

CULTURE AND COMPETITION: NATIONAL AND REGIONAL LEVELS

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INTRODUCTION

The lack of a competition culture has often been considered the central impediment to promoting competition.¹ However, the impact of citizens' values upon competition culture has rarely been investigated. The values of a nation's citizens, or a national culture, exert perpetual influence upon its competition culture and competition policy. National culture differences may substantially affect regional cooperation on competition policy. This article attempts to establish a correlation between culture and competition policy at both the national and regional level, and illuminate its implications for regional competition cooperation.

CULTURE AND COMPETITION: NATIONAL LEVEL

The weakness of a competition culture affects not only developing countries or transition economies, but also developed nations that have decades of experience in implementing competition policies. In Japan, for example, the influence of the

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¹ Organisation for Economic Cooperation and Development ("OECD"), *Challenges/Obstacles Faced by Competition Authorities in Achieving Greater Economic Development Through the Promotion of Competition* (CCNM/GF/COMP(2003)6) at 2 (2003).

traditional harmonization culture, the preference for stability, and the past memory of economic success hinder people from accepting the new culture of competition.² Even among European nations the strength of a competition culture varies: the U.K. and Ireland are building up a stronger competition culture with a drive for rigorous criminal enforcement against cartels, while most others hesitate.³

This article designates national culture differences as an underlying cause of such diversity in competition culture. By measuring and comparing national cultures, cross-cultural psychology helps us verify their impact upon competition cultures and competition policies.

MEASURING AND COMPARING NATIONAL CULTURES

Cross-cultural psychologists developed a framework to compare national cultures, or the values of nations' citizens, on a statistical basis and on a global scale: the Cultural Value Dimension (CVD) framework. It provides us with a world map of cultural values and enables us to locate competition policies on it, so that we can compare national cultures and competition policies on a global scale.⁴ Among other scholars, Geert Hofstede identified five independent dimensions of national culture differences as follows:⁵

² Akinori Uesugi, *How Japan is Tackling Enforcement Activities Against Cartels*, 13 GEO. MASON L. REV. 349, 353-56 (2005).

³ Criminalizing cartel conduct may conflict with existing social and legal norms within a jurisdiction. *See, e.g.*, OECD, *HARD CORE CARTELS: RECENT PROGRESS AND CHALLENGES AHEAD* at 23 (2003). Thus OECD recommends that countries should consider introducing and imposing criminal sanctions against individuals involved in cartels, "where it would be consistent with social and legal norms." OECD, *Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation* at 40 (2005) [hereinafter OECD, *Third Report*].

⁴ Many disciplines, such as management and international accounting, have fruitfully applied the framework in dealing with different cultures, and this is not unprecedented in the legal discipline. *See, e.g.*, Oscar G. Chase, *Legal Processes and National Cultures*, 5 CARDOZO J. INT'L & COMP. L. 1 (1997) (applying the framework to the civil procedure systems of the US and Germany); *see also*, Amir N. Licht, *The Mother of All Path Dependencies: Toward a Cross-Cultural Theory of Corporate Governance Systems*, 26 DEL. J. CORP. L. 147 (2001) (demonstrating the correlation between CVDs and corporate governance laws).

⁵ This article uses Hofstede's framework mainly because of the importance of the Uncertainty Avoidance Index in comparing antitrust

1) *Power Distance* (“PDI”): “The extent to which the less powerful members of institutions and organizations within a country expect and accept that power is distributed unequally.”⁶

2) *Uncertainty Avoidance* (“UAI”): “The extent to which the members of a culture feel threatened by uncertain or unknown situations.”⁷

3) *Individualism/Collectivism* (“IDV”): “Individualism stands for a society in which the ties between individuals are loose: Everyone is expected to look after him/herself and her/his immediate family only. Collectivism stands for a society in which people from birth onwards are integrated into strong, cohesive in-groups, which throughout people’s lifetime continue to protect them in exchange for unquestioning loyalty.”⁸

4) *Masculinity/Femininity* (“MAS”): “Masculinity stands for a society in which social gender roles are clearly distinct: Men are supposed to be assertive, tough, and focused on material success; women are supposed to be more modest, tender and concerned with the quality of life. Femininity stands for a society in which social gender roles overlap: Both men and women are supposed to be modest, tender, and concerned with the quality of life.”⁹

5) *Long-term/Short-term Orientation* (“LTO”): “Long Term Orientation stands for the fostering of virtues oriented towards future rewards, in particular, perseverance and thrift. Its opposite pole, Short Term

policies. Another prominent cross-cultural psychologist, Shalom H. Schwartz, lists three similar value types in his framework: Embeddedness/Autonomy, Hierarchy/ Egalitarianism and Mastery/Harmony. Shalom H.Schwartz, *A Theory of Cultural Values and Some Implications for Work*, 48 APPL’D PSYCHOL. INT’L REV. 23, 26-28 (1999). His project covers more countries than that of Hofstede. Licht, *supra* note 4, at 174.

⁶ GEERT HOFSTEDE, *CULTURES’ CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS AND ORGANIZATIONS ACROSS NATIONS* 98 (2d ed. 2003).

⁷ *Id.* at 161.

⁸ *Id.* at 225.

⁹ *Id.* at 297.

Orientation, stands for the fostering of virtues related to the past and present, in particular, respect for tradition, preservation of 'face' and fulfilling social obligations."¹⁰

Based upon the data collected within the subsidiaries of IBM in 72 countries using more than 116,000 questionnaires between 1967 and 1973, Hofstede categorized 50 countries and three regions (Arab countries, East Africa and West Africa) along the five cultural value dimensions. His research not only shows us the index scores and ranks for countries and regions concerning each dimension,¹¹ but also clusters the 53 countries and regions into 12 branches using a hierarchical cluster analysis.¹² Later, additional data were collected from other countries unrelated to IBM, and Hofstede estimated index scores for 16 countries from that data.¹³

THE IMPACT OF NATIONAL CULTURES UPON COMPETITION POLICIES: THE EXAMPLE OF CARTELS

This article assumes that national culture differences are at least partly responsible for the differences in countries' competition policies. The dissimilarity in the rigor of anti-cartel policy among nations could exemplify such a correlation.

Despite the broadening consensus against hardcore cartels, the rigor of anti-cartel enforcement varies widely among nations. According to an OECD report, less than half of its member countries provide for the imposition of fines on natural persons involved in cartels: Australia, Canada, France, Germany, Ireland, Japan, Korea, Mexico, New Zealand, Norway, Slovak Republic, Spain and the U.S.¹⁴ It lists only nine member countries that provide for the imprisonment of natural persons involved in cartels: Canada, Germany, Ireland, Japan, Korea, Mexico,

¹⁰ *Id.* at 359.

¹¹ HOFSTEDE, CULTURES' CONSEQUENCES, *supra* note 6 at 500, Exhibit A5.1.

¹² *Id.* at 62. This was done without consulting the LTO that was adopted later than the other four dimensions after the survey of Chinese culture. *See id.* at 69-71 Concerning the process of adding the fifth dimension.

¹³ *See id.* at 502, Exhibit A5.3 for the summary of the results.

¹⁴ OECD, *Fighting Hard-Core Cartels: Harm, Effective Sanctions and Leniency Programmes* at 82 (2002) available at <http://www.oecd.org/dataoecd/41/44/1841891.pdf>.

Norway, Slovak Republic and the U.S.¹⁵ The U.K. recently introduced criminal sanctions, including long jail sentences for cartel conduct.¹⁶

The report also says that only a few nations have actually imposed fines upon natural persons (Australia, Canada, Germany, Ireland and the U.S.), and that only two countries have sent executives involved in cartels to jail (Canada and the U.S.).¹⁷ Recently, the U.K. prosecuted executives for engaging in cartels,¹⁸ and Ireland imposed criminal sanctions upon executives (including a custodial sentence upon their ring leader) for cartel conduct.¹⁹

To identify the cultural value dimensions that are responsible for the differences in nations' anti-cartel policies, let us first look over the CVD indexes of the U.S., the country most active in imposing criminal sanctions for cartel conduct. According to Hofstede's research, the U.S. ranks high in IDV (1/53) and MAS (15/53), and ranks low in PDI (38/53), UAI (43/53) and LTO (27/34).²⁰ From these ranks this article draws a pair of hypotheses: (i) the combination of highs and lows in the CVD ranks similar to that of the U.S. is correlated with rigorous anti-cartel policies; and (ii) the CVD in which the US ranks highest (IDV) has a positive correlation with the rigor of anti-cartel policies, while the CVD in which the US ranks lowest (UAI) has a negative correlation.²¹

¹⁵ *Id.*

¹⁶ See Julian M. Joshua and Donald C. Klawiter, *The UK "Criminalization" Initiative*, 16 ANTITRUST 67, 72 (Summer 2002) (The UK's criminalization initiative raised concern on possible policy conflict within the EU). See also, OECD, *Third Report*, *supra* note 3, at 28 (noting that two countries are either expected to adopt criminal sanctions system soon (Australia) or examining the proposal for criminalization of cartel conduct (Sweden)).

¹⁷ OECD, *Fighting Hard-Core Cartels*, *supra* note 14, at 83-84.

¹⁸ Freshfields Bruckhaus Deringer, *Net Tightens Around Anti-Competitive Behavior* (2006), available at www.freshfields.com/publications/pdfs/2006/14912.pdf.

¹⁹ McCann FitzGerald, *First Criminal Convictions for Cartel Offences*, http://www.mccannfitzgerald.ie/PublicAccess/eZine/View_eZine_FullText.asp?cntr=1&groupguid=60FF89A9-7B95-4662-ABE1-61D8D82AD760&eZineID=169&TitleID=158&issue=2.

²⁰ As LTO was added later than other 4 CVDs, Hofstede's research of the 5th CVD covers only 34 countries and regions. See generally, HOFSTEDE, CULTURES' CONSEQUENCES, *supra* note 6.

²¹ The second hypothesis seems quite coherent with the definition of both CVDs quoted above: cartels are definitely a collective phenomenon, even

We could easily find the countries with the combination of CVD ranks similar to that of the U.S. in the 8th of Hofstede's 12 clusters. The so called "Anglo cluster" includes Australia, the U.S., Canada, Great Britain, Ireland and New Zealand.²² Also, among the 9th branch countries, Germany and South Africa show similar combinations.²³

For easier comparison of the ranks of countries in IDV and UAI, this article simply adds the UAI rank of each country to its reverse rank in IDV to create the new "U-I" index, with apologies to cross-cultural psychologists. According to this hypothesis, U-I should have a positive correlation with the rigor of anti-cartel policies. The nations ranked in the top ten in U-I are Great Britain, the U.S., Denmark, Sweden, Canada, Ireland, Australia, New Zealand, the Netherlands and Jamaica.²⁴ It is worth noting that all the Anglo cluster countries rank above 8th in U-I; and Germany (17th) and South Africa (13th), which have a combination of CVD ranks similar to that of the U.S., also rank fairly high.

Of the 14 countries noted above that provide for imposition of fines on natural persons, seven show a combination of CVD ranks similar to that of the U.S.: Australia, Canada, Germany, Ireland, New Zealand, the U.K. and the U.S. itself. Six belong to the Anglo cluster and are ranked within the top eight in U-I, and two rank fairly high in U-I: Norway (11th) and Germany (17th).

Five (Canada, Germany, Ireland, the U.K. and the U.S.) of the ten countries with imprisonment provisions for cartel conduct show a combination of CVD ranks similar to that of the U.S. Four belong to the Anglo cluster and are ranked within the top six in U-I, and two (Germany and Norway) rank fairly high in U-I.

If we turn our attention from the adoption to the implementation of anti-cartel provisions, the correlations get much closer. Each of the five countries (Australia, Canada, Germany, Ireland and the U.S.), that actually imposed fines on natural persons for cartel conduct, shows a combination of CVD ranks similar to that of the U.S. Four belong to the Anglo cluster

though they do not involve a lifelong relationship such as family; cartels are inclined to reduce the uncertainty that competitive process provides.

²² HOFSTEDE, CULTURES' CONSEQUENCES, *supra* note 6, at 62.

²³ *Id.*

²⁴ *See* Appendix.

and rank above 7th in U-I, and one (Germany) ranks fairly high (17th) in U-I. Further, all three countries (Canada, Ireland and U.K.) that imposed imprisonment upon executives involved in cartels belong to the Anglo cluster, and rank above 5th in U-I.²⁵

Using less technical terms, we could sum up the findings above as follows:

- 1) Nations with individualistic values are likely to have a more rigorous anti-cartel policy than those with collectivist ones;
- 2) Nations with high tendency to avoid uncertainty are inclined to have a relatively lax anti-cartel policy;
- 3) Nations that show the combination of cultural values similar to those of the U.S. tend to have a more rigorous anti-cartel policy;
- 4) Anglo cluster countries (the U.S., Canada, U.K., Ireland, Australia and New Zealand) tend to have relatively rigorous anti-cartel policies.

As cartels directly restrain competition and are major targets of competition policy, we could infer that a lax anti-cartel policy indicates a relatively weak competition culture, while a rigorous one manifests a stronger competition culture.

It should be noted, however, that culture is not the only factor affecting anti-cartel policies. Legal and institutional factors, such as the substantive or procedural characteristics of nations' administrative and/or criminal laws, could also seriously affect anti-cartel enforcement. Although the impact of cultural factors seems undeniable, we must conduct research on a global-scale to fully demonstrate the culture-competition policy correlations.²⁶ The full-scale research will require the cooperation of economists, econometricians and cross-cultural psychologists as well as legal scholars. Cooperation among legal scholars is

²⁵ In addition, Australia, which is expected to adopt criminal sanctions for cartels soon, also belongs to Anglo cluster. See OECD, *Third Report, supra* note 3 at 28. And Sweden, which is examining the proposal for criminalization of cartel conduct, ranks very high (4th) in U-I. *Id.*

²⁶ We could also test the robustness of above results by applying the framework of Shalom H. Schwartz, another prominent cross-cultural psychologist. See Schwartz, *supra* note 5 (creating a similar framework).

essential to get beyond the formal language of statutes. Economists could help develop economic indexes that could measure the performance of antitrust policies.²⁷ Econometricians could help describe the correlation between cultures and antitrust policies in numeral letters, and identify the relative importance of national cultures *vis-à-vis* other factors that also affect competition policies. Finally, cross-cultural psychologists could help update nations' CVD indexes through new surveys, and develop new CVD indexes that fit our specific need of comparing cultures and competition policies.

Lacking the resources to support full-scale research, this article demonstrates the propositions rather impressionistically.²⁸ The aim of this incomplete demonstration is to invoke the need for full-scale research rather than to jump to conclusions without sufficient proof.

CULTURE AND COMPETITION: REGIONAL LEVEL HYPOTHESES TO BE TESTED

If it is true that a national culture has a close correlation with its competition policy, such correlation should also assert itself in the contacts between nations in regional cooperation on competition policy. This article tries to establish the culture-competition policy correlations on a regional level by analyzing the prevalence of each type of competition-related provision ("CRP") in regional trade agreements ("RTA"s) with the CVD framework of cross-cultural psychology. However, readers are cautioned here that this approach has three methodological limitations that constrain the ability to address the issue.

²⁷ See generally, THE GLOBAL COMPETITIVENESS REPORT 2005-2006: POLICIES UNDERPINNING RISING PROSPERITY, (Augusto Lopez-Claros et al. eds., World Economic Forum, Pelgrave MacMillan 2005); Office of Fair Trading, *Guidelines for Competition Assessment: A Guide for Policy Makers Completing Regulatory Impact Assessments* (2002), available at <http://oft.gov.uk>; THE WORLD BANK ANNUAL REPORT (2001) available at <http://www.worldbank.org/html/extpb/2001/content.htm> (Chapter 3 contains the cross-country survey of the effectiveness of legal systems); Mark A. Dutz & Maria Vagliasindi, *Competition Policy Implementation in Transition Economy: An Empirical Assessment*, European Bank, Working Paper, No. 47 (1999).

²⁸ Due to the lack of econometric tools and quantifiable data on anti-cartel policies, this article could only discern the most obvious correlations. Full-scale research could reveal subtler correlations between national cultures and competition policies, such as those within clusters other than Anglo.

First, lacking econometric tools and quantifiable data on regional competition cooperation, this article could not show the relative importance of cultural factors *vis-à-vis* other factors that affect regional competition cooperation, such as the international interests and objectives of the parties and the extent of their willingness to undertake international obligations constraining their room to maneuver.²⁹ Again, invoking the need for full-scale research, this article presents an outline of the issue.

Second, the areas that should be covered by comprehensive research on the issue are exceedingly wide, and less than comprehensive research could draw misleading conclusions on imperfect information. For example, numerous mechanisms for regional and international competition cooperation exist, including RTAs, bilateral antitrust cooperation agreements, case-by-case cooperation and soft mechanisms such as the International Competition Network. The U.S. prefers other choices to RTAs, as it does not regard the latter as an optimal tool for promoting and enforcing competition policy. Its RTAs often omit entire CRPs or only contain relatively weak ones. Thus, insofar as the U.S. is concerned, competition chapters in RTAs might not be a good indicator of culture-competition policy correlation on a regional level.

Third, Hofstede's framework provides only the CVD index scores of nations, not those of supranational entities, such as the EU. As this article cannot estimate the CVD scores of the EU as a whole from those of its member countries, it will not elaborate on the cultural implications of RTAs signed by the EU. Doing so will require either the interdisciplinary cooperation of psychologists and econometricians, or a whole new survey based on entirely different methodologies.

As cultural differences may account for the differences in competition policies, the bigger the national culture differences between the parties are, the narrower the room for compromise could get. This article assumes that RTAs among nations with similar cultures tend to have relatively stronger CRPs, while those among different-cultured nations are likely to have weaker ones.

The "stronger" CRPs are here initially defined as those

²⁹ See Spencer Weber Waller, *The International Harmonization of Antitrust Enforcement*, 77 B.U.L.REV. 343, 391-97 (1997) (listing factors affecting successful harmonization of antitrust rules, such as hegemony, deep integration, and shared visions and values).

that have relatively detailed substantive provisions, clauses requiring serious commitment to cooperation (e.g. comity clauses) and/or strong dispute settlement provisions (e.g. arbitration clauses), while the “weaker” ones are those that do not. The distinction between “stronger” and “weaker” CRPs will be further refined in the process of analysis.

By appreciating the cultural similarity between the parties of RTAs, this article notes that the countries within the same branch, which Hofstede clustered according to their cultural similarity, tend to have a similar competition culture, and that the Anglo cluster countries are inclined to have a relatively strong competition culture. It also notes that the countries with similar U-I ranks are likely to have similar competition cultures.

THE CULTURAL IMPLICATION OF THE PREVALENCE OF EACH TYPE OF COMPETITION PROVISION IN REGIONAL TRADE AGREEMENTS

A recent OECD study presents a useful taxonomy to classify selected RTAs and the type of CRPs they contain,³⁰ and thus helps us demonstrate a correlation between national cultures and competition policies on a regional level. This article will follow in its footsteps, looking for evidence that supports the culture-competition policy correlations in regional competition cooperation.³¹

³⁰ Oliver Solano & Andreas Sennekamp, *Competition Provisions in Regional Trade Agreements* (OECD Trade Policy Working Papers, No. 31, 7-9, 2006), available at <http://miranda.sourceoecd.org/vl=2078453/cl=11/nw=1/rpsv/cgi-bin/wppdf?file=519tov5qk4ro.pdf> (The study sorts the CRPs of 86 RTAs into eight categories as follows: (a) adopting, maintaining and applying competition measures; (b) coordination and cooperation; (c) provisions addressing anti-competitive behavior; (d) competition-specific provisions concerning non-discrimination, due process, transparency; (e) exclusion of antidumping; (f) recourse to trade measures; (g) dispute settlement; (h) flexibility and progressivity (special and differential treatment). See also UNCTAD, *A Presentation of Types of Common Provisions to Be Found in International, Particularly Bilateral and Regional, Cooperation Agreements on Competition Policy and Their Application* (ED/RBP/CONF.6/3) (2005) (providing a useful analysis of the main types of CRPs contained in selected RTAs and agreements on competition law enforcement).

³¹ For the sake of clarity this article will focus on the categories that show the most distinct feature in their prevalence among RTAs.

THE “EC-STYLE” AGREEMENTS AND THE “NORTH AMERICAN
STYLE” AGREEMENTS

The OECD study distinguishes two “families” of agreements: the North American style agreements that focus more on coordination and cooperation provisions, and the EC-style agreements that are oriented towards rather substantive rules.³² We could characterize the former as having weaker CRPs and the latter as having stronger, as it is generally more difficult to reach an agreement on substantive rules than on cooperation/coordination clauses. The study also identifies some agreements that have the characteristics of both “families” (e.g. Chile-Korea, EC-Chile, EC-Mexico, Korea-Singapore).³³ We could describe them as having stronger CRPs as well.

Among the 86 RTAs analyzed in the OECD study, 9 agreements were concluded between Anglo cluster countries and those without (Australia-Singapore, Australia-Thailand, Canada-Chile, Canada-Costa Rica, Chile-US, NAFTA, New Zealand-Singapore, Singapore-US and TPSEPA³⁴).³⁵ Most focus more on cooperation/coordination provisions and could be grouped into North American style agreements, which are characterized as having weaker CRPs. Only three have the characteristics of both “families” and could be characterized as having stronger CRPs (Australia-Thailand, Canada-Costa Rica³⁶ and TPSEPA).

³² Solano & Sennekamp, *supra* note 30, at 15. Note that this distinction does not operate with clearly delineated categories but with flexible “families,” and that, despite the denominations, the EC or a North American country is *not* a member of every agreement in each family. Rather the majority of RTAs analyzed in the OECD study do not involve EU or the U.S. In so far as EU or the U.S. is concerned, a “legal experience perspective” could also help us account for the divergence. *See also* David J. Gerber, *The U.S.-European Conflict over the Globalization of Antitrust Law: A Legal Experience Perspective*, 34 NEW ENG. L. REV. 123 (1999) (different legal experience leads EU toward convergence and US toward cooperation).

³³ Solano & Sennekamp, *supra* note 30, at 15.

³⁴ TPSEPA is the acronym of the Trans-Pacific Strategic Economic Partnership Agreement between Brunei, Chile, New Zealand and Singapore, which entered into force on May 1, 2006.

³⁵ Agreements involving EC and EEA are excluded here, even if the U.K. and Ireland are their members. As noted above, the U.K. and Ireland seem to belong to a different category of competition culture than most of the other European countries.

³⁶ Solano & Sennekamp, *supra* note 30, at 17 (The Canada-Costa Rica agreement goes deeper and further than the others in most aspects of CRPs).

On the other hand, most of the 75 RTAs concluded between countries outside the Anglo cluster could be classified as EC-style agreements with stronger CRPs. Only a few have the characteristics of both families and could be characterized as having stronger CRPs (Algeria-EC, CariCom, Chile-EC, Chile-Korea etc.).

Two agreements were concluded within the Anglo cluster. One is a North American style agreement (Australia-US), and the other displays characteristics of both families (ANZCERTA, *i.e.* Australia-New Zealand). The parties to the latter have more similar U-I ranks than those to the former.³⁷

In summation, RTAs outside the Anglo cluster tend to be EC-style agreements, which could be characterized as having stronger CRPs, while RTAs between Anglo cluster countries and those without are likely to be the North American style agreements, which could be characterized as having weaker CRPs. Also, within the Anglo cluster, the RTAs between countries with relatively similar cultures have stronger CRPs.

COOPERATION

The OECD study subdivides the coordination and cooperation provisions of CRPs in RTAs into six subcategories: general cooperation provision, notification, consultation on competition policy or its enforcement, negative comity, and positive comity.³⁸

We could characterize the cooperation/coordination provisions that contain negative and/or positive comity clauses as “stronger,” while those that do not as “weaker,” as the former require more serious commitment to cooperation.³⁹

Only nine of the 86 RTAs analyzed contain comity clauses

³⁷ See Waller, *supra* note 29, at 356-57 (“The developments in Australia and New Zealand are gaining greater appreciation in the United States through the work of writers such as Rex Ahdar and Maureen Brunt, who have revealed their importance and the frustrating possibility that they may be unique and non-transferable to other cultural, economic, historical, and geographic settings.”).

³⁸ Solano & Sennekamp, *supra* note 30, at 7.

³⁹ Specific obligations relating to negative and positive comity are often thought as ‘deeper’ forms of inter-agency cooperation on competition policy. Simon J. Evenett, *What Can We Really Learn From the Competition Provisions of Regional Trade Agreements?* In COMPETITION PROVISIONS IN REGIONAL TRADE AGREEMENTS: HOW TO ASSURE DEVELOPMENT GAINS 41 (Philippe Brusik *et al.* eds., UNCTAD, 2005).

(Algeria-EC, CariCom, Chile-EC, Chile-Korea, EC-South Africa, EC-Mexico, EFTA-Mexico, EEA, Japan-Mexico). Five include EC, EEA or EFTA as a signatory, while none include Anglo cluster countries (even ANZCERTA, an agreement within the cluster, omits comity clauses).⁴⁰ Therefore we could infer that European countries (excluding the U.K. and Ireland) are more inclined to adopt comity clauses, *i.e.* “stronger” cooperation provisions, in their CRPs than Anglo cluster countries.

Two of the agreements with comity provisions involve countries with very similar U-I ranks, *i.e.*, countries with very similar cultural values regarding the Individualism/Collectivism and the Uncertainty Avoidance dimension (Chile-Korea and Japan-Mexico). One involves countries that belong to the same branch under Hofstede’s classification based on their cultural similarity (Chile-Korea). Thus, we could say that countries with very similar cultures at times adopt comity clauses in their CRPs.

PROVISIONS ADDRESSING ANTICOMPETITIVE BEHAVIOR

The OECD study subdivides anticompetitive behavior provisions into 5 subcategories: anticompetitive agreements; monopolization or abuse of a dominant position (ADP); anticompetitive mergers; state aid or subsidies; state monopolies and state enterprises.⁴¹ From our cultural point of view two of them show distinct features in their prevalence among RTAs: anticompetitive agreement clauses and monopolization/ADP clauses.

Anticompetitive agreement clauses are omitted in only 16 of the RTAs analyzed. Among the 70 RTAs containing anticompetitive agreement clauses, 61 were concluded outside the Anglo cluster. Among the 16 RTAs omitting anticompetitive agreement clauses, 7 involve Anglo cluster countries (Australia-Singapore, Australia-US, Canada-Chile, Chile-US, NAFTA, New Zealand-Singapore and Singapore-US). Only four among the 11 RTAs involving Anglo cluster countries contain anticompetitive agreement clauses (ANZCERTA, Australia-Thailand, Canada-Costa Rica and TPSEPA).⁴²

⁴⁰ Note, however, that bilateral antitrust cooperation agreements between Anglo cluster countries often contain comity clauses (e.g. US-Australia, US-Canada).

⁴¹ Solano & Sennekamp, *supra* note 30, at 7-8.

⁴² Within the Anglo cluster, the RTA between relatively similar-cultured nations has anticompetitive agreement clauses (ANZCERTA), while that

Monopolization/ADP clauses are omitted in only five among the 86 agreements analyzed. Three of those five RTAs involve Anglo cluster countries (ANZCERTA, Australia-Singapore and New Zealand-Singapore). Among the four RTAs omitting both anticompetitive agreement clauses and monopolization/ADP clauses, 2 involve Anglo cluster countries (Australia-Singapore and New Zealand-Singapore).

In sum, RTAs outside the Anglo cluster tend to contain anticompetitive agreement clauses, while those within the cluster do not; the former are more inclined to contain monopolization/ADP clauses than the latter.

DISPUTE SETTLEMENT

The OECD study subdivides dispute settlement (DS) provisions into three subcategories: exclusion of competition-related matters from the agreement-specific dispute settlement mechanism; consultations; and arbitration.⁴³ This article regards arbitration clauses as a characteristic of the “stronger” type of DS mechanism,⁴⁴ while it regards clauses excluding RTA-specific DS as a characteristic of the “weaker” one.

Among the 25 RTAs containing arbitration clauses, 11 involve EC or EFTA, while only one involves an Anglo cluster country (New Zealand-Singapore).⁴⁵ Among the 19 RTAs containing clauses excluding RTA-specific DS, nine involve Anglo cluster countries.⁴⁶ Among the 11 RTAs involving Anglo cluster countries, only two omit clauses excluding RTA-specific DS (ANZCERTA and New Zealand-Singapore). We could therefore infer that RTAs involving Anglo cluster countries tend to contain clauses excluding RTA-specific DS and omit arbitration clauses, and could be described as having a tendency to contain “weaker” CRPs.

Again we could quite clearly discern the culture-

between different-cultured nations does not (Australia-US).

⁴³ Solano & Sennekamp, *supra* note 30, at 8.

⁴⁴ Arbitration permits the parties to obtain an enforceable award that cannot be guaranteed through consultation. *Id.* at 14.

⁴⁵ The OECD study also notes that arbitration generally occurs in EC-style and EFTA-style agreements rather than in North American style agreements. Solano & Sennekamp, *supra* note 30.

⁴⁶ Note that three RTAs involving Anglo cluster countries contain clauses that *partially* exclude RTA-specific DS (Australia-US, Chile-US and Singapore-US). *Id.*

competition policy correlation on regional level. Major findings on this point are as follows:

- 1) RTAs within the same branch of countries are inclined to have relatively strong CRPs;
- 2) RTAs between Anglo cluster countries and those without are likely to have weaker CRPs, while RTAs outside the cluster tend to have stronger ones;
- 3) RTAs between countries that are similar in their Individualism/Collectivism index and/or Uncertainty Avoidance Index are apt to have relatively strong CRPs.

PROMOTING COMPETITION CULTURE: NATIONAL AND REGIONAL LEVELS

Before striving to formulate measures to promote competition culture, one thing should be noted: ironing out national culture differences is neither possible nor desirable. National cultures are perceived as extremely stable.⁴⁷ We could only try to enhance competition-friendly values among citizens. We could not put one culture above another, as we have no criteria available for that sort of judgment. Even though Anglo cluster countries could be said to have a relatively strong competition culture, this does not always mean that they have a better or superior competition culture. Like diversity in competition policies among different regimes, cultural diversity should also create opportunities for legal innovation and change.⁴⁸ Given the evolutionary nature of competition laws,

⁴⁷ According to Hofstede, "Culture change basic enough to invalidate the country dimension index scores will need either a much longer period –say, 50 to 100 years - or extremely dramatic outside events." HOFSTEDÉ, *supra* note 6, at 36. However, despite ongoing debates, the supporters of culture-development correlations have spurred on their efforts to flesh out the guidelines for progressive cultural change. *E.g.*, Lawrence E. Harrison, *Promoting Progressive Cultural Change*, in CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS, 296 (Samuel P. Huntington and Lawrence E. Harrison, ed., 2001).

⁴⁸ See John O. McGinnis, *The Political Economy of International Antitrust Harmonization*, 45 WM. & MARY L. REV. 549, 563-64 (2003) ("...the different rules operating within a diversified regime may move to a more optimal level by virtue of their very diversity because diversity creates opportunity for legal innovation and change."). The most radical measures to

cultural diversity could also enhance the process of convergence.⁴⁹ For example, the U.S. got inspiration from Europe and Japan in adopting the National Cooperative Research Act of 1984, which requires rule of reason analysis for research joint ventures.⁵⁰ In comparison with the U.S., Europe and Japan could accept more easily the notion of pro-competitive cooperation among competitors due to their relatively collectivist cultures; and the intercultural contact with the EC and Japan helped the U.S. to reinvigorate⁵¹ the spirit of cooperation in its antitrust policy.

PROMOTING NATIONAL COMPETITION CULTURE

Nations often adopt competition laws that are inconsistent with their citizens' cultural values, and therefore have difficulty implementing them. Of course, even the U.S. has some difficulty implementing its antitrust laws. For instance, business people do not always feel guilty about price fixing.⁵² This kind of difficulty, however, could be much more serious in a different cultural context. In countries with collectivist values and/or a high tendency to avoid uncertainty, competition authorities might have more difficulties in persuading people that cartels are bad. The cultural values of citizens could affect the performance of leniency programs to a certain extent. In a culture that regards a cartel as a form of cooperation rather than a conspiracy or crime, an informer is nothing but a betrayer. If cartels are not

promote innovation among regulators through increased competition has been suggested in connection with securities regulation: Stephen Choi and Andrew Guzman, *Portable Reciprocity: Rethinking the Reach of U.S. Securities Regulation*, 71 S. CAL. L. REV. 903 (1998); Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359 (1998); Stephen Choi, *Law, Finance and Path Dependence: Developing Strong Securities Markets*, 80 TEX. L. REV. 1657 (2002).

⁴⁹ See Kevin J. O'Connor, *Federalist Lessons for International Antitrust Convergence*, 70 ANTITRUST L.J. 413, 429-30 (2002) ("...given the evolutionary nature of antitrust law, the ability of antitrust jurisdictions to allow for development of antitrust principles, as applied to the facts of particular cases, is critical to our ability to achieve meaningful international convergence.").

⁵⁰ Thomas M. Jorde and David J. Teece, *Innovation, Cooperation and Antitrust*, 4 HIGH TECH. L. J. 1, 50 (1989).

⁵¹ On the American cultural tradition of cooperation, see Andrew I. Gavil, *Competition and Cooperation on Sherman Island: An Antitrust Ethnography*, 44 DEPAUL L. REV. 1225, 1235-47 (1995).

⁵² Cartels often create sympathy or fellow-like feeling among participants for successful conspiracy. See David Sally, *Two Economic Applications of Sympathy*, 18 J.L. ECON. & ORG. 455, 465-66 (2002).

sanctioned severely enough due to the cultural resilience, only a few will dare to be betrayers.⁵³

So what shall we do? “Be patient.” For most of the countries in the world, competition laws came from abroad.⁵⁴ Moreover, if their cultural textures are not so competition-friendly, they need time to adapt themselves to the foreign culture of competition. Their antitrust laws might work quite differently from their original prototype, especially during their initial stage of development. Some countries might introduce alien elements that are generally regarded as irrelevant to competition policies, such as equality and discrimination, into their antitrust statutes.⁵⁵ While these statutes or their implementation may look unbalanced or wide of the mark at first glance, they could substantially contribute to the citizens’ adaptation to the foreign culture of competition.

Besides patience, this article strongly suggests the need for competition advocacy directly focusing on citizens’ values. A

⁵³ Mauro Grinberg, *Deterring Cartels: The Brazilian Experience, Trends and Possibilities*, presented to the Global Competition Forum of the International Bar Association on Business Law/Mexican Bar Association/Federal Competition Commission (Mexico) Symposium, at 6 (June 26, 2003), available at http://www.araujopolicastro.com.br/download.asp?file=MG-IBA_Mexico.doc; Rajan Dhanjee, *The Tailoring of Competition Policy to Caribbean Circumstances - Some Suggestions*, Centre on Regulation and Competition, Working Paper Series, Paper No. 79, at 11-12 (2004), available at http://www.competition-regulation.org.uk/publications/working_papers/WP79.pdf. It should be noted, however, that in the past few years many jurisdictions have enacted leniency systems despite cultural resistance. In Korea, business people are beginning to take leniency program seriously, as both the burden of *non*-criminal fines against cartels and the benefits for voluntary reporters (especially the “first in”) increase substantially. The Korea Fair Trade Commission reports two leniency cases in 2004 and 11 in 2005. Press release (written in Korean), available at http://ftc.go.kr/data/hwp/20060629_100927.hwp. These facts indicate that societal attitudes toward leniency programs could be changed in a relatively short term. On the cultural importance of antitrust enforcement in the U.S. that enables the leniency program to function well, see W. Todd Miller, *Whistleblowing on Conspiracies and Cartels: Risks and Lessons from South (East?) of the Border*, Victoria, B.C. (April 24, 2001).

⁵⁴ Canada’s competition legislation preceded that of the US by a year. On the indigenous roots of European competition laws, see DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS* (1998).

⁵⁵ Eleanor M. Fox, *Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia*, 41 HARV. INT’L L. J. 579 (2000).

nation could maximize citizens' receptiveness to competition policy in the short term by aligning it with its culture.⁵⁶ For example, Korea put much more stress on economic concentration and unfair business practices than cartels and mergers in its earliest stages of competition law enforcement. As this line of policy matched well with Korean culture, which attaches great importance to the protection of the weak against the strong,⁵⁷ the Korea Fair Trade Commission (KFTC) gained powerful support from the people. Owing to this public support, the KFTC was able to vigorously step up its drive for anti-cartel enforcement.⁵⁸

In the long run various measures could be taken to encourage competition-friendly values.⁵⁹ Before anything else, nations could revive competition-friendly traditions in their own history and thus facilitate a sense of historical continuity in promoting competition. This revival need not be confined to the tradition of marketplace competition: other relevant traditions

⁵⁶ In designing regulation for nations, experts often take into account the nation's industrial infrastructure. *E.g.*, Russell Pittman, *Chinese Railway Reform and Competition: Lessons from the Experience in Other Countries*, 38 J. TRANSPORT ECON. & POL'Y 309 (2004). Likewise we could take into account the cultural infrastructure of nations in designing antitrust policies.

⁵⁷ Korea's low rank in the Masculinity/Femininity index (41st) relates to such inclination. *See* HOFSTEDE, *supra* note 6, at 317 (indicating that political priority is likely to be given to solidarity with the weak rather than reward for the strong in Feminine culture).

⁵⁸ Korea put in force the Monopoly Regulation and Fair Trade Act (MRFTA) in 1981. During the first 13 years of its enforcement, the ratio of the cases concerning improper concerted acts (cartels and cartel facilitators) to the entire body of cases, in which KFTC used corrective measures against the violations of MRFTA, was only 1.09%. The ratio, however, increased to 6.37% by 2005. The statistics on the enforcement of MRFTA, written in Korean, are available at http://ftc.go.kr/data/hwp/20060613_100848.xls. These facts indicate that the *sequence* of policy introduction, rather than a one-time snapshot, could have a close correlation with national cultures. Other examples might be the countries that first introduced their competition laws without merger control provisions, like Argentina, or those with relatively weak competition laws, like Brazil.

⁵⁹ *See* Dhanjee, *supra* note 53, at 17-18 (it may be appropriate to focus on "establishing legal and institutional mechanisms which...also promote long-term cultural change to make the culture more 'competition-friendly'."); *see also* Grinberg, *supra* note 53, at 6-7 ("...in order to make antitrust law really effective against cartels, a cultural and educational shock is necessary, starting by the economic authorities but going all the way from the Government to the business community."); Uesugi, *supra* note 2, at 356 ("The 'harmonization culture' that dominated Japanese business thinking needed to experience culture shock in order to accede to the new 'competition culture'").

could also help. Even the transition economies might be able to find competition-friendly traditions in their history of communist regimes.⁶⁰ As an example, the tradition of innovation and cooperation could be found in most countries. They could revive such tradition and help people to get familiar with the notion of competition by focusing on the idea of “competition for innovation,” “innovation for competition” or “cooperation for competition.”

The keys to competition-friendly cultures could also be found in literature, arts and popular culture. Missionaries of competition culture need not be confined to competition authorities: support from academic circles, non-governmental organizations, and mass media is also essential.

PROMOTING REGIONAL COMPETITION CULTURE

We could apply similar measures in a regional setting. Cultural common grounds could be explored for successful cooperation on competition policy. In the short term, the parties to an RTA could pursue stronger CRPs by focusing on the areas where their cultural texture allows closer cooperation. For example, if the parties share highly collectivist values and a high tendency to avoid uncertainty, they could pursue detailed anticompetitive agreement clauses with emphasis on joint ventures. When they share Feminine culture, they could seek detailed substantive rules on monopolization or abuse of dominant position. In the case that the parties' cultural values are quite similar in many respects, they could also strive for strong dispute settlement mechanisms. Also, in many cases the special and differential treatment provisions could help bridge the cultural as well as the developmental gaps between the parties.⁶¹ By consulting the CVD indexes of nations, we might be

⁶⁰ On the competition-friendly elements in Marxist-Leninist views, see Tibor Varady, *The Emergence of Competition Law in (Former) Socialist Countries*, 47 AM. J. COMP. L. 229, 299-30 (1999). On the Russian tradition of encouraging “socialist competition”, see Kerry Ellen Pannell, *Growth, Stagnation, and Transition: Economic Implications of Soviet Ministerial Organization*, 27 BUS. & ECON. HIST. 16, 18-19 (1998).

⁶¹ See Philippe Brusick and Julian Clarke, *Operationalizing Special and Differential Treatment in Cooperation Agreements on Competition Law and Policy*, in COMPETITION PROVISIONS IN REGIONAL TRADE AGREEMENTS: HOW TO ASSURE DEVELOPMENT GAINS 176 (Philippe Brusick *et al.* ed., United Nations 2005) (“At the bilateral or regional level, it might be easier for the

able to identify *culturally optimal* regional competition policies.

In the long run nations might be able to close some cultural gaps and pursue stronger CRPs if the parties to an RTA could get the most out of their common cultural heritages and popular cultural codes. As an example, China, Japan and Korea show quite different degrees of tendency to avoid uncertainty.⁶² However, they could find affluent traditions of innovation shared in their histories, such as Confucian emphasis on renovation, which are familiar to their citizens. Innovation-friendly elements could also be found in popular culture, such as *Hallyu* (Korean Wave) dramas, which are commanding general popularity across Asia. By focusing on innovation-friendly traditions and cultural codes, the Northeast Asian countries could help people to more easily accept the uncertainties that the competitive process provides.⁶³

CONCLUSION

Culture, of course, is not the only factor affecting competition policies. Economic, political and institutional factors often prevail, and outcomes deviate from the predictions based on cultural considerations. Nevertheless, the impact of cultural factors seems undeniable. By conducting full-scale research, we might be able to identify the relative importance of national cultures *vis-à-vis* other factors in most areas of competition policies, including mergers,⁶⁴ abuse of dominance⁶⁵ and vertical restraints.⁶⁶ If we could estimate the CVD index scores of

more-advanced party to accept a certain degree of flexibility, than they would be prepared to accept at the multilateral level.”)

⁶² Japan ranks 7th and Korea 16-17th in the Uncertainty Avoidance index. China was not covered by Hofstede’s initial project, but he later estimated China’s UAI score as 30; HOFSTEDE, *supra* note 6, at 502 Exhibit A5.3; which lies between those of Ireland (score 35, rank 47-48th) and Hong Kong (score 29, rank 49-50th).

⁶³ On the importance of popular support for issues surrounding international antitrust, see Abbott B. Lipsky, Jr., *The Global Antitrust Explosion: Safeguarding Trade and Commerce or Runaway Regulation?* 26 Fletcher F. World Aff. 59, 68 (2002).

⁶⁴ Despite the recent development towards the convergence of merger regulation, it seems hard to find any reason to believe that national cultures will prove to be irrelevant.

⁶⁵ Regarding abuse of dominance, it is quite probable that MAS index scores will prove to be relevant.

⁶⁶ Vertical restraints could be perceived as a form of cooperation in some

supranational entities, such as the EU, we might be able to elaborate on the cultural implications of their competition policies at a regional level.

Further insight into the interaction between culture and competition policy could help us to promote competition at both the national and regional level. If all countries could draw on competition-friendly traditions, and the intercultural contact between nations could promote the innovation and convergence of their competition policies, the conflict between competition policies solely focusing on efficiency and consumer welfare and those that do not could become far more tolerable.

We could also enhance international coordination of competition policies by emphasizing cultural values such as innovation and cooperation, which are closely related to competition and could be shared by participating countries. Even if it is hard to find the greatest common measure among widely different cultures, we could still enlist the least common denominator, a higher cultural value, to embrace all the antagonistic values. In this way we could promote the one value antitrust laws have pursued since their inception: progress.⁶⁷

cultures, and incline to reduce the uncertainty that competitive process provides. Thus IDV and UAI indexes could prove to be relevant.

⁶⁷ See Gavil, *supra* note 51, at 1247-49. On the role of competition policies in advancing the national economy and the global economy as a whole, see Joseph Seon Hur, *Capacity Building and Technical Assistance in the Area of Competition Policy: Korea's Experiences and Suggestions*, Address Before the OECD/GFC (Mar. 18, 2002) (transcript available at <http://ftc.go.kr/data/hwp/20020214.doc>). See also William J. Kolasky, *The Role of Competition in Promoting Dynamic Markets and Economic Growth*, Address Before the Tokyo America Center, Tokyo, Japan (Nov. 12, 2002) (transcript available at <http://www.usdoj.gov/atr/public/speeches/200484.htm>).

APPENDIX

U-I Index[†]

<i>Rank</i>	<i>Country or Region</i>	<i>Index</i>
1	Great Britain	98.5
2	United States	96
	Denmark	96
4	Sweden	93
5	Canada	91
6	Ireland	89.5
7	Australia	89
8	New Zealand	87.5
9	Netherlands	84.5
10	Jamaica	81
11	Norway	79
12	India	78
13	South Africa	77.5
14	Switzerland	73
15	Italy	70
16	Finland	68.5
17	Germany	68
18	Philippines	67
	Singapore	67
20	Hong Kong	66.5
21	Malaysia	64
22	Iran	61.5
23	Austria	60.5
24	East Africa (region)	56
	France	56
26	Arab Countries (region)	54.5
27	Israel	54
28	Belgium	50.5
29	Indonesia	48
	West Africa (region)	48
	Brazil	48

[†] U-I Index is the sum of each country or region's UAI rank and its reverse rank in IDV. When multiple countries rank the same in Hofstede's research, the average of the upper next rank and the next lower rank is regarded as the countries' rank. For instance, Brazil and Venezuela rank 21st together in UAI, so their UAI rank is regarded as 21.5, the average of 20 and 23.

32	Spain	46.5
33	Argentina	44
	Thailand	44
35	Turkey	42.5
36	Mexico	40
37	Japan	37.5
38	Taiwan	36
39	Pakistan	31
40	Ecuador	30
41	Uruguay	29
42	Chile	28.5
43	Yugoslavia	28
44	Korea (South)	27.5
45	Venezuela	25.5
46	Greece	25
	Columbia	25
48	Portugal	22
49	Costa Rica	20.5
50	Peru	18
51	Salvador	17.5
52	Panama	15.5
53	Guatemala	4