

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

**UNIVERSITY OF CAPETOWN**  
**FACULTY OF LAW – SCHOOL FOR ADVANCED LEGAL STUDIES**

**LLM IN COMMERCIAL LAW 2012-2013**

**JAN PARMENTIER**

**PRMJAN001**



**THE INTERFACE BETWEEN THE WTO AND COMPETITION LAW**

**- *One Size does not fit All* -**

**Supervisor: Luke Kelly**

**Co-Supervisor: Professor Dennis Davis**

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Masters Degree in Law (LLM) in approved courses and a minor dissertation. The other part of the requirements for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing submission of the Master of Laws dissertations including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations

Signed by candidate

---

**JAN PARMENTIER**

University of Cape Town

## **ACKNOWLEDGEMENTS**

I wish to express my profound gratitude and appreciation to thank my supervisor and co-supervisor for their guidance and devotion of their invaluable time to this dissertation.

University of Cape Town

# TABLE OF CONTENTS

ACKNOWLEDGEMENTS .....	II
I. INTRODUCTION .....	1
II. THE HISTORY BETWEEN COMPETITION LAW AND THE WTO .....	3
A. <i>The role of the WTO</i> .....	3
B. <i>The role of competition law</i> .....	4
C. <i>From the Havana Charter to the Singapore Ministerial Conference</i> .....	5
D. <i>Standpoints of the WTO Members</i> .....	7
1. The United States position .....	7
2. The European Union position .....	9
3. The developing countries' position.....	10
E. <i>The Doha Round of Negotiations</i> .....	11
III. THE INTERFACE BETWEEN INTERNATIONAL TRADE LAW AND COMPETITION LAW.....	14
A. <i>The overlapping scope</i> .....	14
1. General .....	14
2. The complementary role of competition law in international trade law .....	14
3. Case Law - Examples.....	15
B. <i>Differing in scope</i> .....	18
IV. DEFINING THE STRUCTURAL IMPEDIMENTS .....	19
A. <i>Developing countries and international competition law?</i> .....	19
1. The objectives of their competition law.....	20
2. Competition law used as a policy tool .....	21
3. Lack of capacity and resources .....	23
4. No to international standards, Yes to Cooperation .....	24
B. <i>The search for consensus - Sovereignty</i> .....	26
C. <i>The WTO 'as such'</i> .....	29
V. CONVERGENCE OF INTERNATIONAL COMPETITION LAW: FOUR DIFFERENT MODELS.....	32
A. <i>Model I: Competition law provisions in the different existing WTO agreements</i> .....	33
1. Explicit Competition Provisions .....	34
2. Enforcement mechanism: Article XXIII GATT – Non violation Clause .....	37
3. Pro .....	42
4. Contra.....	43

<i>B. Model II: Competition agreement within the WTO: minimum rules with a public defence mechanism.....</i>	<i>45</i>
1. Development of the TRIPS agreement .....	47
2. Comparison to competition law .....	48
2.1. Linkage.....	48
2.2. Special and different treatment: Public policy mechanism.....	49
3. Elements of the multilateral competition agreement .....	50
3.1. Transparency .....	51
3.2. Non-discrimination provision .....	52
4. Pro .....	53
4.1. Linkage.....	53
4.2. Minimum rules with public policy defense.....	53
5. Contra.....	54
5.1. Linking .....	54
5.2. Minimum rules with public policy defence .....	56
<i>C. Model III: The ICN.....</i>	<i>57</i>
1. Formation of the ICN .....	58
2. Functions of the ICN .....	59
3. Pro .....	60
3.1. Capacity building .....	60
3.2. Democratic working.....	60
3.3. No commitments – Informal gathering .....	61
4. Contra.....	61
4.1. No linkage .....	62
4.2. Undemocratic: legitimacy concerns .....	62
4.3. No commitments – No dispute settlement mechanism .....	63
<i>D. Model IV: Cooperation between the WTO and the ICN .....</i>	<i>65</i>
1. WTO private market access restraints – ICN supplementary competition principles .....	65
2. ICN consensus reaching - WTO binding rulemaking .....	66
VI. CONCLUSION.....	67
BIBLIOGRAPHY .....	70

## I. INTRODUCTION

1. With liberalization opening markets, the world is fast growing towards one global village. The downside of this trend is that cross-border practices have also been developed and unregulated sectors are causing damages, especially to the less developed victims that have yet to establish stronger domestic, economic and legal regimes<sup>1</sup>. Trade liberalization has occurred through the effect of organisations like the WTO reducing tariff and non-tariff barriers of governmental measures seeking to reach a global economy. In contrast, the law regulating the behaviour of business practices has never been brought into an international framework.

But what occurs on the level of competition law when there is a cross-border case involving several jurisdictions? Often the standards and values of the different jurisdictions clash or the competition authorities of developing countries are not always fully equipped to deal with transboundary practices<sup>2</sup>. As a result, this global trend with markets transcending national borders raises the question whether or not there is a need for a supranational or multilateral competition framework. Many international organisations have started adapting some international competition principles but consensus indicates that globalization has created a need for some form of international competition law cooperation/ enforcement.

2. Since 1940 efforts have been made to incorporate competition law in the WTO framework. However, until today this process is still incomplete. To a large extent, the WTO has been seen by many jurisdictions and authors to be the appropriate forum<sup>3</sup>, growing from the trust in the GATT/WTO as having a history of being

---

<sup>1</sup> PS Metha & N Nayak 'Global Problems need global solutions: The need for a multilateral framework on competition' in C Bellman & R Melendez-Ortiz & M Rodriguez Mendoza (Eds.) *The future and the WTO: Confronting the challenges – A collection of short essays - ICTSD Programme on Global economic policy and institutions* (2012) 156 at 156 available at <http://ictsd.org/i/publications/138578/>; EM Fox 'Toward world Antitrust and Market Access' (1997) 91 *Am. J. Int'l L.* 1 at 3; DK Tarullo 'Norms and Institutions in global Competition Policy' (2000) 94 *Am. J. Int'l L.* 478 at 479.

<sup>2</sup> PJ Lloyd 'Multilateral rules for International competition law?' (1998) 21 *The World Economy* 1129 at 1132-1135.

<sup>3</sup> H Lee 'Influencing a global agenda: Implications of the modernization of European Competition law for the WTO' (2004) 1 *Erasmus Law and Economics Review* 111 at 137.

pragmatic and concrete. Even more, the dispute settlement system is perceived to be a unique and powerful device<sup>4</sup>.

This research paper will investigate whether or not this is a right premise and what essentially impeded the WTO from incorporating a competition policy.

The first chapter elucidates the role of competition law as well as the role of the WTO. Following this, a historic overview is given of implementing attempts starting from the Havana Charter till the Doha negotiations round in 2004. Specific attention will be given to the different viewpoints of the major negotiations parties before approaching the final Doha Round of Negotiations.

The second chapter identifies the interface between trade law and competition law. International trade law has always been seen as resolving the public restraints while competition law was primarily concerned with private restraints, but do they ultimately encompass the same goals?

The third chapter utterly concentrates its focus on the impediments preventing a global WTO competition consensus from being reached. It becomes clear that not mere institutional impediments underlie the failure. In particular and with regards to the developing countries, the search for an international standard does not reflect their interests.

The fourth and final chapter provides four different models reaching a resolution to convergence competition law on a multilateral level ranging from the WTO to the ICN. The different models are constructed in such a way, with regard to the detected impediments, that every model explores its shortcomings and gradually improves in the following model. In the fourth and last model, all the elements come together which makes this the most viable and realisable of all the models.

---

<sup>4</sup> C Noonan *The emerging principles of international competition law* (2008) Oxford University Press Oxford 51.

## II. THE HISTORY BETWEEN COMPETITION LAW AND THE WTO

### A. The role of the WTO

3. The World Trade Organization (hereafter the 'WTO'), which can be seen as the modest enhancement of the General Agreement on Trade and Tariffs (GATT), came into being in 1995<sup>5</sup>. The Uruguay negotiations started in the month of September 1986 and the results of this negotiation were formally signed at Marrakesh, Morocco on 15 April 1994 ensuing in their ratification by various nations and eventually coming into force on the first of January 1995<sup>6</sup>.

The WTO is an international organisation which governs the trade relations of the members by reducing and eliminating governmental trade barriers, such as tariffs and quantitative restrictions<sup>7</sup>. The procedures of the WTO dispute settlement have been used almost exclusively for reviewing governmental trade restrictions and distortions<sup>8</sup>. The ultimate goal of this institution is opening up the markets by improving the market access of the Member countries.

The whole idea of the WTO is based on the fundamental principles of most-favoured-nation treatment (MFN), national treatment and transparency. These principles are embedded as fundamental, as they establish and maintain non-discrimination and openness in the international market. They are established to eliminate discriminative measures from member countries<sup>9</sup>.

---

<sup>5</sup> JH Jackson *The jurisprudence of GATT&WTO Insights on treaty law and economic relation* (2002) Cambridge University Press Cambridge 399.

<sup>6</sup> R Goswami 'Harmonization of Competition law by the contracting parties of the World Trade Organisation' (2012) LLM Dissertation, National Law University Jodhpur at 5 available at SSRN: <http://ssrn.com/abstract=2046829> or <http://dx.doi.org/10.2139/ssrn.2046829>

<sup>7</sup> M Matsushita 'Basic Principles of the WTO and the role of Competition policy' (2004) 3 *Wash. U. Global Stud. L. Rev.* 363 at 363.

<sup>8</sup> F Weiss 'From World Trade law to World Competition Law' (1999-2000) 23 *Fordham Int'l L.J.* 250 at 262.

<sup>9</sup> See Margin Number 80-84; MFN: Article 1 of GATT Oct. 30 1947, 61 Stat. A-11; Article II of the GATS Apr. 15 1994 Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33, I.L.M. 1167.

## **B. The role of competition law**

4. Competition law is the law regulating business practices and transactions that create or abuse market power and interfere with the free market<sup>10</sup>. The aim of this law is to establish and maintain the freedom of enterprises, the equality of competitive conditions under which they compete and the openness of markets<sup>11</sup>. Hence competition law aims primarily at protecting the processes underlying efficient functioning of the market<sup>12</sup>.

Competition law covers 'unfair competition practices' from a domestic market point of view but also from an international trade perspective. However the objectives of the policy vary from country to country. To put it simply, competition law is there to ensure that markets are accessible and consequently that incumbent firms are not able to sustain anti-competitive behaviour for any amount of time<sup>13</sup>.

5. Hoekman and Holmes make the distinction between a competition law and a competition policy in which the latter covers a much broader domain than the former<sup>14</sup>. Competition law is part of the domain of competition policy which also includes components such as privatising state owned firms and reducing the extent of policies that discriminate against foreign products. The major difference between them is that competition law encounters private restraints whereas competition policy pertains to private and government actions<sup>15</sup>.

6. In a comparison with the WTO, competition law generally protects the areas of vertical and horizontal restraints, unilateral restraints like the abuse of dominance and merger control, while WTO rather covers the area that aims to protect import-

---

<sup>10</sup> EM Fox 'Competition Law' in JH Jackson (Ed.) *International Economic Law series* Oxford University Press Oxford (2008) 417 at 418.

<sup>11</sup> Matsushita op cit note 7 at 364.

<sup>12</sup> KE Maskus & M Lahouel 'Competition policy and intellectual property rights in developing countries' (2000) 23 *The World Economy* 595 at 597.

<sup>13</sup> Ibid at 597.

<sup>14</sup> B Hoekman & P Holmes 'Competition policy, Developing countries and the WTO' (1999) 22 *The World Economy* 875 at 876; Sweeney and Lloyd also make this distinction: B Sweeney 'Globalisation of competition law and policy: some aspects of the interface between trade and competition' (2004) 5 *Melb. J. Int'l L.* 375 at 378-379; Lloyd op cit note 2 at 1131.

<sup>15</sup> Hoekman & Holmes op cit note 14 at 876-877; Element of so-called 'beggar-my-neighbour' policy. See for more information: O Budzinski 'International antitrust institutions' (2012) 17 *Illmenau Economics Discussion Papers* 1 at 5-6.

competing producers rather than competition and consumer welfare<sup>16</sup>. So the provisions of the GATT and the WTO are generally not used to protect consumer welfare and market distortions<sup>17</sup>.

### **C. From the Havana Charter to the Singapore Ministerial Conference**

7. Prior to the creation of the WTO there were two serious attempts to create a comprehensive framework for international economic relations, one at the Geneva International Economic Conference in 1927 and another one following the Second World War. In both of them, competition law was often portrayed as an important part of the proposed framework<sup>18</sup>.

A real competition policy was mentioned the first time in the GATT's Havana Charter of 1947. The charter for the creation of an International Trade Organization included a Restrictive Business Practices chapter whose objective was to prevent business practices that restrain competition and adversely affect international trade<sup>19</sup>. Chapter V of the Havana Charter was devoted to competition law and policy. Since that time, the idea of international competition policy has been debated in many international fora including the WTO, UN, UNCTAD, OECD and the ICN<sup>20</sup>.

8. In the mid 1990's, the first real substantive talks about implementing competition law in the WTO began under the aegis of the European Union. It was Sir Leon Brittain, European Commissioner in charge of External Relationship for the European Union, who gave the call for a measure in 1992 at the Davos World Economic Forum. At this time, the European commission also accordingly appointed a group of experts. They argued that competition law belonged in this institution because private distortions of competition were a significant problem. However the United States and the vast majority of the developing countries declined to support this idea<sup>21</sup>. Subsequently, they concluded in their report that an initiative should be

---

<sup>16</sup> Weiss op cit note 8 at 257.

<sup>17</sup> Ibid at 257.

<sup>18</sup> DJ Gerber 'Competition Law and the WTO: Rethinking the relationship' (2007) 10(3) *J. Int'l Econ. L* 707 at 707.

<sup>19</sup> Metha & Nayak op cit note 1 at 156.

<sup>20</sup> Matsushita op cit note 7 at 374.

<sup>21</sup> Gerber op cit note 18 at 710.

taken to start some cooperation between the national competition agencies, ultimately resulting in a stage where states should agree to adopt common minimum rules for transaction and conduct of international dimensions with a certain system of dispute resolution<sup>22</sup>.

9. In 1996, the Singapore Ministerial Conference established the Working Group on the Interaction between Trade and Competition Policy<sup>23</sup>. This Working Group worked extensively on the areas that merit further consideration in the WTO framework<sup>24</sup>. In 1999, 2000 and 2001 they produced three reports<sup>25</sup> dealing with the interaction between trade law and a competition policy towards the perspective of introducing competition law into the WTO. Matsushita construes from the reports that amongst the members of the WTO an agreement was reached that the WTO and competition policy share common objectives, i.e. the promotion of the free market, consumer welfare and efficiency<sup>26</sup>. During the Ministerial Conference in Doha, the members defined in Paragraph 25 the future task for the Working Group and placed the subject of competition policy on the agenda<sup>27</sup>.

However, with regard to the reports that conclusively agreed to work towards the implementation of competition policy into the WTO framework, opinions were divided. In the following I seek to summarize the respective positions of the negotiating parties from the perspective of the respectively the United States, the European Union and the developing countries.

---

<sup>22</sup> Goswami op cit note 6 at 16; AK Koul *Guide to the WTO and GATT: Economics, Law and Politics* (2005) Kluwer Law International The Hague at 533-534.

<sup>23</sup> Lee op cit note 3 at 121.

<sup>24</sup> Ibid at 121.

<sup>25</sup> *WTO working Group on the Interaction between Trade and Competition Policy* Report to the General Council, WT/WCTCP/1 (Nov. 28, 1997); WT/WGTCP/2 (Dec. 8, 1998); WT/WGTCP/3 (Oct. 11, 1999); WT/ WGTCP/4 (Nov. 30, 2000); WT/WGTCP/5 (Oct. 8, 2001).

<sup>26</sup> Matsushita op cit note 7 at 374.

<sup>27</sup> Doha Ministerial Declaration, *World Trade Organization, Ministerial conference, Ministerial Declaration of 14 November 2001*, WT/MIN(01)/DEC/1 available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm). The issues concerning the relationship between Trade and Competition are identified in paragraphs 23-24 and 25 of the Doha Ministerial Declaration.

## D. Standpoints of the WTO Members

### 1. The United States<sup>28</sup> position

**10.** The US rejected the Havana Charter in 1948 since they had the fear that restrictive business practices would have been used against their own commercial interests<sup>29</sup>. Nonetheless the support for competition law in international disciplines was originally stimulated by the US deriving from their concerns that international cartels and the non-enforcement of national competition law would impede them from entering foreign markets<sup>30</sup>. However they do not support the idea of allowing their competition rules to be subordinated to an international regime of any kind<sup>31</sup>. They appear to prefer the concept of acting unilaterally or pursuing bilateral cooperation<sup>32</sup>. Subsequently follows the brief history of the attempts and arguments.

**11.** Following the Havana Charter, the US defended their stance of being firmly against an implementation into the WTO framework. The argument given was often centred around the less pro-competitive result a multilateral agreement could turn out, as opposed to what the proponents were hoping for<sup>33</sup>. The achievement of a de facto international competition law in the field of cartel behaviour would be from their perspective thoroughly sufficient on an international level<sup>34</sup>. The US preferred the OECD as multilateral forum because their members are 'like' nations and the

---

<sup>28</sup> Hereafter 'US'.

<sup>29</sup> G Hufbauer & J Kim 'International competition policy and the WTO' (2009) 54 *Antitrust Bull.* 327 at 330.

<sup>30</sup> Hoekman & Holmes op cit note 14 at 877.

<sup>31</sup> Gerber op cit note 18 at 710; see e.g. AD Melamed Principal Deputy Assistant attorney Gen., Antitrust Div., U.S. Deputy of Justice 'Antitrust enforcement in a Global Economy' at the *Fordham corporate Law Institute 25<sup>th</sup> annual conference on International Antitrust Law and Policy* (Oct. 22, 1998) available at <http://www.usdoj.gov/atr/public/speeches/2043.pdf>.

<sup>32</sup> AT Guzman 'International antitrust and the WTO: The lesson from intellectual property' (2002-2003) 43 *Va.J. Int'l L.* 933 at 935; see also EM Fox 'Global Markets, National Law, and the regulation of business: A view from the Top' (2001) 75 *St. John's L. Rev.* 383 at 383; EM Fox 'Competition Law and the Millenium Round' (1999) 2 *J. Int'l Econ. L.* 665 at 665; Tarullo op cit X at 478.

<sup>33</sup> See JI Klein 'Anticipating the Millennium: International Antitrust enforcement at the end of the twentieth century' in B. Hawk (Ed.) *Annual proceedings of the Fordham Corporate Law Institute: international antitrust Law and practice* (1998-1999) Juris Publishing Inc New York 1 at 9-10, Presented at Fordham corporate law institute 24<sup>th</sup> annual conference on international law and policy (1997), also available at [http://www.jurispub.com/cart.php?m=product\\_detail&p=10083](http://www.jurispub.com/cart.php?m=product_detail&p=10083)

<sup>34</sup> H First 'The Vitamins Case: Cartel prosecutions and the Coming of international competition law' (2001) 68 *antitrust L.J.* 711 at 727; EM Fox 'Linked-In: Antitrust and the Virtues of a Virtual Network' (2009) 43 *Int'l L.* 151 at 156.

OECD does not have a dispute resolution mechanism and is not a rule-making body<sup>35</sup>.

The International Competition Policy Advisory Committee (ICPAC) was organised in 1997 by the US to research the possibility of an international competition policy from the United States perspective<sup>36</sup>. They submitted its report in 1999 with a rather sceptical tone towards an international competition framework within the WTO<sup>37</sup>.

The report brought forward that the US was mainly concerned about the swift inclusion of competition law into the WTO<sup>38</sup>. The opposing approach could be brought together in three problem zones. First was the possible distortion of competition standards through the quid pro quo nature of the WTO negotiations, together with the fear of having a good already existent enforcement system diminishing into an unwieldy and theoretical WTO exercise<sup>39</sup>. Second was the existing apprehension towards the intrusion of the WTO's dispute settlement into domestic competition regulatory practices<sup>40</sup>. Last was the inappropriateness of obliging countries to adopt these common principles of competition law which are domestically often used as policy tools.

**12.** To conclude, the report proposes that there should be an initiative towards greater convergence by means of soft law, but with no necessity to bring this into the framework of an international organisation. The committee expressed the view that in the end, national authorities are still the best positioned to deal with anti-competitive practices of private firms that are occurring on their territory<sup>41</sup>. For this reason and based on the report of the committee, the American government initiated the "International Competitive Network". Agencies and competition authorities from

---

<sup>35</sup> Fox 'Competition Law' (2008) op cit note 10 at 461.

<sup>36</sup> International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust [electronic resource] final report; Washington, D.C. : U.S. Dept. of Justice, 2000.; available at <http://purl.access.gpo.gov/GPO/LPS17186>

<sup>37</sup> Fox 'Linked-In: Antitrust and the Virtues of a Virtual Network' (2009) op cit note 34 at 158; In specific Klein expressed a strong opposition: Klein (1998-1999) op cit note 33.

<sup>38</sup> Matsushita op cit note 7 at 378.

<sup>39</sup> Klein (1998-1999) op cit note 33.

<sup>40</sup> B. Sweeney 'International competition law and policy: A work in progress' (2009) 10 *Melb. J. Int'L.* 58 at 60.

<sup>41</sup> *International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust Committee Report in the Executive Summary, final report, Washington D.C., US Dept. of Justice, 2000* available at <http://purl.access.gpo.gov/GPO/LPS17186>

all over the world informally meet here and share their thoughts on the convergence of competition law.

However, due to the perceived developing anticompetitive practices of some BRIC countries, the US has expressed more willingness in the 21<sup>st</sup> century to cooperate with EU on an international competition agreement<sup>42</sup>. Nonetheless, they still differ in the various approaches with each espousing their own standards and concepts.

## 2. The European Union position

**13.** At the Ministerial Meeting in Singapore, the European Union proposed to launch an initiative on trade and competition<sup>43</sup>. This is how the Working Group was initiated. The US opposed it at first but eventually agreed with the Working Group as long as its goal was to share and enhance mutual knowledge without implying the next step of negotiating competition rules within the WTO<sup>44</sup>.

The realisation of the single market in the European Union was an encouragement to go one step further and export their competition law while inspiring other countries to follow their example<sup>45</sup>.

In 2000, the EU presented its position paper clarifying its position on the relationship between international trade and competition policy<sup>46</sup>. Within this paper, the EU argued for a binding WTO framework agreement on competition policy by especially advocating for international co-operation. Basically what the EU was proposing is

---

<sup>42</sup> Lloyd op cit note 2 at 1135.

<sup>43</sup> Fox 'Linked-In: Antitrust and the Virtues of a Virtual Network' (2009) op cit note 34 at 154-155.

<sup>44</sup> See for EU proposal which became the basis for the Singapore antitrust initiative: *Commission of the European Communities, Report of the Group of Experts, Competition Policy in the new Trade Order: Strengthening International Cooperation and Rules*, COM (1995) 359 final (Dec. 7, 1995; also see *European Commission, XXVIth Report on Competition Policy*, at 95, COM (1997) 628 final (1996).

<sup>45</sup> Hufbauer & Kim op cit note 29 at 330; A Bradford 'When the WTO works, and How it fails' (2010-2011) 51 *Va. J. Int'l L.* 1 at 23; A Bradford 'International Antitrust negotiations and the False hope of the WTO' (2007) 48 *Harv. Int'l L.J.* 383 at 408.

<sup>46</sup> Advocate of an international competition agreement : M Monti 'European commentator for Competition Policy, A global Competition policy?' *Address at the European Competition Day Conference* (Sept. 17, 2002), available at [http://europa.eu/rapid/press-release\\_SPEECH-02-399\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-02-399_en.htm); *WTO Working Group on the Interaction between Trade and Competition Policy Communication from the European Community and its Members* WT/WGTCP/W/152 (Sept. 25, 2000); Weiss op cit note 8 at 254.

international co-operation between the national competition authorities<sup>47</sup> together with agreement on some core principles of competition law and policy<sup>48</sup>. They also put forward the option of establishing a Competition Policy Committee within the WTO with the given task of examining how greater convergence could be reached<sup>49</sup>.

So in contrast to the US, the European Union was prepared to link competition law together with trade law<sup>50</sup>. Together with the EU, Japan, Korea and Canada favoured the idea of an incorporation of competition law within the WTO framework<sup>51</sup>.

### 3. The developing countries' position

**14.** At the time of the Havana Charter, developing countries were demanding an implementation of a competition policy into an international framework, especially since they saw themselves as victims of predatory behaviour by the EU and the US in the 40's.

In contrast to these decades, 60 years later the developing countries were generally speaking opposed to the idea of an international competition policy instituted into the WTO framework<sup>52</sup>.

Several reasons can be given for this alteration<sup>53</sup>.

Firstly, the integration would be too intrusive to the national policies of some developing countries. In addition, the fear existed in the developing countries that a general competition policy would be used by the developed countries to open up their markets<sup>54</sup>.

---

<sup>47</sup> Including case specific co-operation to the exchange of general information and principles including the aid for development of competition authorities in developing countries through a more coherent and enhanced approach for capacity building.

<sup>48</sup> *WTO Working Group on the Interaction between Trade and Competition Policy, Communication from the European Community and its Members* WT/WGTCP/W/152 (Sept. 25, 2000).

<sup>49</sup> *Ibid.*

<sup>50</sup> Bradford 'International Antitrust negotiations and the False hope of the WTO' (2007) op cit note 45 at 407.

<sup>51</sup> Fox 'Linked-In: Antitrust and the Virtues of a Virtual Network' (2009) op cit note 34 at 156.

<sup>52</sup> Gerber op cit note 18 at 709-710.

<sup>53</sup> For more information: Reference to Impediment 1: Margin number 26-34.

<sup>54</sup> B Sweeney 'Global competition: Searching for a rational basis for global competition rules' (2008) 30 *Sydney L. Rev.* 209 at 221.

In particular, the existing threat to them is that the potential competition model law, imposed by the US or the EU, will interfere with their industrial, development and economic policies and thus may be detrimental to their national goals<sup>55</sup>. Besides consumer welfare and economic efficiency, developing countries also take other factors into consideration, i.e. public interest as for example employment rate. In other words, they acquire themselves some 'policy space' to nurture monopolistic practices in some branches<sup>56</sup>. Out of economic considerations, they support infant industry policies for selected products and business services which eventually imply restraints on competition<sup>57</sup>. The integration of a common competition policy would therefore imply that compulsory provisions need to be executed by the developing countries without having any policy space.

Secondly, most of the competition authorities in developing countries at the time of the ongoing negotiations did not yet have a domestic competition law at their disposal. Even in the situation where they had incorporated a competition law in their domestic legislation already, their competition authorities were often not well equipped. They argued having too little experience with competition law while eventually setting up a whole competition network according to the WTO standards would turn out to be very costly<sup>58</sup>.

## **E. The Doha Round of Negotiations**

**15.** In 2001, at the WTO ministerial meeting in Doha, recognition was given to the case for a multilateral framework to enhance the contribution of competition policy to international trade and development<sup>59</sup>.

The core of the proposal<sup>60</sup> was built upon three critical areas for harmonization<sup>61</sup>. Firstly it grew out of the core principles comprising transparency, non-

---

<sup>55</sup> Sweeney 'Globalisation of competition law and policy: some aspects of the interface between trade and competition' (2004) op cit note 14 at 385; Matsushita op cit note 7 at 374.

<sup>56</sup> Hufbauer & Kim op cit note 29 at 331.

<sup>57</sup> Ibid at 331.

<sup>58</sup> KT Do 'Competition Law and Policy and economic development in developing countries' (2011) 8 *Manchester J. Int'l Econ. L.* 18 at 18.

<sup>59</sup> Metha & Nayak op cit note 1 at 156.

<sup>60</sup> Countries supporting these values: The European Union, Canada, Korea, Japan and several Latin American countries.

discrimination, procedural fairness and prohibition of hardcore cartels<sup>62</sup>. Secondly the implementation sought to encourage the voluntary cooperation of competition authorities. The third and last area was the support for institutional development (technical assistance) with regard to competition policy<sup>63</sup>.

**16.** The Doha Round of Negotiations was launched in November 2001. The agenda of the Doha declaration was quite ambitious as it addressed new issues such as investment and competition policy. Nonetheless, when in September 2003 in Cancun the Ministerial Conference ended in a deadlock<sup>64</sup>, the General Council of the WTO dropped competition policy from the Doha Agenda in 2004 in order to put the negotiations back on track<sup>65</sup>.

Many factors were responsible as political, legal and institutional concerns for the failing<sup>66</sup>.

Reasons given for the lack of consensus were centrally themed in the lack of confidence in the norms and procedures of the WTO<sup>67</sup>. In particular and as mentioned before, the developing countries expressed a lack of confidence that the implementation of competition law would be reflected in a way that would be interest based in their perspective<sup>68</sup>. With regard to the abolition of hardcore cartels, for example, the developing countries argued that they would not be able to

---

<sup>61</sup> Lee op cit note 3 at 122.

<sup>62</sup> See for more information margin number 73-74; Fox 'Linked-In: Antitrust and the Virtues of a Virtual Network' (2009) op cit note 34 at 157.

<sup>63</sup> RD Anderson & F Jenny 'Current developments in competition policy in the World Trade Organization' (2001) 16 *FALL ANTITRUST* 40 at 42.

<sup>64</sup> Sweeney 'Globalisation of competition law and policy: some aspects of the interface between trade and competition' (2004) op cit note 14 at 376-377.

<sup>65</sup> DOHA agenda of 2004: The text of the General Council, called the 'July Package', was agreed to on August 1, 2004. *WTO Doha Work Program* Decision adopted by the General Council on 1 August 2004 WT/L/579 (Aug. 2, 2004) available at

[http://www.wto.org/english/tratop\\_e/dda\\_e/draft\\_text\\_gc\\_dg\\_31july04\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm); Hufbauer & Kim op cit note 29 at 327 & 329; The excluded topics are enumerated in the original Doha Ministerial Declaration in paragraphs 20-26 supra note 27; *WTO Doha Work Programme* WT/GC/W/535, 2004; see also report for disagreement: *WTO Report of the Working Group on the Interaction between Trade and Competition Policy to the General Council* WT/WGTCP/6 (Dec. 9, 2002).

<sup>66</sup> See Chapter IV: Margin number 25-49.

<sup>67</sup> Gerber op cit note 18 at 710.

<sup>68</sup> Bradford 'When the WTO works, and How it fails' (2010-2011) op cit note 45 at 24; Do 'Competition Law and Policy and economic development in developing countries' (2011) op cit note 58 at 18-19; For more detailed information: T Stewart 'The fate of competition policy in Cancun: Politics or Substance?' (2004) 31 *Legal Issues Econ. Integration* 7 at 7-11.

overcome the regulatory burdens and compliance costs if agreement on these issues were to be implemented<sup>69</sup>. This round of negotiations was predominantly focussed on displaying a greater recognition of the concerns of the developing countries in order to give the WTO its credibility back<sup>70</sup>. Since the developed countries refused to unpack and separate the Singapore Issues<sup>71</sup>, it left the developing countries with no other possibilities than refusing the whole packet ultimately leaving the competition issue unsolved<sup>72</sup>. Because the US and the EU were at odds, the developing countries were able to stand up to the pressure.

As a result, the developing countries blocked the initiatives for further negotiations and the controversial topic got dropped from the Doha agenda. It is significant that few consumer groups and industries lobbied to endorse the international competition agreement<sup>73</sup>. Moreover, only a small group of prominent competition authorities have prompted the demand for an international competition agreement within the WTO. The uncertain result whether or not an international antitrust agreement would be advantageous for some industries and lobby groups could be a clarification for the latter.

---

<sup>69</sup> Do 'Competition Law and Policy and economic development in developing countries' (2011) op cit note 58 at 18, footnote 2.

<sup>70</sup> The WTO was repeatedly accused of negotiating on pre-agreed subjects by the developed countries; P Marsden 'Competition policy at the WTO: Not the end, but the end of the beginning' 2002 *Competition Law Insight* 6 at 6; Fox 'Linked-In: Antitrust and the Virtues of a Virtual Network' (2009) op cit note 34 at 157.

<sup>71</sup> E.g. Investment protection, transparency in government protection.

<sup>72</sup> Bradford 'When the WTO works, and How it fails' (2010-2011) op cit note 45 at 37.

<sup>73</sup> Ibid at 25.

### III. THE INTERFACE BETWEEN INTERNATIONAL TRADE LAW AND COMPETITION LAW

#### A. The overlapping scope

##### 1. General

17. Since the stalemate of the Doha Round Negotiations, every initiative to bring competition law into this international framework has stalled. National sovereignty seems to have won. However, in my opinion and that of the vast majority of authors, there is a very clear correlation between competition law and international trade<sup>74</sup>. The reasoning starts from the point where private restraints (competition area) undermine existing state obligations already embodied in the WTO (International trade area)<sup>75</sup>.

The Uruguay round succeeded in lessening the barriers to world trade but fuelled the demand for opening the markets. As a result it became even more necessary to substantially lessen any competition-preventing system/actions. Since the accomplished successes over the last fifty years regarding the dramatic fall in international tariffs, the focus shifted now to the elimination of non-tariff barriers with competition law represented as one of them<sup>76</sup>. A reform in the WTO framework would therefore include the adoption of a competition policy in order to check abuse of private power, to limit privileges and to open markets to trade and competition<sup>77</sup>.

##### 2. The complementary role of competition law in international trade law

18. The coverage of competition policy not only extends to the purely domestic market, but also influences the international market. The objectives of competition policy vary from country to country. Nonetheless competition policy aims in general

---

<sup>74</sup> Do 'Competition Law and Policy and economic development in developing countries' (2011) op cit note 58 at 19; KT Do 'The perspectives of International cooperation in Competition law and policy' 2009 *Zeitschrift für Wettbewerbsrecht Journal of Competition law* 289 at 289-314.

<sup>75</sup> Fox 'Competition Law' (2008) op cit note 10 at 381.

<sup>76</sup> Guzman op cit note 32 at 934; M Martin 'The creation of a global competition regime. Where exactly do the obstacles lie – Practical co-operation or ideological differences?' (2008) 7 *Rich. J. Global L. & Bus.* 297 at 299.

<sup>77</sup> Fox 'Competition Law' (2008) op cit note 10 at 418.

at controlling not only the activities of private enterprise but also governmental restrictions. In this latter respect, competition policy shares a striking similarity in goals with the GATT/WTO<sup>78</sup>. The objective of competition policy (key concepts) is to establish and maintain the freedom of enterprises, the equality of competitive conditions under which they compete, and the openness of markets especially as they both promote efficiency and the maximization of consumer welfare<sup>79</sup>. A domestic competition policy is therefore closely related to the move towards trade liberalization, deregulation and globalization<sup>80</sup>. With reference to the previously explained concept of competition policy, in the situation when strategic competition policies are actively used by governments, they will eventually distort competition on the international market and thus produce negative externalities, thus reducing world welfare<sup>81</sup>. For that reason this is the rationale to bring competition law within the WTO.

### 3. Case Law - Examples

**19.** I present, for a good understanding of the relation between competition law (private restraints) and international trade law (public restraints), the following examples.

**20.** Fox mentions the case where private restraints may block outsiders from access to markets, for instance when a cartel of domestic producers is tying up essential distributors and requires them to reject foreign goods. While states have WTO obligations not to block their markets by state restraints, they have no meaningful obligation to keep their markets free of private restraints.

States have the WTO obligations not to block their markets by governmental restraints. However this does not imply the duty to keep their market free of private restraints. By implementing a competition policy, member states could then fulfil their WTO obligations through erasing the private restraints by adopting and

---

<sup>78</sup> Sweeney 'Globalisation of competition law and policy: some aspects of the interface between trade and competition' (2004) op cit note 14 at 377.

<sup>79</sup> Matsushita op cit note 7 at 364; Maskus & Lahouel op cit note 12 at 607.

<sup>80</sup> Do 'Competition Law and Policy and economic development in developing countries' (2011) op cit note 58 at 26.

<sup>81</sup> Budzinski op cit note 15 at 6.

enforcing a national competition law/ WTO competition agreement<sup>82</sup>. However Fox seeks not for a direct international competition model law/ policy but rather the convergence through the law of the country with the exclusionary restraint<sup>83</sup>. Nonetheless, the applicable law needs to be a credible law prohibiting unreasonable market blocking restraints<sup>84</sup>.

**21.** Matsushita's logical reasoning is the following. In the situation that governments are controlling restraints of international trade as for example the cartels, private restraints will be of less importance as the trade is restricted by the public authorities anyway. However, when trade liberalization has been achieved, the next step in a trading system requires dealing with private restraints. For this reason, it is important that an international competition policy would be effectuated in the international World Trade Organization<sup>85</sup>.

The following case correspondingly shows the shortcomings of the WTO regarding abolishment of the private restraints in order to obtain a free market without borders<sup>86</sup>.

#### Kodak/Fuji Case

**22.** A remarkable case, Photographic Film (*Kodak/Fuji*<sup>87</sup>), decided by the Dispute Settlement Body in 1998, revealed the difference between public restraints addressed by the WTO and the private trade restraints which the WTO was ineffective in dealing with.

The US government filed a claim, brought within the so called 'non violation' complaint under Article XXIII of the GATT<sup>88</sup>, with the WTO regarding measures

---

<sup>82</sup> Hypothetically spoken.

<sup>83</sup> See for solution proposed by Fox margin number 107.

<sup>84</sup> Fox 'Competition Law' (2008) op cit note 10 at 463.

<sup>85</sup> Matsushita op cit note 7 at 365-366.

<sup>86</sup> EM Fox 'The WTO's first antitrust case – Mexican Telecom: A sleeping victory for trade and competition' (2006) 9 *Journal of International Economic Law* 271 at 271-273.

<sup>87</sup> *Japan – Measures Affecting Consumer Photographic Film and Paper, Report of the Panel*, WT/DS44/R (Apr. 22, 1998) available at <http://www.worldtradelaw.net/reports/wtopanels/japan-film%28panel%29.pdf> (hereafter Kodak/Fuji).

<sup>88</sup> See for further explanation margin number 59-62.

taken by the Japanese government in connection with the distribution of films in Japan<sup>89</sup>.

In essence, the US government objected that some restrictive features of the Japanese distribution system, which allegedly had been initiated under the directives of their government<sup>90</sup>, blocked foreign produced films from entering the Japanese film market<sup>91</sup>. The case involved a distribution system created by the market leader, Fuji Films, in which four distributors of Fuji acted as exclusive distributors of Fuji products. As a result and according to the US, Kodak films were excluded from the film wholesaling networks and this prohibited them from accessing the country by only being able to sell to retailers, which was much less efficient<sup>92</sup>.

More important in the perspective of the dissertation is that the WTO ruled that the US failed to provide evidence of the participation of the Japanese government whereas clearly there was an impediment of international trade<sup>93</sup>. According to Matsushita, the central matters of contention in this case were the private trade restraints set up by Fuji Films. Therefore she concludes that unless there is some change, the WTO will remain largely ineffective concerning issues of private conduct (restraint) in international trade<sup>94</sup>. Consequently the WTO will not be complete without the inclusion of competition policy within its framework<sup>95</sup>. Hoekman and Holmes are of the same opinion that, although competition claims can be brought under the 'non violation' process, it is a very limited instrument. It brings them to conclude that the WTO is very ill-equipped to investigate competition issues<sup>96</sup>.

---

<sup>89</sup> Hoekman & Holmes op cit note 14 at 878-879.

<sup>90</sup> Informal administrative guidance by issuing guidelines on what constituted fair and unfair competition; Ibid at 879.

<sup>91</sup> Maskus & Lahouel op cit note 12 at 600.

<sup>92</sup> Hoekman & Holmes op cit note 14 at 879.

<sup>93</sup> The US attempted to prove that although it seemed like a private restraint (by Fuji), the government of Japan played a decisive role in this distributorship agreement and therefore should be punished by the WTO.

<sup>94</sup> Matsushita op cit note 7 at 369-370.

<sup>95</sup> Ibid 370; Weiss is of the same opinion: Weiss op cit note 8 at 263.

<sup>96</sup> Hoekman & Holmes op cit note 14 at 880.

## B. Differing in scope

23. However, while some authors<sup>97</sup> argue that for instance some features of the anti-dumping legislation can be mitigated by the incorporation of some competition law features, other authors argue that they in essence serve a different goal and are based on different constituencies and so cannot be reconciled<sup>98</sup>.

Weiss mentions that international trade law and competition law do not necessarily form a stable relationship. According to this author, competition law is focussing on the goal of efficiency and consumer welfare while trade law is rather concerned with the interest of a country's individual producers<sup>99</sup>. Nevertheless, he is also of the opinion that they share broadly the same goals and are partially overlapping. In particular they overlap as both of them affect access to the market by seeking greater efficiency in the production and allocation of goods and services through the removal of barriers to the competitive process. Essentially, he explains that once trade liberalization removes the governmental trade barriers to open market access, competition policy comes in to secure open access by removing the private restraints.

According to Hoekman and Holmes, the WTO's objectives are to pursue a greater market access which will eventually result in national welfare while competition law basically emphasises welfare and competitive process<sup>100</sup>. Hence as the main focus is on market access, national welfare is a side effect without the presumption that this always will be the result. Therefore the authors conclude that doubts can be expressed regarding the WTO as an appropriate forum to play a constructive role in the convergence of competition law<sup>101</sup>. In addition, not all trade related issues are competition issues and vice versa<sup>102</sup>.

---

<sup>97</sup> A Wolff 'The (notionally) bridgeable chasm between Antitrust and Trade policy' (2003) 47 *New York Law School Law Review* 167 at 167.

<sup>98</sup> Matsushita op cit note 7 at 374; Hoekman & Holmes op cit note 14 at 887.

<sup>99</sup> Weiss op cit note 8 at 254.

<sup>100</sup> Sweeney is of the same opinion and shares the following example. In an already competitive market, a competition policy will rather be neutral on the coming of new entrants. Whilst trade law is concerned with the competitor's rights and thus the right of the new entrant to enter the market. It is therefore not focused on an objective standard such as consumer welfare. Sweeney 'Globalisation of competition law and policy: some aspects of the interface between trade and competition' (2004) op cit note 14 at 414.

<sup>101</sup> Hoekman & Holmes op cit note 14 at 887.

<sup>102</sup> Sweeney 'Globalisation of competition law and policy: some aspects of the interface between trade and competition' (2004) op cit note 14 at 416; Moreover, Tarullo argues that remarkably few private

24. To conclude, in my opinion and that of the vast majority of the legal authors, both the WTO and the competition policy aim to promote and maintain a free and open trading system. Their similarities are unmistakable.

#### **IV. DEFINING THE STRUCTURAL IMPEDIMENTS**

25. Given that some competition law provisions are already incorporated in the WTO agreements<sup>103</sup>, then what are still the institutional, political and legal elements that still hinder the addressing of major trans-border violations of competition law that hamper international trade and impact global welfare<sup>104</sup>? Although for instance Weiss who is of the opinion that the focus on “interaction problems” between trade law and competition law needs to be clarified rather than focussing on harmonizing the different national competition laws, many impediments still remain<sup>105</sup>.

Therefore the following chapter will give an overview of the factors impeding implementation of global competition policy within the WTO. Furthermore and where possible, attention will be given to how much current circumstances differ from the time of the DOHA round of negotiations, which raises the question if WTO is ready to take the next step.

##### **A. Developing countries and international competition law?**

26. Developing countries came to recognize the substantial difference a competition law can make towards reaching their goals. Therefore they started adopting and

---

restraints withheld trade: Tarullo ‘Norms and Institutions in global Competition Policy’ (2000) op cit note 1 at 484.

<sup>103</sup> See for more information Margin Number 53-58

<sup>104</sup> Metha & Nayak up cit note 1 at 157; Global welfare as the guiding principle? There are three main candidates to become a guiding principle for an international competition law: global welfare, global consumer welfare and international market contestability. For a detailed discussion: Noonen op cit note 4 at 94-96.

<sup>105</sup> Weiss op cit note 8 at 264.

integrating new competition laws<sup>106</sup>. Lately, seventy of the world's developing countries have adopted a competition law or are in the process of adopting one<sup>107</sup>.

The main question remaining is if the developing countries should follow the developed countries in their competition policies and emulate them, or if they should rather adopt their own legislation according to their developmental status.

When looking for the emerging international consensus on competition standards, it is apparent that while these standards are good for, for example, America, this does not imply that they are necessarily good for (Sub-Saharan) Africa. Optimal standards for developed countries may differ from those of developing countries<sup>108</sup>. When looking for international standards to convergence competition law, they tend to be the standards of the United States or the European Union. Probably the major impediment is the difference between the economic policies of developed and developing countries.

By the following arguments, divided in three appropriate questions that should be taken into consideration, I will demonstrate that developing countries cannot aspire to adopt the same competition law and policies which the developed countries implement<sup>109</sup>.

#### 1. The objectives of their competition law

*Firstly, what is the aim of the competition law they are envisaging?*

**27.** As mentioned before, competition policies differ from country to country. The US's competition policy is concerned with the promotion of allocative efficiency and

---

<sup>106</sup> Do 'Competition Law and Policy and economic development in developing countries' (2011) op cit note 58 at 19.

<sup>107</sup> Noonan op cit note 4 at 74; Do 'Competition Law and Policy and economic development in developing countries' (2011) op cit note 58 at 21; AE Rodriguez & MD Williams 'The effectiveness of proposed anti-trust programs for developing countries' (1994) 19 *North Carolina Journal of International Law and Commercial Regulation* 209 at 209-211.

<sup>108</sup> EM Fox 'Competition, Development and Regional Integration: In search of a competition law fit for developing countries' 2012 *Law&Economic Research Paper Series No.11-04* (1) at 8-9.

<sup>109</sup> A Singh 'Competition policy, development and developing countries' 1999 *South Centre T.R.A.D.E Working papers No. 50* (1) at 2.

consumer welfare while the EU prefers to make the trade-off between the loss of competition and the gains of efficiency. For developing countries it is important to have a competition policy which is designed to take appropriate account of their level of development and the long term objective of sustained growth<sup>110</sup>. Therefore they should adopt a competition policy encouraging the long term growth of productivity. So Singh is of the opinion that they, instead of having a static policy, should adopt a dynamic competition policy in order to attract foreign investors<sup>111</sup>. Laffont argues even more strongly that competition law is a good thing in the ideal world with a large number of participants, no public goods, no externalities, complete markets, and no natural monopolies. However, according to the author, because developing countries are so far from the ideal world, it is not always the case that competition should be encouraged in these countries<sup>112</sup>. Nevertheless, this argument is in my opinion outdated as most of the developing countries have recently adopted a competition law.

## 2. Competition law used as a policy tool

*Secondly and subsequently, the question that should be asked is to which extent developing countries should use their competition law as a policy tool.*

**28.** The following can best be shown by examples of how and why their competition policy should be dynamic instead of accepting an international competition consensus adopted and enforced by the WTO.

**29.** *The first example* is one where they differ from the developed countries in the fact that sometimes it is better to act than not to act.

Predatory pricing has repeatedly been declared as a rarely occurring event and mostly unsuccessful in the US<sup>113</sup>. The US Supreme Court has formulated a rule of

---

<sup>110</sup> Ibid at summary.

<sup>111</sup> Ibid at 12.

<sup>112</sup> J Laffont 'Competition, Information, and development' (1998) *Annual World Bank Conference on development economics World Bank Washington D.C.* available at <http://www.cenet.org.cn/download/16075-1.pdf>. at 7.

<sup>113</sup> Maskus & Lahouel op cit note 12 at 599.

law to make it nearly impossible for a plaintiff to win a predatory pricing case<sup>114</sup>. They also abolished the antitrust duty of a dominant firm to supply a scarce input or else to refrain from price-squeezing an intermediate buyer who is also a competitor<sup>115</sup>.

The reasoning behind this rule of reason expresses the fear that duties on dominant firms will undermine or lessen the incentives of these dominant firms to invest and invent in their business. Never put across, however, is the implication that rival firms or smaller firms may have incentives to invent or innovate undermined. Fox articulates this as one of the particular differences between the economy of a developed and a developing country.

Developing countries were for a long time dominated by an economy which was regulated by state-owned markets together with barriers to entering the market<sup>116</sup>. In such countries, dominant firm predation and exclusion are out of control and especially harmful<sup>117</sup>. They are major forces in keeping markets closed and uncompetitive. As a result, the cost of antitrust non-intervention is in many circumstances likely to be higher than the costs of intervention<sup>118</sup>.

This example shows clearly that the search for an international consensus often collides with the standards of developed countries and developing countries. For this reason, in developing countries, the cost of antitrust non-intervention is in many circumstances likely to be higher than the costs of intervention. Hence Noonan makes the proposition that one could adopt special competition rules during the

---

<sup>114</sup> *United States v. AMR Corp.* 335 F.3d 1109 (10<sup>th</sup> Cir. 2003) (No. 01-3202).

<sup>115</sup> Fox 'Competition, Development and Regional Integration: In search of a competition law fit for developing countries' (2012) op cit note 108 at 9-10.

<sup>116</sup> Singh op cit note 109 at 7-8.

<sup>117</sup> Noonan op cit note 4 at 75.

<sup>118</sup> Fox 'Competition, Development and Regional Integration: In search of a competition law fit for developing countries' (2012) op cit note 108 at 10; D Lewis 'Chilling Competition' in B Hawk (Ed.) *Fordham Comp. L. Inst.* (2009) 419-437; RS Khemani 'Competition Policy and Promotion of Investment, Economic Growth and poverty alleviation in least developed countries' *FIAS Occasional Papers No. 19* (1) at 5-47 available at [http://www.ifc.org/ifcext/fias.nsf/Content/FIAS\\_OccasionalPapers](http://www.ifc.org/ifcext/fias.nsf/Content/FIAS_OccasionalPapers); EM Fox & A Matteus *Economic Development: The critical role of Competition Law and Policy Introduction to Volume II* (2011); DD Sokol 'Order without (enforceable) Law: Why countries Enter into non-enforceable competition policy chapters in Free trade agreements' (2008) 83 *Chi-Kent L. Rev.* 231.

transitional period of the developing country and gradually adopt the international standard used by developed countries<sup>119</sup>.

**30.** *The second example* is when developed and developing countries differ in their basic idea and values of competition policy.

Developed countries may for instance prohibit a merger between two large domestic firms on the reasoning that the gains of efficiency do not outweigh the loss of competition. However it may be legitimate in developing countries, for those same domestic firms, to be allowed the merger on the terms of being able to compete with other multinationals from abroad<sup>120</sup>.

Competition is no longer a domestic matter but is rather used as a fundamental strategy of a government to respond to the globalised markets<sup>121</sup>. In other words, competition law can be used in order not to make firms more competitive within their own domestic market, but rather to make them viable to compete with international/multinational globalised firms<sup>122</sup>. Specifically for developing countries within a developmental state, competition law could have enormous socioeconomic impact by creating more jobs, having a higher tax revenue and creating a higher standard of wealth<sup>123</sup>.

### 3. Lack of capacity and resources

*Do the developing countries possess the necessary capacities?*

**31.** The competition authorities of developing countries are often not well enough equipped and do not have the right knowledge, infrastructure and resources to

---

<sup>119</sup> Noonan op cit note 4 at 75; See also MM Sheth 'Formulating antitrust policy in emerging economies' (1997) 86 *Georgetown Law Journal* 451 at 471-472.

<sup>120</sup> Singh op cit note 109 at 17.

<sup>121</sup> Do 'Competition Law and Policy and economic development in developing countries' (2011) op cit note 58 at 20; Martin op cit note 76 at 303.

<sup>122</sup> Maskus & Lahouel op cit note 12 at 600; S Nambiar 'A multilateral competition framework in the WTO: A developing country perspective' (2002) *Malay. Inst of Econ. Res.* 1 at 4-5; Martin op cit note 76 at 297-299.

<sup>123</sup> Reference to Margin number 35-40; Do 'Competition Law and Policy and economic development in developing countries' (2011) op cit note 58 at 20.

execute their task. As a result, developing countries are a long way ahead from having the institutional capacity to implement some developed competition principles<sup>124</sup>. In particular, they fear not having the right capacities to discipline the anti-competitive practices of foreign multinational firms which will eventually have detrimental effects<sup>125</sup>. Singh therefore proposes setting out far less difficult and fewer rules to implement for the developing countries as they will be easier to be enforced due to the lack of their institutional enforcement power<sup>126</sup>.

Clearly the developing countries need to be supported in the enforcement of their legislation and supported to overcome their lack of expertise and experience. The latter could be provided by giving them technical experience and capacity building through a cooperative network of competition authorities<sup>127</sup>. Such cooperation would facilitate the enforcement and foster economic growth.

#### 4. No to international standards, Yes to Cooperation

**32.** In considering the issue of using a common competition policy, adopted by the WTO, emphasis should be placed on a dynamic rather than static efficiency as the main objective of a competition policy for developing countries. Developing countries should seek for a concept of optimal degree of competition instead of encouraging a maximum level of competition. The former implies a level of competition where on the one hand there is not too much competition law deterring the propensity to invest but on the other hand there is enough competition law entailing sufficient rivalry to reduce inefficiency<sup>128</sup>. Sang concludes that there certainly should not be a multilateral discipline of the WTO type obliging developing countries to have universal competition policies or even more, any competition policy at all when it is determined that the costs are higher than the benefits<sup>129</sup>. Fox is also of the opinion that developing countries must develop their own brand of

---

<sup>124</sup> Laffont op cit note 112 at 11.

<sup>125</sup> Hoekman & Holmes op cit note 14 at 878.

<sup>126</sup> Laffont op cit note 112 at 11.

<sup>127</sup> Do 'Competition Law and Policy and economic development in developing countries' (2011) op cit note 58 at 33; Similar endeavours have been undertaken by UNCTAD for technical cooperation and support.

<sup>128</sup> Singh op cit note 109 at 12.

<sup>129</sup> Ibid at 17.

competition law, resisting pressure to adopt or copy 'international standards' without regard to fit<sup>130</sup>.

**33.** However Kim and other authors argue that developing countries are beginning to appreciate their vulnerability to anticompetitive practices expressed in the evolution of adopting domestic competition laws<sup>131</sup>. To indicate this, a common example used is the export cartels designed to exploit their market power on foreign markets which tend to be merely developing countries<sup>132</sup>. Consequently developing countries could arguably gain from an international agreement abolishing such an uncompetitive practice<sup>133</sup>. However, developing countries aspire for the abolition of cartels (when they import) but they argue for exceptions when they export.<sup>134</sup> Here is a non-competition example: should developing countries favour the abolition of anti-dumping measures as the developed countries are often using them as a protectionist device? The answer is no, since often developing countries are also using this device against other developing countries<sup>135</sup>. Even in the case that developed or OECD countries decide to agree on the banning of export cartels, a quid pro quo will be demanded from the developing countries and especially one that goes further than only enforcing competition law<sup>136</sup>.

**34.** Nevertheless, I can conclude that support for a competition law is highly needed for developing countries, but the acceptance of a common international competition policy is not feasible to support the need of these countries. This is not only due to the different developmental circumstances of developed countries but is also significantly due to the variation in the interests of different developing countries. Suitable solutions could be the adoption of certain competition minimum rules with a rule of reason including a public policy defence for developing countries.

---

<sup>130</sup> Fox 'Competition, Development and Regional Integration: In search of a competition law fit for developing countries' (2012) op cit note 108 at 2-3.

<sup>131</sup> Hufbauer & Kim op cit note 29 at 331; Martin is also of the opinion that the initial resisting developing countries are gradually starting to change by starting to give input into possible elements, modalities and parameters for a multilateral framework: Martin op cit note 76 at 306.

<sup>132</sup> Noonan op cit note 4 at 78-79.

<sup>133</sup> Hoekman & Holmes op cit note 14 at 878 & 886.

<sup>134</sup> Hufbauer & Kim op cit note 29 at 332.

<sup>135</sup> Singh op cit note 109 at 16.

<sup>136</sup> Hoekman & holmes op cit note 14 at 887.

## B. The search for consensus - Sovereignty

The following deals with the concerns for the search for consensus and subsequently the sovereignty issue. The arguments can be divided in two sections.

**35.** *The first* setback starts on the assumption that countries do agree on the relationship between competition policy and trade law. However this does not imply that countries have a common sense of competition policy. In particular, countries diverge on the merits, potential modalities and even further on the necessity of adopting competition law within the WTO framework<sup>137</sup>.

Precisely on the matter of substantive competition law, the similarities are not apparent as every jurisdiction reflects its own economic, social, political and historical experiences<sup>138</sup>. It is therefore very difficult to converge existing national competition regimes into one single standard, especially since these national policies not only entail different standards but also require different methods of determination with regard to designed actions in a specific market (mergers, tying, ...) <sup>139</sup>. National competition authorities differ in welfare standards (e.g. consumer welfare vs. total welfare), on different goals (e.g. different efficiency concepts, protection of the competitive process, freedom of competition) and on the inclusion of 'non-welfare' goals in particular for developing countries (market integration, economic development, employment, international competitiveness)<sup>140</sup>.

**36.** The pre-eminent example to illustrate the latter is the remarkable difference between the US's concept of competition and that of the European Union. Whereas the US law has been guided by focusing on market performance<sup>141</sup> the EU stresses

---

<sup>137</sup> Hufbauer & Kim op cit note 29 at 330; also the OECD Joint Group on Trade and Competition has expressed that a comprehensive code would be undesirable: *OECD Joint Group on Trade and Competition International Options to improve the coherence between Trade and Competition policies* (Sept. 12, 2002) COM/DAFFE/TD(2002)49/FINAL at 3 available at [http://search.oecd.org/officialdocuments/displaydocumentpdf/?doclanguage=en&cote=com/daffe/td\(2002\)49/final](http://search.oecd.org/officialdocuments/displaydocumentpdf/?doclanguage=en&cote=com/daffe/td(2002)49/final)

<sup>138</sup> Lee op cit note 3 at 113.

<sup>139</sup> HM Hollman & WE Kovacic 'The International Competition Network: Its past, current and future role' (2011) 20 *Minn. J. Int'l L.* 274 at 278; Hufbauer & Kim op cit note 29 at 327-328.

<sup>140</sup> Budzinski op cit note 15 at 7.

<sup>141</sup> Roots of Pragmatic Liberalism which gradually faded into conservatism; Lee op cit note 3 at 114.

the process of competition to achieve various ends<sup>142</sup>. The principle view of the US on competition law is to advance the competitive process rather than to protect the competitors<sup>143</sup>, while the European view on competition is concerned with the following: “It does not regard competition as an end itself but a means to an end”. This will eventually lead to a trade-off approach<sup>144</sup>.

An appropriate example can be given with the assessment of respectively an American competition authority and a European competition authority. When the merger would be *in se* prohibited by the American authority, the European authority would allow the merger in the case that it can be shown that the welfare reducing effect of increased market power resulting from the merger is more than matched by gains to society<sup>145</sup>. Hence a case by case approach will be applied instead of the *in se* approach and conversely the merger will be allowed when the uncompetitive effect is counterbalanced by benefits for the society<sup>146</sup>.

**37.** Hoekman and Holmes argue that seeking an agreement on the determination of different substantial competition law subjects could be detrimental to some countries. A general consensus about substantive issues is according to them non-existent<sup>147</sup>. Also the published guidelines make it apparent that opinions differ considerably between the United States and the various EU countries in which practices are viewed as potentially anti-competitive<sup>148</sup>. According to Maskus and Lahouel, it is very difficult if not impossible to find the ‘ideal’ definition or application of competition law<sup>149</sup>. So considering the fact that there is no real consensus and when

---

<sup>142</sup> Ibid at 113; Ordo-Liberalism.

<sup>143</sup> EM Fox ‘We protect competition, You protect Competitors’ (2003) 26 *World Competition* 149 at 149-156

<sup>144</sup> Ibid at 156-164.

<sup>145</sup> Justified reasons could for example be the reduced cost to society; Singh op cit note 109 at 9.

<sup>146</sup> The opposite happened in the *GE/HONEYWELL* Merger. The US cleared the merger stating that it did not raise prices and thus it must have been efficient. While the EU prohibited the merger on the case by case approach stating that the merger would have resulted in the creation of a dominant position ultimately effecting consumer prices.; Case COMP/M. 2220 *GE/Honeywell*, Commission decision of 3 July 2001, OJ C239/16 (Feb. 14 2004); Fox ‘We protect competition, You protect Competitors’ (2003) op cit note 143 at 161; CW Smitherman ‘Future of global competition governance: Lessons from the transatlantic’ (2004) 19 *Am. U. Int’l L. Rev.* 796 at 859.

<sup>147</sup> Hoekman & Holmes op cit note 14 at 888.

<sup>148</sup> Maskus & Lahouel op cit note 12 at 598.

<sup>149</sup> Ibid at 598.

even the supporters of the idea<sup>150</sup> recognize that there will be long negotiations and many pitfalls, this is conceivably not worth it<sup>151</sup>.

For given reasons the majority in the doctrine are of the opinion that the convergence of a common set of substantive law is not a suitable solution for all WTO members<sup>152</sup>.

**38.** What relates to procedural competition law is often less disputed in the doctrine. Proposals are made to adopt rules within the WTO to enhance enforcement cooperation between national competition authorities and a choice of law system for modulating disputes which appoint the applicable competition law<sup>153</sup>.

**39.** *Secondly*, another main concern put forward by the WTO member states is the requirements for a multilateral agreement. This would require to a certain extent a standardisation of the domestic policies and thereby deprive many of important policy tools (ref. to competition policy)<sup>154</sup>. As competition law is recognised as one of the basic tools in support of particular economic strategies, members are not eager to hand over this sovereignty. For this reason the application of soft law, for example issued by the ICN or guidelines issued by OECD or UNCTAD, is more likely to be an efficient approach<sup>155</sup>.

**40.** To summarize briefly, a common set of substantive competition rules for all WTO members is not feasible as many established competition laws represent unique social and legal visions that cannot be readily transferred to other nations<sup>156</sup>. In general and specifically with regard to developing countries: one size does not fit all.

---

<sup>150</sup> H Paemen 'Trade and competition in the transatlantic area' (1998) 21 *Fordham Int'l J.* 637 at 649.

<sup>151</sup> Weiss op cit note 8 at 271.

<sup>152</sup> Noonan op cit note 4 at 84; SW Waller 'Neo-realism and the international harmonization of law: lessons from antitrust' (1994) 42 *Kansas Law Review* 557; DP Wood 'The Trade effects of domestic antitrust enforcement' in JS Bhandari & AO Sykes (Eds.) *Economic dimensions in International Law: Comparative and Empirical Perspectives* Cambridge University Press, Cambridge (1997) 513 at 524-525; Smitherman op cit note 146 at 858

<sup>153</sup> Fox 'Competition Law' (2008) op cit note 10 at 418; Nambiar op cit note 122 at 21.

<sup>154</sup> Metha & Nayak op cit note 1 at 157.

<sup>155</sup> Reference to Model III: see margin number 95-105.

<sup>156</sup> Noonan op cit note 4 at 84; EM Fox 'Toward world Antitrust and Market Access' (1997) 91 *Am. J. Int'l L.* 1 at 15

### C. The WTO ‘as such’

**41.** The third major impeding factor concerns the question whether or not the WTO ‘as such’ is an appropriate institution to converge competition law. The doctrine is divided between advocates and opponents.

#### **On the one side,**

**42.** Many reasons were responsible for the failed attempt to include competition law on the negotiation agenda for the DOHA round of negotiations as there were political and legal concerns and in particular institutional concerns. Reasons given for the lack of support were centrally themed around lack of confidence in the norms and procedures of the WTO<sup>157</sup>.

Many organizations have been founded by the international competition community to examine the possibilities of convergence. Organizations like the International Competition Network (ICN), the International Chamber of Commerce’s Commission on Law Practices in Relation to Competition were founded together with several joint meetings of Bar Associations and annual conferences distributing guidelines on the convergence of competition law<sup>158</sup>. This was a response of the community towards the limited progress that was made by the plurilateral and multilateral agreements<sup>159</sup>. The implication is therefore that it is more practical to reach consensus and a homogenous agreement in a specific purpose-built organization<sup>160</sup>.

**43.** One of the impediments frequently raised is the relationship between competition law and the objectives of the WTO. These objectives are often seen as serving to protect international trade which implicates that competition law must serve this goal as well<sup>161</sup>. The real concern of the developing countries relates exactly to this point

---

<sup>157</sup> Gerber op cit note 18 at 710.

<sup>158</sup> Noonan op cit note 4 at 56.

<sup>159</sup> A Schaub ‘The Global competition Forum: How it should be organised and operated’ at *European Policy Centre Brussels* (March 14, 2001) available at [http://ec.europa.eu/competition/speeches/text/sp2001\\_003\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2001_003_en.pdf).

<sup>160</sup> Noonan op cit note 4 at 57.

<sup>161</sup> ME Janow ‘Observations on TWO Multilateral Venues: the International Competition Network (ICN) and the WTO’ (2002) *Working Draft: prepared for the Fordham Corporate Law Institute*

as they fear that competition law will be used as a trade tool. For example in relation to market access, developing countries are afraid that developed countries will use competition law in order to have easier access to their markets while developed countries want to protect these markets<sup>162</sup>.

**44.** According to Gerber, two obstacles impede the WTO from implementing competition law into the organisation. Firstly there is a lack of confidence that the norms, practices and procedures of the WTO rest on a robust conception of community and secondly there is uncertainty about what the exact role of the WTO as an institution would include<sup>163</sup>.

According to this author, the WTO operates primarily as a venue for negotiating and transferring access right to the markets of member countries, but introducing competition law into the WTO would require a different or at least additional concept of the WTO's goals and operations<sup>164</sup>. To achieve this ambition, it would be necessary to design a special form of competition law especially for the WTO<sup>165</sup>.

**On the other side,**

**45.** There are the legal commentators convinced that the WTO is the most feasible institution to convergence competition law.

**46.** One of the most regular arguments brought up is the dispute settlement mechanism of the WTO<sup>166</sup>. Unlike the WTO, other institutions like for example

---

*Twenty-Ninth Annual Conference on International Antitrust Law and Policy October 31 and November 1 2002* at 12 available at <http://www.columbia.edu/~mj60/PDF/janow.fordham.pdf>

<sup>162</sup> Noonan op cit note 4 at 81-83.

<sup>163</sup> Gerber op cit note 18 at 708-710; other authors mention also mention the extra heavy workload for the WTO See Sweeney 'Global competition: Searching for a rational basis for global competition rules' (2008) op cit note 54 at 220; Tarullo 'Norms and Institutions in global Competition Policy' (2000) op cit note 1 at 489.

<sup>164</sup> Gerber op cit note 18 at 709; Also Professor Tarullo shares the same opinion. He argues that the WTO is fundamentally a trade organization which results in the incapability of properly accommodating competition policy. DK Tarullo 'Competition Policy for global markets' (1999) 2 *J. Int'l Econ. L.* 445 at 479; same argument made in Lloyd (1998) op cit note 2 at 1143; GUZMAN argues that indeed with the incorporation an institutional change is required but is convinced that this can be done: Guzman op cit note 32 at 955.

<sup>165</sup> Gerber op cit note 18 at 710.

<sup>166</sup> As mentioned in the research paper: often opposed by many legal commentators concerning the advantages of having a dispute settlement mechanism. The need for an enforcement mechanism was a lesser concern in the antitrust negotiations; Bradford 'When the WTO works, and How it fails' (2010-

UNCTAD and ICN do not have a dispute settlement mechanism at their disposal. Noonan argues that this could be the reason that the achievements of UNCTAD, despite their global reach, are rather modest with regard to their attempts to convergence the international competition law. This author is of the opinion that unless there is a binding agreement with a dispute settlement mechanism, states are rather unwillingly to adapt their domestic competition laws<sup>167</sup>.

47. Another pro-argument used by the advocates is the possible trade-off zone<sup>168</sup>. The argument starts from the assumption that countries negotiating an international competition agreement will likely negotiate on sector-specific substantive competition law-related problems<sup>169</sup>. While the WTO deals with a broad range of trade issues, members may have the possibility to trade-off between different or even unrelated values<sup>170</sup>. Thus such a trade-off could possibly increase the zone of agreement in multiparty settings<sup>171</sup>. Other legal commentators however are against this since it includes the risk that issue linkage could require trade-offs between competition law and trade interest-related issues<sup>172</sup>.

---

2011) op cit note 45 at 6; Bradford 'International Antitrust Negotiations and the False hope of the WTO' (2007) op cit note 45 at 434.

<sup>167</sup> Noonan op cit note 4 at 52.

<sup>168</sup> Also called 'Linking'. See for extensive information Margin Number 74; Bradford 'When the WTO works, and How it fails' (2010-2011) op cit note 45 at 5.

<sup>169</sup> For a more detailed discussion whether or not there could be a trade-off between competition law and non-competition related issues: Bradford 'When the WTO works, and How it fails' (2010-2011) op cit note 45 at 8; JH Jackson 'Afterword: The linkage problem –Comments on Five Texts' (2002) 96 *Am. J. Int'l L.* 118 at 118 n.1; DW Leebron 'The boundaries of the WTO: Linkages' (2002) 96 *Am. J. Int'l L.* 5 at 5.

<sup>170</sup> TRIPS agreement: Developed countries promised to cut down their agricultural subsidies. Developing countries agreed to protect Intellectual Property Rights.

<sup>171</sup> Noonan op cit note 4 at 52.

<sup>172</sup> See Margin Number 90-93; JI Klein 'A note of caution with respect to a WTO agenda on competition policy' *Remarks before the Royal Institute of International affairs Chatham House London* (Nov. 18 1996) available at [www.usdoj.gov/atr/public/speeches/3727.htm](http://www.usdoj.gov/atr/public/speeches/3727.htm); AD Melamed 'International antitrust in an age of international derugaltion' (1998) 6 *George Mason University Law Review* 437.

## V. CONVERGENCE OF INTERNATIONAL COMPETITION LAW: FOUR DIFFERENT MODELS

**50.** Many legal scholars and authors are of the opinion that a common competition culture is still considerably growing<sup>173</sup>.

Initially while the search for a model law was still a concern, there was not so much question about the fact that the US would impose their competition law as model law<sup>174</sup>. However there was concern from both sides. Developing countries reasoned that the US competition law would disadvantage their countries in development circumstances, while American observers argued that the implication of making the US competition law as a model law would include that their own competition laws would be watered down because of a less rigorous application<sup>175</sup>.

Nevertheless, as mentioned in the impediment chapter, unification through the search for one certain consensus is not a workable option. Consequently, the proposed solutions enhance harmonisation instead of unification as diversity will be encompassed<sup>176</sup>. In view of that routes have been explored to include competition law in the WTO which is still recognized as being the most effective forum of the international institutions<sup>177</sup>.

**51.** Therefore the question remains in which format the latter should be accomplished. Several options can be distinguished in order to reach the necessary convergence of competition law.

The first model will explore the possibility of keeping the WTO in its current form dealing with public and private related provisions. Secondly and in my opinion a

---

<sup>173</sup> Do 'Competition Law and Policy and economic development in developing countries' (2001) op cit note 58 at 19; Do 'The perspectives of International cooperation in Competition law and policy' (2009) op cit note 74 at 303.

<sup>174</sup> Gerber op cit note 18 at 3.

<sup>175</sup> Ibid.

<sup>176</sup> Hollman & Kovacic p cit note 139 at 278.

<sup>177</sup> Bradford 'When the WTO works, and How it fails' (2010-2011) op cit note 45 at 7; J Stiglitz 'Globalisation and its discontents' (2003) 32 *Economic Notes* 123-142; HJ Chang 'Bad samaritans: The myth of free trade and the secret history of capitalism' (2007) 288.

more plausible and well thought-out solution is the integration of a competition law agreement mirrored to the structure of the TRIPS agreement.

However opponents are of the opinion that in the foreseeable future, the likelihood of having competition law integrated in the WTO framework is very small<sup>178</sup>. So in case harmonization is not possible within the body of the WTO, solutions should be sought through soft law. The third proposed model is therefore harmonization through soft law focussing on the International Cooperation Network<sup>179</sup>. The final model brings all the elements together in the, in my opinion, most feasible solution which attempts to bring the complementary ICN and WTO institutions together through cooperation.

#### **A. Model I: Competition law provisions in the different existing WTO agreements**

52. A number of competition provisions are already included in the WTO agreements or as a minimum very closely related. In essence, they are often designed to embrace free trade but they cover the same competition issues. Examples can be found in the GATT, TRIPS, Anti-Dumping Agreement, Agreement on Technical Barriers to Trade, Agreement on Safeguards and the Agreement on Trade-Related Investment Measures.

Weiss is of the opinion that when the GATT transformed into the WTO, a greater emphasis was put on broader and integrated market access guarantees. Consequently a much greater focus is laid on private market access restraints<sup>180</sup>.

---

<sup>178</sup> Do 'Competition Law and Policy and economic development in developing countries' (2011) op cit note 58 at 20.

<sup>179</sup> Hereafter 'ICN'.

<sup>180</sup> Weiss op cit note 8 at 264; RD Anderson & P Holmes 'Competition policy and the future of the Multilateral Trading System' (2002) *Discussion Paper in Economics of University of Sussex* nr. 84 at 6 available at

<http://www.google.com/url?sa=t&rct=j&q=RD+Anderson+%26+P+Holmes+%E2%80%98Competition+policy+and+the+future+of+the+Multilateral+Trading+System%E2%80%99+282002%29+&source=web&cd=2&cad=rja&ved=0CDgQFjAB&url=http%3A%2F%2Fciteseerx.ist.psu.edu%2Fviewdoc%2Fdownload%3Fdoi%3D10.1.1.195.9366%26rep%3Drep1%26type%3Dpdf&ei=uTnvUle5Lc2QhQfH6IGgDQ&usq=AFQjCNExHeEKLrt9EGw9NB1fxThiEmmiQ&bvm=bv.1357700187.d.ZG4>  
also available at (2002) 5 *J.Int Economic L.* 531-563.

By examining the following examples, a conceivable solution could be found in broadening these provisions by interpreting them broadly or adding specific competition law provisions in order to erase private restraints.

### 1. Explicit Competition Provisions

*Article VIII of GATS 1994*<sup>181</sup>:

**53.** The following provision deals with private market access barriers<sup>182</sup>. This can be seen as an application of the MFN principle. The article entails a system similar to the 'abuse of control' mechanism which is exercised by domestic competition law authorities in some countries<sup>183</sup>. It provides that any service supplier, being in a monopoly position, has to act in a manner consistent to his commitments made in Article II of GATS<sup>184</sup>. Thus every member has to act in accordance with unconditional and immediate requirements regarding all services and the service supplier of all members on a most favoured nation basis<sup>185</sup>.

*Article IX of GATS 1994:*

**54.** This provision acknowledges that certain business practices of WTO members probably restrain competition. Consequently it lays the responsibility on WTO members to supply non-confidential and practical information concerning the unfair practices to resolve the anti-competitive situation<sup>186</sup>.

*Article XVI of GATS 1994:*

**55.** This article provides for market access besides the most favoured nations treatment. As per Article XXIV of GATS it provides for the mechanism for a

---

<sup>181</sup> Article VIII of GATS: Monopolies and Exclusive Service Suppliers.

<sup>182</sup> MC Malaguti 'Restrictive business practices in International trade and the role of the World Trade Organization' (1998) 32 *J. World Trade* 117 at 123.

<sup>183</sup> Matsushita op cit note 7 at 367.

<sup>184</sup> Article XIX and XX of GATS.

<sup>185</sup> Goswami op cit note 6 at 17-18.

<sup>186</sup> Ibid; Koul op cit note 22 at 527; M Bronckers 'Trade and Competition Interlinkages: The case of Telecom' contribution for Fondazione EE Mattei *Trade and Competition in the WTO and beyond* (1998) at 12-13.

Council for Trade in services that can decide if a monopoly is abusing power and can ask the member to whom the monopoly belongs to supply information of such abuse.

*Article XI Agreement on Safeguards*<sup>187</sup>:

**56.** This article on voluntary export restraints would have no teeth to execute the Article without the competition rule provisioned in Article 11.3 of the Agreement. Article 11.3 is designed to discourage private exporters from engaging in restrictive activities which may block the disciplines of Article XI<sup>188</sup>.

*Article 8(2) & 40 TRIPS agreement:*

**57.** The WTO Agreement on Trade-Related aspects of Intellectual Property Rights (TRIPS) recognizes that intellectual property rights and licensing in specific can be used in an unreasonable and abusive way, harming trade and competition. Therefore, stipulated in Article 8 and 40 of the TRIPS, it counterbalances these granted IP rights by permitting states to control the uncompetitive behavior or use of IP rights through domestic regulations<sup>189</sup>.

In particular, article 8(2) of the TRIPS agreement specifies that states are allowed to regulate anti-competitive behaviors when consistent with the agreement, that “unreasonable restrain trade or adversely affect the international transfer of technology”<sup>190</sup>. Such specific restrictive practices can cover unilateral abuse of the IP right holder and contractual restraints on IPR-related trade<sup>191</sup>.

---

<sup>187</sup> Art 11.1 of the Agreement on Safeguards provides “A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement.”

<sup>188</sup> Matsushita op cit note 7 at 365.

<sup>189</sup> EM Fox ‘Trade Competition and Intellectual Property – TRIPS and its antitrust counterparts’ (1996) 29 *Vand. J. Transnat’l L.* 481 at 484-485; Anderson & Holmes op cit note 180 at 6; YA Pai ‘The international dimension of proprietary technical standards: Through the lens of trade, competition law and developing countries’ (2012) *Society of International Economic Law Working paper no. 40* (1) at 44 available at <http://www.ssrn.com/link/SIEL-2012-Singapore-Conference.html> ; JH Reichman ‘From freeriders to fair followers: Global competition under the TRIPS agreement’ (1997) 29 *N.Y.U.J. Int’l L & Pol.* 11 at 54.

<sup>190</sup> Ibid at 54-55; Anderson & Holmes op cit note 180 at 6.

<sup>191</sup> TT Nguyen & HH Lidgard ‘WTO Competition law revisited: From TRIPS flexibilities and Singapore issues to the WTO agenda of a post-Doha round’ 2009 *Legal Studies Research Paper 2009:51*, Lund university 1 at 5-6 Electronic copy available at: <http://ssrn.com/abstract=1455366>.

Article 8(2) can be read in conjunction with article 40 of the TRIPS agreement which specifically provides member states to take measures relating to anti-competitive licensing practices producing reasonable restraints on trade<sup>192</sup>. A consultative procedure is hence to be followed when such practices have transnational effects<sup>193</sup>. In effect, these provisions include some competition policy considerations and ensure that the rights granted under the TRIPS agreement serve the welfare of citizens<sup>194</sup>.

However, arguments are raised that neither Article 8 nor 40 of TRIPS clarifies the exact scope of the competition policy enacted in these provisions. As a result they leave many questions unanswered relating to endorsing an exact approach to the subject of states regulating abuses of intellectual property rights<sup>195</sup>. A lack of guidance is noticed.

*Reference Paper GATS Basic Telecommunication Service Agreement*<sup>196</sup>:

**58.** Nearly all the WTO member countries agreed to an additional set of competition commitments derived from a reference paper which was attached/in relation to the WTO GATS Basic telecommunication Services Agreements (Hereafter Reference Paper (RP))<sup>197</sup>. Initially the majority of the telecommunication sector was operated under a legal monopoly regime<sup>198</sup>. Since liberalization, this reference paper has come into effect to prevent the former monopoly holder from using its acquired rights in a way detrimental to new entrants in the market<sup>199</sup>. Therefore the RP provides competition requirements to safeguard market access and foreign investment, in order to prevent the major suppliers of anticompetitive behaviour<sup>200</sup>. These competition rules are thus only designed for this specific market's behaviour and

---

<sup>192</sup> Anderson & Holmes op cit note 180 at 6.

<sup>193</sup> Reichman op cit note 189 at 55.

<sup>194</sup> Anderson & Holmes op cit note 180 at 6.

<sup>195</sup> Pai op cit note 189 at 44; Anderson & Holmes op cit note 180 at 14; Reichman op cit note 189 at 54.

<sup>196</sup> Available at [http://www.wto.org/english/tratop\\_e/serv\\_e/telecom\\_e/tel23\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm).

<sup>197</sup> Bronckers op cit note 186 at 1; see for detailed information: L Sherma 'wildly enthusiastic about the First Multilateral Agreement on Trade I Telecommunications Services' (1998) 51 *Fed. Comm.L.J.* 61 at 61-110.

<sup>198</sup> Bronckers op cit note 186 at 1-2.

<sup>199</sup> Sweeney 'Globalisation of competition law and policy: some aspects of the interface between trade and competition' op cit note 14 at 401 footnote 122.

<sup>200</sup> Anderson & Holmes op cit note 180 at 6; Bronckers op cit note 186 at 1-2.

regulation. These obligations for the monopoly holder are complementary to those stipulated in the GATS<sup>201</sup>.

Section 1.2 of the RP refers to three examples of anti-competitive practices including “(i) engaging in cross-subsidization, (ii) use of information obtained from competitors with anti-competitive results and (iii) withholding technical and commercial information to other services suppliers”<sup>202</sup>.

The latter makes the Reference Paper the most competition-related trade commitment within the WTO framework<sup>203</sup>.

## 2. Enforcement mechanism: Article XXIII GATT – Non violation Clause

**59.** In principle, national competition laws and cases are subject to the application of the dispute settlement system when they are not in accordance with obligations embedded in the WTO agreements<sup>204</sup>. However, in the current circumstances, the non-violation complaint embedded in Article XXIII(b) of the GATT is the only complaint specifically applicable to competition-related matters<sup>205</sup>.

Article XXIII (b) of the GATT<sup>206</sup> could potentially be an essential asset for the further relation between trade and competition related issues. The article is applicable when a state can establish the nullification or impairment of a benefit or any objective that has been granted to it under the GATT even if the measure does not violate any obligation or condition of a WTO agreement<sup>207</sup>.

**60.** The purpose of this article is clear. It is designed to prevent measures that were initially and specifically not prohibited but currently are preventing free trade and

---

<sup>201</sup> Bronckers op cit note 186 at 5.

<sup>202</sup> Nguyen & Lidgard op cit note 191 at 12, footnote 52; Bronckers op cit note 186 at 5.

<sup>203</sup> P Marsden ‘Trade and Competition – WTO decides First Competition Case – With Disappointing results’ (2004) 16 *competition Law Insight* 3 at 4.

<sup>204</sup> HC CD Ehlermann & L Ehling ‘WTO dispute settlement and competition law: Views from the perspective of the Appellate Body’s experience’ (2002) 26 *Fordham Int’l J.* 1505 at 1506.

<sup>205</sup> F Spitzer *The non violation complaint in the WTO law* (2004) Tenea berlin at 107.

<sup>206</sup> Article XXIII (1) (b) GATT.

<sup>207</sup> Ehlermann & Ehling op cit note 204 at 1554.

distorting legitimate expectations of WTO members<sup>208</sup>. The scope, however, has never been clear. At this stage, the use of this non violation claim is considered<sup>209</sup> to be an exceptional rare remedy requiring detailed justification<sup>210</sup>. Hence this model suggests a broad interpretation of this provision which encompasses all instances where trade obligations are adversely affected<sup>211</sup>.

The application of this article needs three requirements to be established. The claimant needs to prove that the (importing) state has engaged in a measure and by implication that this measure nullified or impaired the existence of a benefit. The third and last requirement obliges the proof of a concession or benefit, directly or indirectly to another member of the WTO<sup>212</sup>.

Habitually subsidy claims are the common applicable area<sup>213</sup> but nonetheless the article is not only restricted to subsidies<sup>214</sup>. Claims could be potentially brought before the WTO panel when the exporting state is able to establish the failure or refusal of the importing state to employ its competition laws against its local firms<sup>215</sup>. In the event that this failure nullifies or impairs the importing state's agreed tariff concessions, the claim could be held to be successful.

**61.** However, opponents query if the non-violation complaint is still relevant since many non-tariff barriers are now inserted in WTO agreements<sup>216</sup>.

---

<sup>208</sup> F Roessler & P Gappah 'A Re-appraisal of non-violation complaints under the WTO dispute settlement procedures' in PFJ Marcrory & AE Appleton, MG Plummer (Eds.) *The World Trade Organization: Legal, Economic and Political Analysis* (2005) Springer New York 1372 at 1382.

<sup>209</sup> See to the before mentioned *Kodak/Fuji* supra note 87; See also *EC- Asbestos* WTO doc

WT/DS135/AB/R, AB-2000-11 (2001) 186.

<sup>210</sup> Roessler & Gappah op cit note 208 at 1374.

<sup>211</sup> Sweeney 'Globalisation of competition law and policy: some aspects of the interface between trade and competition' (2004) op cit note 14 at 376-377.

<sup>212</sup> Ehlermann & Ehring op cit note 204 at 1557.

<sup>213</sup> See, e.g. *Australian subsidy on ammonium sulphate* GATT BISD Vol II, 188 (1950); Follow-up on the panel report *European Economic Community – Payments and subsidies Paid to Processors and Producers of Oilseeds and related animal-feed proteins* GATT BISD 39<sup>th</sup> Supp GATT DS28/R (1992).

<sup>214</sup> *Kodak/Fuji* supra note 87 - WT/DS44/R (1998) (10.38) (Report of the panel). Trade-distorting subsidies are now expressly covered by the Marakesh Agreement establishing the World Trade Organization, opened for signature 15 april 1994, 1867 UNTS 3 (entered into force 1 January 1995) Annex 1 A (Agreement on Subsidies and Countervailing measures) , 1869 UNTS 14. An unlawful subsidy would now amount to a violation.

<sup>215</sup> Sweeney 'Globalisation of competition law and policy: some aspects of the interface between trade and competition' (2004) op cit note 14 at 404.

<sup>216</sup> Roessler & Gappah op cit note 208 at 1387.

In particular for competition law, panels have circumscribed the use of this complaint by strengthening its requirements which makes it nearly impossible for competition law-related complaints. For instance, as seen in the *Kodak/ Fuji* case, there must be a required level of state involvement to hold the government liable for the private action<sup>217</sup>. Moreover, the more indirect an anti-competitive measure becomes, the more unlikely it is to establish the task of a government involved action. For example when developing countries do not possess a competition law, the mere failure to enact such a law is unlikely to be a measure.

This article clearly recognises that that this provision is not designed to deal with the majority of private anti-competitive actions inhibiting free trade<sup>218</sup>.

**62.** Therefore, when incorporating more competition law provisions within the existing agreements, an amendment of the provision or at least broader interpretation will be necessary to extend its scope in order to cover the entire area of competition-related issues which are not specifically named in the competition provisions<sup>219</sup>. As a result, the state's failure to adopt or enforce its competition law could be included in the non-violation clause. As mentioned, disputes concerning rights and obligations under the WTO agreements may be settled under WTO's dispute settlement mechanism. Consequently, claims arising out of competition law provisions embedded in the WTO agreements are subject to this mechanism. In accordance with the broad interpretation of the non-violation clause, both could possibly cover the complete area of competition law on a multilateral level.

Nonetheless, there are many drawbacks related to this provision. For instance, it would imply that a competition authority is required to prosecute every single competition case, while lacking time and equipment<sup>220</sup>. This is only one of the many drawbacks<sup>221</sup>.

---

<sup>217</sup> Sweeney 'Globalisation of competition law and policy: some aspects of the interface between trade and competition' (2004) op cit note 14 at 405.

<sup>218</sup> Anderson & Holmes op cit note 180 at 15; Sweeney 'Globalisation of competition law and policy: some aspects of the interface between trade and competition' (2004) op cit note 14 at 412.4.

<sup>219</sup> See for opponent of this suggestion: F Roessler 'Should Principles of Competition Policy be Incorporated into WTO Law through Non-violation Complaints?' (1999) 2 *J.Int.Econ. Law* 413 at 418.

<sup>220</sup> Sweeney 'Globalisation of competition law and policy: some aspects of the interface between trade and competition' (2004) op cit note 14 at 426.

<sup>221</sup> See Margin Number 67-69.

Thus far there have been few WTO dispute settlement adjudications that address market access implications of a competition perspective directly or indirectly<sup>222</sup>. The *Telmex case* is to date one of the few competition cases settled under the dispute settlement mechanism and is regarded as the first case where competition law and international trade law walk hand in hand.

*Mexico – Measures Affecting Telecommunications Services*<sup>223</sup> (*Telmex*)

**63.** This case is regarded as a successful premiere of the WTO addressing combined public and private restraints since the Reference Paper is the first in which explicit competition policy considerations are incorporated.

**64.** The following case dealt with the question whether or not Mexico had violated its commitments of anticompetitive practices under Section 1 and the procompetitive provisions under Section 2 of the Telecoms Reference Paper<sup>224</sup>. The United States, which initiated the complaint, claimed that Mexico had set up a cartel of Telecom operators with Telecom in charge that raised the price of terminating cross border telephone calls in Mexico, and inhibiting foreign competitors from entering the market.<sup>225</sup>

The WTO panel decided in favor of the United States by determining that Mexico had not done enough to prevent anti-competitive measures in its market from impeding

---

<sup>222</sup> See the before *Kodak/fuji* supra 87; *US – 1916 Act (EC)* Panel Report, *United States - Anti-Dumping Act of 1916 - Complaint by the European Communities*, WT/DS136/R, 2000, adopted as upheld by Appellate Body 26 September 2000; *Canda- Measures relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R adopted as upheld by Appellate Body 30 August 2004.

<sup>223</sup> *Mexico – Measures affecting Telecommunications Services* WT/DS204/R (April 2, 2004) available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/204r\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/204r_e.pdf) (Hereafter *Telmex*).

<sup>224</sup> D Sokol 'Monopolists without borders: The institutional challenge of international antitrust in a gilded age' (2007) 4 *Berkely bus. L.J.* 37 at 87; Nguyen & Lidgard op cit note 191 at 11.

<sup>225</sup> See panel Report *Telmex* supra note 223 at 7.222-7.224.; Fox 'The WTO's first antitrust case – Mexican Telecom: A sleeping victory for trade and competition' (2006-2007) op cit note 86 at 271; Marsden 'Trade and Competition – WTO decides First Competition Case – With Disappointing results' (2004) op cit note 203 at 3; R Rosenthal 'United States V Mexico: The first Telecommunications Challenge Confronting the World Trade Organization' (2001-2002) 10 *CommLaw Conspectus* 315 at 315.

foreign competitors to enter the market<sup>226</sup>. Furthermore the panel stated that antitrust issues are intractably tied to national treatment and market access<sup>227</sup>. More important than the outcome is how this case provides insight into how the WTO might handle future competition law cases. This significance extends further than the Telecom sector since the Reference paper is suggested as template for opening other sectors. So far, the Reference Paper is the most competition-related commitment within this trade related framework<sup>228</sup>.

**65.** Nevertheless, many authors expressed their concerns regarding the WTO's dispute settlement mechanism taking up the role of global competition authority<sup>229</sup>.

As its main competition provisions were left undefined in the RP, the WTO panel was left with a wide policy space regarding to the interpretation of these competition commitments<sup>230</sup>. However, the WTO panel was not afraid to define the latter. For instance, from a competition point of view, it laid out detailed definitions of "major suppliers" and market definition. Furthermore, it stretched the definition of anti-competitive practices and overruled the state action doctrine<sup>231</sup>.

With regard to the anti-competitive practices, the Reference paper provides a non-exhaustive list of "anti-competitive practices". The panel decided this term is not defined distinctly enough, and thus used other sources to examine what anticompetitive behavior encompasses. As a result, the panel read a cartel ban into the commitments to anticompetitive behavior, whereas none of the signatories have agreed to add these commitments to the Reference Paper<sup>232</sup>. Therefore Marsden argues that a more rigorous competition analysis was required<sup>233</sup>.

---

<sup>226</sup> Marsden 'Trade and Competition – WTO decides First Competition Case – With Disappointing results' (2004) op cit note 203 at 3.

<sup>227</sup> D Sokol 'Monopolists without borders: The institutional challenge of international antitrust in a gilded age' (2007) op cit note 224 at 87.

<sup>228</sup> Sweeney 'Globalisation of competition law and policy: some aspects of the interface between trade and competition' (2004) op cit note 14 at 401 footnote 122; Marsden 'Trade and Competition – WTO decides First Competition Case – With Disappointing results' (2004) op cit note 203 at 4.

<sup>229</sup> Reference to Margin Number 67-69.

<sup>230</sup> Ibid at 4.

<sup>231</sup> Ibid at 3.

<sup>232</sup> Ibid at 8; Reference to sovereignty issue.

<sup>233</sup> Ibid.

With regard to the state doctrine, the panel held that Mexico could not order business to engage in anticompetitive conduct and thus overruled the state doctrine which was the given justification of economic development reasons specified by Mexico. The latter defended this strategy on the basis of its defense regulatory sovereignty. They argued that, in the interest of their economic development, it was necessary to allow or require Mexican firms to charge extraordinary prices to foreign carriers serving Mexico<sup>234</sup>. Despite the accuracy of this appeal, it is clear, in my opinion, that the current Reference Paper and its extension to other provisions do not entail any consideration regarding a rule of reason or public policy mechanism for the developing countries through the perspective of their economic development. Model Two gives a well thought out solution in this regard.

### 3. Pro

**66.** *On the one hand*, some authors are of the opinion that the implementation of given competition provisions imply that the drafters of the WTO saw the need to integrate a variety of competition principles<sup>235</sup>. It is their belief that the WTO is capable and ready to incorporate more provisions to tackle private restraints with anti-competitive behaviour. The addition of the provisions would be advantageous since these issues can often not be solved on a domestic level of competition law.

In particular, Fox argues that the WTO could for instance usefully expand the obligations of member states to prohibit trans-border cartels or at least to aid in discovery and enforcement against their own nationals when requested to do so by states that have been injured by cartels<sup>236</sup>. Such an addition to the WTO obligations would be, according to this author, a small but practical step since under the safeguards agreement states have the obligation to refrain from ordering or encouraging import or export cartels<sup>237</sup>. As a result developing countries would be less vulnerable to offshore cartels as they do not have enough resources to protect

---

<sup>234</sup> Fox 'The WTO's first antitrust case – Mexican Telecom: A sleeping victory for trade and competition' (2006-2007) op cit note 86 at 274.

<sup>235</sup> Matsushita op cit note 7 at 365.

<sup>236</sup> Fox 'Competition Law' (2008) op cit note 10 at 463.

<sup>237</sup> Agreement on Safeguards, Article XI.

themselves, in comparison with developed countries that are protected by bilateral agreements and extraterritorial enforcement.

It is suggested by Fox that competition issues that are related to market access and thus tackle the issue of private restraints should be incorporated into the WTO. However some solutions, not related to international trade law, can best be prepared on a horizontal level such as the ICN<sup>238</sup>. (See Model IV). Nevertheless even the advocates are aware of the dispersed competition provisions throughout the WTO agreements which cannot satisfactorily address the relation between international trade law and competition law, and so subsequently admit that competition law is still a domestically regulated subject<sup>239</sup>. So far, it is only the TRIP's and the Telecom agreement that clearly recognize the adverse effects of anti-competitive practices on trade.

#### 4. Contra

**67.** *On the other hand*, there is dispute surrounding this Model as representing the WTO in its current form with in addition the incorporation of supplementary competition law provisions. Following arguments can be distinguished as opposing this model.

**68.** Firstly, the competition law provisions are scattered around in several WTO agreements. For this reason, the majority of authors contend that the current WTO agreements do not form a sufficient basis for an international competition policy and lack the necessary institutional infrastructure<sup>240</sup>. Sweeney argues that broad interpreting, amending or adding provisions to the existing instrumental and institutional structure would not be sufficient to fill gaps<sup>241</sup>. In particular, these gaps represent the areas where the member states did not indicate their willingness to hand over their sovereignty. A separate agreement is thus necessary. Even in the presence of certain competition provisions, the relation between the WTO (international trade

---

<sup>238</sup> EM Fox 'International antitrust and the Doha Dome' (2002-2003) 43 *Va. J. Int'l* 911 at 914

<sup>239</sup> Nguyen & Lidgard op cit note 191 at 5.

<sup>240</sup> Weiss up cit note 8 at 269; P Arhel 'Droit International de concurrence, s'orienté-t-on vers des négociations?' (1999) 425 *Revue du marché commun* 84 at 84.

<sup>241</sup> Sweeney 'Globalisation of competition law and policy: some aspects of the interface between trade and competition' (2004) op cit note 14 at 426.

law) and competition does not provide a coherent basis for a global competition policy as there may be competition issues not related to market access and thus out of the scope of the WTO<sup>242</sup>. For instance the elaborated competition law provisions such as mentioned in the Reference Paper are sector-specific competition provisions which are mainly focused on market access for foreign suppliers, while general competition law agreement/ provision is concerned with overall general competitive conditions in a market<sup>243</sup>. At worse, these sector provisions can have a negative impact on global competition welfare<sup>244</sup>.

As a result, the ultimate goal of convergence or harmonization of competition law will not succeed.

**69.** Secondly there are the concerns related to one of the major impediments hindering the introduction of a global competition policy, namely the developing countries. This model does not take any dynamic preferential mechanism into consideration for developing countries<sup>245</sup>.

Therefore such mechanism is something that acquires a separate agreement.

**70.** The third and last objection raised by the doctrine is the dispute settlement mechanism deciding about competition law-related disputes.

The incorporation of competition law-related provisions retains rights and obligations for the Member states. Nevertheless, there are currently no competition law-related definitions or established knowledge which enriches the WTO when deciding upon competition disputes such as those a domestic competition authority has<sup>246</sup>. This was also a subject of dispute in the *Telmex* case.

Since there is no WTO definition of anti-competitive practices or abuse of dominance, the WTO panel based its reasoning on the open-ended language and the object and purpose of the Telecoms Reference paper, international practice and

---

<sup>242</sup> Sokol 'Monopolists without borders: The institutional challenge of international antitrust in a gilded age' (2007) op cit note 224 at 86; Bronckers op cit note 186 at 13.

<sup>243</sup> Bronckers op cit note 186 at 14.

<sup>244</sup> Ibid.

<sup>245</sup> Martin op cit note 76 at 309.

<sup>246</sup> Ehlermann & Ehrling op cit note 204 at 1540-1554.

national practice<sup>247</sup>. Therefore the panel decided to add horizontal price fixing and market sharing agreements to the non-exhaustive list of anticompetitive practices listed in Section 1.2 of the Telecoms Reference Paper<sup>248</sup>. Marsden shares the before-mentioned opinion of Sweeney and highlights the danger of this practice. In essence, the dispute settlement mechanism added a cartel ban as a WTO commitment which was not previously agreed to by the WTO members<sup>249</sup>.

In addition, the WTO dispute settlement body does not possess the techniques, mechanisms or equipment that domestic competition authorities use to assess an anti-competitive practice resulting ultimately in a sub optimal interpretation of the competition law provisions<sup>250</sup>. Especially concerning developing countries, it is very difficult to reconcile their existing competition law and evaluate the appropriateness of their existing remedies against anti-competitive practices<sup>251</sup>.

## **B. Model II: Competition agreement within the WTO: minimum rules with a public defence mechanism**

71. Hence, there is a seeming consensus on the need for a new competition multilateral agreement, since the WTO in its current form is not fully capable of dealing with private restraints and competition law in particular. As became clear out of the first proposal, the provisions are scattered around through the different WTO agreements, rendering them impractical. The most feasible alternative seems to be a convergence of national competition policies through a multilateral framework, being the WTO, without implying a static wide set of common substantive competition provisions as well as with a dynamic special focus on the interests of developing countries<sup>252</sup>.

---

<sup>247</sup> Nguyen & Lidgard op cit note 191 at 12.

<sup>248</sup> *Telmex* supra note 233 para. 7.237.

<sup>249</sup> Marsden 'WTO Decides First Competition Case- with Disappointing Results' (2004) op cit note 203 at 3.

<sup>250</sup> Bronckers op cit note 186 at 13-14.

<sup>251</sup> Nguyen & Lidgard op cit note 191 at 12.

<sup>252</sup> Lloyd op cit note 2 at 1145.

**72.** Therefore the second proposed model is, while tackling the mentioned impediments, the implementation of an international agreed competition policy existing out of minimum rules. Such a proposition is reflected to the structure of the TRIPS agreement. The aim or objective is to provide a minimum degree of content implemented in domestic competition law<sup>253</sup>. The existence of the TRIPS agreement is a classic example of the tradeoff that occurred between developed and developing countries. Hence a lesson could be drawn from the TRIPS agreement since both areas (competition and IP) have very similar implications for developing countries<sup>254</sup>. For this reason particularly the WTO is the appropriate forum as it presents a possibility for linkage or transfers<sup>255</sup>.

**73.** This model comprises merely the elements suggested by the European Union in the Working Groups of what components a competition agreement should entail<sup>256</sup>. Eventually in the Doha Ministerial Declaration support was expressed for this proposal through agreement on further elaboration of these elements in the existing Working Group<sup>257</sup>. The Working Group would thereafter have continued their preparations, but stalled them when the topic got dropped from the negotiating agenda<sup>258</sup>. However the text of the Doha Ministerial Declaration<sup>259</sup> indicates consensus amongst the members that the following elements should be integrated into a multilateral framework on competition. These elements could be divided in three areas<sup>260</sup>.

**74.** Their proposal compromised the core principles of the WTO reflected in the domestic competition laws such as non-discrimination, transparency, procedural fairness, special and differential treatment/public policy/ exemptions, as well as certain commitments to deal with hardcore cartels and serious breaches of

---

<sup>253</sup> Gerber op cit note 18 at 7.

<sup>254</sup> In addition: the negotiations over IP took place in both a stand-alone forum (WIPO) and within the GATT/ WTO system; Guzman op cit note 32 at 935.

<sup>255</sup> Ibid at 933.

<sup>256</sup> Anderson & Holmes op cit note 180 at 7; See for origination of the minimum rules: Fox 'Toward world Antitrust and Market Acces' (1997) op cit note 156 at 9.

<sup>257</sup> Paragraph 23, 24 and in particular 25 of the *Doha Ministerial declaration* supra note 27; Ehlermann & Ehring op cit note 204 at 1508-1509; Janow op cit note 161 at 12.

<sup>258</sup> Fox 'International antitrust and the Doha Dome' (2002-2003) op cit note 238 at 913.

<sup>259</sup> *Doha Ministerial Declaration* supra note 27.

<sup>260</sup> Fox 'International antitrust and the Doha Dome' (2002-2003) op cit note 238 at 913.

competition law<sup>261</sup>. Often the minimum rules would be the maximum rules for developing countries. As noted that developing countries should accept a dynamic competition agreement rather than a static one, a special and differential treatment would, as ruled out in the TRIPS agreement, include a specific public policy consideration since the developing countries feared that agreeing to an international competition standard would open up their markets for competitive multinationals. Thus they wanted, for instance, the assurance that the “market access” commitment would be tempered by the ‘public interest’ concerns<sup>262</sup>.

## 1. Development of the TRIPS agreement

**75.** The developed countries requested a high IP protection since they wanted their undertakings in research and development protected throughout the whole world when exporting their products. Developing countries at the other hand were the importers of IP products who preferred a low level of IP protection in order to have access to new technologies<sup>263</sup>. Various efforts have been made on an international level to conclude an international intellectual property agreement ranging from bilateral to regional or other international institution attempts<sup>264</sup>. Once parties brought negotiations within the WTO, they reached an agreement due to the desire of developing countries to receive concessions in the area of agricultural subsidies or market access for their own agricultural goods in exchange for accepting the Trade Related Aspects of Intellectual Property Agreement<sup>265</sup>. Ultimately an agreement was reached during the Uruguay Round of GATT/WTO talks<sup>266</sup>.

**76.** The TRIPS agreement encompasses a minimum level of rules unification, a broader range of harmonisation principles<sup>267</sup> and invites a full consideration of policies for competition maintenance in countries where such policies are weakly

---

<sup>261</sup> Fox ‘Linked-In: Antitrust and the Virtues of a Virtual Network’ (2009) op cit note 34 at 157.

<sup>262</sup> Marsden ‘Competition policy at the WTO: Not the end, but the end of the beginning’ (2002) op cit note 70 at 6.

<sup>263</sup> Guzman op cit note 32 at 946-948.

<sup>264</sup> Eg WIPO.

<sup>265</sup> Guzman op cit note 32 at 934; Weiss op cit note 8 at 271; See for more information: FM Abbott ‘Commentary: The international intellectual property order enters the 21<sup>st</sup> Century’ (1999) 29 *Vand. J. Translat’l L. Econ. L.* 471 at 547-549; Guzman op cit note 32 at 950-951.

<sup>266</sup> Guzman op cit note 32 at 947.

<sup>267</sup> Sweeney ‘Globalisation of competition law and policy: some aspects of the interface between trade and competition’ (2004) op cit note 14 at 419.

developed<sup>268</sup>. In addition, a form of multilateral enforcement mechanism is enacted to enforce compliance<sup>269</sup>.

For this reason and with reference to the impediments concerning the developing countries, the issue at stake is similar to the pursuit for an international competition agreement.

## 2. Comparison to competition law

### 2.1. Linkage<sup>270</sup>

77. Examination of the TRIPS agreement reveals that it was the decision to bring intellectual property rights within the WTO framework which was eventually the key to success. In particular, the trade-off that took place between different trade-related issues enhanced the negotiation process. Guzman argued, before the topic was dropped from the Doha agenda, that unless negotiations regarding a global antitrust regime took place in the WTO or some other mechanism which facilitates transfers among states, a substantive agreement would be unlikely<sup>271</sup>. Guzman is for this reason an advocate of keeping competition law within the WTO as according to him the transfer payments of concessions are the key to success<sup>272</sup>.

Bradford observes that the existence of the TRIPS agreement is a very important precedent in the capability of the WTO to extend its scope. He argues that by the incorporation of the latter agreement, the WTO exposed that new issues could be brought into the WTO which fall outside the traditional non-discrimination regime and encroach on the realm of domestic regulation<sup>273</sup>. However the author counters that in stark contrast with the TRIPS agreement, the EU and the US as being the great powers could not reach a consensus regarding the content and institutional form

---

<sup>268</sup> Fox 'Trade Competition and Intellectual Property – TRIPS and its antitrust counterparts' (1996) op cit note 189 at 482-483; Maskus & Lahouel op cit note 12 at 596.

<sup>269</sup> Sweeney 'Globalisation of competition law and policy: some aspects of the interface between trade and competition' (2004) op cit note 14 at 419.

<sup>270</sup> For a general discussion on linking see JE Alvarez 'Symposium: The boundaries of the WTO' (2002) 96 *Am. J. Int'l L.* 1 at 1-4.

<sup>271</sup> Guzman op cit note 32 at 948.

<sup>272</sup> *Ibid* at 945-952.

<sup>273</sup> Bradford 'When the WTO works, and How it fails' (2010-2011) op cit note 45 at 16.

of such a competition agreement<sup>274</sup>. Seemingly, the great powers did not put any pressure on the developing countries as opposed to what happened with the TRIPS negotiations. At the latter negotiations the great powers had suppressed the developing countries by make the threat of possible withdrawal of trade obligations vis à vis certain developing countries<sup>275</sup>.

Since Europe's views of competition law have shifted towards an alignment with the US, would they nowadays be able to make an agreement<sup>276</sup>? Whatever the answer to this question, the WTO still provides a suitable framework for linking. For instance, should the developing countries agree to open up market access through the adopting of this model, a partial disarmament of the anti-dumping actions by the developed countries could be traded in favor of the developing countries<sup>277</sup>.

## 2.2. Special and different treatment: Public policy mechanism

**78.** With reference to the chapter on impediment, it is often argued that an international obligation to adopt an international competition law complying with certain minimum standards could undermine the development strategies of some developing countries<sup>278</sup>.

This concern derives from the inequality on an economic and competition law of scale between the developed countries and the developing countries. It stems from the differing needs of these countries and different dimensions of development. The WTO secretariat recognized the view that there is a need for exemptions due to the diversity of the members<sup>279</sup>. Consequently, a preferential regime with exemptions for developing countries, comparable to the TRIPS agreement, would be a dynamic and feasible solution. A 'policy space' could be recognized within the framework for

---

<sup>274</sup> Ibid at 4 & 22; Sweeney 'Globalisation of competition law and policy: some aspects of the interface between trade and competition' (2004) op cit note 14 at 419; for more detailed information RH Steinberg 'In the shadow of law or power? Consensus-Based Bargaining and outcomes in the GATT/WTO' (2002) 56 *Int'l Org.* 339 at 360.

<sup>275</sup> Bradford 'When the WTO works, and How it fails' (2010-2011) op cit note 45 at 4; for more detailed information Steinberg op cit note 274 at 360.

<sup>276</sup> PH Verdier 'Transnational Regulatory networks and their limits' (2009) 34 *Yale J. Int'l L.* 113 at 151.

<sup>277</sup> Maskus & Lahouel op cit note 12 at 608.

<sup>278</sup> Noonan op cit note 4 at 77.

<sup>279</sup> *Annual Report of the Working Group 2002 WT/WGTCP/6* (Dec. 9, 2002).

developing countries in order to pursue economic and social policies for development<sup>280</sup>. This is one of the essential requirements to bring the developing countries on board a multilateral agreement with its binding obligations<sup>281</sup>.

**79.** An example would be a provision used in the TRIPS agreement which granted the developing countries the exception of enforcing their intellectual property rights within a certain transition period<sup>282</sup>. In particular for a competition agreement, when a developing economy is for instance in the transition from an infant economy towards a market economy, there may be a genuine need for cooperation among firms, especially where infrastructure is inadequate. Therefore a rule of reason might be executed allowing this cartel and justifying the transaction for these circumstances. In this way the developing country would be given the chance to prevent efficient firms of being penalized by bigger markets. Conversely it gives these economies the chance to grow to a scale where they can be internationally competitive<sup>283</sup>.

### 3. Elements of the multilateral competition agreement

**80.** The minimum level suggested by the doctrine entails minimum requirements of domestic competition law to overcome international problems which are exposed by the failure to resolve on a domestic competition level<sup>284</sup>. Essentially this will also imply the need to erase protectionist measures hindering free trade. The elements which were agreed on during the Doha ministerial declaration can be divided into three areas<sup>285</sup>.

Firstly there is the clarification and implementation of the core principles of the WTO, namely, procedural fairness, non-discrimination and transparency<sup>286</sup>. The second area of the agreement would include the ban of hard core cartels, and the last

---

<sup>280</sup> Ibid; Martin op cit note 76 at 313.

<sup>281</sup> Ibid supra note 279.

<sup>282</sup> Hoekman & Holmes op cit note 14 at 884.

<sup>283</sup> Noonan op cit note 4 at 78.

<sup>284</sup> Sweeney 'Global competition: Searching for a rational basis for global competition rules' (2008) op cit note 54 at 213.

<sup>285</sup> Fox 'International antitrust and the Doha Dome' (2002-2003) op cit note 238 at 913.

<sup>286</sup> Martin op cit note 76 at 308.

area of negotiation would include the special needs of developing countries by providing technical assistance and support in capacity building in order to enhance closer enforcement cooperation<sup>287</sup>.

Correspondingly a general consensus could be found in the doctrine that the WTO would be capable of adopting a set of undertakings on competition policy incorporating these 'core principles'. Janow argued that this incorporation involves a significant step but not an enormous step<sup>288</sup>.

These core principles are the cornerstone of the WTO and already embedded in the majority of the WTO agreements. They are partly designed to establish and maintain competition amongst their members. Their implementation would include the following.

### 3.1. Transparency

**81.** This principle has been entrenched in the WTO agreements since its adoption<sup>289</sup> and was considered as one of the core rules. From its inception in Article X of GATT it has been further incorporated in other WTO agreements<sup>290</sup>.

**82.** In essence for competition law, it would include the obligation that the administration of competition policies must be based on published laws, regulations and guidelines<sup>291</sup>. This provision could possibly also include that enforcement decisions should be published, depending on whether information is confidential or not.

Developing countries could be for instance awarded a preferential regime regarding the transparency principle<sup>292</sup>.

---

<sup>287</sup> Fox 'Linked-In: Antitrust and the Virtues of a Virtual Network' (2009) op cit note 34 at 157.

<sup>288</sup> Janow op cit note 161 at 17.

<sup>289</sup> Eg Article III GATS.

<sup>290</sup> Article III GATS, Article 2.9 TBT, Article 6 TRIMS.

<sup>291</sup> Janow op cit note 161 at 13.

<sup>292</sup> Martin op cit note 76 at 309.

### 3.2. Non-discrimination provision

**83.** The next fundamental provision of the WTO entails the principle of national treatment and most-favoured-nation components. The multilateral agreement would include both principles yet the principle of national treatment is the more important element<sup>293</sup>.

The principle of national treatment, regarded as one of the foundations of the WTO<sup>294</sup>, is meant to maintain a competitive equality between products of one member state and those of other member states<sup>295</sup>. Clearly the application of the principle will vary depending on if it is applied to trade in goods, trade in services or intellectual property. In particular, Article III. 4 of the GATT 1994 is of special interest for this dissertation. This article requires national treatment with respect to all laws, regulations and requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of imported goods<sup>296</sup>.

However, the scope of Article III.4 of the GATT 1994 has already been interpreted broadly in order to include any laws and regulations which might adversely modify the conditions of competition between domestic and imported products in the internal market<sup>297</sup>.

**84.** In particular for the minimum agreement, the implementation of a non-discrimination provision would entail the efforts of states to internalize benefits while externalizing costs, namely preventing the use of export cartel exemptions and constraining egregious forms of de facto discrimination<sup>298</sup>.

Concerning the developing countries, some argue that strengthening the non-discriminatory principle would constitute a more effective means of reducing governmental distortions which would promote the non-discriminatory

---

<sup>293</sup> A Guzman *The case for International Antitrust* (2003) Boalt Working Papers in Public Law, UC Berkeley at 40.

<sup>294</sup> Embedded in Article III.4 GATT 1994; Article XVII of GATS; Article 3 of TRIPS Agreement.

<sup>295</sup> Matsushita op cit note 7 at 366.

<sup>296</sup> Ibid at 366.

<sup>297</sup> Janow op cit note 161 at 17.3.

<sup>298</sup> Guzman 'The case for International Antitrust' (2003) op cit note 293 at 40 & 42-43; See also this document for critics on the limited effects of this provisions used in a competition context.

competition<sup>299</sup>. Nonetheless this would imply an obligation for developing countries to open up their markets to foreign direct investment<sup>300</sup>. Therefore, in the potential situation of an international agreement, developing countries want the potential exception to allow them to exempt certain sectors from the application<sup>301</sup>.

#### 4. Pro

##### 4.1. Linkage

**85.** A part of the doctrine believes the WTO to be the best suited institution to address issues with distributional consequences as there are potential parties winning and other losing regarding the competition negotiations<sup>302</sup>. This belief originates from the TRIPS agreement that would never have been conceded by the developing countries in a stand-alone agreement<sup>303</sup>. This part of the doctrine is therefore convinced that the competition negotiations should be kept within the WTO since the transfer payments of concessions are the key to success<sup>304</sup>.

##### 4.2. Minimum rules with public policy defense

**87.** The following arguments are provided by the advocates of a competition agreement within the WTO arising out of certain minimum rules but with a preferential regime for developing countries.

**88.** *Concerning the minimum rules*, the advocates view the dispute settlement procedures of the WTO as being beneficial for the harmonization and convergence of the competition rules through the adoption of these minimum rules. Agreeing to such a multilateral instrument makes the dispute settlement procedure available for countries to enforce obligations of member states. This is vital not only for the developed countries but also for the developing countries since this gives the

---

<sup>299</sup> Weiss op cit note 8 at 270.

<sup>300</sup> Noonan op cit note 4 at 79.

<sup>301</sup> Ibid at 79.

<sup>302</sup> Bradford 'When the WTO works, and How it fails' (2010-2011) op cit note 45 at 3; Guzman op cit note 32 at 950-951.

<sup>303</sup> Bradford 'When the WTO works, and How it fails' (2010-2011) op cit note 45 at 3.

<sup>304</sup> Guzman op cit note 32 at 945-952.

competition commitments more credibility. It is viable to ensure that the developing countries enforce their commitments but also viable for those developing countries to execute their commitments in exchange for their concessions/exemptions<sup>305</sup>. As a result, regardless of their preferences, this system provides a specific minimum level of competition law.

**89.** *Concerning the preferential mechanism for developing countries*, it may be in the interest of developing countries to approve such an agreement in exchange for greater technical assistance and international enforcement cooperation<sup>306</sup>. Subsequently this would involve the opening of their markets to foreign investors. Additionally, this agreement is capable of reducing international anticompetitive behaviour where the developing countries' enterprises could eventually benefit from the prohibition of the international merger cartels between multinational firms. However the existing questions will always remain: Will the multinational firms now drive the local firms out of their market? Will the infant industries resist the international market pressure? Will the developing countries lose out in the global welfare standard reached by an international competition agreement? Therefore, the adoption of a dynamic preferential regime existing out of a public policy mechanism for developing countries is the necessary tool of persuasion in order to accept the adoption of a multilateral competition agreement.

## 5. Contra

### 5.1. Linking

**90.** Nonetheless there is disagreement among authors whether conclusions can be drawn from the TRIPS agreement and projected on the competition related negotiations.

**91.** *Firstly*, the argument is raised that the competition law dispute is not negotiated in a comparable environment to the Intellectual Property negotiations. These legal commentators are of the opinion that unlike the TRIPS agreement which was crafted

---

<sup>305</sup> Ibid at 949-950.

<sup>306</sup> Noonan op cit note 4 at 82.

around provisions incorporated from pre-existing intellectual property agreements such as made in the WIPO, there are no standards to fall back on with regard to the competition law negotiations<sup>307</sup>.

Sweeney shares the same opinion and expresses several concerns around the dissimilar background of the TRIPS agreement and competition negotiations<sup>308</sup>. Alongside his arguments about the disagreement between the US and the EU, the author mentions the lack of interest of large business and lobby groups which had a powerful incentive in the existence of the TRIPS agreement<sup>309</sup>.

**92.** *Secondly*, since the outcome of a potential competition agreement is unsure, parties are not willing to pay a high cost. Bradford observed that relating to the TRIPS agreement, a clear distinction could be drawn between the countries benefiting (developed countries) and countries losing from making this agreement<sup>310</sup>. For this reason, a trade-off could be made within the WTO with other trade-related aspects such as concessions to lower tariffs on textiles, clothing and agriculture. However when states cannot predict which general policy will ultimately be the most favourable, they are less likely to support any all-embracing policy proposal<sup>311</sup>. Consequently while the costs are high and the benefits of a global competition policy uncertain, the developed countries and in particular the US were not prepared to accept any transfer payment that would address the distributional effects. Sweeney therefore observed that the US was not prepared to show any intention of abandoning any of the above-mentioned protectionist antidumping remedies<sup>312</sup>.

**93.** *Thirdly*, there is the significant role that TRIPS played in engendering distrust of competition law since many of the promised trade-offs to the developing countries failed to eventuate, or seemingly neutral provisions were used in a way advantageous

---

<sup>307</sup> Weiss op cit note 8 at 2723; Sweeney 'Globalisation of competition law and policy: some aspects of the interface between trade and competition' (2004) op cit note 14 at 419; For a solution: Reference to Model IV

<sup>308</sup> Sweeney 'Globalisation of competition law and policy: some aspects of the interface between trade and competition' (2004) op cit note 14 at 419.

<sup>309</sup> Ibid at 419.

<sup>310</sup> Bradford 'When the WTO works, and How it fails' (2010-2011) op cit note 45 at 35.

<sup>311</sup> Ibid at 35.

<sup>312</sup> Sweeney 'Globalisation of competition law and policy: some aspects of the interface between trade and competition' (2004) op cit note 14 at 385; PK Yu 'The objectives and principles of the TRIPS agreement' (2009) 46 *Hous. L. Rev.* 979 at 980-981.

to the developing countries<sup>313</sup>. For this reason, it is doubtful if developing countries will again accept such a trade-off, since they are disillusioned by the manner in which developed countries sought to enforce the TRIPS provisions on them. Bradford and Sweeney are of the opinion that implementation in the sphere of intellectual property rights cultivated the wrong impression or even optimism that other areas such as investment and competition could be brought into the WTO framework<sup>314</sup>.

## 5.2. Minimum rules with public policy defence

**94.** However disagreement also exists as to whether such a preferential treatment would be ultimately beneficial for developing countries.

Janow for instance is not convinced of the rationale of such a preferential treatment for developing countries. He argues that, after all, the main beneficiaries of their competition laws are likely to be their own domestic firms and consumers. The exemption for a country to apply its legal competition framework in a transparent and non-discriminatory way for a certain period of time is not likely to benefit this state. In addition, the core principles of the GATT under the national treatment obligation already ensure the obligation for member countries to have a domestic competition law in a transparent and non-discriminatory fashion<sup>315</sup>. As noted earlier, a nation would in any event be likely to be held accountable under the national treatment obligation of the GATT as it currently stands for transparent and non discriminatory application of all domestic competition laws and regulations<sup>316</sup>.

Furthermore Noonan notes that none of the arguments demonstrate why measures against abuses such as cartelization and monopolization are anti-developmental<sup>317</sup>. In his opinion, the adoption of a competition law will likely be harmful to the economy

---

<sup>313</sup> Gerber op cit note 18 at 707,3; Sweeney 'Globalisation of competition law and policy: some aspects of the interface between trade and competition' (2004) op cit note 14 at 419.

<sup>314</sup> Bradford 'When the WTO works, and How it fails' (2010-2011) op cit note 45 at 4; Sweeney 'International competition law and policy: A work in progress' (2009) op cit note 40 at 60.

<sup>315</sup> See for minimum rules Margin number 80; Janow op cit note 161 at 17.3.

<sup>316</sup> Ibid at 17.3.

<sup>317</sup> Noonan op cit note 4 at 77; Anderson & Holmes op cit note 180 at 553.

if certain industries and sectors may be exempt from a competition law<sup>318</sup>. Even more, they may be able to attract more investors when they for instance do not explicitly proscribe vertical restraints.

### C. Model III: The ICN

**95.** After the competition talks stalled within the WTO framework, states sought to overcome the negative externalities of decentralized antitrust enforcement through international institutions pursuing convergence by developing recommendations to foster voluntary convergence<sup>319</sup>.

So far, bilateral agreements existing out of competition cooperation arrangements on a case by case approach between two states have been the major competition cooperation on an international level<sup>320</sup>. Each jurisdiction has their own set of bilateral agreements being a useful instrument for nurturing dialogue and cooperation and the management of competition conflicts<sup>321</sup>. Nevertheless, by using a bilateral agreement, convergence of competition law on a global level cannot be reached. Furthermore, some developing countries still do not provide a coherent competition law and as a consequence these bilateral agreements marginalize the latter<sup>322</sup>. Additionally developing countries will not enter into disharmonized bilateral agreements with developed countries.

Focussing on soft law issued by international institutions, we can examine three international institutions namely UNCTAD, the OECD and the ICN<sup>323</sup>. However the ICN is seen as the most comprehensive institution of these and therefore this

---

<sup>318</sup> Noonan op cit note 4 at 77.

<sup>319</sup> Bradford 'When the WTO works, and How it fails' (2010-2011) op cit note 45 at 3; See O Budzinski 'The International Competition Network; Prospect and Limits on the road towards international competition governance' (2004) 8 *Competition & Chance* 223 at 225-227; F Jenny 'International cooperation on Competition: Myth, Reality and Perspective' (2003) 48 *Antitrust Bull.* 973; A Piilola 'Assessing theories of Global Governance: A case study of International Antitrust Regulation' (2003) 39 *Stan J. Int'l L.* 207 at 235-236.

<sup>320</sup> The most famous is the bilateral agreement between the EU and the US. Other examples are US-Canada, US- Brazil, Australia-Korea; Smitherman op cit note 146 at 856.

<sup>321</sup> Janow op cit note 161 at 1.

<sup>322</sup> Martin op cit note 76 at 300.

<sup>323</sup> D Sokol 'Order without (Enforceable) Law: Why countries enter into non-enforceable competition policy chapters in free trade agreements' (2008) op cit note 118 at 267.

dissertation will only discuss the ICN<sup>324</sup>. The ICN has been seen as the major endeavour to facilitate the emergence of international standards<sup>325</sup>.

### 1. Formation of the ICN<sup>326</sup>

96. The concept of a global competition initiative gained life in 2000 under the lead of Joel Klein expressing his opinion at the EC merger control 10<sup>th</sup> Anniversary Conference<sup>327</sup>. It was his belief that, regardless of the WTO undertakings, a move towards a global competition initiative was inevitable<sup>328</sup>. The lack of an institution which facilitated a forum where parties could share their competition ideas and experience, close cooperation and exploration of common issues that could lead to convergence led to the institutionalisation of the ICN<sup>329</sup>. Eventually the ICN was formed in 2001 under the initiative of the US which reflects their preference for avoiding any form of international agreement or voluntary multilateral cooperation<sup>330</sup>. It furthermore derives its creative inspiration from the findings of the ICPAC Report<sup>331</sup>.

---

<sup>324</sup> Fox 'International antitrust and the Doha Dome' (2002-2003) op cit note 238 at 914; Hollman & Kovacic op cit note 139 at 320.

<sup>325</sup> Fox 'Competition, Development and Regional Integration: In search of a competition law fit for developing countries' (2012) op cit note 108 at 8.

<sup>326</sup> See for more information: *International Competition Policy Advisory Committee to the Attorney General and the Assistant Attorney General for Antitrust*, United States of America Congress, Final Report (2000). The ICN is described by US authorities as a 'virtual network'. It has no headquarters: See R H Pate *The DOJ International Antitrust Program - Maintaining Momentum* Speech delivered at the American Bar Association, Section of Antitrust Law, 2003 Forum on International Competition Law, New York, 6 February 2003.

<sup>327</sup> J Clarke & SJ Evenett 'A multilateral framework for competition policy' in SJ Evenett & State Secretariat of Economic Affairs Switzerland (Eds.) *The Singapore issues and the World Trading System: The road to Cancun and beyond* (2003) Bern Switzerland (77) also available at [http://www.google.co.za/url?sa=t&rct=j&q=j%20clarke%20%26%20sj%20evenett%20%E2%80%98a%20multilateral%20framework%20for%20competition%20policy%E2%80%99%20in%20sj%20evenett%20%26%20state%20secretariat%20of%20economic%20affairs%20switzerland%20\(eds.\)%20the%20singapore%20issues%20and%20the%20world%20trading%20system%3A%20the%20road%20to%20cancun%20and%20beyond%20\(2003\)%20&source=web&cd=1&cad=rja&ved=0CC0QFjAA&url=http%3A%2F%2Fwww.alexandria.unisg.ch%2Fexport%2FDL%2FSimon\\_Evenett%2F22339.pdf&ei=Qh4NUe74K4jNhAePioGgBQ&usq=AFQjCNEI9vGfoE3Mf4RX3dU84gmQVNuYMw&bvm=bv.41867550,d.ZG4](http://www.google.co.za/url?sa=t&rct=j&q=j%20clarke%20%26%20sj%20evenett%20%E2%80%98a%20multilateral%20framework%20for%20competition%20policy%E2%80%99%20in%20sj%20evenett%20%26%20state%20secretariat%20of%20economic%20affairs%20switzerland%20(eds.)%20the%20singapore%20issues%20and%20the%20world%20trading%20system%3A%20the%20road%20to%20cancun%20and%20beyond%20(2003)%20&source=web&cd=1&cad=rja&ved=0CC0QFjAA&url=http%3A%2F%2Fwww.alexandria.unisg.ch%2Fexport%2FDL%2FSimon_Evenett%2F22339.pdf&ei=Qh4NUe74K4jNhAePioGgBQ&usq=AFQjCNEI9vGfoE3Mf4RX3dU84gmQVNuYMw&bvm=bv.41867550,d.ZG4) at (1) 24; Fox 'Linked-In: Antitrust and the Virtues of a Virtual Network' (2009) op cit note 34 at 158-159.

<sup>328</sup> Janow op cit note 161 at 3.

<sup>329</sup> Fox 'Linked-In: Antitrust and the Virtues of a Virtual Network' (2009) op cit note 34 at 158; See also these pages for the reasons why other institutions such as the OECD did not fulfill this need.

<sup>330</sup> US and Foreign Antitrust Officials Launch International Competition Network (Oct. 25, 2001) available <http://www.ftc.gov/opa/2001/10icn.shtm>; Bradford 'When the WTO works, and How it fails' (2010-2011) op cit note 45 at 23.

<sup>331</sup> See for more information: Sweeney 'Global competition: Searching for a rational basis for global competition rules' (2008) op cit note 54 at 211; Hollman & Kovacic op cit note 139 at 301.

## 2. Functions of the ICN

**97.** The main goal is to share and disseminate ideas and practices in order to collect and produce a view of best practices and improve the enforcement of domestic based rules. As opposed to the WTO which performs from a vertical level, the ICN is considered to be working on a horizontal level between all the different competition authorities. Accordingly, the main focus is not on enhancing a global competition agreement but rather on gathering information and capacity building between the latter authorities in an informal manner<sup>332</sup>. So the ICN will not be a rule making body but will address and encourage the domestic antitrust agencies to embody their recommended best practice<sup>333</sup>.

The body of the vehicle exists out of domestic competition authorities but also includes private sector experts and practitioners who are represented during the Working Groups<sup>334</sup>.

The major source of information gathering derives from the various Working Groups institutionalised within the ICN. The latter groups gather information and produce best recommended practices which are presented during an annual conference shared with the overall membership<sup>335</sup>. The ICN thus gathers information concerning substantive aspects of national legislation, and initiates projects to promote or facilitate convergence on substantive, procedural and administrative aspects of competition law<sup>336</sup>. Practically, the ICN will firstly gather information through decentralized experimentation by testing different substantial rules of several jurisdictions. Secondly they will build consensus on a superior practice while they finally encourage the domestic authorities to opt into those superior techniques<sup>337</sup>.

---

<sup>332</sup> Fox 'International antitrust and the Doha Dome' (2002-2003) op cit note 238 at 914; Fox 'Linked-In: Antitrust and the Virtues of a Virtual Network' (2009) op cit note 34 at 165.

<sup>333</sup> INT'l Competition Network (ICN), Memorandum on the establishment and operation of the International Competition Network 1 (2002) available at ... ; Hollman & Kovacic op cit note 139 at 275; Fox 'Linked-In: Antitrust and the Virtues of a Virtual Network' (2009) op cit note 34 at 165.

<sup>334</sup> Sweeney 'Global competition: Searching for a rational basis for global competition rules' (2008) op cit note 54 at 211; Janow op cit note 161 at 6; Verdier op cit note 276 at 157.

<sup>335</sup> Janow op cit note 161 at 6.

<sup>336</sup> E.g on Unilateral conduct laws and predatory pricing; Hollman & Kovacic op cit note 139 at 275; Verdier op cit note 276 at 158.

<sup>337</sup> Hollman & Kovacic op cit note 139 at 281.

Best practice recommendations are for instance produced for multijurisdictional mergers including the review of multijurisdictional mergers, an analytical framework for merger review and investigating techniques to make the process less cost associated<sup>338</sup>. Besides these activities, they inform new authorities on technical aspects and give workshops on how to build enforcement capacity<sup>339</sup>.

### 3. Pro

#### 3.1. Capacity building

**98.** One of the major achievements of the ICN is reflected in the possibility for capacity building. For example in the case of hard core cartels, in order to be able to globally prosecute these cartels, capacity building is vital especially for the developing countries. Through the ICN, member competition authorities can share information, request evidence to convict the cartel members and recognise foreign judgements<sup>340</sup>.

#### 3.2. Democratic working

**99.** The inclusion of the domestic competition authorities from the developed and from the developing countries, as well as the presence of other interested non-governmental parties, assigns the ICN a high democratic appeal<sup>341</sup>. Additionally, the work is undertaken by the participants themselves and thus not a top-heavy secretariat<sup>342</sup>. Furthermore, competition agencies can speak freely without the fear of expressing views contradicting other law related issues<sup>343</sup>. Therefore, one of the pillars of its success is its inclusiveness and inviting character.

---

<sup>338</sup> Verdier op cit note 276 at 157; Janow op cit note 161 at 7.

<sup>339</sup> Verdier op cit note 276 at 158.

<sup>340</sup> Sweeney 'International competition law and policy: A work in progress' (2009) op cit note 40 at 61.

<sup>341</sup> Janow op cit note 161 at 6; Fox 'Linked-In: Antitrust and the Virtues of a Virtual Network' (2009) op cit note 34 at 167.

<sup>342</sup> Janow op cit note 161 at 6.

<sup>343</sup> Hollman & Kovacic op cit note 139 at 304.

This is in contrast with the WTO that arguably suffers from perceptions of capture and illegitimacy. Sweeney argues that these may be less of an issue for the ICN since the powers of the WTO are much more extensive<sup>344</sup>.

### 3.3. No commitments – Informal gathering

**100.** The argument is raised that the informal contacts within such an organizations will likely lead to greater recognition of the benefits and will lead to new analytical methods and analysis of new issues<sup>345</sup>. Even more, it may help to promote the adoption of best practices in all countries<sup>346</sup>. There is a significant sense in the international community of the added value in this expanded dialogue<sup>347</sup>. As mentioned before, since the costs are so high, parties do not tend to take any risks. Through the informal cooperation within the ICN, they are offered the chance to experiment with different approaches and develop a sense of their economic impact without committing themselves to certain obligations such as in the WTO<sup>348</sup>. In particular for the developing countries, recommended practices are flexible and acknowledge differences for developing countries<sup>349</sup>. In this regard, they appear to be similar to the public policy mechanism explained in Model II since there is no real commitment to execute.

### 4. Contra

**101.** Other authors disagree with the role of the ICN as being the major facilitator of reaching an international competition harmonization agreement.

---

<sup>344</sup> Sweeney 'Global competition: Searching for a rational basis for global competition rules' (2008) op cit note 54 at 220.

<sup>345</sup> Noonan op cit note 4 at 58.

<sup>346</sup> H Dumez & A Jeumaitre 'The convergence of competition policies in Europe: Internal dynamic and external implications' in S Berger & R Dore (Eds.) *National diversity and Global capitalism* (1996) Ithaca: Cornell University Press New York 216 at 227.

<sup>347</sup> Janow op cit note 161 at 9.

<sup>348</sup> Verdier op cit note 276 at 161.

<sup>349</sup> Fox claims even for more acknowledgment for smaller economies and developing countries; Fox 'Linked-In: Antitrust and the Virtues of a Virtual Network' (2009) op cit note 34 at 174.

#### 4.1. No linkage

**102.** First of all, the lack of possibilities within the ICN of linkage or transfer payments by making concessions is disputed and it is thus unlikely that the ICN will reach convergence<sup>350</sup>. For this reason, Guzman and Sweeney are of the opinion that the ICN is an international institution serving the purpose of reducing the cost of international cooperation, improving the communication through sharing of non-confidential information or informal policy changes but is ultimately no substitute for a forum such as the WTO which permits the transfers<sup>351</sup>.

Furthermore, it is contended that ICN is a strong forum concerning the harmonization function as the institution is lacking a trade related perspective<sup>352</sup>. For the reason, arguably there is no push for a global competition regime which is in pursuance of checking global anti-competitive trade related practices<sup>353</sup>.

#### 4.2. Undemocratic: legitimacy concerns

**103.** The democratic status of the ICN is from time to time disputed in the doctrine although it is considered to be as inclusive as possible<sup>354</sup>.

Firstly there might be legitimacy concerns due to the adopting of international competition policies by a clique of unelected and foreign authorities<sup>355</sup>. It is the belief of Sweeney that consequently bilateral agreements will continue to be made however the author is conscious of the costs associated with operating bilaterally as opposed to multilaterally<sup>356</sup>.

---

<sup>350</sup> Guzman op cit note 32 at 954.

<sup>351</sup> Ibid at 954; Sweeney 'Globalisation of competition law and policy: some aspects of the interface between trade and competition' (2004) op cit note 14 at 400; Clarke & Evenett op cit note 327 at 41.

<sup>352</sup> Clarke & Evenett op cit note 327 at 24.

<sup>353</sup> Martin op cit note 76 at 306.

<sup>354</sup> Currently the membership has grown to 114 of the national competition authorities which implicates that nearly all the jurisdictions with a competition law are included; Notable member with jurisdiction who is not part of the ICN: China; Hollman & Kovacic op cit note 139 at 175; Verdier op cit note 276 at 150; Fox mentions the inclusiveness of the developing countries during the annual conferences: Fox 'Linked-In: Antitrust and the Virtues of a Virtual Network' (2009) op cit note 34 at 164.

<sup>355</sup> Sweeney 'Globalisation of competition law and policy: some aspects of the interface between trade and competition' (2004) op cit note 14 at 400.

<sup>356</sup> Ibid.

The second argued democratic weakness of this institution is based on the prerequisite of a country having dedicated competition legislation for membership<sup>357</sup>. Despite the adoption of competition law by the majority of the developing countries, there is a fear that the ICN will be dominated by the participation of the developed countries instead of the developing countries that are the most in need of capacity building requirements<sup>358</sup>. Further, although the ICN is presumably a virtual organization in which 90% of the work is done through email and teleconferencing<sup>359</sup>, it is arguable if developing countries have the financial capacities to attend the working groups and the annual conferences<sup>360</sup>. Accordingly most of the resources derive from older, more experienced and better funded competition authorities<sup>361</sup>.

#### 4.3. No commitments – No dispute settlement mechanism

**104.** Sceptics of the ICN contend that the commitments are generalised and not accompanied by the obligation of implementing them in a domestic competition law. In their opinion noted in 2002, the recommendations made so far are already implied by the WTO core principles of non-discrimination embedded in Article III.4 of the GATT and thus the principles lack the enforceability and robustness of the WTO standards<sup>362</sup>. Yet the author recognises this is not the main goal of the ICN and rather is established from the point of developing perspectives and practices in order to deepen consensus on several competition-related issues<sup>363</sup>.

Further it is submitted that the ICN, unlike the WTO, is unlikely to be an effective forum since it is lacking any dispute settlement mechanism<sup>364</sup>.

---

<sup>357</sup> Clarke & Evenett op cit note 327 at 41.

<sup>358</sup> Martin op cit note 76 at 306; Hollman & Kovacic op cit note 139 at 282; J Mertus 'Considering Non state Actors in the New Millennium: Toward Expanded participation in norm generation and norm application' (2000) 32 *N.Y.U.J Int'l L. & Pol.* 537 at 541-542.

<sup>359</sup> Hollman & Kovacic op cit note 139 at 305.

<sup>360</sup> Fox 'Linked-In: Antitrust and the Virtues of a Virtual Network' (2009) op cit note 34 at 167.

<sup>361</sup> Hollman & Kovacic op cit note 139 at 282.

<sup>362</sup> Janow op cit note 161 at 10.

<sup>363</sup> Ibid at 10.

<sup>364</sup> Noonan op cit note 4 at 5; Guzman op cit note 32 at 951.

**105.** The success of the ICN has proven these authors wrong<sup>365</sup> yet some concerns are still expressed regarding the commitments of the members. Regardless of the adopting of superior practices by the domestic competition authorities, achieving broad agreement upon recommended practices, by itself, does not ensure that such standards become embedded in the practice of individual jurisdictions.

In the goal of reaching convergence through the recommended practices, the adopting of superior practices by domestic competition authorities will not succeed by itself if there is no authority ensuring the implementing of these standards in the individual jurisdictions<sup>366</sup>. Unless there is monitoring and continuous coaching, convergence will not be reached in contrast to the members' obligations of the WTO<sup>367</sup>.

Nonetheless, the ICN as an informal venue with no ground location and no binding rulemaking power has turned out to be an enormous success<sup>368</sup>. It has assisted in reaching consensus and convergence in different fields<sup>369</sup> and aided newer competition agencies in giving them an anchor point<sup>370</sup>. As a result, the ICN cannot be overlooked anymore in the search for convergence and thus Model IV approaches to be the most realistic and ideal one.

---

<sup>365</sup> Fox 'Linked-In: Antitrust and the Virtues of a Virtual Network' (2009) op cit note 34 at 163.

<sup>366</sup> Hollman & Kovacic op cit note 139 at 283.

<sup>367</sup> Others argue that exactly the fact of no enforcement is the strength of the ICN. The WTO would infringe the members their sovereignty. see David Gerber 'Global competition' (2010) at 129-137.

<sup>368</sup> Fox 'Linked-In: Antitrust and the Virtues of a Virtual Network' (2009) op cit note 34 at 165.

<sup>369</sup> E.g. Cartel enforcement, merger process and the mutual understanding of competition law; Fox 'Linked-In: Antitrust and the Virtues of a Virtual Network' (2009) op cit note 34 at 166.

<sup>370</sup> Fox 'Linked-In: Antitrust and the Virtues of a Virtual Network' (2009) op cit note 34 at 166.

#### **D. Model IV: Cooperation between the WTO and the ICN**

**106.** The last model can be elucidated briefly, but it brings together all the elements of the previous described models in one most plausible model.

According to Janow, the WTO and the ICN could hardly be more dissimilar<sup>371</sup>. He observes that besides the fact both include developing and developed countries, points of commonality are few. However, this could perhaps be used in an advantageous way as both institutions are not overlapping. Moreover, the ICN is not an entirely sufficient forum to reach coherent convergence and was also never meant to be<sup>372</sup>. In this sense, the ICN could pave the road towards a greater international convergence accomplished by a rulemaking body such as the WTO. Hence a complementary set of competition provisions could be developed by both institutions and the ICN could investigate and gather information to reach a consensus while the WTO converts this consensus into rules/obligations<sup>373</sup>.

Two possible scenarios of cooperation between the WTO and the ICN could be suggested<sup>374</sup>.

##### 1. WTO private market access restraints – ICN supplementary competition principles

**107.** Fox favoured in 1999 the approach of purely addressing the private market access restraints within the WTO, while the other competition-related issues should be treated in another independent international forum since the WTO primarily focusses on trade related issues<sup>375</sup>. According to the author, competition laws designed to weaken private restraints play the same basic role as liberal trade law and should be placed within the WTO<sup>376</sup>. Competition rules not addressing market access

---

<sup>371</sup> Janow op cit note 161 at 1.

<sup>372</sup> Fox 'Linked-In: Antitrust and the Virtues of a Virtual Network' op cit note 34 at 168.

<sup>373</sup> Janow op cit note 161 at 1; Fox mentioned in 2003: "These voluntary agreements, or at least some of them, might ultimately be adopted on the world level" Fox 'International antitrust and the Doha Dome' (2002-2003) op cit note 238 at 929.

<sup>374</sup> A seemingly similar idea was already noticed by Tarullo in 2000 between the WTO and the OECD. However projected to 2013, the OECD can be replaced by the ICN in this idea: Tarullo 'Norms and Institutions in global Competition Policy' (2000) op cit note 1 at 504.

<sup>375</sup> Fox 'Competition Law and the Millenium Round' (1999) op cit note 32 at 675; Guzman op cit note 32 at 953.

<sup>376</sup> Guzman op cit note 32 at 953.

should therefore be left out of the WTO. At this time, the author did not predict the success of the ICN but since its current success the ICN could be possibly appointed as 'another independent international forum'. This solution accords with Model I where competition-trade related provisions are adopted within existing WTO agreements and non-trade related competition issues would be dealt within the ICN.

## 2. ICN consensus reaching - WTO binding rulemaking

**108.** Whilst the ICN is a soft law forum with a consultative and deliberative reach to find a consensus on global competition law, the WTO is forum for the negotiation of hard binding rules which includes obligations for its members. A proposed scenario is one in which the ICN deliberately, being a channel of building mutual trust and consultation, searches for consensus on soft law provisions which could be evolved into hard law provisions through including them in the existing WTO agreements<sup>377</sup> of model I and subsequently handing over the role of guardian to the WTO. Alternatively the ICN could gather information and reach consensus on the minimum competition requirements such as the core principles and the ban on hard core cartels<sup>378</sup> which would eventually be institutionalized in an agreement like model II of the WTO.

---

<sup>377</sup> Hollman & Kovacic op cit note 139 at 301.

<sup>378</sup> Currently the membership has grown to 114 of the national competition authorities which implicates that nearly all the jurisdictions with a competition law are included; Notable member with jurisdiction who is not part of the ICN: China; Hollman & Kovacic op cit note 139 at 320.

## **VI. CONCLUSION**

### **The convergence of competition law up to the Doha Round**

**109.** From the start of the dissertation, it has been apparent that international trade law (WTO) and a competition policy would be complementary elements to move towards trade liberalization, deregulation and globalization. However the *Kodak/Fuji* case provided the evidence of the shortcomings of the WTO by indicating sharply that public restraints and private restraints are dealt with in separate boxes. Private restraints have been completely forgotten in the past within the WTO and are only regulated in domestic competition laws.

**110.** Nonetheless a common competition consensus could not be reached amongst the WTO members in 2004 resulting in its removal from the Doha agenda. I have attempted to indicate the precise impediments hindering the realization of an international competition policy within the WTO. Every jurisdiction reflects and represents its own unique social and legal vision. The approval of an international common set of substantive competition principles would imply to a certain extent the standardisation of the domestic policies, thereby depriving developing countries in particular of many of their important policy tools. For that reason I concluded that support and competition cooperation is highly needed for developing countries but the acceptance of a static common international competition policy is not feasible to support their needs. In general and specifically with regard to developing countries: one size does not fit all.

### **The convergence of competition law, a decade after the stalled negotiations of the Doha Round**

**111.** Having observed the hindering factors, the critical question should be asked what the future role of the WTO in the convergence process still entails. I therefore developed four different models in the second part of the dissertation designed to overcome these impediments. It became apparent that the WTO perceived to have grown in addressing private restraints through the first specific competition

provisions incorporated in the Telecommunications Reference Paper which was successfully used in the Telmex case. However I observed the undeniable success of the ICN due to its unique informal structure. The question arises, since ICN's issued soft law becomes hard law when implemented by members in their legislation, whether or not the ICN has irreversibly taken over the leading role in the convergence process?

I, as the author, am aware of the many complications facing these models. However, after a decade of the successes of the ICN and the stalled negotiations within the WTO, in my opinion a new structure should be considered in the attempt to reach a convergence of competition law. The success of the ICN could be used in a beneficial way since the ICN and the WTO are complementary organizations. The ICN and the WTO could work in perfect harmony bringing global competition law to the next level.

Because of the recommended practices of the ICN and its informal style of working, the suspicions of developing countries that competition law is simply another tool used by the developed countries to achieve their own goals is dissipating. Confidence is growing that opting into multilateral organizations will promote economic development. In addition to this, next to the ICN, there is still a belief in the doctrine that negotiations within the WTO with regard to the adoption of a competition policy may resurface. The WTO, being the only binding rulemaking body, is still regarded as the most appropriate forum to add a global competition policy since international trade and competition law are based on the same sympathetic values.

**112.** For precisely this reason, model IV turns out to be the most applicable and realistic model. Thus by means of the consensus-reaching process within the ICN, countries are delicately introduced to the competition principles. Subsequently these principles will be converted into hard law through the WTO such as suggested in Model I or through Model II existing out of minimum rules with a special different treatment for developing countries. With the following model, many posed impediments such as the observed sovereignty, one static standard and lack of infrastructure concerns are obviated. Therefore I am thoroughly of the belief that cooperation between the ICN and the WTO could be accomplished in a way

advantageous to all countries. Even if the implemented soft law became by this time hard law, the incorporation of these principles in the WTO could serve as a metric towards enriching its role as an institution.

Precisely in this manner, the 'one size does not fit all' predicate is scrupulously executed.

University of Cape Town

## **BIBLIOGRAPHY**

### **Primary Sources**

#### **WTO:**

- Marrakesh Agreement Establishing the World Trade Organization
- Article I of GATT, Oct. 30, 1947
- Article II of the GATS, Apr. 15, 1994
- Article VIII of GATS
- Art 11.1 of the Agreement on Safeguards
- Article XXIII (1) (b) GATT
- Reference Paper GATS Basic Telecommunication Service Agreement

#### **WTO Agenda**

- World Trade Organization, Doha Ministerial conference, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1. available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm)
- ⇒ Paragraph 23-24-25
- World Trade Organization, Doha Work Program, Decision adopted by the General Council on 1 August 2004, WT/L/579 (Aug. 2, 2004) available at [http://www.wto.org/english/tratop\\_e/dda\\_e/draft\\_text\\_gc\\_dg\\_31july04\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm)

#### **WTO Working Group Reports**

WTO, Working Group on the Interaction between Trade and Competition Policy, Report to the General Council:

- WT/WCTCP/1 (Nov. 28, 1997)
- WT/WGTCP/2 (Dec. 8, 1998)
- WT/WGTCP/3 (Oct. 11, 1999)
- WT/WGTCP/4 (Nov. 30, 2000)
- WT/WGTCP/5 (Oct. 8, 2001)
- WT/WGTCP/6 (Dec. 9 2002)

WTO, Working Group on the Interaction between Trade and Competition Policy, Communication from the European Community and its Members:

- WT/WGTCP/W/152 (Sept. 25, 2000)

Reports available at [http://www.wto.org/english/tratop\\_e/comp\\_e/wgtcp\\_docs\\_e.htm](http://www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm)

### **International Competition Policy Advisory Committee**

- International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust final report; Washington D.C. US Dept. of Justice (2000) available at <http://purl.access.gpo.gov/GPO/LPS17186>

### **European Commission**

- Report of the Group of Experts 'Competition Policy in the new Trade Order: Strengthening International Cooperation and Rules' COM (1995) 359 final (Dec. 7, 1995) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1995:0359:FIN:EN:PDF>
- European Commission 'XXVIth Report on Competition Policy' COM (1997) 628 final (1996) available at [http://ec.europa.eu/competition/publications/annual\\_report/1996/en.pdf](http://ec.europa.eu/competition/publications/annual_report/1996/en.pdf)

### **OECD**

- OECD Joint Group on Trade and Competition International Options to improve the coherence between Trade and Competition policies (Sept. 12, 2002) COM/DAFFE/TD(2002)49/FINAL available at [http://search.oecd.org/officialdocuments/displaydocumentpdf/?doclanguage=en&co=e=com/daffe/td\(2002\)49/final](http://search.oecd.org/officialdocuments/displaydocumentpdf/?doclanguage=en&co=e=com/daffe/td(2002)49/final)

### Jurisdiction

#### **EU**

- Case COMP/M. 2220 *GE/Honeywell*, Commission decision of 3 July 2001, OJ C239/16 (Feb. 14 2004) available at [http://ec.europa.eu/competition/mergers/cases/decisions/m2220\\_en.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m2220_en.pdf)

#### **US**

- *United States v. AMR Corp.* 335 F.3d 1109 (10<sup>th</sup> Cir. 2003) (No. 01-3202) available at <https://bulk.resource.org/courts.gov/c/F3/335/335.F3d.1109.01-3202.html>

## WTO Dispute Settlement

- *Japan – Measures Affecting Consumer Photographic Film and Paper, Report of the Panel*, WT/DS44/R (Apr. 22, 1998) available at <http://www.worldtradelaw.net/reports/wtopanels/japan-film%28panel%29.pdf>
- *United States - Anti-Dumping Act of 1916 - Complaint by the European Communities*, WT/DS136/R, 2000, adopted as upheld by Appellate Body 26 September 2000 available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_settlement\\_cbt\\_e/als1p1\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/als1p1_e.htm)
- *EC- Asbestos*, WT/DS135/AB/R (March. 12, 2001) available at [http://www.worldtradelaw.net/reports/wtoab/ec-asbestos\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/ec-asbestos(ab).pdf)
- *Mexico – Measures affecting Telecommunications Services* WT/DS204/R (April 2, 2004) available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/204r\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/204r_e.pdf)
- *Canada- Measures relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R adopted as upheld by Appellate Body 30 August 2004 available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/276abr\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/276abr_e.pdf)

### Secondary Sources

#### Journals & Books

Abbott FM ‘Commentary: The international intellectual property order enters the 21<sup>st</sup> Century’ (1999) 29 *Vand. J. Translat’l L. Econ. L.* 471-479.

Alvarez JE ‘Symposium: The boundaries of the WTO’ (2002) 96 *Am. J. Int’l L.* 1-4.

Anderson RD & Holmes P ‘Competition policy and the future of the Multilateral Trading System’ (2002) 5 *J.Int Economic L.* 531-563.

Anderson RD & Jenny F ‘Current developments in competition policy in the World Trade Organization’ (2001) 16 *Fall Antitrust* 40-44.

Arhel P ‘Droit International de concurrence, s’orientent-on vers des négociations?’ (1999) 425 *Revue du marché commun* 84-92.

Bradford A ‘International Antitrust negotiations and the false hope of the WTO’ (2007) 48 *Harv. Int’l L.J.* 383-438.

Bradford A ‘When the WTO works, and How it fails’ (2010-2011) 51 *Va. J. Int’l L.* 1-46.

Bronckers M ‘Trade and Competition Interlinkages: The case of Telecom’ contribution for *Fondazione EE Mattei Trade and Competition in the WTO and beyond* (1998) 1-15.

Budzinski O 'The International Competition Network; Prospect and Limits on the road towards international competition governance' (2004) 8 *Competition & Chance* 223-242.

Budzinski O 'International antitrust institutions' (2012) 17 *Illmenau Economics Discussion Papers* 1-29.

Clarke J & Evenett SJ 'A multilateral framework for competition policy' in SJ Evenett & State Secretariat of Economic Affairs Switzerland (Eds.) *The Singapore issues and the World Trading System: The road to Cancun and beyond* (2003) Bern Switzerland 77-168

also available at

[http://www.google.co.za/url?sa=t&rct=j&q=j%20clarke%20%26%20sj%20evenett%20%E2%80%98a%20multilateral%20framework%20for%20competition%20policy%20%E2%80%99%20in%20sj%20evenett%20%26%20state%20secretariat%20of%20economic%20affairs%20switzerland%20\(eds.\)%20the%20singapore%20issues%20and%20the%20world%20trading%20system%3A%20the%20road%20to%20cancun%20and%20beyond%20\(2003\)%20&source=web&cd=1&cad=rja&ved=0CC0QFjAA&url=http%3A%2F%2Fwww.alexandria.unisg.ch%2Fexport%2FDL%2FSimon\\_Evenett%2F22339.pdf&ei=Qh4NUe74K4jNhAePioGgBQ&usg=AFQjCNEI9vGfoE3Mf4RX3dU84gmQVNuYMw&bvm=bv.41867550,d.ZG4](http://www.google.co.za/url?sa=t&rct=j&q=j%20clarke%20%26%20sj%20evenett%20%E2%80%98a%20multilateral%20framework%20for%20competition%20policy%20%E2%80%99%20in%20sj%20evenett%20%26%20state%20secretariat%20of%20economic%20affairs%20switzerland%20(eds.)%20the%20singapore%20issues%20and%20the%20world%20trading%20system%3A%20the%20road%20to%20cancun%20and%20beyond%20(2003)%20&source=web&cd=1&cad=rja&ved=0CC0QFjAA&url=http%3A%2F%2Fwww.alexandria.unisg.ch%2Fexport%2FDL%2FSimon_Evenett%2F22339.pdf&ei=Qh4NUe74K4jNhAePioGgBQ&usg=AFQjCNEI9vGfoE3Mf4RX3dU84gmQVNuYMw&bvm=bv.41867550,d.ZG4) 1-98.

Do KT 'The perspectives of International cooperation in Competition law and policy' 2009 *Zeitschrift für Wettbewerbsrecht Journal of Competition law* 289-314.

Do KT 'Competition Law and Policy and economic development in developing countries' (2011) 8 *Manchester J. Int'l Econ. L.* 18-35.

Dumez H & Jeumaître A 'The convergence of competition policies in Europe: Internal dynamic and external implications' in S Berger & R Dore (Eds.) *National diversity and Global capitalism* (1996) Ithaca: Cornell University Press, New York p. 400.

Ehlermann HC & Ehring L 'WTO dispute settlement and competition law: Views from the perspective of the Appellate Body's experience' (2002) 26 *Fordham Int'l J.* 1505-1561.

First H 'The Vitamins Case: Cartel prosecutions and the Coming of international competition law' (2001) 68 *antitrust L.J.* 711-734.

Fox EM 'Trade Competition and Intellectual Property – TRIPS and its antitrust counterparts' (1996) 29 *Vand. J. Transnat'l L.* 481-505.

Fox EM 'Toward world Antitrust and Market Access' (1997) 91 *Am. J. Int'l L.* 1-25.

Fox EM 'Competition Law and the Millennium Round' (1999) 2 *J. Int'l Econ. L.* 665-679.

Fox EM 'Global Markets, National Law, and the regulation of business: A view from the Top' (2001) 75 *St. John's L. Rev.* 383-400.

Fox EM 'International antitrust and the Doha Dome' (2002-2003) 43 *Va. J. Int'l* 911-932.

Fox EM 'We protect competition, You protect Competitors' (2003) 26 *World Competition* 149-165.

Fox EM 'The WTO's first antitrust case – Mexican Telecom: A sleeping victory for trade and competition' (2006) 9 *Journal of International Economic Law* 271-292.

Fox EM 'Competition Law' in JH Jackson (Ed.) *International Economic Law series* Oxford University Press Oxford (2008) 417-464.

Fox EM 'Linked-In: Antitrust and the Virtues of a Virtual Network' (2009) 43 *Int'l L.* 151-174.

Fox EM 'Competition, Development and Regional Integration: In search of a competition law fit for developing countries' 2012 *Law & Economic Research Paper Series No.11-04* (1)-24.

Gerber DJ 'Competition Law and the WTO: Rethinking the relationship' (2007) 10(3) *J. Int'l Econ. L.* 707-724.

Goswami R '*Harmonization of Competition law by the contracting parties of the World Trade Organisation*' (2012) LLM Dissertation, National Law University Jodhpur 1-23 available at SSRN: <http://ssrn.com/abstract=2046829> or <http://dx.doi.org/10.2139/ssrn.2046829>.

Guzman AT 'International antitrust and the WTO: The lesson from intellectual property' (2002-2003) 43 *Va.J. Int'l L.* 933-957.

Guzman A *The case for International Antitrust* (2003) Boalt Working Papers in Public Law, UC Berkeley 1-44.

Hufbauer G & Kim J 'International competition policy and the WTO' (2009) 54 *Antitrust Bull.* 327-335.

Hoekman B & Holmes P 'Competition policy, Developing countries and the WTO' (1999) 22 *The World Economy* 875-893.

Hollman HM & Kovacic WE 'The International Competition Network: Its past, current and future role' (2011) 20 *Minn. J. Int'l L.* 274-323.

Jackson JH *The jurisprudence of GATT&WTO Insights on treaty law and economic relation* (2002) Cambridge University Press Cambridge p. 512.

Jackson JH 'Afterword: The linkage problem –Comments on Five Texts' (2002) 96 *Am. J. Int'l L.* 118-125.

Janow ME 'Observations on TWO Multilateral Venues: the International Competition Network (ICN) and the WTO' (2002) *Working Draft: prepared for the*

*Fordham Corporate Law Institute Twenty-Ninth Annual Conference on International Antitrust Law and Policy October 31 and November 1 2002* (1)-18 available at <http://www.columbia.edu/~mj60/PDF/janow.fordham.pdf>.

Jenny 'International cooperation on Competition: Myth, Reality and Perspective' (2003) 48 *Antitrust Bull.* 973-1004.

Khemani RS 'Competition Policy and Promotion of Investment, Economic Growth and poverty alleviation in least developed countries' *FIAS Occasional Papers No. 19* (1)-47 available at [http://www.ifc.org/ifcext/fias.nsf/Content/FIAS\\_OccasionalPapers](http://www.ifc.org/ifcext/fias.nsf/Content/FIAS_OccasionalPapers).

Klein JI 'Anticipating the Millennium: International Antitrust enforcement at the end of the twentieth century' in B. Hawk (Ed.) *Annual proceedings of the Fordham Corporate Law Institute: international antitrust Law and practice* (1998-1999) Juris Publishing Inc New York 1-16 also available at also available at [http://www.jurispub.com/cart.php?m=product\\_detail&p=10083](http://www.jurispub.com/cart.php?m=product_detail&p=10083).

Koul AK *Guide to the WTO and GATT: Economics, Law and Politics* (2005) Kluwer Law International The Hague p. 630.

Lee H 'Influencing a global agenda: Implications of the modernization of European Competition law for the WTO' (2004) 1 *Erasmus Law and Economics Review* 111-141.

Leebron DW 'The boundaries of the WTO: Linkages' (2002) 96 *Am. J. Int'l L.* 5-27.

Lewis D 'Chilling Competition' in B Hawk (Ed.) *2008 Fordham Comp. L. Inst.* (2009) Chapter 17

Lloyd JP 'Multilateral rules for International competition law?' (1998) 21 *The World Economy* 1129 – 1149.

Malaguti MC 'Restrictive business practices in International trade and the role of the World Trade Organization' (1998) 32 *J. World Trade* 117-152.

Marsden P 'Competition policy at the WTO: Not the end, but the end of the beginning' 2002 *Competition Law Insight* 6-8.

Marsden P 'Trade and Competition – WTO decides First Competition Case – With Disappointing results' (2004) 16 *competition Law Insight* 3-9.

Martin M 'The creation of a global competition regime. Where exactly do the obstacles lie – Practical co-operation or ideological differences?' (2008) 7 *Rich. J. Global L. & Bus.* 297-297.

Mertus J 'Considering Non state Actors in the New Millennium: Toward Expanded participation in norm generation and norm application' (2000) 32 *N.Y.U.J Int'l L. & Pol.* 537-566.

Maskus KE & Lahouel M 'Competition policy and intellectual property rights in developing countries' (2000) 23 *The World Economy* 595-611.

Matsushita M 'Basic Principles of the WTO and the role of Competition policy' (2004) 3 *Wash. U. Global Stud. L. Rev.* 363-385.

Metha SP & Nayak N 'Global Problems need global solutions: The need for a multilateral framework on competition' in Bellman C & Melendez-Ortiz R & Rodriguez Mendoza M (Eds.) *The future and the WTO: Confronting the challenges – A collection of short essays - ICTSD Programme on Global economic policy and institutions* (2012) 156-161.

Nambiar S 'A multilateral competition framework in the WTO: A developing country perspective' (2002) *Malay. Inst of Econ. Res.* 1-36.

Nguyen TT & Lidgard HH 'WTO Competition law revisited: From TRIPS flexibilities and Singapore issues to the WTO agenda of a post-Doha round' 2009 *Legal Studies Research Paper 2009:51*, Lund university 1-24 Electronic copy available at: <http://ssrn.com/abstract=1455366>.

Noonan C *The emerging principles of international competition law* (2008) Oxford University Press Oxford p.639.

Paemen H 'Trade and competition in the transatlantic area' (1998) 21 *Fordham Int'l J.* 637-649.

Pai YA 'The international dimension of proprietary technical standards: Through the lens of trade, competition law and developing countries' (2012) *Society of International Economic Law Working paper no. 2012/40* (1)-64 available at <http://www.ssrn.com/link/SIEL-2012-Singapore-Conference.html>.

Piilola A 'Assessing theories of Global Governance: A case study of International Antitrust Regulation' (2003) 39 *Stan J. Int'l L.* 207-252.

Reichman JH 'From freeriders to fair followers: Global competition under the TRIPS agreement' (1997) 29 *N.Y.U J. Int'l & Pol.* 11-93.

Roessler F 'Should Principles of Competition Policy be incorporated into WTO Law through Nonviolation Complaints?' (1999) 2 *J. Int. Econ. Law* 413-421.

Roessler F & Gappah P 'A Re-appraisal of non-violation complaints under the WTO dispute settlement procedures' in PFJ Marcroly & AE Appleton, MG Plummer (Eds.) *The World Trade Organization: Legal, Economic and Political Analysis* (2005) Springer New York 1372-1387.

Rodriguez AE & Williams MD 'The effectiveness of proposed anti-trust programs for developing countries' (1994) 19 *North Carolina Journal of International Law and Commercial Regulation* 209 at 209-232.

- Rosenthal R 'United States V Mexico: The first Telecommunications Challenge Confronting the World Trade Organization' (2001-2002) 10 *CommLaw Conspectus* 315-336.
- Sherma L 'Wildly enthusiastic" about the First Multilateral Agreement on Trade I Telecommunications Services' (1998) 51 *Fed. Comm.L.J.* 61 at 61-110.
- Sheth MM 'Formulating antitrust policy in emerging economies' (1997) 86 *Georgetown Law Journal* 451-477.
- Singh A 'Competition policy, development and developing countries' 1999 *South Centre T.R.A.D.E Working papers No. 50* (1)-21.
- Smitherman CW 'Future of global competition governance: Lessons from the transatlantic' (2004) 19 *Am. U. Int'l L. Rev.* 796-882.
- Sokol D 'Monopolists without borders: The institutional challenge of international antitrust in a gilded age' (2007) 4 *Berkely bus. L.J.* 37-122.
- Sokol D 'Order without (Enforceable) Law: Why countries enter into non-enforceable competition policy chapters in free trade agreements' (2008) 83 *Chi. Kent L. Rev.* 231-292.
- Spitzer *The non violation complaint in the WTO law* (2004) Tenea Berlin p. 136.
- Steinberg RH 'In the shadow of law or power? Consensus-Based Bargaining and outcomes in the GATT/WTO' (2002) 56 *Int'l Org.* 339-374.
- Stewart T 'The fate of competition policy in Cancun: Politics or Substance?' (2004) 31 *Legal Issues Econ. Integration* 7-11.
- Stiglitz J 'Globalisation and its discontents' (2003) 32 *Economic Notes* 123-142.
- Sweeney B 'Globalisation of competition law and policy: some aspects of the interface between trade and competition' (2004) 5 *Melb. J. Int'l L.* 375-433.
- Sweeney B 'Global competition: Searching for a rational basis for global competition rules' (2008) 30 *Sydney L. Rev.* 209-244.
- Sweeney B. 'International competition law and policy: A work in progress' (2009) 10 *Melb. J. Int'L.* 58-69.
- Tarullo DK 'Competition Policy for global markets' (1999) 2 *J. Int'l Econ. L.* 445-456.
- Tarullo DK 'Norms and Institutions in global Competition Policy' (2000) 94 *Am. J. Int'l L.* 478 – 504.
- Verdier PH 'Transnational Regulatory networks and their limits' (2009) 34 *Yale J. Int'l L.* 113-172.

Weiss F 'From World Trade law to World Competition Law' (1999-2000) 23 *Fordham Int'l L.J.* 250-273.

Wolff A 'The (notionally) bridgeable chasm between Antitrust and Trade policy' (2003) 47 *New York Law School Law Review* 167-190.

Wood DP 'The Trade effects of domestic antitrust enforcement' in Bhandari JS & Sykes AO (Eds.) *Economic dimensions in International Law: Comparative and Empirical Perspectives* Cambridge University Press Cambridge (1997) 513-525.

Yu PK 'The objectives and principles of the TRIPS agreement' (2009) 46 *Hous. L. Rev.* 979-1046.

### Speeches

Laffont J 'Competition, Information, and development' (1998) *Annual World Bank Conference on development economics World Bank Washington D.C.* available at <http://www.cenet.org.cn/download/16075-1.pdf>.

Klein JI 'A note of caution with respect to a WTO agenda on competition policy' *Remarks before the Royal Institute of International affairs Chatham House London* (Nov. 18 1996) available at [www.usdoj.gov/atr/public/speeches/3727.htm](http://www.usdoj.gov/atr/public/speeches/3727.htm)

Janow ME 'Observations on TWO Multilateral Venues: the International Competition Network (ICN) and the WTO' (2002) *Working Draft: prepared for the Fordham Corporate Law Institute Twenty-Ninth Annual Conference on International Antitrust Law and Policy October 31 abd* (Nov. 1, 2002) available at <http://www.columbia.edu/~mj60/PDF/janow.fordham.pdf>

Melamed AD Principal Deputy Assistant attorney Gen., Antitrust Div., U.S. Deputy of Justice 'Antitrust enforcement in a Global Economy' *at the Fordham corporate Law Institute 25<sup>th</sup> annual conference on International Antitrust Law and Policy* (Oct. 22, 1998) available at <http://www.usdoj.gov/atr/public/speeches/2043.pdf>

Schaub A 'The Global competition Forum: How it should be organised and operated' *at European Policy Centre Brussels* (March 14, 2001) available at [http://ec.europa.eu/competition/speeches/text/sp2001\\_003\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2001_003_en.pdf).

Monti M 'European commentator for Competition Policy, A global Competition policy?' *Address at the European Competition Day Conference* (Sept. 17, 2002), available at [http://europa.eu/rapid/press-release\\_SPEECH-02-399\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-02-399_en.htm).

Hewitt RP 'The DOJ International Antitrust Program - Maintaining Momentum' *at the American Bar Association, Section of Antitrust Law, Forum on International Competition Law New York* (Feb. 6, 2003) available at [www.justice.gov/atr/public/speeches/200736.htm](http://www.justice.gov/atr/public/speeches/200736.htm) - United States