsistent with their enforcement of competition law. In Japan, the enforcement of the Antimonopoly Act has been decidedly ambiguous and cyclical, depending on its economic performance.²²⁹ In South Korea, the

²²⁹ Simon Vande Walle, (n 149), 123.

Korea Fair Trade Commission has made waves on the international level, but the Monopoly Regulation and Fair Trade Act has predominantly failed with regards to its statutory objective; to relinquish the concentration of economic power in Korea. And in China, while there is recognition that the decisions of competition regulators are reflective of a growing analytical understanding and sophistication, both the contents of the Anti-Monopoly Law itself and the enforcement of competition regulation particularly with regard to state-owned enterprises, has attracted its fair share of criticism. In Chapter four of this paper, the challenges of inconsistencies of East Asian competition law will be explored in more detail and the costs of the convergence of competition law will be evaluated.

Chapter 4

Analysis of the challenges encountered when applying competition law to the East Asian region

4.1 Competition Law Challenges in Japan

As stated in the analysis of its competition enforcement, Japan's engagement with its international model of competition law has been decidedly ambiguous and cyclical, depending on its economic performance.²³⁰ The Antimonopoly Act in Japan has developed and changed in accordance with the political and economic circumstances over time.²³¹ By reviewing the history of Japan's enforcement of the AMA, it is clear that strict competition rules transplanted from advanced countries do not necessarily guarantee substantive and successful implementation of competition policy.²³² Japan is evidence of the fact that a host of economic, political and social factors must be aligned if injecting competition law into a jurisdiction is going to be a smooth transition.²³³

There has traditionally been a widely held conventional view that Japan's Antimonopoly Act was simply a translation of US antitrust law and, as such, was an entirely alien concept forced upon the Japanese by the US occupation authorities.²³⁴ In fact, it was so alien, that the Japanese government initially had difficulty understanding it, with the

²³⁰ Simon Vande Walle, (n 149), 123.

²³¹ Shuya Hayashi, Kunlin Wu and Xiaoya Ma, "The Japanese competition law in its own way: historical review of the AMA and its characteristics", in Steven Van Uytsel, Shuya Hayashi and John O. Haley, "*Research Handbook on Asian Competition Law*" (Edward Elgar Publishing 2020), 64.

²³² Ibid, 64.

²³³ Ibid, 64.

²³⁴ Alex Y. Seita and Jiro Tamura, "*The Historical Background of Japan's Antimonopoly Law*", (University of Illinois Law Review 115, 1994), 122.

official who was tasked with translating the first draft of the AMA later remarking, “it seems laughable today, but then we didn’t really know what they were talking about.”²³⁵ Recent scholarship has partly amended this view, with records showing that the Japanese government quickly came to understand the key issues of competition law.²³⁶ However, even though the Japanese government understood the law, this correction does not detract from the fact that they did not agree with its foundational presumptions.²³⁷ Japan’s enormous economic growth pre-war had convinced policymakers that “large companies were efficient, that cartels were a good way of avoiding overproduction, and that strong governmental guidance of industry was essential for promoting economic growth.”²³⁸ The Antimonopoly Act was still undoubtedly a foreign element in the Japanese legal and economic order. Even the Japanese bureaucrats in charge of the adoption of competition law were highly sceptical, with one official, Maeda Yasuyuki, claiming that “most of them thought that enforcing the Antimonopoly Law was part of Japan’s punishment. Getting even with Japan, somehow.”²³⁹

So, was the introduction of a foreign, Western-style, competition law always likely to fail in Japan? According to Gunther Teubner, the fundamental problem with using the metaphor of a ‘legal transplant’, is that it gives the impression that the foreign law is

²³⁵ Chalmers Johnson, “*MITI and the Japanese Miracle: the growth of industrial policy, 1925-1975*”, (Stanford, CA: Stanford University Press, 1982), 175.

²³⁶ Simon Vande Walle, (n 149), 137.

²³⁷ *Ibid*, 137.

²³⁸ *Ibid*, 137.

²³⁹ William Chapman, “*Inventing Japan: The Making of a Postwar Civilisation*”, (New York: Simon and Schuster, 1991), 104.

either rejected or accepted, as is the case with organ transplants.²⁴⁰ The reality is much more complicated, and Teubner contends that such legal transfers are better described as “legal irritants”.²⁴¹ Legal irritants are fundamental irritations that trigger a whole series of new and unexpected events, which can last for a long time before there is a preliminary equilibrium.²⁴² Competition law is connected to a range of economic institutions, making a protracted process of mutual irritation inevitable, and in the case of the AMA in Japan, the mutual irritation process is still ongoing after more than 70 years.²⁴³

Throughout the post-war period, Japan had to change, interpret, and enforce their competition law in ways that made it compatible with Japan’s specific form of capitalism, in fact, so much so that their particular approach to competition law was said to be a key institutional ingredient of Japan’s capitalism.²⁴⁴ Japan’s alteration of its competition law was a direct challenge to the orthodox view that Western-style competition law was necessary for a well-functioning capitalist system.²⁴⁵ Furthermore, according to Simon Vande Walle, without this diverging approach to competition law, it would not have been possible for the Japanese government to implement its national industrial policy, which

²⁴⁰ Gunther Teubner, “*Legal Irritants: How Unifying Law Ends up in New Divergences*,” in Peter A. Hall and David W. Soskice (eds.), “*Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*”, (Oxford University Press, 2001), 418.

²⁴¹ *Ibid*, 418.

²⁴² *Ibid*, 418.

²⁴³ Simon Vande Walle, (n 149), 139.

²⁴⁴ Ulrike Schade, “Cooperative Capitalism: Self-Regulation, Trade Associations, and the Antimonopoly Law in Japan”, (Oxford University Press, 2000), 4.

²⁴⁵ Simon Vande Walle, (n 149), 140.

steered production through cartels and fostered national champions, and it would not have been possible for companies to cooperate to the extent that they did.²⁴⁶

On one hand, the AMA's ban on cartels pushed companies in the 1950s and 1960s to seek government approval for cartels, which in turn strengthened the close ties between businesses and the government that became characteristic of Japanese capitalism.²⁴⁷ Furthermore, the AMA's prohibition on holding companies was probably a major factor behind Japanese businesses reuniting through cross-shareholdings, leading to the formation of the notorious 'keiretsu' groups.²⁴⁸ And on the other hand, policymakers, scholars, and many small and medium-sized enterprises point out that the Japanese economy has been and is characterized by intense competition in most sectors, although unlike in the United States, it is perhaps less about price and more about quality and innovation.²⁴⁹ The prevailing view in Japan has, therefore, been that rigorous application of Western-style competition rules are unnecessary and counterproductive, in that they would lead to a single-minded focus on destructive price competition as opposed to competition through quality and innovation.²⁵⁰

As noted by Simon Vande Walle, within Japan, there remains more fundamental concerns about the trend towards a more Western-style implementation of competition law.²⁵¹ They highlight that, in contrast to many other advanced industrial countries in

²⁴⁶ Ibid, 140.

²⁴⁷ Ibid, 140.

²⁴⁸ Hiroshi Iyori and Akinori Uesugi, "*The Antimonopoly Laws of Japan*", (Federal Legal Publications, 1983), 320.

²⁴⁹ Simon Vande Walle, (n 149), 141.

²⁵⁰ Ibid, 141.

²⁵¹ Ibid, 141.

Europe and North America, “there has been no mass unemployment, no social conflict, no conspicuous gap between the rich and the poor, and no community breakdown”, and despite two decades of low economic growth, the Japanese system has shown remarkable social resilience.²⁵² Therefore, Japan’s particular form of capitalism and its resulting approach to competition law remains highly valued for the perceived positive role it plays in enabling these favourable social outcomes.²⁵³

In conclusion, it is apparent that a large gap remains between Japanese views on the goals and role of competition law and those in the West, particularly the United States.²⁵⁴ Despite the fact that the Antimonopoly Act has been in place for over 70 years, Japan has never subscribed to the view, that is commonplace in the United States, that competition law’s sole concern should be economic efficiency.²⁵⁵ David Gerber suggests that it is this divergence between the competition law goals in East Asia, and the narrow economic-based goals in the United States present the biggest obstacle to competition law convergence.²⁵⁶ Competition law in Japan will likely continue to evolve in conjunction with Japan’s unique form of capitalism, however, it will evolve on a trajectory that is entirely distinct from competition law in the West.²⁵⁷

²⁵² Ibid, 141.

²⁵³ Ibid, 141.

²⁵⁴ Ibid, 142.

²⁵⁵ Michael W. Dowdle, “*The regulatory geography of market competition in Asia (and beyond): a preliminary mapping*”, in Michael W. Dowdle, John Gillespie and Imelda Maher, “*Asian Capitalism and the Regulation of Competition*”, (Cambridge University Press, 2013), 123.

²⁵⁶ David J. Gerber, (n 7), 46.

²⁵⁷ Simon Vande Walle, (n 149), 143.

4.2 Competition Law Challenges in South Korea and the Effectiveness of the MRFTA

Today, the *chaebol* businesses constitute a significant impediment to Korea's attempted conversion into a market-oriented economy, predicated on competition and fair trade. The *chaebol* remain in place as Korea's "representative form of business organisation", and while they embody the historic successes of the economy, they equally represent the current systemic problems within the Korean market.²⁵⁸ This thesis will now assess the salient reasons why the current antitrust legislation, under the MRFTA, has been largely ineffectual, thus facilitating the unabated concentration of economic power in Korea. The author concurs with Yang Myong Cho's explicit argument that, the MRFTA in its current iteration can never fully succeed in converting Korea's monopolistic structure into a competitive one, and neither can it effectively reduce the concentration of economic power.²⁵⁹ Renewed hope exists that, with President Moon Jae-in taking active steps toward more aggressive enforcement against abusive behaviour by domestic conglomerates, and his championing of growth for small and medium-sized enterprises, the Korean economic monopoly can be curtailed. Furthermore, with the recent upsurge in prominent chaebol leaders being required to face severe sanctions for unethical practices, there appears to be a genuine optimism that the Korean monopolies are entering a watershed period.²⁶⁰

²⁵⁸ Michael Wise, (n 131), 5.

²⁵⁹ Yang Myong Cho, (n 201).

²⁶⁰ The Economist, "*Dairy of a sniper*", <https://www.economist.com/business/2018/01/06/south-koreas-antitrust-tsar-has-a-good-shot-at-taming-the-chaebol>, (06/01/18).

The failure of the MRFTA to impact on the *chaebol* monopolisation of Korean enterprise can, in the author's opinion, be accredited to a few prevailing reasons. Firstly, the Act has failed to impose meaningful reform on Korean market structures, with Kwon attributing this to the MRFTA's "inherently flawed" nature.²⁶¹ Traditionally, monopolisation of economic markets tended to occur when a modest number of existing competitors obtained a commanding share of the market by way of successful technological innovation or through accretion of significant capital. However, the monopolisation of the Korean market was a consequence of a relatively unique set of circumstances. Essentially, through the Promotional Committee for Economic Reconstruction, the Korean government actively sought to forge a strategic partnership with the country's entrepreneurial elite.²⁶² From the outset, the government's instrumental role in creating these market-dominating companies cannot be exaggerated. Thus, while the *chaebol* received persistent preferential treatment from the state itself, the MRFTA would inevitably struggle to enact any meaningful structural reform on the market.²⁶³ Another fundamental limitation of the competition law is that while the United States, as is the norm for most countries, developed antitrust law to prevent the susceptibility of the market to monopolies, Korea only instituted the MRFTA after *chaebol* monopolisation had "permeated most domestic markets".²⁶⁴ Therefore, the precondition of the economic market seriously disadvantaged the Act from its inception. Furthermore, Shin would argue that the KFTC had failed to aggressively enforce the

²⁶¹ Ohseung Kwon, (n 185), 356.

²⁶² Hyung- A Kim, (n 29), 87.

²⁶³ Ju Hyejung, (n 133), 1.

²⁶⁴ Ohseung Kwon, (n 185), 356

provisions of the Act prior to the IMF Asian Financial crisis in 1997.²⁶⁵ If the MRFTA had been aggressively and consistently enforced from the outset, rather than as a reactionary policy in response to economic crisis, it may have had more success in reforming Korean market structures.

Having discussed the prevailing reasons behind the shortage of structural market reform, the explanations as to why Korean competition law has failed to reduce economic concentration must also be examined. This thesis will now outline why, despite its tenure fast approaching forty years in duration, the Fair Trade Act has been wholly unsuccessful in relinquishing the concentration of economic power from the *chaebol*. The “most persuasive” reason is that the MRFTA, in its current iteration, is “inherently incapable” of inducing the desired reduction of economic concentration.²⁶⁶ Currently, the establishment of holding companies, cross shareholdings, and debt guarantees for affiliated corporations are the only regulated business practices under the MRFTA. This regulation of business dealings between the chaebol companies is based on a “rigid formulae”, which fails to take account of actual economic effects.²⁶⁷ Yi and Jung have further observed that the limits on holding companies and cross-shareholdings in the Act, are based on a largely vague and ill-defined concept of “concentration of economic power”.²⁶⁸ This provokes discussion of the key, fundamental weakness of Korean competition law in its current iteration; the anti-concentration

²⁶⁵ Youngsu Shin, (n 183), 235.

²⁶⁶ Ibid, 235.

²⁶⁷ Sang-Seung Yi & Youngjin Jung, “A New Kid on the Block: Korean Competition Law, Policy, and Economics” (2011 CPI Journal, 3), 154.

²⁶⁸ Ibid, 155.

policies of the MRFTA fail to make any challenge to previously existing monopolies.²⁶⁹ As highlighted by Danny Abir, the provisions of the MRFTA are centred on preventing future anticompetitive practices and future abuses of market dominant positions.²⁷⁰ Therefore, while the Act may have been somewhat useful in prohibiting the further concentration of economic power, it simply cannot “alleviate or resolve” the existing monopolies possessed by the chaebol companies.²⁷¹ A further critique of the Act itself, is that the broad language used to regulate anti-competitive activities fails to provide Korean businesses with any justifications for the regulations. This lack of justification appears, according to Kwon, to be at odds with the MRFTA’s principal intention of ensuring and encouraging free competition and fair trade practices in the Korean marketplace.²⁷²

Another factor behind the competition law’s failure to deconcentrate any of Korea’s economic power is the structure, not just of the legislation, but of the *chaebol* conglomerates. Despite now being horizontally diversified and permeating almost all aspects of the Korean market, many of the large *chaebol* still operate under an essentially family-owned hierarchy. The two largest companies, Samsung and Hyundai, are now controlled by third-generation scions belonging to the original founding family, who consolidate their power by way of holdings in affiliates.²⁷³ This unique corporate

²⁶⁹ Danny Abir, “*Monopoly and Merger Regulation in South Korea and Japan: A Comparative Analysis*”, (13 International Tax & Business Law. 143, 1996), 160.

²⁷⁰ Ibid, 160.

²⁷¹ Younsu Shin, (n 183), 235.

²⁷² Ohseung Kwon, (n 185), 357.

²⁷³ Robyn Mak, “*Breaking Views-Korean chaebol overhaul runs into economic reality*” <https://uk.reuters.com/article/us-south-korea-conglomerate-breakingview/breakingviews-korean-chaebol-overhaul-runs-into-economic-reality>, (27/8/18).

governance set-up enables the controlling families to govern their empires with minimal input from the largely side-lined minority shareholders. This problem has been termed “tunnelling” and allows the controlling families to utilise an intricate web of shareholdings in affiliate companies to marginalize small shareholders and exercise the majority of voting rights.²⁷⁴ In fact the tunnelling problem is so entrenched that traditionally, in many companies, minority shareholders have not been welcome at Annual General Meetings. Given the deeply engrained nature of family-oriented governance in Korean business, it is perhaps of little surprise that the MRFTA has been incapable of impacting on this structure; a structure which so much of modern Korean society was predicated on.

4.3 Competition Law Challenges in China

As has been the case in both Japan and South Korea, efforts to regulate competition through a formal competition law have been faced with particular challenges in China. Before the AML was even enacted in China, questions were raised concerning the applicability of a Western model of competition law in China. Writing in 2004, John Haley succinctly stated that the competition law models that originated in the United States and Europe “were designed to deal with problems in advanced capitalist states in which the influence of private actors in national and international markets often seemed to outmatch the role of the state.”²⁷⁵ Haley contended that none of these models “were concerned with state power or the need of the state to create

²⁷⁴ Sang-Seung Yi & Youngjin Jung, (n 203), 168.

²⁷⁵ John O. Haley, ‘*Competition Policy for East Asia*’, Washington University Global Studies Law Review, 3 (2004): 277–284, 277.

conditions for effective market competition.”²⁷⁶ Even as early as 2004, Haley was able to accurately predict that the Western models of competition law “do not adequately address the basic underpinnings of monopoly power and barriers to free and competitive markets in East Asia or in most other developing states”, and he questioned whether these models had any applicability in China.²⁷⁷ This thesis will now explore how the main themes of China’s particular form of ‘state capitalism’ have impacted on the regulation of competition in China. China’s unique political conditions has directly influenced the effectiveness and relevance of the Western antitrust models that were incorporated in the AML.²⁷⁸ This thesis will agree with the conclusion of Wentong Zheng, who provides that in the three main areas of competition enforcement: cartels, abuse of dominant market position, and merger review, “China’s local conditions have prevented the AML from becoming an integral part of China’s market environments.”²⁷⁹

Most competition laws forbid the formation of cartels, whereby, competitors reach and enforce an agreement among themselves on certain areas, such as, price. The idea being that, in an ideal competitive market, companies make production and sale decisions independently of – and thus in competition with – one another, which will in turn, keep prices down and increase the volume of production to socially optimal levels.²⁸⁰ While the AML has sought to regulate cartels, at least in principle, China has faced fundamental challenges in enforcing any kind of coherent cartel policy due to the

²⁷⁶ Ibid, 277.

²⁷⁷ Ibid, 277.

²⁷⁸ Wentong Zheng, (n 141), 151.

²⁷⁹ Ibid, 151.

²⁸⁰ Ibid, 151.

widespread structural distortions in its economy. As noted by Wentong Zheng, many of China's industries experience chronic excess capacity, and this coupled with the economy's low market concentration ratios, leads to enormous competitive pressures in some industries.²⁸¹ With competitive pressures already this high, there is subsequently an increased incentive for Chinese companies to organise illegal cartels. So, on the one hand, there is the AML and its regulations that strictly prohibit cartels, but on the other hand, there are widespread attempts at cartels that are so public and normalised that they are routinely reported in the media.²⁸² Predictably, the Chinese government have been very reluctant to rigorously enforce the anti-cartel provisions of the AML. In fact, government regulators continue to see a positive role for cartels in addressing structural distortions and as a means of keeping some sort of control on prices.²⁸³ In summary, despite having Western-style, stringent anti-cartel laws through the enactment of the AML, China is unlikely to enforce a rigorous policy against cartels unless the structural distortions in its economy have been addressed first.

A cornerstone of any effective competition law is to prevent abuses of dominant market position. In general, competition laws have recognised two types of abusive conduct according to Zheng; exclusionary conduct and exploitative conduct.²⁸⁴ Exclusionary conduct "seeks to exclude competitors from the market and create or maintain the dominant firm's market power", while the exploitative conduct, "involves the exploitation

²⁸¹ Ibid, 152.

²⁸² Ibid, 154.

²⁸³ Ibid, 153.

²⁸⁴ Ibid, 156.

of one's market position to charge excessive prices to consumers."²⁸⁵ Given that the AML was heavily influenced by competition laws in the United States and Europe, it follows most Western countries in that it focuses on exclusionary conduct.²⁸⁶ However, once again China's unique economic circumstances mean that the AML's regulation of abuse of dominance has only had limited applicability to China's monopoly industries.²⁸⁷ Indeed, under the traditional understanding of exclusionary conduct, for there even to be cases of exclusionary abuses, there must be competitors that, but for regulatory intervention, would be excluded. But given that the state tightly controls the number of incumbent firms, as well as market entry by new firms, this condition is not satisfied in China.²⁸⁸ Furthermore, there have been examples where the Chinese state has allowed only one firm in an industry, by prohibiting entry from others. In such extreme cases, the industry in question will not have any exclusionary conduct within the wording of the AML, because the exclusion of competitors has already been carried out by the state and the monopoly company itself will not need to resort to any exclusionary conduct.²⁸⁹ Therefore, because the AML focuses on exclusionary conduct like the Western models of competition law, it is effectively powerless to address this kind of abuse of dominance. In these sectors, unless competition can be created by moving away from state-sanctioned monopoly and allowing entry by new firms, the AML will only have a limited relevance to the regulation of abuse of dominance.²⁹⁰

²⁸⁵ Ibid, 156.

²⁸⁶ Brian A. Facey and Dany H. Assaf, "Monopolization and Abuse of Dominance in Canada, the United States, and the European Union: A Survey", *Antitrust Law Journal*, 70 (2002): 513–591, 544.

²⁸⁷ AML, (n 205), art. 17.

²⁸⁸ Wentong Zheng, (n 141), 157.

²⁸⁹ Ibid, 157.

²⁹⁰ Ibid, 157.

As is the norm with most modern competition regulations, China's AML contains a merger review regime, whereby, parties to a proposed merger are required to notify the government so that the proposed transaction can be reviewed with regards to its likely effects on competition. In China, a merger review process had only existed for foreign companies who were seeking to acquire domestic Chinese companies. Therefore, Article 2 of the AML was of particular significance because, in theory, it extended merger review to "monopoly conduct in economic activities within People's Republic of China."²⁹¹ However, the AML's merger review process has had only a limited impact on domestic firms since its enactment.²⁹² As with the previously discussed elements of competition law in China, the limited relevance of its domestic merger review process also has to do with state-owned enterprises. Conceptually, Wentong Zheng notes that if there are exemptions for mergers among private firms that are subsidiaries of a common parent, why should mergers among SOE's that are also owned by one common parent, the state, not be exempted as well?²⁹³ Furthermore, China also has long had a policy favouring SOE mergers, and as a result, subjecting SOE's to merger review would create tensions between competing policy goals."²⁹⁴ Even if China's Ministry of Commerce was notified of a potential SOE merger, it would be difficult for the ministry to act independently and overrule either of these competing policy goals. Therefore, despite the creation of a domestic merger review process appearing to be one of the AML's most significant breakthroughs on paper, it has simply not had any

²⁹¹ AML, (n 205), art. 2.

²⁹² Wentong Zheng, (n 141), 158.

²⁹³ Ibid, 159.

²⁹⁴ Ibid, 159.

significant impact in practice.²⁹⁵ Once again, unless there is a significant shift in China's SOE policies, the AML's merger review process will continue to remain focused on foreign companies rather than domestic. A final obstacle that China has faced when applying the AML is corruption and Hew Pate, the former US Assistant Attorney General for Antitrust, observed the acute issue of politicised decision-making in China: "Pursuing the more amorphous concepts inherent in merger review and monopolisation analysis leaves much more room for mistaken and arbitrary decisions. Decision making under the vague and subjective standards that plague unilateral conduct in the United States and Europe also presents special hazards for a system struggling with corruption and lack of independence. Vague standards are an easy refuge for corrupt decision-making."²⁹⁶

In conclusion, a clear and recurring theme emerges from the analysis of the introduction of competition law in China. As stated by Zheng, "despite having been widely regarded as a historic step for China, the AML has not yet become an integral part of China's competition policy."²⁹⁷ China's economy remains in a transitional stage and that, coupled with the unique market structures and the pervasive state control in Chinese companies, have combined to limit the applicability and impact of the AML on the three main areas of competition law: regulation of cartels, preventing abuses of dominant market position, and merger review.²⁹⁸ Furthermore, despite the enactment of the AML,

²⁹⁵ Ibid, 160.

²⁹⁶ Hew Pate, "*What I Heard in the Great Hall of the People: Realistic Expectations of Chinese Antitrust*", (75 Antitrust LJ 195, 2008), 209.

²⁹⁷ Wentong Zheng, (n 141), 160.

²⁹⁸ Ibid, 160.

there remains a fundamental lack of consensus on the need to have a formal competition law that explicitly regulates domestic competition in China. This analysis has demonstrated that, as was the case in both Japan and South Korea, the specific economic and political conditions in China have severely limited the impact of its global model of competition law. “Due to the extensive role of the state in China’s economy, the regulation of competition takes place under conditions that are not entirely compatible with global competition law models”, even though these models have, on paper, been successfully adopted in China under the AML.²⁹⁹ Therefore, while China has, in theory, successfully followed the global strategy to converge competition laws along a series of agreed ‘best practices’ with its Western-style AML, China has not developed and likely will not develop a Western-style competition law jurisprudence in the near future because of its unique local conditions.

²⁹⁹ Ibid, 163.

Chapter 5

5.1 Criticisms of competition convergence, conclusions from the East Asian experiences, and advice for developing jurisdictions.

From the examination of competition law in East Asia, the influence of Western-style competition law in the region is clear and unquestionable. That the United States was the promoter of competition law ideas in both Japan and South Korea was inevitable given its significant political influence in both those jurisdictions at the time of enactment. Furthermore, there was no significant local intellectual movement that had the potential to provide the underpinnings of a coherent homegrown competition law. In fact, there was not even any domestic desire for the introduction of competition law in Japan, for example. However, the world is no longer characterized by dependence.³⁰⁰ Therefore, each country that is interested in, or in the process of, adopting a competition law, has the option to find its own way in this area of law. Of course, as noted by Steven Van Uytsel, this potential independence does not mean that each country has to reinvent the wheel and start writing a competition law from scratch.³⁰¹ Indeed, these countries will naturally be influenced by other legal regimes and having a range of competition models to draw from is a positive thing that should be preserved. Nevertheless, after analysis of the East Asian region, it is clear that better choices can be made as to what is appropriate given the countries particular political, economic, and social structure. While this would require a particularly meticulous approach to the

³⁰⁰ Steven Van Uytsel, “*Adopting competition law in Asia: an increasingly complex reality*”, in Steven Van Uytsel, Shuya Hayashi and John O. Haley, “*Research Handbook on Asian Competition Law*” (Edward Elgar Publishing, 2020), 4.

³⁰¹ *Ibid.*, 4.

adoption of competition law, “without an analysis of why something exists in one jurisdiction or why there are differences between jurisdictions, drafters of competition law may end up mixing elements from competition laws from different countries.”³⁰²

As previously stated in this thesis, the efforts to harmonize competition law have been led by established jurisdictions such as the United States and the European Union. Through organisations such as the Organisation for Economic Cooperation and Development (OECD) and the International Competition Network (ICN), an attempt has been made to establish a consensus on the different aspects of competition enforcement. However, this thesis would argue that legislators should be aware that allowing these leading jurisdictions and international organisations to advise on the conceptualization of their respective competition laws requires the utmost vigilance in relation to the concepts they decide to borrow.³⁰³ The reason for this caution is clear from an examination of one of the main drivers of competition convergence: the ICN. The ICN’s role in the convergence of competition law is to “promote the flow of information about different competition agencies ongoing experiments and feedback from these experiments.”³⁰⁴ Of course, this is helpful for countries seeking to adapt a competition law and by reading ICN documents, drafters will learn that there are potentially different solutions for dealing with competition-related issues.³⁰⁵

Nevertheless, it remains imperative that the ICN’s documents are read and studied with

³⁰² Ibid, 7.

³⁰³ Ibid, 7.

³⁰⁴ Maurice E. Stucke, “*Greater International Convergence and the Behavioral Antitrust Ambit*” in Ariel Ezrachi (ed.) “*Research Handbook on International Competition Law*”, (Edward Elgar Publishing 115, 2012), 158.

³⁰⁵ Steven Van Uytsel, (n 300), 15.

meticulous care by the developing jurisdiction and with consideration for the country's own economic and political context. The reason for this is that, as stated by Steven Van Uytsel, mature enforcement agencies are the main driver behind the ICN's activities and policy setting.³⁰⁶ Financially well-resourced enforcement agencies such as the United States have greater possibilities to influence the agenda setting, and less mature enforcement agencies may not have the experience to discuss and evaluate the proposals.³⁰⁷ In fact, very often a consensus on a particular issue of competition law already exists and, therefore, despite being on the ICN's agenda, no profound discussion takes place. With the well-resourced enforcement agencies being the driving force, Van Uytsel has argued that the ICN has effectively been a substitute for the main competition-related idea merchants, such as the United States.³⁰⁸ Therefore, how can an inexperienced legislator, or new competition enforcement agency be expected to modify the ideas put forward by the ICN, and tailor them to suit their own economic conditions, if no guidelines on the applicability of the best practices are given?³⁰⁹

Against this backdrop, scepticism has grown towards competition laws adopted under the influences of external pressure, such as Japan and South Korea, and new competition laws such as in China. John Haley has even gone as far as to suggest that the adoption of competition law in some jurisdictions could be seen as wasted effort.

Haley articulates this view by stating: "The problem ... is misplaced reliance on

³⁰⁶ Ibid, 15.

³⁰⁷ Eleanor Fox, "Linked-In: Antitrust and the Virtues of a Virtual Network" in Paul Lugard (ed.), "The International Competition Network at Ten: Origins, Accomplishments and Aspirations", (Intersentia 2011) 105, 126.

³⁰⁸ Steven Van Uytsel, (n 300), 15.

³⁰⁹ Ibid, 16.

inappropriate models. Simply stated, the legislative paradigms used for national competition legislation throughout the region do not adequately address the basic underpinnings of monopoly power and barriers to free and competitive markets in East Asia or in most other developing states. Nor, some might add, can these models be reasonably transplanted into legal systems that lack the institutional and cultural infrastructures necessary for their effective implementation.”³¹⁰ This thesis argues that, after analysis of the East Asian region, it is clear that competition law, as a legal transplant, must be moulded to the specific economic, political and cultural needs of its receiving country. This idea has certainly been gaining some momentum in competition law literature in recent years and proponents have often used Godek’s comment to support this view: “Exporting antitrust... is like giving a silk tie to a starving man. It is superfluous; a starving man has much more immediate needs. And if the tie is knotted too tightly, he won’t be able to eat what little there is available to him.”³¹¹ From the recent literature on competition law in developing countries, and from the analysis in this paper, a clear message emerges for jurisdictions adopting competition law. Do not blindly follow the ideas of the well-resourced enforcement agencies or international organisations and especially avoid adopting a cut and paste model.³¹² According to Heba Shaheim, emerging competition jurisdictions should be sceptical of advice that recommends “wholesale copying or partial importation from establish competition rules.”³¹³

³¹⁰ John O. Haley, (n 275), 277.

³¹¹ Paul E. Godek, “*One U.S. Export Eastern Europe Does Not Need*”, in “*The CATO Review of Business and Government*” (15 Regulation, 1992), 21.

³¹² Steven Van Uytsel, (n 300), 18.

³¹³ Heba Shaheim, “*Designing Competition Laws in New Jurisdictions: Three Models to Follow*” in Richard Whish and Christopher Townley (eds) “*New Competition Jurisdictions: Shaping Policies and Building Institution*” (Edward Elgar Publishing, 2012), 45.

In each of the three countries examined in this thesis, Japan, South Korea, and China, there was a need to internalize something that was foreign to their legal system. With this in mind, Mor Bakhoun wrote that, “with the current trend of an ever-increased internationalization of antitrust and increased convergence around western antitrust principles, one must ask whether developing countries should be mere followers or should they step back and define antitrust principles adapt to their specific situation.”³¹⁴ It is clear after analysis, that countries developing competition legislation should make an assessment and adapt the competition principles to their specific situation. After a thorough analysis, the drafters should mould the competition law to fit the economic and political needs in their respective country. One caveat to this is, of course, that in the process of drafting, not all knowledge gained by mature and well-resourced competition law regimes should be simply disregarded. In fact, it would be helpful to stick to the well-accepted terminology in order to avoid enforcement problems.³¹⁵ It is, rather, a case of adapting and tailoring the existing competition law knowledge to the particular economic and political context in the respective country. Ideally, outside technical advisors will cooperate with indigenous experts to create a competition law suited to that jurisdiction. Heba Shahein describes this as follows: “the strongest draft law is the one where the principles emerge from the recommendations of local experts from the borrowing countries who have a command of the market’s need, and which is illuminated by the

³¹⁴ Mor Bakhoun, “*Reflections on the Concepts of ‘Economic Freedom’, ‘Free Competition’ and ‘Efficiency’ from the Perspective of Developing Countries*” in Daniel Zimmer (ed.) “*The Goals of Competition Law*”, (Edward Elgar Publishing 2012) 408, 439.

³¹⁵ Steven Van Uytsel, (n 300), 18.

experiences of other foreign competition laws. This is to ensure an understanding of the needs of the markets, while knowledge and experience of developed competition rules can be addressed during the borrowing process.”³¹⁶

This collaborative process between outside technical advisors and local experts may seem relatively straightforward in theory, but Steven Van Uytsel is careful to highlight three elements that could threaten the process in jurisdictions that are developing a competition law.³¹⁷ First, it is important to realise that this collaborative approach to creating a more contextualised or tailor-made competition law will naturally take a long time.³¹⁸ Before a competition law can be formulated, a country’s characteristics should be mapped and Michal S. Gal and Eleanor M. Fox have identified the four characteristics that need to be mapped which are related to: economics, institutions, politics and sociocultural elements.³¹⁹ The economic characteristics relate to the ideology and methodology of market control, barriers to trade, the vulnerability of the market and wealth distribution.³²⁰ The institutional characteristics may concern any shortage in human or financial resources, whether it’s a lack of financial institutions that guide market activity or well-functioning courts.³²¹ With regards to politics, Gal and Fox refer to political instability, which may distract a government from problems related to the market or corruption that can lead to barriers for firms that are not favoured by the

³¹⁶ Heba Shahein, (n 313), 56.

³¹⁷ Steven Van Uytsel, (n 300), 18.

³¹⁸ Ibid, 18.

³¹⁹ Michal S. Gal and Eleanor M. Fox, “*Drafting Competition Law for Developing Jurisdictions: Learning from Experience*” in Michal S. Gal et al. (eds) “*The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law*” (Edward Elgar Publishing 2015) 296, 304-311.

³²⁰ Ibid, 306.

³²¹ Ibid, 308.

political elite.³²² Finally, for sociocultural characteristics, it is important to recognise that there may be a conflict between competitive values and other cultural values within the adopting jurisdiction and that competition may have a different meaning among cultures or be less valued than business collaboration.³²³ Second, Van Uytsel warns that even if the outside technical advisors and local experts succeed in elaborating an understanding of the country's characteristics and attach the necessary legislative implications to these characteristics, there is still a risk that a well-balanced draft can be torn apart by different interests or misunderstandings once it enters the legislative process.³²⁴ Therefore, it is imperative that drafters do not let what could easily be an implementable provision become unnecessarily complex. Third, by adapting existing competition laws or tailoring a competition law to a country's context, there is a risk that the enforcement of the competition law may initially go through somewhat of a trial and error stage.³²⁵ However, as we have seen in examination of Japan and South Korea, where the competition legislations were heavily influenced by the United States, there was still an extended period of trial and error and inconsistent enforcement that spanned across many decades.

5.2 The case for maintaining regulatory divergence in competition law.

Before this thesis further develops the case for maintaining regulatory divergence in competition law, it is important to recognise some of the main points in favour of

³²² Ibid, 309.

³²³ Ibid, 310.

³²⁴ Steven Van Uytsel, (n 300), 19.

³²⁵ Ibid, 19.

developing a global approach to competition enforcement. The adoption of competition law by large swathes of jurisdictions has given rise to challenges for global corporations. Damien Geradin notes that the decentralised globalisation of antitrust has had three major implications for global corporations.³²⁶ First, it has increased the cost of doing business and the complexity of large-scale competition investigations, which now have a multi-jurisdictional component.³²⁷ Second, it has increased the risk of contradictory decisions where a firm's behaviour is reviewed by different antitrust authorities under different sets of rules.³²⁸ And thirdly, it has increased the likelihood that some decisions will be guided by protectionist motives.³²⁹ However, competition law is far from the only area of business regulation that faces the problem of cross-jurisdictional regulatory inconsistencies. In fact, these inconsistencies are a fact of life for multinational corporations and are present in most areas of law, including corporation law, tax law, labour law, products liability law, securities regulation, and environmental law.³³⁰ Yet, as noted by Braithwaite and Drahos, there has been much less clamour for harmonization in these other areas of law, with corporation law, for example, relatively free from efforts at harmonization.³³¹ Furthermore, this thesis would argue that for international convergence of competition law to be totally feasible and beneficial, there would have to be an international consensus on the objectives of competition law. As this research has demonstrated from the analysis of Japan, South Korea, and China, such a consensus is

³²⁶ Damien Geradin, "*The Perils of Antitrust and the Risks of Overregulation of Competitive Behaviour*", (Chicago Journal of International Law, Vol. 10, Iss. 1, 2009), 192.

³²⁷ *Ibid*, 192.

³²⁸ *Ibid*, 192.

³²⁹ *Ibid*, 192.

³³⁰ Thomas K. Cheng, (n 1), 456.

³³¹ John Braithwaite and Peter Drahos, "*Global Business Regulation*", (25 Cambridge University Press, 2000), 167.

lacking. Indeed, Oliver Budzinski has argued that “there neither is, nor can ever be, an ultimately ‘right’ competition theory.”³³²

This project’s discussion about the differing attitude towards competition law in the East Asian region is not meant to suggest that companies in these countries do not compete, because they certainly do. Instead, it illustrates that the belief in the inherent merit of competition is not necessarily universally shared. Therefore, in countries that do not share this belief, such as Japan, South Korea, or China, “competition is generally considered a means to a higher end and not an end itself.”³³³ As seen in the analysis of East Asia, this higher end tends to evolve around a set of particular economic goals, whether it be consumer welfare, economic development, national competitiveness or protection of employment.³³⁴ Of course, this thesis does not argue that competition laws should be preoccupied with broader economic or non-economic policy goals.

Competition law should not be principally concerned with the broader political implications of economic concentration, nor should it be primarily focused on protecting employment or the development of national competitiveness.³³⁵ The main focus of competition law must always be “the protection of the competitive process and the enhancement of societal welfare.”³³⁶ However, this thesis acknowledges that just because the protection of the competitive process is the main focus of competition law, that does not mean that it is the exclusive focus for many jurisdictions. While some

³³² Oliver Budzinski, “*The Governance of Global Competition: Competence Allocation in International Competition Policy*”, (71 Edward Elgar Publishing, 2008), 105.

³³³ Thomas K. Cheng, (n 1), 469.

³³⁴ *Ibid*, 469.

³³⁵ *Ibid*, 475.

³³⁶ *Ibid*, 475.

jurisdictions choose to exclude any secondary non-market-related goals entirely, other jurisdictions, particularly developing nations, adopt a broader conception of the goals of their competition laws.³³⁷ Furthermore, within the group who incorporate non-market-related goals in their competition laws, each jurisdiction may accord different weights to these goals, so there is no one correct approach.³³⁸ For instance, Professor Barry Rodger asserts that “competition law is not necessarily solely concerned with the fulfilment of economic ideals,” politics and economics “have played a significant role in the formation of competition policy.”³³⁹ According to Thomas K. Cheng, this multitude of potential approaches to competition law poses a serious dilemma for the convergence strategy.³⁴⁰ Convergence increases the costs resulting from the loss of national regulatory prerogative and at the same time reduces a jurisdiction’s ability to ascertain the correct balance of goals for themselves, thus it is unlikely that the benefits of convergence will outweigh its costs.³⁴¹ Finally, a global consensus on the specific goals of competition law becomes even more elusive when you consider the high number of developing countries who have, or are currently in the process of, adopting competition law. Policy goals that are particularly relevant to developing countries include economic development, poverty reduction, and inclusive growth.³⁴² These are goals, however, that have not been given particular priority in the industrialized nations and, therefore, are not reflected in the global ‘best practices’ of competition law that are pushed by the convergence strategy. This thesis argues that the specific economic and political

³³⁷ Ibid, 475.

³³⁸ Ibid, 475.

³³⁹ Barry J. Rodger, “*Competition Policy, Liberalism and Globalization: A European Perspective*”, (6 Colum J Eur L 289, 2000), 302.

³⁴⁰ Thomas K. Cheng, (n 1), 475.

³⁴¹ Ibid, 475.

³⁴² Ibid, 477.

characteristics in developing countries requires specific recognition when adopting competition law and thus, the merits of global competition convergence have been overstated.

5.3 Conclusion

Over a period of fifty years, the landscape of advice for jurisdictions seeking to adopt competition law has drastically changed.³⁴³ Early adopters of competition law only had one model upon which to base their new legislations: the competition laws of the United States. However, as has been demonstrated through analysis of both Japan and South Korea, it quickly became clear to the early adopters that this initial model was not fully suitable for their jurisdiction.³⁴⁴ As such, changes to the original US model were being made and new competition models were created. Hence, by the time competition law began proliferating across the globe, countries seeking to adopt competition law were confronted with a myriad of models that could potentially have contradictory claims.³⁴⁵ In an effort to respond to the rapid proliferation of competition law and to overcome the contradictory claims, scholarship developed to promote the idea of global competition convergence. Convergence was presented as the best, perhaps only, available strategy for “reducing the conflict, costs, and uncertainties that the transnational competition law regime imposes on global economic activity.”³⁴⁶ The efforts to harmonize competition law have been led by established jurisdictions, such as, the United States and the European Union, and through organisations like the Organisation for Economic Cooperation and Development (OECD) and the International Competition Network (ICN), a concerted attempt has been made to establish a consensus on different aspects of competition law. As such, deviations from this

³⁴³ Steven Van Uytsel, (n 300), 23.

³⁴⁴ Ibid, 23.

³⁴⁵ Ibid, 23.

³⁴⁶ David J. Gerber, (n 4), 1.

converged global approach have been considered to be inappropriate applications of competition law.³⁴⁷

This research adds to the existing literature on competition law convergence by questioning the facile assumption that the convergence strategy should be followed across the globe. Through examination of the competition law in Japan, South Korea, and China, this thesis has illustrated the inherent flaws in the assumption that there is a universally applicable set of competition law principles. Firstly, the convergence strategy relies on there being a universal consensus on the objectives of competition law and, as demonstrated through the analysis of the East Asian region, such a consensus is lacking. As argued by Oliver Budzinski, “there neither is, nor can ever be, an ultimately ‘right’ competition theory.”³⁴⁸ In Japan, for example, their differing views on importance of competition law, coupled with their own policy goals for economic development, led to a long period of inconsistent enforcement under their Western model of competition law. Considering the myriad of diverging views on the objectives of competition law, this thesis would argue that any deep convergence encompassing all aspects of competition law is not attainable. Furthermore, this thesis contends that competition law principles and doctrines must be fashioned and applied with an acute awareness of the local economic, political, and socio-cultural characteristics of the adopting jurisdiction.³⁴⁹ The lack of experience and expertise in many emerging jurisdictions places a responsibility on the established enforcement agencies and international organisations to make

³⁴⁷ Steven Van Uytsel, (n 300), 23.

³⁴⁸ Oliver Budzinski, (n 332), 105.

³⁴⁹ Thomas K. Cheng, (n 1), 490.

recommendations that will be applicable to the particular economic needs of the adopting country.³⁵⁰ Under the current convergence strategy, 'best practices' are created which do not incorporate the specific economic, political and socio-cultural contexts of the adopting country. Therefore, this thesis argues that some level of regulatory diversity must be maintained in competition law. Each country should adopt a competition law that has been adequately adjusted to its needs and capabilities.

³⁵⁰ Ibid, 490.

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