International Competition Policy and the WTO: Future Pathways

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Abstract

The process of globalization is changing the world's economic structure as economic borders between countries are being diminished in favour of the creation of a new global market. It seems though that, at least at some fields, this process lacks international thinking. Competition regulation is an example of a field in which international thinking is currently lacking.

This paper focuses on the deficiencies that the lack of competition policy creates for international trade, and the obstacles to the acceptance of a competition policy. This paper also examines structural and legislative issues with regard to international competition policy.

In this paper, the author aspires to provide a pragmatic breakthrough for this deadlocked situation. Thus several suggestions are proposed on both the legislative and the judicial levels.

Résumé

Le phénomène de la globalisation occasionne une transformation de la structure économique mondiale en cette ère où les frontières entre les pays sont abolies en faveur de la création d'un nouveau marché global. Il semble cependant, a tout le moins sous certains aspects, que ce processus souffre d'un manque de réflexion à l'échelle internationale. L'encadrement légal de la concurrence constitue l'un de ces aspects.

Cette thèse s'intéresse aux carences que l'absence d'une politique de réglementation de la concurrence occasionne sur le marché international ainsi qu'aux obstacles à franchir pour la mise en place d'une telle réglementation. Les questions structurelles et législatives à l'égard de la politique de concurrence internationale seront également étudiées. L'auteur aspire à fournir une solution pragmatique à cette impasse. Aussi, plusieurs solutions seront proposées aussi bien sur le plan législatif que sur le plan judiciaire.

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International Competition Policy and the WTO: Future Pathways

"Globalization is a fact of life. But I believe we have underestimated its fragility."
-Kofi Annan.

I. Introduction:

Today, we are living in a new global era; on the shelves of our local convenience stores we find food cans from Thailand, newspapers from Italy and alcohol form Finland. We drive Korean cars (which were assembled in Canada), and we drink 'fair-trade' Colombian coffee (because we feel responsible for the well-being of Colombian farmers). All of these products can easily be purchased through the World Wide Web, from the convenience of our homes, (almost) wherever they may be.

Most of what I just described can be attributed directly to the process of the opening of markets, or as part of what is often referred to as "globalization." Through trade negotiations, national governments are opening the gates to their local markets so that foreign producers may do business within their national borders. In return, local producers are allowed to act within foreign markets as well. The result of all of the above can be described in one word: change. The shape and the structure of markets are changing, the size of markets is changing, and the competition between producers is changing as well. Where once a producer had to compete mostly with other national producers, today it must compete with producers from all over the world, some of which are significantly bigger and stronger. It is no wonder, therefore, that some states are refusing to allow an "even playing field" to foreign producers within their domestic markets.[1]

[1] See online: Consumer Unity & Trust Society (CUTS International) <http://www.cuts-international.org/iwogda-backgrounder.htm>. [CUTS]

Producers' behaviour is changing, as well and phenomena such as international cartels for instance are now abundant in international markets. Unfortunately, the main target of these cartels is often Developing Countries (DCs).[2]

Just as markets and competition have changed and now offer a different dynamic, so too has the regulation of competition changed and moved away from its former dynamic. We are witnessing a globalization of competition laws: States and international organizations are trying to promote the idea of "international competition law" and cooperation between states on competition related issues. However, as discussed below, these efforts are not sufficient, and the international market is relatively unprotected. This situation affects international trade and trade liberalisation.

In this thesis, I examine the problems the lack of international policy and "international thinking" create for international trade. I evaluate the possibility of establishing an effective and coherent set of international competition laws under a WTO regime, and, further, evaluate other types of regulation as well. I examine the suitability of the WTO to oversee such a regime, and review possible future legal pathways which might be considered realistic in light of the current negotiation's climate.

As the problem seems to be wide in scope, I focuses only on the adverse effects that the lack of international policy regarding the regulation of competition creates for international trade in terms of market access and free flow of trade from one WTO member state to another.

I have based my research and analysis on several key assumptions, the validity of which will not be questioned in this paper due to scope and space restrictions.

First, I do not question the virtues of competition law. Thus, it is assumed that competition policy contributes to the development of economies, the maximization of

[2] Levenstein, Margaret and Valerie Y Suslow. "Contemporary International Cartels and Developing Countries: Economic effects and implications for Competition Policy" (2004) 71(3) Antitrust Law Journal 801 [Levenstein and Suslow] at 803.

wealth and efficiency, and generally to the welfare of states within the international trading system.

Secondly, I do not question the virtues of international trade. I thus assume that international trade promotes development, maximizes wealth and efficiency, alleviates poverty, and generally serves as a positive factor domestically and internationally.

Thirdly, I do not question that a global market does indeed exist - quite a reasonable assumption regarding the latest economic crisis. This assumption is important to my argument regarding the necessity of international regulation.

Overall, I believe there is ample room for academic debate on the topic of international competition policy, especially as this topic currently seems to be in a deadlock. It is my hope that this paper will contribute to the evolution of thought and debate surrounding this issue, and that the few lessons I have learned will be the base for further research.

Chapter II of this paper provides an overview of the current situation. It presents an historical background, and reviews the inefficiencies the lack of international competition policy leads to.

Chapter III examines institutional aspects. It scrutinizes the WTO institutional framework, and provides an overview of the reasons in favour and against the application of international competition policy under the WTO framework.

Chapter IV provides an overview and a critical examination of the different types of legislation that may regulate this field.

Chapter V of this thesis offers future possible pathways. Based on the conclusions of the first three chapters, chapter V provides several conclusions and future trails the international community should consider regarding the current situation.

II. The interaction between international competition law and trade liberalization

This chapter explains the current relationship between international competition law and trade liberalization, as well as the many problematic aspects of this relationship. The chapter opens with a brief background review of past attempts to achieve international competition policy.[3] It then reviews the inefficiencies created by the lack of international competition policy and the justifications for the implementation of this policy.

a. Historical background

Efforts to achieve some sort of a globalized competition regime have been made since the late 1940s, with the drafting of the Havana Charter for an International Trade Organization ("The Havana Charter").[4] The Havana Charter stated that countries should "take appropriate measures" and cooperate to prevent restrictive business practices, which might be harmful for international trade.[5] However, the Havana Charter was not enacted by the international community at the time and thus its importance remains theoretical. In the 1960s, the GATT members selected a group of experts to re-evaluate the Havana Charter. However, The Group concluded though that any efforts towards achieving a multilateral agreement may be infertile as consensus on the matter does not exist. Further, the GATT group noted that this was an area of law in which many states lacked the practical experience necessary to apply such an international instrument.[6]

In the years after the GATT group made its determinations, the Organisation for Economic Co-operation and Development ("OECD") and the United Nations ("UN") attempted to advance this topic as well, but only succeeded in passing non-binding recommendations.[7]

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[3] See for a complete and detailed history of the events at Marsden, *infra* note 6 at 45-66.

[4] *United Nations Conference on Trade and Employment, Havana Cuba,* 24 March 1948, ICITO/1/4 never entered into force. online: WTO <http://www.wto.org/english/docs_e/legal_e/havana_e.pdf> [The Havana Charter].

[5] See at the Havana Charter, *Ibid.* Chapter V.

[6] Philip Marsden, *A Competition Policy for the WTO* (London: Cameron May, 2003) [Marsden],at 50.

[7] OECD, *Recommendations & Best Practices, Revised recommendation of the Council Concerning Cooperation between Member countries on Anticompetitive Practices affecting International Trade1995* (including Appendix: Guiding principles for notifications, exchange of information, co-operation in investigations and proceedings, consultations and conciliation of anticompetitive practices affecting international trade), (Paris: OECD 1998). Online: OECD

At the 1996 WTO Ministerial Conference in Singapore, the WTO working group on the interaction between trade and competition policy ("the WTO working group") was established.[8] The Working Group has issued numerous reports over the years, and its work has laid an important foundation for many academic studies.[9] At the 2003 WTO Cancun Ministerial Conference ("Cancun conference"), the topic of competition policy was rejected by several Member States along with the other "Singapore issues." Below, I will elaborate at length on the events that led to this decision.

July 2004 seems to be the official burial date of the topic, at least in terms of attempts to achieving an international set of rules under the WTO framework. In Article 1(g) of the decision adopted by the General Council (better known as the "July package" or the "July decision"),[10] it was decided that "no work towards negotiations on any of these issues will take place within the WTO during the Doha Round". [11]

b. Justification for international framework

In this part, I explain why the current international competition law regulatory regime should be revised, and why the WTO should be involved in this revision. In order to do so, I offer two classes of justification. The first class of justifications can be described as "classical-competition" justifications. The second class of justifications concentrates on

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< http://www.oecd.org/dataoecd/60/42/21570317.pdf>. [OECD recommendations];, United Nations Conference on Trade and Development, *The United Nations set of Principles and rules on competition*, UNCTAD UN Doc. TD/RBP/CONF/10/Rev.2, (adopted as a Recommendation to States in GA Resolution 35/63 , (1980)) online: UNCTAD < http://www.unctad.org/en/docs/tdrbpconf10r2.en.pdf>. [The United Nations set of Principles and rules]

[8] WTO, *Singapore WTO Ministerial 1996: Ministerial Declaration*, WTO Doc. WT/MIN(96)DEC, Adopted on 13 December 1996. Online: WTO <http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm>. [The Singapore Declaration], at paragraph 20.

[9] See online: WTO <http://www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm>.

[10] WTO, *Doha Work Programme: Decision Adopted by the General Council on 1 August 2004*, WT/L/579, August 2004, online: WTO <http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm> ["The July Decision" or "The July Package"].

[11] "The issues" are trade and investment, competition policy, and transparency in government procurement, all together known as the "Singapore issues", see online: WTO <http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm>

the rights and obligations acquired by WTO Member States through trade negotiations and other commitments made by the international community.

b(i) First class of justifications: a market without regulation.

The first type of justifications for the WTO's involvement with international competition law concentrates on the practical-classical competition justifications, or put another way, the general reasons we need competition law at all.

International disciplines for international problems

The world's economy has greatly changed in the past few decades, and the policies that regulate it have changed as well. Indeed, as is mentioned in the WTO Accra Accord of 2008:[12]

> "The increasing interdependence of national economies in a globalizing world and the emergence of rules-based regimes for international economic relations have meant that the space for national economic policy, that is, the scope for domestic policies, especially in the areas of trade, investment and industrial development, is now often framed by international disciplines, commitments and global market considerations."

From this viewpoint, a global competition policy should have been developed as part of the evolving international disciplines that regulate this new global market. Nevertheless, as discussed below, this suggestion was never acted upon.

There are many justifications for the development of a common international competition policy and/or regulatory regime. The first justification is protective in nature. As a general rule, consumers and producers must be protected from anti-competitive conduct which results in economic inefficiencies. The global market is as susceptible as any other market to anti-competitive behaviour, and thus needs to be protected in the same way that a domestic market needs protection. The WTO's working group has issued several reports on this problem, in which it reviewed the types of anti-competitive behaviour

[12] UNCTAD, *Accra Accord,* UN UNCTAD Doc. UNCTAD/IAOS/2008/2. Adopted on 25 April 2008. online: UNCTAD <http://www.unctad.org/en/docs//iaos20082_en.pdf> [Accra Accord] at paragraph 5.

which may endanger the global market.[13] The OECD[14] and the UN[15] issued reports on the subject as well.

The WTO's elimination of trade barriers between countries has created a new economic structure. The global economy is no longer built of many small, autonomous economies working independently, but rather is advancing towards a more harmonized structure,[16] which allows companies to compete simultaneously in numerous geographic markets. While most national economies have their own system of competition law to protect their domestic markets from damaging anti-competitive practices, the newly emerging global economy is left unprotected against anti-competitive behaviour (some would say even in "anarchy"[17]), as no set of binding competition laws has ever been created for it.

The result of this situation is the existence of anti competitive practices which harm both international and national markets.[18] A common example of these anti-competitive practices is the existence of international cartels,[19] which divide control over geographic areas between themselves so as to avoid competition[20] and thus fix prices and reduce

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[13] See for example WTO, *Working Group on the Interaction between Trade and Competition Policy - Report on the Meeting of 11-13 March 1998 - Note by the Secretariat.* WTO Doc. WT/WGTCP/M/4 (1998), online: WTO <http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDocuments/t/WT/WGTCP/M4.DOC> [M/4] at para 21.

[14] OECD, *Hard Core Cartels: Third report on the implementation of the 1998 Council Recommendation* (Paris: OECD 2005) online: OECD <http://www.oecd.org/dataoecd/58/1/35863307.pdf >. [oecd report]

[15] The United Nations set of Principles and rules, *supra* note 7.

[16] WTO, *Working Group on the Interaction between Trade and Competition Policy, "The Fundamental principles of Competition Law"*, WTO Doc. WT/WGTCP/W/127, (1999). online: WTO <http://www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm> [W/127] at 10, See also WTO DSB panel analyse in *EC – Export Subsidies on Sugar (Complaint by Australia) (2004)* WT/DS265/R (panel report), WTO online: WTO < http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds265_e.htm> .

[17] Noonan, Chris. *The Emerging Principles of International Competition Law* (New York: Oxford University Press 2008) [Noonan] at 21.

[18] WTO, *Report of the Working Group on the Interaction Between Trade and Competition Policy to the General Council*, WTO Doc. WT/WGTCP/2, (1998) at 28. online: WTO <http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDocuments/t/WT/WGTCP/2.DOC>. [WT/WGTCP/2]

[19] Evenett, Simon. J., Levenstein, Margaret, and Valerie Y Suslow. "International Cartel Enforcement: Lessons from the 1990s" (2001) 24 World Economy, 1221. [Evenett Levenstein & Suslow] at 1222.

[20] Margaret Levenstein and Valerie Y. Suslow, "Contemporary International Cartels and Developing Countries: Economic effects and implications for Competition Policy" (2004) 71(3) Antitrust Law Journal 801 [Levenstein & Suslow] at 802.

productivity[21] (these cartels are commonly referred to as "hardcore cartels"). Evenett Levenstein and Suslow explain how the international market can be an ideal environment for such anti-competitive conduct[22] because territories are easy to divide between cartel members (through the use of national borders) and other competitors' activities are easy to monitor (for example through published trade and customs data). The fact that international cooperation is needed for the enforcement of these cartels makes their activity relatively easy as well.[23] Indeed, the United Nations has promulgated a set of Principles and Rules which warn of international cartels.[24]

The domestic policies' deficits

It is true that domestic authorities have been vigorous in seeking out and punishing the activities of international cartels. International cartels were fined the cumulative sum of 45 billion American dollars,[25] and, as the OECD has reported, international co-operation between domestic authorities in the investigation and prosecution of cartel activities has reached "unprecedented levels".[26] But, regardless of national activities, domestic authorities are not suited to deal with this conduct, both because of its international nature (which requires cross-border investigations)[27] and because of domestic policy limitations. Domestic policies are usually aimed at the protection of domestic markets' interests alone,[28] even on account of foreign markets' interests.[29] Andrew Guzman has written that:

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[21] Evenett Levenstein & Suslow have divided those into three main groups: 1. international Hard-core cartels which are made of producers from at least two different states, who divide international markets between themselves so as to avoid competition and fix prices. 2. Private export cartels. These cartels are made of exporters who act together in order to fix the price of their exportation. 3. state-run export cartels. See in Evenett Levenstein & Suslow, *supra* note 19 at 1222, see also at OECD, *Glossary of Industrial Organisation Economics and Competition Law* (Paris: OECD 2002) online: OECD <http://www.oecd.org/dataoecd/8/61/2376087.pdf>.

[22] Evenett Levenstein & Suslow, *supra* note 19 at 1223-1224.

[23] Drexl, Josef. "International Competition Policy after Cancún: Placing a Singapore issue on the WTO Development Agenda, (2004) 27 (3) World Competition 419 at 430.

[24] The United Nations set of Principles and rules, *supra* note 7 at 8.

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

[26] Oecd report, *supra* note 14 at 29-31.

[27] Drexl, *supra* note 23 at 430-431.

[28] Evenett Levenstein & Suslow, *supra* note 19 at 1221-1222, see also in Paul B. Stephen, "Against International Cooperation" in Epstein and Greve, *infra* note 110 [Stephen] at 69-70.

> "The procedural cooperation that is in place does not evidence a move toward a more international conception of antitrust. It simply represents the adaptation of domestic enforcement agencies to new international challenges. […]"[30] "[…] it is only necessary to assume that governments and regulators favour their own constituents over foreigners, a reasonable assumption that is present in virtually any model of country behaviour. A government that promotes local interests (whether those of the public or the policymakers) seeks to capture the maximum possible benefits for local while externalizing as many costs as possible onto foreigners. […]" [31]

A good example of when domestic policies may be aimed at protecting domestic markets on account of the global market (or other domestic markets) is in the case of mergers. Mergers may hinder competition in the international market (as discussed below), but they may also benefit the country which will host the activity of the merged entity, for example in term of jobs and the generation of additional tax revenues.[32] The same maxim may also apply to monopolies and cartels, which may benefit the hosting state while damaging the international market.[33] Thus, the incentives for the hosting state to prosecute or disrupt the activities of the cartel are lessened by the actual and potential benefits which the state receives from the cartel's activities.

Another more specific example of how domestic policies are aimed at protecting domestic interests alone is the regulation of export cartel activities,[34] which are legal under many domestic competition law regimes.[35] These cartels are beneficial to local producers although they create negative market experiences abroad.[36] Thus, no single state is motivated to prohibit these activities, at least not without a global, binding agreement to do so.

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[29] Such is the case of export cartels which aren't usually prohibited by national laws. Another case which is being mentioned by Prof. Drexl are mergers which may hinder competition in the international market, but may benefit their hosting country. See in Drexl, *supra* note 23 at 431.
[30] Guzman, Andrew T. "Antitrust and International Regulatory Federalism", (2001) 76 N.Y.U.L. Rev. 1142 [Guzman, "International Regulatory"] at 1146.
[31] Guzman, "International Regulatory", *Ibid.* at 1152.
[32] Drexl, *supra* note 23 at 431.
[33] Stephen, *supra* note 28 at 70-71.
[34] Export cartels are cartels which are made of exporters who act together in order to fix the price of their exportation, See in Evenett Levenstein & Suslow, *supra* note 19 at 1222
[35] See in Evenett Levenstein & Suslow, *Ibid.* at 1230.
[36] Sweeney, Brendan. "Export Cartels: Is there a need for Global Rules?" (2007) 10 (1) Journal of International Economic Law 87 [Sweeney] at 87.

Indeed, domestic anti-cartel sanctions have been described as impractical and non-deterring,[37] and, as Eleanor Fox mentions, when it comes to enforcement, there are problems of information and discovery as well:[38] In these cases, documents can be kept in states 'A' and 'B', the scheme can be made in a states 'C' and 'D', and the plotters may reside in states 'E', 'F' and 'G'.[39] While it is true that some problems with regards to information and discovery can be resolved by co-operation agreements,[40] these agreements do not usually involve developing countries ("DCs"),[41] and even if they do, many DCs do not have competition authorities to work with in the first place.

Guzman mentions another example, the case of small and open economies,[42] which typically export most of their products to foreign markets. These countries have little incentive to adopt competition laws at all, since local producers are not competing in the local market, but rather outside of the nation's border. In other words, the negative ramifications of anti-competitive activities occur in other markets.

Another example of this anti-competitive conduct is the case of import cartels which are formed by importers that have the ability to cooperate in anti-competitive conduct such as importation quotas and price fixing.[43]

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[37] Connor, *supra* note 25 at 575-576.
[38] Eleanor M. Fox, "International Antitrust and the Doha Dome" (2003) 43 Virginia Journal of International Law 911 [Fox, "international Antitrust"] at 927, see also at Guzman, "International Regulatory", *supra* note 30 at 1146, and International Competition Network, Cartels Working Group, *Report to the ICN Annual Conference: Co-operation Between Competition Agencies in Cartel Investigations* (Moscow: ICN, 2007) online: ICN <http://www.internationalcompetitionnetwork.org/media/library/conference_6th_moscow_2007/19ReportonCo-operationbetweencompetitionagenciesincartelinvestigations.pdf> [ICN Report on Co-operation] at 5.
[39] Guzman, "International Regulatory", *supra* note 30 at 1144.
[40] See for instance, article III of the U.S – E.U Agreement, *Agreement between the Government of the United States and the Commission of the European Communities regarding the application of their competition laws*, United states and the European Union, 23 September 1991, O. J. L.95/47 online: European Commission (Trade and Competition) <http://ec.europa.eu/competition/international/bilateral/us_agreement_1995_en.pdf>. [U.S – E.U Agreement].
[41] Fox, "international Antitrust", *supra* note 38 At 927.
[42] Guzman, "International Regulatory", *supra* note 30 at 1153.
[43] Mitsou Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, 2ed. *The world Trade Organization, Law, Practice and Policy* (New York: Oxford University Press, 2006) [Matsushita Schoenbaum and Mavroidis] at 855.

The example of mergers has been raised above to demonstrate why local policy makers may lack interest in enforcing competition laws, but this example is also relevant to demonstrate international enforcement deficits, such as for example, a company that merges with a foreign competitor, and thus eliminates competition in the global market, or in its own domestic market through the elimination of importation.[44]

This conduct is indeed being investigated and prosecuted by some domestic authorities, however, as mentioned before, the domestic authorities are not suited to deal with these situations.

International cartels and their effects on the developing world

This situation is even more troublesome because the targets of these international cartels are usually DCs' markets. This is so because DCs are often weak in terms of sufficient anti-competition legislation and enforcement.[45] Evenett describes the activity of the vitamins cartel as an example of such abuse. Consumers in South American countries with weak anti-cartel enforcement regimes were charged 38.1% more than South American consumers from countries with strong anti-trust regimes (and similar economies) by the vitamins cartel.[46]

Levenstein and Suslow have analysed data that derived from cases of international cartel prosecution.[47] International cartels have been operating in a variety of industries; the chemical, transportation, and minerals industries were the most commonly affected industries among the case examined.[48] The mean duration of an international cartel is

[44] Matsushita Schoenbaum and Mavroidis, *Ibid.* at 857.
[45] Levenstein and Suslow, *supra* note 2 at 803; see also United Nations Conference on Trade and Development, *Can Developing Economies Benefit from WTO Negotiations on Binding Disciplines for Hard Core Cartels?* UNCTAD UN Doc. UNCTAD/DITC/CLP/2003/3 (2003) online UNCTAD <http://www.unctad.org/Templates/Page.asp?intItemID=4150&lang=1> [UNCTAD report, can DC benefit?], at 10.
[46] UNCTAD report, can DC benefit?, *Ibid.* at 10.
[47] Cases which were successfully prosecuted by the U.S Department of Justice and the European Commission. See in Levenstein and Suslow, *supra* note 2 at 805-819.
[48] Levenstein and Suslow, *supra* note 2 at 806.

more than five years (although some have lasted more than twenty years),[49] and in 1997 alone, DCs imported the amazing sum of 51 billion dollars from industries which were influenced by international cartel activity.[50] Other sources report that the numbers in 1997 were significantly higher, around 81 billion dollars.[51] In Asia alone, it has been reported that from 1990 to 2007, sales affected by price fixing by international cartels amounted to 1.1 trillion dollars, of which at least 500 billion dollars were considered as losses for Asian consumers.[52] It is important to note that the real numbers are probably much higher than those reported above, since the reported figures represent only the effects of known cartels (i.e. cartels which were caught), and do not include damages caused by cartels which were not caught, as these are obviously not known.[53] Evenett reports a 20-40% drop in consumer prices after a cartel's illegal activity is stopped.[54]

The "New Economy" and international competition policy

Another reason why the global market should be regulated is that it is borderless in nature. This is true especially in light of the emergence of the so-called "New Economy"[55] (i.e. an economy that relies mainly on computers, telecommunications, satellites, and other means of technology), in which trade, production, and distribution are increasingly carried out through electronic channels. The "New Economy" phenomenon blurs geographic borders and thus, by its very nature, requires international regulation. The former Commissioner of the Canadian competition bureau, Sheridan Scott, stated on this aspect:[56]

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[49] Levenstein and Suslow, *Ibid* at 806.
[50] Levenstein and Suslow, *Ibid* at 813
[51] Qaqaya, Hassan & Lipimile, George (eds.), *The effects of anti-competitive business practices on developing countries and their development prospects* (New York: United Nations Conference on Trade and Development (UNCTAD), 2008) [Qaqaya & Lipimile] at v.
[52] Connor, *supra* note 25 at 575.
[53] Margaret Levenstein, Valerie Y. Suslow and Lynda Oswald, "International Price-Fixing Cartels and Developing Countries: A Discussion of Effects and Policy Remedies" NBER Working Paper Series, Working Paper 9511, Cambridge, Mass: National Bureau of Economic Research, online: NBER < http://www.nber.org/papers/w9511> [Levenstein Suslow and Oswald] at 29.
[54] UNCTAD report, can DC benefit? *supra* note 45 at 9.
[55]Cosmo graham and Fiona Smith, eds., *Competition, Regulation and the New Economy* (Portland Oragon, Hart Publishing 2004)].
[56] See opening remarks by Sheridan Scott at the 7th Annual ICN Conference in Kyoto, April 14th, 2008, available online: International Competition Network <http://www.internationalcompetitionnetwork.org/index.php/en/newsroom/2008/04/14/34>.

> "We work today in a dynamic economic environment, in which technology has altered the shape of our world. Due to the widespread availability of communications technology, the prevalence of global competitors, new developments in transportation technology and international commercial frameworks, the world is no longer characterized by isolated and distinct economies – it is flat."

An uneven playing field

It has also been argued that the lack of international competition law leads to "unfair" advantages in the global market.[57] According to this argument, the lack of binding international competition law leads to differences in domestic regulation, and thus an "uneven playing field" is created, where some companies are regulated by domestic competition law, while others operate under either light regulation or no regulation at all. Unsupervised firms benefit from the latter situation because they enjoy certain advantages over their "regulated" competitors. They are allowed for instance, to block certain parts of the global market to competition by establishing monopolies or cartels (there is no regulation to stop them from doing so), or by allowing other exclusionary practices (like predatory pricing). It is argued as well that this "unfair" advantage may result in retaliatory measures by "disadvantaged" nations who will not accept the continuance of this state of affairs.[58]

Furthermore, the lack of an international policy may create a "race to the bottom" problem, in which firms may prefer to be hosted by weakly regulated states (or even non-regulated states).[59] An American Bar Association ("ABA") Report dismisses the "race to the bottom" possibility though, as it argues that as a matter of fact the migration of firms from well regulated - competition wise - states to states with low standards of competition regulation does not occur.[60] The potential for this type of migration does exist, however, and a "race to the bottom" actually may happen in the future. Currently, DCs are fighting for investments and may be willing to "race to the bottom" if this

[57] Noonan, *supra* note 17 at 100.
[58] Noonan, *Ibid* at 100.
[59] American Bar Association, *Report of the ABA Sections of Antitrust Law and International Law and Practice on the Internationalization of Competition Law Rules: Coordination and Convergence* (2000), online: ABA <https://www.abanet.org/antitrust/at-comments/2000/reports/01-00/conv_rpt.pdf> [ABA Report] at 15.
[60] ABA Report, *Ibid.*

"bottom" will generate more domestic investments. This is the case in the domain of environmental laws for example. Moreover, DCs' are improving their infrastructural and other abilities to host international businesses, and commercial mobility is increasingly growing. Under these conditions, migration of firms may in the future become more abundant, and accordingly, the incentives host states are willing to offer will have to be more appealing.

DCs have expressed an interesting point of view concerning the matter of an "uneven playing field"[61] in international markets. It has been argued that allowing an "even playing field" for competitors from around the globe will lead to another type of "unfair" competition, one in which local DC firms will have to compete against international firms in the form of huge western multi-nationals. The possible result of this competition could be that the DCs' domestic markets are taken over by western multinationals, and accordingly, local industries are excluded from these markets (and thus, are completely "out of the game"). The following opinion has been expressed at the Third World Network web site:[62]

> "Policy-makers in major developed countries are advocating the introduction of a new agreement on competition policy in the World Trade Organisation so that their big corporations will be better able to take over a larger share of the markets of developing countries. Ironically, competition policy was originally understood as a means to help small companies not to be overwhelmed by the big firms. But it is now sought to be used by the rich countries to help their giant corporations compete with the local firms in the developing countries. "

Fox indeed mentions that:

> "the popular American conception – that antitrust law is a tool to produce efficiency through markets – is not necessarily a faithful description. In fact, antitrust (or competition law) is whatever legislators and judges of particular jurisdictions say it is."[63]

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[61] CUTS, *supra* note 1.
[62] Khor, Martin. "Developing countries resist WTO agreement on 'competition policy'" (1999), Online: Third World Network <http://www.twnside.org.sg/title/1889-cn.htm>. See description of similar opinion in Taimoon Stewart, "The Fate of Competition Policy in Cancun: Politics or Substance?" (2004) 31 L.I.E.I. 7 [Stewart], at 9.
[63] Fox, Eleanor M. "Antitrust and Regulatory Federalism: Races up, down, and sideways" (2000), 75 N.Y.U.L. Rev. 1781 [Fox "Races up, down, and sideways"] at 1782.

DCs therefore have the right to define their own objectives for competition law and to support this "uneven playing field" for the sake of protecting of their own domestic industries. Qaqaya & Lipimile affirm that at least in some cases, the objectives of DCs' domestic authorities are to protect local industry from foreign actors.[64]

Without rejecting the option of granting some exemptions for DCs in any future international competition agreement or regime, I believe two issues need to be noted. First, even if it is not the objective of some competition legislation, it is still widely accepted that competition law does enhance market efficiency. Thus, allowing competition may just as well benefit local producers and consumers; technology may improve; prices may be reduced; and DC's producers may even raise their production efficiency standards so as to be able to compete.

Second, these arguments clearly reveal a problematic agenda – competition law is being used as a non-tariff trade barrier for the entrance of foreign competitors. If the protection of local producers is really behind this argument, this objective should be achieved through transparent trade negotiations and not by the manipulation of trade law through competition law.

Inefficient markets

Another argument which may be included under this type of justification addresses the efficiency of markets. It is argued that competition law increases economic efficiency[65] and protects consumer welfare.[66] Yet, the global market currently operates without such regulation, and thus, according to this argument, is inefficient. The same is true with regard to domestic markets, where the WTO working group has reported specific cases in

[64] Qaqaya & Lipimile, *supra* note 51 at 596.
[65] WTO, Working *Group on the Interaction between Trade and Competition Policy*,**,** *Study on issues relating to a possible multilateral framework on Competition Policy*, WTO Doc.WT/WGTCP/W/228, (2003) at 12 , online: WTO <http://www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm> ["W/228"]. It has been empirically proven that competition rules reduce prices for consumers and increase employment rates, technology development and the quality of services given, and thus, more efficient. See in Qaqaya & Lipimile, *supra* note 51 at 7-9.
[66] Qaqaya & Lipimile, *supra* note 51 at 3-40.

which anti-competition activity has been suspected as hindering the potential profits of trade liberalization in states such as Argentina and Peru.[67] From this viewpoint, it can be argued that the lack of international competition laws hinders the objectives of the WTO.

Indeed, the objectives of the WTO have been defined in several documents and declarations, one of which is the General Agreement on Tariffs and Trade (GATT)[68] which define these objectives as:

> "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods "

Expanding production, increasing income and efficiency, and other objectives of the WTO can be achieved through the enhancement of competition in markets.[69] Thus, it can be argued that the promotion of international competition law is compatible with the objectives of the WTO. The former EC Competition Commissioner Karel van Miert stated on this matter:[70]

> "Time and time again over the last years and yet again on the recent occasion of the pre-insulated pipes cartel (…), again I have emphasised that the Commission shall continue its staunch fight against cartels, which are one of the most harmful restraints of trade. To this effect, it seemed necessary to me to create a new unit (…) charged exclusively with unveiling, pursuing and eliminating cartels for any product and service related activities. Its creation confirms in concrete terms the Commission's priority to fight such practices."

In conclusion, it seems that the lack of a cohesive international approach toward anti-competitive activity has resulted in many problems. An unregulated commercial sphere has arisen, one that is being exploited by private and public actors. Most of what was described above results in problems within the present WTO framework, as it hinders the objectives and goals of the WTO itself. Indeed several proposals directly linked

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[67] WT/WGTCP/2, *supra* note 18 at paragraph 85-86.
[68] *General Agreement on Tariffs and Trade, being part of annex IA to the Agreement Establishing the World Trade Organization*, 15 April 1994, 33 I.L.M 1144.
[69] Qaqaya & Lipimile, *supra* note 51 at 5.
[70] Available online: EC <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/98/1060&format=HTML&aged=1&language=EN&guiLanguage=en>, see also at the EC Proposal 2, *infra* note 72.

international anti-competitive activities with non-tariff trade barriers which adversely affect international trade: The United Nations set of Principles and Rules,[71] and the EC Proposal[72] are two examples, but as will be further describe, both were rejected.

[71] The United Nations set of Principles and rules, *supra* note 7 at chapter F for example.
[72] WTO, Working Group on the Interaction between Trade and Competition Policy, Communication From the European Community and its Member States, WTO Doc. WT/WGTCP/W/193 (2002), online: WTO <http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDocuments/t/WT/WGTCP/W193.doc> [EC proposal 2] at para. 4.

b(ii) A second class of justifications: prior commitments

The second class of justifications relates to several obligations and commitments which were made under the WTO agreement.

Commitments toward other Member States.

The first type of commitments that justifies the creation of a WTO international competition policy are those made by one member to another. During decades of trade negotiations and innumerable declarations and agreements, the members of the WTO have committed to one another to reduce tariffs in order to increase trade liberalization. In this regard, the *Japan – Taxes on Alcoholic Beverages* Appellate Body has stated:[73]

> "The WTO Agreement is a treaty -- the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement."

But while formal tariffs are indeed being reduced, unofficially, and, as *The Economist* has described, "subtly"[74], non-tariff barriers are being created instead. The dimensions of this phenomenon are increasing and have recently been described by the World Bank as a "worrisome trend".[75] WTO panels have acknowledged the existence of these "subtle" barriers as well. The panel of the *EC oilseeds case* stated:[76]

> "[…] the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement. In order to encourage contracting parties to make tariff

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[73] *Japan – Taxes on Alcoholic Beverages (Complaint by the European Communities)* (1996) WTO Doc. WT/DS10/AB/R, (Appellate Body Report), online: WTO <http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDocuments/t/WT/DS/8ABR.WPF> [Japan Taxes on Alcoholic Beverages] at 16.

[74] "The nuts and bolts come apart", *The Economist* (26 March 2009), Online: Economist.com <http://www.economist.com/displaystory.cfm?story_id=13362027>.

[75] Elisa Gamberoni & Richard Newfarmer, World Bank, International Trade Department, Trade Protection: Incipient but Worrisome Trends, 37 Trade notes (March 2, 2009). Online: World Bank: <http://siteresources.worldbank.org/NEWS/Resources/Trade_Note_37.pdf>. [Gamberoni & Newfarmer]

[76] *European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins (complaint by the United States)*(1990) GATT Doc. L/6627, BISD/37S/86, online: WTO <http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDocuments/t/JCR/PANELS/88OILSDS.WPF>. [EC Oilseeds case].

concessions they must therefore be given a right of redress when a reciprocal concession is impaired by another contracting party as a result of the application of any measure, whether or not it conflicts with the General Agreement."

This recognition is apparent throughout Article XXIII of the GATT, which states:[77]

"1. If any contracting party should consider that <u>any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of</u>

(*a*) the failure of another contracting party to carry out its obligations under this Agreement, or

(*b*) <u>the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or</u>

(*c*) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it."

The same kind of recognition can be found at Article XXIII:3 of the General Agreement on Trade in Services ("GATS"), which deals with trade in services.

Non-tariff hybrid barriers and competition policy

Non-tariff barriers in the form of anti-competitive activities may be used in order to frustrate the benefits which states have achieved through trade negotiations. This threat has been recognized in the United Nations set of Principles and Rules,[78] and negotiating parties to agreements are starting to recognise the danger as well. Indeed, the negotiating members of the Free Trade Area of the Americas ("FTAA") have emphasised the need

[77] Emphasize added.

[78] The United Nations set of Principles and rules, *supra* note 7 at 8: "*Recognizing also* the need to ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting international trade, particularly those affecting the trade and development of developing countries,"

for transparency with regard to competition policy and non-tariff trade barriers, as they stated in the third draft agreement:[79]

> "Any exclusions or exceptions [or authorizations] from the coverage of national or subregional competition measures shall be transparent and [should] be reviewed periodically by the Party or subregional entity to evaluate if they are necessary to achieve their overriding policy objectives. "

The lack of international competition regulations was defined as "the next generation of barriers to trade in a liberalized world".[80] These trade barriers include, for example, threats of predatory price wars, vertical foreclosures, patent pooling,[81] or even abusive use of antidumping laws,[82] by which cartels are able to prevent the entrance of new competitors to markets.

Market barriers are not completely private by nature, as governments may take part in them as well, whether through lack of enforcement or through deliberate policies which encourage barrier producing activity. These barriers are not completely governmental, as the activity itself is often conducted by privates. Therefore, these types of barriers are known as "hybrid trade barriers".[83]

This line of justifications focuses mainly on the need for adequate domestic regulation and enforcement. Without regulation and enforcement, non-tariff trade-barriers may be created and trade liberalization may be hindered. Local monopolies and cartels may, for example, exclude foreign competitors from local markets through the use of anti-competitive conduct (such as vertical agreements with local distributors, boycotts, or tie-in contracts[84]) or by using the local law which permits these actions in certain

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[79] Emphasize added. Free Trade Area of the Americas, Third Draft Agreement, online: FTAA < http://www.ftaa-alca.org/ftaadrafts_e.asp> [FTAA draft agreement] at Article 7.1.f

[80] Kathy Y. Lee, "The WTO Dispute Settlement and Anti-Competitive Practices: Lessons Learnt from Trade Disputes" online: (2005) The University of Oxford Centre for Competition Law and Policy 10/05 <http://denning.law.ox.ac.uk/lawvle/users/ezrachia/CCLP%20L%2010-05.pdf> at 4, see also Melaku Geboye Desta & Naomi Barnes, "Competition Law in Regional Trade Agreements: An Overview" in Lorand Bartels and Federico Ortino eds. *Regional Trade Agreements and the WTO Legal System* (New York: Oxford University Press, 2006) [*Desta & Barnes*] at 242.

[81] Levenstein Suslow and Oswald, *supra* note 53 at 9.

[82] Levenstein Suslow and Oswald, *Ibid.* at 8.

[83] Noonan, *supra* note 17 at 420.

[84] Matsushita Schoenbaum and Mavroidis, *supra* note 43 at 856.

circumstances (as was claimed in the *film case*), thus creating *de facto* trade barriers for foreign competitors on entering local markets.[85] The EC have proposed the WTO the prohibition of any anti-competitive practices which may have impact on international trade[86] ("The EC Proposal"), but at the Cancun Ministerial Conference and later at the Doha's July decision, the topic was removed from negotiations for reasons discussed below.

It should be noted that, by its nature, global anti-competitive activity hinders free trade, as, for example, the division of global markets between cartel members diminishes the existence of free trade.[87] This is true because cartel members will not enter their partners' territory, (and thus a "voluntary" trade barrier is created) or because other competitors (non-cartel members) may choose not to enter cartels' territory from fear of being "punished" by the cartel. One reported example presented by Yu, concerns the acid citric cartel. It is reported that following the cartel breakup, imports of citric acid from China to the U.S. rose by 150%, proving that the cartel had imposed *de facto* market barriers.[88]

An important point relating to these claims regards the issue of transparency. One may argue that a condition for a claim against hybrid competition trade barriers should be that one could not have anticipated the barrier at the time of the negotiations.

Obviously, it could be argued that once the state has allowed this anti-competitive activity to occur, that this activity was a clear part of the state's economic policy at the time of the negotiations, the claimant should have calculated the policy as part of the

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[85] *Noonan, supra* note 17 at 422. See also United States' position in *Japan – Measures affecting Consumer Photographic Film and Paper (Complaint by the United States)* (1998) WT/DS44/R, (Panel Report), online: WTO < http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds44_e.htm>.

[86] WTO, Working Group on the Interaction between Trade and Competition Policy, Communication From the European Community and its Member States, WTO Doc. WT/WGTCP/W/184 (2002), online: WTO <http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDocuments/t/WT/WGTCP/W184.doc> [EC Proposal 1] at 2.

[87] United Nations Conference on Trade and Development, *Capacity-Building on competition and policy for development, A consolidated report*, UNCTAD UN Doc. UNCTAD/DITC/CLP/2007/7 (2008) online: UNCTAD <http://www.unctad.org/en/docs/ditcclp20077_en.pdf> [UNCTAD capacity building report] at 1-2.

[88] Yinne Yu, *The Impact of Private International Cartels on Developing Countries*, (Honors Thesis, Stanford University, Department of Economics, 2003), online: Stanford University <http://economics.stanford.edu/files/Theses/Theses_2003/Yu.pdf> [Yu]at 12.

price he was willing to pay, and should not later be allowed to claim against the policy. Indeed this condition is incorporated in Article XXIII:1(b) of the GATT, which deals with non-violation claims.

Nevertheless, several points should be noted. First, economic realities change. What used to be a sufficient competition regulation twenty-five years ago may not be adequate any more to control anti-competitive activities, as both the global and domestic economies have greatly evolved.

Second, other changes, like improvements in telecommunications, transportation, and the birth of the internet for example (all of which makes international and domestic cartelisation easier), or the sophistication of the private sector, all may have not been predictable at the time of the negotiations.

Therefore, it may be argued that the fact that transparency actually existed at the time of negotiations does not mean barriers were actually predictable.

Existing jurisprudence

One of the most prominent WTO cases in this field is the *Japan – Measures affecting Consumer Photographic Film and Paper* case ("the *film case*").[89] The main argument in the *film case* was that Japan's domestic competition policy and enforcement posed direct market entry barriers to foreign players,[90] thus breaching existing commitments which were taken under the framework of the WTO agreement and its annexes. Through almost thirty years of negotiations, Japan has reduced its tariffs on photographic products from 25-40% duty (at 1967) to zero percent (at 1994).[91] This reduction of duties was by no

[89] *Japan – Measures affecting Consumer Photographic Film and Paper (Complaint by the United States)* (1998) WT/DS44/R, (Panel Report), online: WTO < http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds44_e.htm> ["the film case"]

[90] See at The film case, *Ibid.* at 167, Or as the International Competition Policy Advisory Committee ("ICPAC") report rhetorically asks: "If there is as international interest in removing those restraints and thus freeing up the world markets, can this interest be fully satisfied by national anti-trust law?" See in the International Competition Policy Advisory Committee, Anti-Trust division, "Final Report to the Attorney General and Assistant Attorney General for Antitrust", February 2000, online: United States Department of Justice <http://www.usdoj.gov/atr/icpac/tableofc.htm> at p. 37. [ICPAC report]

[91] The film case, *Ibid.* at 176.

means a gesture of good will, as the U.S. heavily paid for it with trade concessions of its own. Therefore, it was argued that Konica and Fuji's - two Japanese companies - allegedly anticompetitive conduct, which was somewhat allowed and aided by the Japanese law, frustrated the ability of American companies to enter the Japanese market. Accordingly, it was argued that Japan did not conform to its obligations under the WTO agreement.

The U.S. also argued that certain domestic Japanese laws (the Large Scale Retail Store Law and the Premiums Law) helped to seal domestic markets since they did not allow necessary measures for foreign players to enter the market. For example, the Premiums Law forbade gifts or rebates, which foreign producers often use in order to enter new markets. The Large Scale Retail Store Law gave local retailers the right to veto the establishment of large scaled retail stores. This is of particular importance since the use of large scaled retail stores is considered to be the easiest way for a foreign producer to enter a local market. Ultimately, the U.S claim was not successful because it did not demonstrate that any of these measures nullified or impaired benefits the U.S. expected to gain. The issue of burden of proof in WTO and related proceedings will be discussed further in this paper.

Other prominent WTO cases which are often mentioned in this context are the *Argentina — Measures Affecting the Export of Bovine Hides and Import of Finished Leather* case ("*the bovine hides case*"),[92] *The United States - Anti-Dumping Act of 1916* case ("the *1916 AD act case*"),[93] and the *Mexico - Measures Affecting Telecommunications Services* case ("*the telecom case*").[94]

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[92] *Argentina — Measures Affecting the Export of Bovine Hides and Import of Finished Leather (complaint by the European Communities)* (2001) WT/DS155/R (Panel Report), online: WTO <http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/a1s1p1_e.htm> [the Bovine hides case].

[93] *United States - Anti-Dumping Act of 1916 (Complaint by the European Communities)* (2000) WT/DS136/R (Panel Report), online: WTO <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds136_e.htm> [The 1916 AD case].

[94] *Mexico - Measures Affecting Telecommunications Services (complaint by the United States)* (2004) WT/DS204/R (Panel Report) online: WTO <http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDocuments/t/WT/DS/204R.doc> [The Telecom case].

The 1916 AD act case is often mentioned in the overall discussion about competition policy and trade law, but it should be noted that the issue in this case was somewhat different. A U.S. Act was challenged for imposing other measures on dumping activity rather than those allowed by the GATT and the Anti Dumping Agreement. While the arguments in this case dealt with competition policy and the differences – or similarities - between AD and anti-competitive conduct, the issue of anti-competitive activity in relation to non-tariff trade barriers was never directly dealt with in this case. Consequently, although this case is important to WTO jurisprudence generally, I will not further address it in this paper.

The *bovine hides case* presented a case study in which a mix of governmental regulation and parties' conduct resulted in, according to the EC claims, anti-competitive activity which frustrated the flow of international trade, and thus violated Article XI of the GATT (General Elimination of Quantitative Restrictions), as well as other WTO policies.

Under Argentinean regulations, representatives of *the Association of Industrial Producers of Leather, Leather Manufactures and Related Products* ("ADICMA") were permitted to participate in customs control procedures for raw bovine hides before their exportation. These authorisations allegedly allowed the Argentinean leather export cartel to obtain valuable business information which allowed price fixing and the reduction of leather exportation, which created a *de facto* quantitative restriction. Even though the regulation itself did not restrict exportation, the EC claimed that a *de facto* restriction on free trade had been created.

As in the *film case,* the *bovine hides case* panel determined that the EC failed to meet its burden of proving that the allegedly anti-competitive activity committed by the Argentineans had established a *de facto* trade barrier. Proving the effects anti-competitive activity has on trade seems therefore to be a very high threshold to pass.

The *telecom case* is a unique case within WTO jurisprudence on competition since it is the only case in which legal arguments were backed up by a specific, binding provision, i.e. the respondent had actually committed itself to competition policy. As part of the General Agreement on Trade in Services (GATS), several members, including Mexico, undertook additional commitments regarding telecommunications services and competition. These commitments were part of two documents: the Telecom Annex to the GATS, and what is known as the "Reference Paper".[95] The existence of these provisions made this case far more easy to resolve, as the existence of the State's commitments was obvious, and the DSB panel was not asked to apply the more general provisions of the GATT (Article XXIII and XI of the GATT), which it usually seems reluctant to apply.

Thus, the conclusions which may be drawn from the *telecom case* are therefore limited only to the few cases which deal with services at the telecommunication sector, and involve Member States who signed the Reference Paper.

According to Mexican Law, foreign telecommunication carriers wishing to carry phone calls into Mexico must connect to the local Mexican telecommunications network. The Mexican Telecommunication regulatory body (Comisión Federal de Telecomunicaciones (COFETEL)) delegated the authority to fix the rates paid by foreign telecommunication carriers who wish to use *any* Mexican telecom networks to Telmex, a Mexican telecommunication company. As a result, foreign carriers could not negotiate in a competitive manner with the different local telecom companies in Mexico, but were required to negotiate only with Telmex. The WTO panel agreed with the U.S.' claims, and found Mexico's regulatory system inconsistent with Mexico's obligations under the GATS and the Reference Paper. This case was the first to positively annul hybrid competition barriers and, as such, it constitutes an important breakthrough. However, the fact that a specific commitment to avoid these barriers exists, makes this case a relatively easy one to resolve.

[95] Reference Paper on Telecommunication Services, online: WTO <http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm>.

National treatment

Another commitment which is allegedly being breached by the creation of trade barriers is the obligation to provide national treatment to foreign actors, asset out in Article III of the GATT.[96] The main purpose of Article III is to fight protectionism, which may be applied through state regulation.[97] It may be argued that cases like the *film case* may pose a breach of Article III as well since the lack of competition enforcement was a regulatory measure aimed at providing protectionist treatment to Fuji or Konica. In this regard, the *Japan Taxes on Alcoholic Beverages* stated:[98]

> "the purpose of Article III "is to ensure that internal measures 'not be applied to imported or domestic products so as to afford protection to domestic production'". Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products."

It is important to note, however, that this type of argument may be problematic since as other Japanese companies beside Fuji or Konica may have suffered the same fate as Kodak, and thus discrimination against foreigners would be hard to prove in certain cases. The use of this Article may be more appropriate when a local union of merchants is blocking the entrance to local markets through cartelisation, as it would then be clear that local players were receiving better treatment than foreigners.

Commitments toward development

Another commitment made under the WTO framework was to development in general, and, more specifically, to DCs and least developed countries (LDCs). These commitments were made on several occasions and in several instruments, including the

[96] General Agreement on Tariffs and Trade, being part of annex IA to the Agreement Establishing the World Trade Organization, 15 April 1994, 33 I.L.M 1144 [GATT], Article III.
[97] Japan Taxes on Alcoholic Beverages, *supra* note 73 at 15; See also at WTO, Working Group on the Interaction between Trade and Competition Policy, The Fundamental WTO Principles of National Treatment, Most Favourite-Nation Treatment and Transparency, WTO Doc. WT/WGTCP/W/114 (1999), online: WTO <http://www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm> [WT/WGTCP/W/114].
[98] Japan Taxes on Alcoholic Beverages, *Ibid.*at 15.

preamble of the Marrakesh agreement establishing the WTO (the Marrakesh agreement):[99]

> "Recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development"

And the Doha ministerial declaration:[100]

> "International trade can play a major role in the promotion of economic development and the alleviation of poverty. We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates. The majority of WTO members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration"

The WTO is therefore obliged to promote DCs well-being and development. If one is to accept the virtues of competition law as an indisputable fact, one must accept that the promotion of competition policy indeed promotes these obligations.

Beyond this argument, however, there are other reasons why international competition policy promotes development. First, it is in DCs best interests to optimize the functioning of the international market. Since foreign direct investments and international trade have become an "engine" of growth and development, the reliance of DCs on global market forces have substantively increased. The global market, therefore, must be vigorously protected from anti-competitive behaviour so that development, alleviation of poverty and increased standards of living may be achieved.[101]

Second, competition policy may aid DCs as they are the most vulnerable to anti-competitive conduct. As previously mentioned,[102] much of the anti-competitive activity

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[99] *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 U.N.T.S. 154 (entered into force in 1 January 1995). [WTO agreement]
[100] Paragraph 2 of the *Doha Ministerial Declaration, Ministerial Conference, Fourth Session*, 14 November 2001, WTO Document WT/MIN(01)/DEC/W/1, available online: WTO <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm> .
[101] See at Markus Gehring, "Sustainable Competition Law" in Marie-Claire Cordonier Segger and Judge C.G. Weeramantry, *Sustainable Justice: Reconciling Economic, Social and Environmental Law* (Leiden: Martinus Nijhoff Publishers, 2005) [Gehring, "Sustainable Competition Law"].
[102] Evenett Levenstein & Suslow, *supra* note 19 at 1230.

on the global market is aimed at the exploitation of DCs unprotected markets. Moreover, even when anti-competitive activity is applied in order to create trade-barriers toward foreign actors in general (i.e. without discrimination based on their origin), it has been argued by Levenstein Suslow and Oswald that actors from DCs are more susceptible to these measures than actors from developed countries.[103] DCs' producers, so it is argued, are usually forced into joining joint ventures which severely limit their possibility to compete.

Moreover, DCs' producers are usually the first to be targeted by anti-competitive actors in the global markets. DCs' producers seem to be negatively affected by the lack of international competition policy as international cartels' methods for eliminating competition of "outsiders" have been reported to target competitors from DCs.[104] Cartels are using means which DCs producers are especially vulnerable to, for example limitations on access to technology (through patent pools) and the use of tariff barriers and antidumping duties[105] have been described as means to prevent competition by DCs producers.

Third, on the domestic level it seems that acceptance of competition law can improve DC's prospects for development. The presence of competition law - especially when based on widely accepted competition norms - may increase incentives for investors to invest in a DC which will adopt this law,[106] and thus will support development. It should be noted though that, as argued above, under certain circumstances the lack of competition laws may serve as an incentive for foreign investors.

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[103] Levenstein Suslow and Oswald, *supra* note 53 at 9.
[104] Evenett Levenstein & Suslow, *supra* note 19 at 1229.
[105] Under these joint-venture agreements, DC producers are restricted from several markets. See Levenstein and Suslow, *supra* note 2 at 821-826.
[106] WTO, *Working Group on the Interaction between Trade and Competition Policy, Synthesis Paper on the Relationship of the Trade and Competition Policy to Development and Economic Growth.* WTO Doc. WT/WGTCP/W/80 (1998), online: WTO <http://www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm> at paragraph 18.

Furthermore, it seems that the application of several competition guidelines is very much needed in many DCs' markets due to their current structure.[107] In many developing markets the state used to be the only actor because the market was ruled by a state monopoly. Today, however, after going through processes of liberalization and privatization, formerly state-owned monopolies have become privately owned monopolies, which cause all of the above mentioned inefficiencies in the market. For this reason, competition policy should be promoted.

In conclusion, it seems safe to argue that anti-competitive activity affects free trade and hinders the development of DC's.[108] Competition policy may therefore serve as an important tool for development, one which supports the commitments which were already made to development.[109] Indeed, only recently it was declared at the UNCTAD XII Accra Accord:[110]

> "If the opportunities arising from liberalization and integration are to be fully exploited, there needs to be an enabling environment that may include both national and regional competition policies and international cooperation, to deal with anti-competitive practices, particularly those that affect trade and development of developing countries. The increased scope of anti-competitive practices, including abuse of dominance, may negate the benefits of trade and investment liberalization by developing countries.

c. An interim conclusion

[107] Qaqaya & Lipimile, *supra* note 51 at 587.
[108] See for example at The United Nations set of Principles and rules, *supra* note 7 at 7:
"*Recognizing* that restrictive business practices can adversely affect international trade, particularly that of developing countries, and the economic development of these countries,
Affirming that a set of multilaterally agreed equitable principles and rules for the control of restrictive business practices can contribute to attaining the objective in the establishment of a new international economic order to eliminate restrictive business practices adversely affecting international trade and thereby contribute to development and improvement of international economic relations on a just and equitable basis"
[109] WTO Doc.WT/WGTCP/W/2, para 33-37, See also at Qaqaya & Lipimile, *supra* note 51 at 133 sqq.
[110] Article 54 of the Accra Accord, *supra* note 12,

The first part of this paper provided an overview of the vast extent of problems that an unprotected global market may cause. It reveals justifications for future research on this topic and discusses the need for development of possible solutions.

Even though only few WTO cases deal with these issues, it is important to note that the scope of the problem is wider than what seems to be reflected by WTO jurisprudence. There are reasons for this. First, the burden of proof imposed by the relevant GATT Articles seems to be a very hard one to fulfill. It is hard to prove the existence of anti-competitive activity which happens abroad, and it is especially hard to prove that the failure to enter a market was created due to these barriers and not due to, for example, customers' taste. Thus, in many instances a member state will avoid bringing complaints to the WTO in the first place, knowing that its chances of meeting this burden are slim.

Second, potential claimants do not always understand that a barrier exists. These barriers usually involve a sophisticated combination of different legislation from different fields of law and the activities of private firms. Therefore, it is not always easy to recognise the existence of these barriers. Moreover, anti-competitive activity such as cartelization is usually done in secret. The "private" ingredient of barriers is therefore hard to detect, especially as it takes place in other jurisdictions.

My next step in this paper will be to review whether the WTO is indeed the suitable framework for the governance of future international competition policy. After deciding this question, I will attempt to suggest future pathways for the deadlocked situation.

III. Institutional aspects: should the WTO govern an international competition law framework?

It is clear than that a problem exists, and a solution should be found. It is also clear that the WTO's activity is entangled, through ties of efficiency and liability, with this problem. But should the proposed solutions to the problem of market competition be governed by the WTO framework? Does the WTO provide a suitable and desirable framework to address the problem? Epstein and Greve open their book with a warning on the matter[111]:

> "The success of a complex legal system depends first and foremost on the soundness of its substantive rules. Sound substantive rules, however, are easily undercut by choosing the wrong legal institutions and procedures to enforce them."

In this chapter, I discuss whether the WTO should be the governing framework for international competition policy. I review and estimate the solidity of the objections which were raised to this framework both in the literature and at the Cancun conference, and ultimately argue in favour of this framework. At the end of this chapter, I attempt to reach a conclusion with regard to this issue.

As discussed below, the international work regarding competition law has been performed at many levels. It is being done as part of an international set of rules, it can be governed by regional, multilateral or bilateral agreements of cooperation between domestic authorities, and it can be governed by domestic laws alone. In this paper I do not intend to argue that any of the work which is being done outside the framework of the WTO is not efficient or unwanted, indeed, the opposite is true - bilateral, regional, and multilateral agreements are necessary and their efficiency has increased in recent years.[112] What I do argue, however, is that WTO involvement is important both for the success of any widely scoped international policy and for the success of WTO objectives as well.

[111] Richard A. Epstein & Michael S. Greve (eds.) *Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy* (Washington D.C.: AEI Press, 2004) [Epstein and Greve] at 1.
[112] Oecd report, *supra* note 14 at 29-31.

Returning to the question I began with, is the WTO framework suitable for hosting and leading international competition reform? Apparently, some do not think so. With regard to the idea of international competition law for example, some have suggested the alternative of establishing a regime independent of the WTO[113] - as a "stand alone" institution[114]. Indeed, Evenett mentions the idea that the prosecution of international anti-competitive activities can be done without any relevancy to market access, and, thus, the WTO's involvement may not be necessary.[115] This idea cannot be rejected lightly, especially when considering the failure of the WTO Cancun Ministerial Conference, in which the topic of competition, along with the other Singapore Issues (Investment, Government Procurement, and Trade Facilitation), was rejected,[116] and, in light of the WTO "July decision", when the topic of competition was completely removed from the Doha negotiations table.[117]

In order to argue that the WTO is indeed a suitable framework for the governing of international competition, I first examine the reasons that international competition policy and regulation was rejected by the WTO Member States. By performing this examination I will be able to estimate the solidity of this rejection and, more importantly, to suggest practical conclusions with regard to the matter. After looking into the reasons competition policy was rejected by the WTO, I discuss other objections raised in the literature against such an engagement by the WTO.

a. A political struggle

The application of competition policy under a WTO regime is politically problematic, as there are many opponents to this scheme. The WTO Member States do not seem to even agree to opening negotiations on the matter, and, therefore, as a matter of fact, the subject of international competition policy may be currently regarded as a "dead issue". But the

[113] Fox, "international Antitrust", *supra* note 38 at 926.
[114] See a description of Fox's opinion in Guzman, "International Regulatory"], *supra* note 30 at 1143.
[115] Evenett, Simon J. "Five hypotheses concerning the fate of the Singapore issues in the Doha Round" (2007) 23(3) Oxford Review of Economic Policy 392 [Evenett, Five hypothesis] at 408.
[116] Bridges Daily Update On the Fifth WTO Ministerial Conference, "Cancun collapse: Where there's no will there's no way", (2003) Online: Bridges Daily Update <http://ictsd.net/downloads/2008/08/ben030915.pdf> [Bridges Daily Update "six's report"]
[117]The July Decision, *supra* note 10.

reasons for this premature death do not necessarily involve substantive objections to the subject matter of international competition policy, and as will be explained below, a large dose of politics seems to be involved.

The reasons for the failure of competition policy advocacy may be first and foremost learned from the negotiation history of the Cancún Ministerial. Amrita Narlikar opens her article with the words: "They came to the Cancún Ministerial, they saw, and they went home empty handed".[118] In truth "they" actually talked for several days and nights, but could not push the negotiations forward.[119]

Why did "they" go home "empty handed"? The reasons seem to be more political than substantive, and are entangled in a history of hard negotiations and bad past deals.[120] One of the main reasons for this failure was that the Singapore issues were promoted by the "wrong proponent" - the E.U-[121] and as these were objected to as part of a broader negotiation scheme. DCs apparently saw competition policy as a European agenda, one which was important for European interests alone, and not one of universal importance. DCs overall impression at the time was that the draft Ministerial Declarations did not represent the interests of DCs[122] and together with the U.S. – E.U's hard stand on issues which were important to DCs (agriculture for example), the DCs' objection to anything with a European "smell" to it was expected.[123]

DCs expected at the time to first negotiate the subjects which mattered most to their own interests, and the green room's decision to first negotiate the Singapore issue led to great

[118] Amrita Narlikar, "The Ministerial Process and Power Dynamics in the World Trade Organization: Understanding Failure from Seattle to Cancun" (2004), 9 New Political Economy 413.
[119] Bridges Daily Update "six's report", *supra* note 116.
[120]. Stewart, *supra* note 62.
[121] Evenett, Five hypothesis, *supra* note 115 at 402.
[122] Evenett, Five hypothesis, *Ibid.* at 398.
[123] Stewart, *supra* note 62 at 8. See also Bridges Daily Update "six's report", *supra* note 116; Evenett, Five hypothesis, *Ibid.* at 398-399; UNCTAD report on capacity building, *supra* note 87 at 3.

frustration. An important description of the events was written by Nasiruddin Ahmed, an official representative of the Bangladesh Ministry of Commerce:[124]

> We strongly feel that there must not be any reduction in the level of ambition with respect to the provisions already unanimously agreed upon and contained in the draft Cancun text. In particular, there must not be any dilution or obfuscation of the issues of specific interest to LDCs. However, during the green room discussion the Chairman of the Conference considered that the decision should come up first on Singapore Issues in order to reach agreement on other issues. This created great disappointments among the developing countries. As a result, when the proposal was put forward to unbundle the Singapore issues and decided to keep only one or two issues under the purview of the WTO, many developing countries rejected the proposal arguing that prior to making any decision of Singapore issues, development agenda of developing countries should be addressed in the WTO. Unfortunately, no discussions were held on other issues. As a result, the Conference collapsed without any agreed declaration.

Mr. Arun Jaitley, India's Commerce & Industry Minister at the time and the head of the Indian delegation to Cancún, (India was one of the leaders of the G-22 group, a group of DCs who has sternly objected the Singapore Issues) was interviewed by Newsweek Magazine with regard to the failure of the Cancún talks.[125] His answers demonstrated DCs the notion that the Singapore issues, including competition regulation, served European interests, and were not within the interests of the international community as a whole. When asked by the interviewer about the Singapore issues, he answered:

> "Post-Cancun I'm not so sure the European Union is in a position to push for them."

The Bridges Daily Update on the fifth WTO Ministerial Conference reported from Cancún:[126]

> "many (mostly developing) countries earlier in the negotiations had insisted that progress in Singapore issues would be contingent on movement in agriculture. Some African delegates wondered why this EC-driven agenda should be the "make or break" issue, rather than their own priorities."

Nasiruddin Ahmed puts things even more straight forward:[127]

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[124] Emphasize added. Nasiruddin Ahmed, "Cancun and the Aftermath" DG, WTO Cell, Ministry of Commerce, Government of the People's Republic of Bangladesh, online: UNESCAP <http://www.unescap.org/tid/mtg/postcancun_rte_bangcs.pdf> [Ahmed] at 3.
[125] Mark L. Clifford, "Where the Cancun Talks "succeeded"" (2003) Newsweek Magazine, 28 online: Newsweek <http://www.businessweek.com/bwdaily/dnflash/sep2003/nf20030925_3389_db053.htm>.
[126] Emphasise added. Bridges Daily Update "six's report", *supra* note 116.

> It is apparent that if development-related issues such as cotton subsidies, substantial reduction of domestic support in agriculture, special and differential treatment are not addressed adequately in the current negotiations, the developing countries are not likely to make any forward movement for opening up their market and on Singapore issues.

Other reasons which have been mentioned for the DCs rejection of competition policy were DCs' objections to other "Singapore issues," such as Investment and Government Procurement, and the increased burden of trade negotiations (many DCs were engaged simultaneously in other trade talks as well) which did not enable DCs to negotiate extensively on the matter.[128]

The conclusion is that competition policy is not necessarily perceived by its fiercest opponents at the WTO as a wrong or unwanted policy, but mostly was refused due to political reasons, as it is wrongly seen as an "European agenda", and thus, it is believed, refusing to address it might pressure the E.U. to agree to other issues which mattered more to DCs.

The WTO system, which depends on consensus, rejected the issue of competition policy, but this rejection actually says nothing about the WTO's ability to engage in competition policy.

Other reasons

Additionally, more substantive arguments have indeed been raised against the WTO's involvement in international policy competition.

b. A well-detailed agreement. An unachievable possibility?

It has been argued that the WTO framework may not be a suitable framework for competition policy since a well-detailed, multilateral WTO agreement on this topic is unachievable. It has been argued that, even if a resolution were passed, and an agreement

[127] Ahmed, *supra* note 124 at 5.
[128] Stewart, *supra* note 62. at 7.

was achieved, this agreement would include only the few issues on which a consensus may be reached, not the full spectrum of issues associated with competition policy.[129]

The current deadlock in multilateral trade negotiations and the genuine differences that exist between the WTO Member States regarding the role of competition rules and their objectives and interests will not allow the Member States to achieve a truly well–detailed agreement for regulation of this field. Only the few areas in which consensus exists would be covered by this agreement, and, due to the above mentioned obstacles, the terms of any potential agreement would not be comprehensive enough for the complete regulation of this field. The result would be the creation of a generally defined agreement which would be made of just a few and overly generalised rules.[130]

According to this critique, A WTO-based agreement would not only contribute nothing to the already existing status-quo, it would also cause harm. A vague, "generally worded", "ill defined" agreement would provide an overly broad scope for litigation between WTO Member States, and, accordingly, would lead to massive litigation and tension between Member States.[131]

Nevertheless, as I argue below, I do not see the application of a "generally worded" agreement in a bad light at all. Many international agreements and treaties are based upon "generally worded" principles, like "National Treatment", "Most Favourite Nation", and "Expropriation". These terms serve as principles on which agreements stand, although they are not necessarily detailed.

It is indeed the role of domestic legislation to draft the detailed application of each principle as it sees fit, in accordance with its own objectives and ideals, and it is not the role of the WTO to dictate the exact rules states ought to apply, but only the general principles which states must follow. Whether domestic application is done in accordance

[129] According to the "decision making by consensus" principle, see in article IX of the WTO agreement. See also at Marsden, *supra* note 6 at 57.
[130] See in Marsden, *Ibid.* at 72-73.
[131] As has been described at Marsden, *Ibid.* at 72.

with these principles is a matter for the Judicial Tribunals to decide on eventually, as in the case of other generally worded terms.

Ian Laird[132] raises an important point with regard to "generally worded" "overly broad" provisions when he argues in favour of another "broad" doctrine – the necessity doctrine. Laird compares the necessity doctrine with Article XXI of the GATT,[133] which has been described as "so broad, self-judging and ambiguous, that it obviously can be abused […]"[134] and therefore, can be viewed as a threat to the stability and predictability of the law. According to Laird, despite this negative potential, it is clear that Article XXI of the GATT has not in fact been misused, and that States have been "quite prudent in their application of the provision".[135] He further argues that while reviewing its general history, one can see that the necessity doctrine has not been abused either. Thus, it can be argued that fear of overly generalized provisions may be exaggerated.

c. Different rules for different economies

Another problem which should be addressed is the proliferation of interests and approaches to competition law within the WTO. It has been argued that there are differences in the approaches and the objectives of each member's competition law,[136] and that each domestic set of rules should be adopted in accordance with the local economy and its unique character.[137] Chris Noonan describes this notion as the "public interest" or "public benefit" test, where each country designs its own domestic competition laws according to its own interests, and not necessarily according to

[132] Ian Laird, "The Emergency Exception and the State of Necessity", in Ortino Federico, Liberty Lahra, Sheppard Audley and Warner, Hugo. Eds. *Investment Treaty Law, Current Issues II,* (London: British Institute of international and comparative law, 2007) [Laird], at 247.
[133] *General Agreement on Tariffs and Trade, being part of annex IA to the Agreement Establishing the World Trade Organization*, 15 April 1994, 33 I.L.M 1144. [GATT].
[134] John H Jackson, *The World Trading System: Law and Policy of International Economic Relations* (Cambridge, Ma: MIT Press, 1997) at 230, see at Laird, *supra* note 132 at 247.
[135] Laird, *Ibid* at 247.
[136] Fox "Races up, down, and sideways", *supra* note 63 at 1782. See for example the case of small economies at Michelle Goddard, "Challenge of implementing a competition regime in a small developing countries: Barbados, in United Nations Conference on Trade and Development, *Regional Seminar for Latin America and Caribbean Countries on the Post-Doha WTO Competition Issues, Sao Paolo, 23-25 April 2003* UNCTAD UN Doc. UNCTAD/DITC/CLP/2003/8 online: UNCTAD <http://www.unctad.org/Templates/Page.asp?intItemID=4150&lang=1> [Goddard] at 55.
[137]For a review of the different approached and objectives of domestic competition laws, see further at W/127, *supra* note 16, at para. 17-20.

efficiency-based standards.[138] Accordingly, domestic laws vary between different states,[139] and in many cases these laws do not exist.[140] Furthermore, even if states will eventually agree to follow "efficiency," or "the optimization of welfare," as a leading principle for this framework, the definition of "efficiency" and the way to achieve it varies greatly between the members states.[141]

The application of competition law and the manner of its application thus depends on the state interests and the ideals of each local government,[142] "This is a political decision that stakeholders in every country have to take".[143] Can the WTO therefore practically aspire to achieve an effective agreement which will satisfy the interests of all 153 members? In light of past attempts to do so, it would not be an easy task. It may be argued therefore that the WTO is just too big for the adoption of this policy, it includes too many members, and there are too many different economies and interests for any sort of reconciliation and common agreement.

It is indeed true that each economy must maintain the set of rules which best suits its features,[144] and thus a universal detailed legislation cannot (and maybe should not) be established. But, nevertheless, one should bear in mind that, at least theoretically, some common-denominator of interests exists between all Member States with regard to competition policy.

First, there are the commitments made by Member States in accepting the WTO agreement and it annexes, namely to protect the free flow of international trade and the market access each state has committed itself to. A future set of principles may be

[138] Noonan, *supra* note 17 at 159.
[139] Fox "Races up, down, and sideways", *supra* note 63 at 1802, see also at Qaqaya & Lipimile, *supra* note 51 at 595.
[140] Where even such non-existence of domestic laws may be due to reasons of lack of means, or purely interest-based (see above example of export cartels, or attempts to entice investors - according to the "public interests" test), see in Fox "Races up, down, and sideways", *supra* note 63 at 1794.
[141] Stephen, *supra* note 28 at 68-69.
[142] Fox "Races up, down, and sideways", *supra* note 63 at 1782.
[143] Qaqaya & Lipimile, *supra* note 51 at 596.
[144] Gehring, Markus W. *The 'Singapore Issues', Competition and Sustainable Development* in Gehring, Markus W. & Cordonier Segger, Marie-Claire (eds.) *Sustainable Development in World Trade Law* (Hague: Kluwer Law International, 2005) [Gehring] at 370.

established upon these common denominators, for example on the commitment to protect the free flow of international trade and to fight the threats international or local anti-competitive activities pose to this flow.[145]

A second, widely agreed and more specific common-denominator is the need to fight "Price fixing and market allocation cartels, which have been termed the "supreme evil" of antitrust",[146] or in other words – hard core cartels - which are prohibited by almost all competition authorities.[147] The EC has suggested an international ban on hard-core cartels[148] and so have the OECD,[149] and the UN.[150]

On several occasions, a more ambitious attempt at the identification of relevant common denominators has been tried, as the UN and the WTO have each attempted to point out the universal rules and principles which most jurisdictions share.

The United Nations set of Principles and Rules,[151] which was drafted at 1980 and reaffirmed at September 2000, has adopted a:

> "set of multilaterally agreed equitable principles and rules for the control of restrictive business practices having adverse effects on international trade, particularly that of developing countries, and on the economic development of those countries, including a decision on the legal character of the principles and rules"[152]

The United Nations set of Principles and Rules calls for the prohibition of conduct which may have adverse effect on international trade, for a more intense collaboration between

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[145] See for example at the The United Nations set of Principles and rules, *supra* note 7 at 3:
"set of multilaterally agreed equitable principles and rules for the control of restrictive business practices having adverse effects on international trade […]"
[146]Christopher Sprigman, "Symposium: Antitrust: Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction over International Cartels" (2005) 72 U. Chi. L. Rev. 265 sqq. [Sprigman] at 281, see also Desta & Barnes, *supra* note 80 at 239.
[147] Sprigman, *Ibid.*
[148] EC proposal 2, *supra* note 72.
[149] OECD, *Hard Core Cartels: Third report on the implementation of the 1998 Council Recommendation* (Paris: OECD 2005) online: OECD <http://www.oecd.org/dataoecd/58/1/35863307.pdf> sqq. See especially the recommendation section at p. 39-40. [OECD Report on Hard Core Cartels]
[150] The United Nations set of Principles and rules, *supra* note 7 at section D "Principles and Rules for Enterprises, including Transnational corporations".
[151] The United Nations set of Principles and rules, *supra* note 7.
[152] The United Nations set of Principles and rules, *Ibid,* at 2.

domestic authorities[153] (including the establishment of mechanisms to promote exchange of information[154]), the restriction of hard core cartels,[155] and the domestic promulgation of laws which prohibit abusive usage of dominant position of market power.[156]

The WTO working group has attempted to point out the common-denominator which most jurisdictions share despite their differences, as it drafted "The Fundamental Principles of Competition Policy" document ("The Fundamental Principles"),[157] in which it attempted to identify the "principles of policy design and application […], whose impact transcends specific statutory provisions and sectors, and is common to a broad range of jurisdictions having competition policies."[158] The Fundamental Principles document names the promotion of economic efficiency and consumers' welfare as two of the most widespread objectives of competition authorities.[159] Several other principles were also identified by the working group as common among the different domestic authorities, such as the presumption under which competitive markets yield more efficient results (a market needs be "workably competitive", and not necessary completely competitive)[160]; and the presumption in favour of the promotion of external and other market opening measures for competition policy,[161] to name only a few.[162]

The WTO working group also performed a comparative study of 55 members and observers domestic legislation.[163] This study showed that, with very few exceptions,[164]

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[153] *Ibid.* at Chapter C.
[154] *Ibid.* at Chapter E(7)
[155] *Ibid.* at Chapter D and F.
[156] *Ibid*. at Chapter E.
[157] W/127, *supra* note 16.
[158] *Ibid,* at para. 5.
[159] *Ibid,* at para. 17-18.
[160] See further on the definition of "workably competitive" at *Ibid,* at para. 22.
[161] *Ibid,* at para. 25.
[162] *Ibid,* at para. 26-34.
[163] WTO, *Working Group on the Interaction between Trade and Competition Policy, Overview of Members' National Competition Legislation*, WTO Doc. WT/WGTCP/W/128/Rev.3 (2003), online: WTO <http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDocuments/t/WT/WGTCP/W128R3.doc> [*W128R3*].
[164] The only exceptions were Luxemburg which do not have any provisions with regard to mergers, and Morocco which do not have provisions with regard to vertical restraints. According to this study China do not have provisions with regard to mergers and vertical restraints, but since the study was published China has enacted a new Competition law which includes provisions on both.

all 55 states have provisions on horizontal and vertical restrains, abuse of dominant position, and mergers.

Indeed, several smaller multilateral frameworks such as FTAs and custums unions have agreed on competition framework,[165] even between members with different types of economies and interests.

The conclusion of the above overview is that a certain common-denominator between the majority of the worlds' domestic competition laws actually exists, and, therefore a certain common regulation may, at least theoretically, be achieved, despite the differences in objectives, ideals, and politics between the different jurisdictions.

This conclusion is relevant to another critique regarding the "vagueness" "generally worded", and "ill definition" which characterise any competition policy agreement which will be based upon a common-denominator. Indeed, as in mathematics, common-denominators are by nature wide as they must be "common" to a many different numbers, but as mentioned above, I do not consider "vagueness" as a fault in any such agreement; an overly detailed agreement will be soon bypassed by a more sophisticated measure, as a "cat and mouse" chase would occur. The best way to deal with the terminology problem would be to allow the WTO DSB to decide each case in light of principles, and not detailed legislation which will be soon bypassed by a "new generation" of more sophisticated measures. Article XXIII of the GATT is a good example of such a legislation, as will be explained below.

d. Can competition rules be applied where no domestic competition authority is to be found?

Another problem which must be addressed is the problematic application of a competition regime in states which do not have local competition law (mainly DCs), or have only recently adopted competition regulations and do not yet posses the ability to efficiently enforce these laws. After all, how can such a state provide relevant

[165] The E.U, and the latest draft of the forthcoming FTAA agreement for example, FTAA, *supra* note 79.

information or investigate suspected competition violations when it does not even have a competition authority? And how can a state even negotiate and consent to this agreement when it has no experience with the application of such law?[166] This problem should not be ignored, as it will obviously not make any sense to expect Member States that currently do not posses the ability to apply these standards to do so.

Furthermore, applying a pragmatic point of view, it is hard to see how DCs will ever agree to the application of new standards after the experience they seem to have had with the Uruguay Round "Grand Bargain". The words of Ghana's former minister of Trade and Industry, Dr. John Abu, are important on this aspect:[167]

> "The experience of some of us with the implementation of the Uruguay Round Agreements has not been pleasant. This is not due to lack of efforts on our part. Our limited institutional and human resource capacities have made it difficult for us in adapting our laws, regulations and institutions to meet the demands of the WTO Agreements. Consequently we have been labouring to fulfil obligations without being able to enjoy corresponding benefits. Certainly the poor performance of Africa in the multilateral trading system must be reversed, for Ghana firmly believes that benefits from the global trading system should be evenly shared so as to offer gains to all, especially, African countries. "

At the conclusion of this paper, I argue that, without a satisfying first stage of what I term "capacity-building first and only" (i.e. a first stage which will include capacity-building alone, without any further commitments), no progress in this area should be made.

Nevertheless, I do believe that the challenge of applying a complicated mechanism in these jurisdictions can and should be met, and that the current situation should not prevent attempts at addressing the current problematic situation for several reasons.

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[166] United Nations Conference on Trade and Development, Final Consolidated report of regional capacity-building meetings organized by UNCTAD on competition issues within the framework of the Doha mandate, UNCTAD UN Doc. UNCTAD/DITC/CLP/2003/1 online: UNCTAD <http://www.unctad.org/Templates/Page.asp?intItemID=4150&lang=1> [UNCTAD Final Consolidated report on capacity building], at 3. See also at Marsden, supra note 6 at 69.

[167] WTO, *Ghana – Statement by H.E. Dr. John Abu, Minister of Trade and Industry,* WTO Doc. WT/MIN(99)/ST/95 (1999), online: WTO <http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDocuments/t/WT/MIN99/ST95.DOC>. [statement by Dr. John Abu]

First, it would be highly arrogant to assume that DCs do not posses the potential to applying anti-trust mechanisms, and thus that no attempt should be made to remedy the situation. The current lack of capacity can and should be amended, and it should not be presented as a reason against reform, but only as another challenge which any reform policy should aspire to meet.

Second, other complicated and "foreign" systems are being assimilated in jurisdictions where no similar system has existed before, so there is no reason to believe competition rules cannot be assimilated just as well, especially once the lessons which may be learned from past assimilations are learned. The WTO has been investing in many capacity-building and education efforts in order to improve Member States' abilities to enjoy the benefits of trade liberalization ("Aid for Trade" schemes). Capacity-building has been proposed by the EC with regard to competition law as well,[168] and capacity-building is being performed by the UNCTAD to certain extent. Despite the difficulties, developing Member States have been able to employ and benefit from this trade system[169] (as was the case of the economies of China and India for example), and, thus, it can be assumed, with the right capacity-building and exceptions (especially on "national treatment"[170] policies), all Member States will be able to participate in this global effort. Beside the WTO, the International Competition Network ("ICN") plays an important role in assimilation,[171] as it facilitates the exchange of highly technical knowledge and promotes cooperation between authorities from all over the world.

Third, the problem of competition "regulation-less" states is becoming less and less relevant today. As reported by UNCTAD,[172] during the last decades many DCs have enacted, or in the process of enacting, domestic competition laws, and are therefore

[168] EC Proposal 1, *supra* note 86 at 3.
[169] Nye, Joseph S. Jr. "Globalization's Democratic Deficit, How to Make International Institutions More Accountable", (2001) 80(4) Foreign Affairs 2 at 3.
[170] Exception on "national treatment" are necessary to diminish the fear of foreign multinationals taking over local markets and eliminating local industries which are not able to compete with the much more modernised and efficient multinationals.
[171] See more on this aspect at Gehring, *supra* note 144 at 369.
[172] Qaqaya & Lipimile, *supra* note 51 at iii.

gaining experience with the enforcement of these laws. This problem, therefore, is becoming less and less relevant.

Lastly, any new model or suggestion with regard to the WTO may include exceptions for DCs which would facilitate assimilation in the area competition policy and regulation.

e. And Why Yes? Arguments in favour of the WTO framework

Philip Marsden mentions two important reasons for a WTO framework.[173] The first reason is the scope of the WTO and its internationalism – almost all of the world's states are WTO members, and are committed on some level or another to its jurisdiction. A global problem needs a global solution, and the WTO as a global organization is suitable an answer that need.

Another argument which is relevant to this discussion can be summarized as follows: using the WTO framework may be beneficial because it is already there; it is a working and existing framework. Establishing a new authority, on the other hand, may be extremely complicated.[174]

Indeed, it may be argued that the WTO's organizational capacities and experience in trade negotiations and dispute resolution supply the infrastructure of a well functioning global system. The WTO serves as an existing negotiations arena, with existing facilities, a working administrative team, and a leading secretariat, and, thus, it could be advantageous to use the WTO for the regulation of a subject matter which is highly coincidental to, or may even be considered as inevitable part of, international trade.

The WTO framework is also suitable since competition policy is closely linked to international trade. Competition policy is basically another layer of trade regulation; it provides the rules which guaranty trade's continuation and optimization. It therefore only makes sense to entrust the regulation of this subject matter to the same framework which

[173] Marsden, *supra* note 6 at 68-69.
[174] Fox, "international Antitrust", *supra* note 38 at 926.

is entrusted with the subject matter of international trade. Fox has mentioned on this issue:[175]

> "Nearly all proponents of global antitrust conclude that the appropriate forum would logically and practically be the WTO. It is the only existing global economic body to which antitrust could be incrementally added, and sympathetically so, to its current mandate. Free trade and free competition naturally go hand in hand, as they are based on sympathetic values. "

Another reason why the WTO is a suitable mechanism for an international competition regime is the WTO's Dispute Settlement Body (DSB) mechanism. Gehring argues that:[176]

> "The WTO may play a decisive role since it is the only global economic institution able to provide binding decisions, which may prove increasingly important in this area".

The ability of DSB to provide binding decisions is an important aspect for the enforcement of any subject-matter, but most importantly that of hybrid trade barriers. As I discuss below, Article XXIII provides the DSB with a flexible mechanism, and does not require the removal of an intrusive measure from domestic measures. The DSB's decisions are still binding in this aspect, as they may reveal certain governmental measures (like those which were allegedly applied by Japan in the *film case* or by Argentina in the *bovine hides case*) for what they are – measures which diminish the expected benefits of market access. By this declaration, (a "naming and shaming" strategy) other states will know to estimate future trade benefits which may be achieved from dealing with the "shamed" state more accurately, and thus any future trade bargains will be fairer and more transparent.

Second, the DSB may provide the needed expertise for dealing with this subject matter. As mentioned above,[177] the subject matter of competition policy and its effects on trade are closely linked to the topics the DSB deals with on a regular basis, and the DSB panel members should be able to deal with these claims. As a matter of fact, as mentioned

[175] Fox, "international Antitrust", *supra* note 38 at 925-6.
[176] Gehring, *supra* note 144 at 369.
[177] Fox, "international Antitrust", *supra* note 38 at 925-6.

above, the DSB has dealt with several competition-related claims in the past,[178] and its jurisprudence on this topic is evolving.

Moreover, as this paper deals only with the effects of anti-competitive activity on the free flow of trade, there is no doubt that the DSB possesses the expertise to deal with questions related to non-tariff barriers. It is important to explain that the required expertise on this topic is not one of domestic regulatory legal review, but rather expertise in the identification of non-tariff trade barriers, and no other tribunal in the world theoretically does this better than the DSB.

Third, using the DSB may prove to be helpful, as it will ensure that the decisions which will be made on this topic will be coherent with regard to other WTO policies.[179] Since decisions on competition-related matters affect other trade-related issues, the use of the one tribunal will ensure that competition policy evolution does not conflict with the general evolution of trade law jurisprudence. DSB panels are indeed not obliged to the *stare decisis* rule, but still produce a very coherent line of decisions, as DSB panels often derive and are "inspired" by former decision of other tribunals.

f. Interim conclusion

In this chapter, I explained how the failure of the WTO to incorporate competition policy was mostly linked to political reasons, and not necessarily to substantive objections. I also reviewed the pros and the cons of using the WTO as a framework for the governance of international competition policy. My conclusion from all of the above is that if certain obstacles are to be genuinely overcome, the WTO framework may be a suitable arena in which to do it. Furthermore, it seems that the WTO for the time being is the only possible arena for international competition policy, both for reasons related to the subjects of competition policy and trade, and because of the WTO DSB. The next sections of this paper confront certain challenges presented in this chapter. The biggest challenge, in my view, will be to design a solution which will be fair toward the non-experienced states,

[178] The 1916 AD case, *supra* note 94, The Film case, *supra* note 89, the Bovine hides case, *supra* note 92, The Telecom case, *supra* note 94.
[179] Lawrence, *infra* note 298 at 830.

one which will allow them to negotiate an agreement from a well-informed point of view and thus will prevent the mistakes of the Uruguay “grand bargain”, a bargain the WTO is paying for with a long standing deadlock which up until now the Member States did not find a way out of.

IV. What kind of competition law? The different structures.

In order to continue to the next stage of identifying future legal pathways, I must first lay the foundations and explain what kind of laws may apply to any future possibilities. In doing so, I will identify the relevant legal structures which may apply to any future solutions in order to discover what the advantages and weaknesses of any type of rules are, and to learn better how (and if) any such type of laws should be incorporated within my suggestions.

Therefore, after addressing the different justifications and before addressing the possible solutions, I review the different types of competition law which are relevant to this discussion. The types of competition law I refer to can be roughly divided into three groups: "international competition law," "domestic competition law, and "international co-operation between national authorities" laws.

a. International competition law

The first type of competition law discussed is "international competition law". By using the term "international competition law," I refer to a set of international rules which govern the international/global market, and thus address the points raised in both justifications for the WTO's involvement in international competition law (i.e. "a market without regulation" and "prior commitments"). International regulation may be binding, as are the WTO regulations mentioned in this chapter, or non-binding, as are the UN set of Principles and Rules.

As explained in this paper, the international market is relatively unprotected. Unlike most of the national/domestic markets, there is no set of binding rules to protect the global market, and thus, it is argued, a binding form of "international competition law" should be established. Fox suggest three models of "international competition law"[180]:

[180] Fox, "international Antitrust", *supra* note 38 at 926.

Fox calls the first model the "Strong form" model, and it is described as "antitrust on its own bottom"[181]. It represents a regime that deals with antitrust matters relevant to the global market, i.e., a set of rules to govern the international market. According to Fox, the "strong form" is typically considered as impractical since it is overly restrictive, and the process of achieving wide international agreement on these rules may be "daunting".[182] It should also be mentioned that this form of law may be economically efficient. Guzman, for example, mentions that transaction costs may be reduced if the strong form model was adopted, since firms would not have to act independently in front of each domestic regulatory authority.[183]

The second model focuses on the problems which anti-competitive conduct creates for international trade. This model does not aspire to regulate the international market, but only to facilitate international trade by dealing with the inefficiencies and trade barriers created by anti-competitive conduct. Articles 81 and 82 of the EC treaty[184] are good examples of the second model; they prohibit anti-competitive conduct, where this conduct is capable of affecting trade between EU Member States.[185] Another good example of the second model is the Caribbean Community (CARICOM) competition commission, which holds relatively vast authority for the investigation and penalization of cross-border anti-competitive conduct.[186] The objectives of the future competition policy of the planned Free Trade Area of the Americas ("FTAA") suggest that the same approach will be taken in this agreement as well.[187]

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[181] Fox, "international Antitrust", *Ibid* At 926.
[182] Fox, "international Antitrust", *Ibid* At 927.
[183] Guzman, Andrew T. "The case for International Antitrust" in Epstein and Greve, *supra* note 111 at 90-92.
[184] *Treaty Establishing the European Economic Community*, 25 March 1957, 298 UNTS 11. [EC treaty].
[185] EC, Communication from the Commission - Guidelines on the application of Article 81(3) of the Treaty (Text with EEA relevance), OJ 101 27.04.2004, online: EC <http://europa.eu/scadplus/leg/en/lvb/l26114.htm>.
[186] See chapter 8 of the *Revised Treaty of Chaguaramas establishing the Caribbean Community including the GARICOM single market and economy*, 5 July 2001, 946 U.N.T.S. 17, 12 I.L.M. 1033. [The CARICOM treaty]
[187] See at the competition policy objectives, declared at the San Jose FTAA Ministerial Declaration: "To guarantee that the benefits of the FTAA liberalization process not be undermined by anti-competitive business practices.". online: <FTAA http://www.ftaa-alca.org/ngroups/POPUP/PopCompObjectives_e.htm>.

The United Nations' set of Principles and Rules on competition is another relevant model, though its effect is limited by the fact that these principles and rules are not binding.

Fox's third model is described as a "minimal form of the second model",[188] and basically demands a "minimum" standard of domestic competition legislation, which would have to follow certain international WTO guidelines such as transparency, non-discrimination and procedural fairness. This third model is essentially the harmonization and standardization of what will be classified in this paper as the "domestic competition laws" group.

Other good examples of "international competition laws" can be found in certain provisions of the WTO agreement and its annexes, like Article XI of the General Agreement on Trade and Services ("GATS"),[189] Article 40 of the Agreement on Trade-Related aspects of Intellectual Property Rights ("TRIPS"),[190] and the Reference Paper on Telecommunication Services.[191] These provisions are important but nevertheless they are relevant only in certain domains, and thus are not part of the general discussion with regard to WTO global competition policy.

It has been argued[192] that this form of law (i.e. international law) creates problems of state sovereignty. Specifically, it has been argued that internationalization of laws inherently reduces the amount of control that a state has over the rules it is bound by, as the international law governing bodies, such as the WTO, usually receive some share of the governing powers under the terms of international agreements.

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[188] Fox, "international Antitrust", *supra* note 38 at 926.
[189] *General Agreement on Trade and Services, being part of annex IB to the Agreement Establishing the World Trade Organization*,15 April 1994, 33 I.L.M 44 [GATS], which recognise the fact that anti-competitive conduct may hinder trade in services, and require states to cooperate with requests of other member state for consultation and for the transferring of non-confidential information.
[190] *Agreement on trade-related aspects of Intellectual Property Rights, being part of annex IC to the Agreement Establishing the World Trade Organization*, 15 April 1994, 33 I.L.M 1144. [TRIPS]
[191] The Reference Paper, *supra* note 95.
[192] Fox "Races up, down, and sideways", *supra* note 63 at 1802.

It is true that the problem of state sovereignty erosion exists, and indeed any potential solution should be considered in light of it. However, I believe that questions of sovereignty alone should not deter any attempt for the internationalization of competition law. In light of the current activity of global institutions, such as the WTO itself, it does not seem that many states really consider this aspect as a "problem", or at least not as problematic enough so as to stop them from aspiring towards further globalization. States have freely given up their sovereignty on many aspects. As Prof. Bederman describes in his book:[193]

> "Today, the WTO is grappling with the most intractable issues of protectionism: liberalizing the trade in services, removing agricultural subsidies and supports (which, for many developed nations (including the United , European Union [EU[and Japan), remains a lighting rod of domestic dissent), eliminating the so called "cultural exception" for trade in books, films, and TV content, and protecting intellectual property rights against challenges of compulsory licensing by developing nations seeking cheap access to life-saving drugs. Each of these issues implicates some of the most basic matters of sovereignty and the delegation of national authority over the public welfare to transnational governance institutions".

Nevertheless, in truth it seems that, at least for the time being, the fear of loss of sovereignty plays a crucial role in Member States' refusal to accept global competition policy, as mainly DCs do not wish to subject themselves to this set of rules. When looking at the history of the Uruguay Round and DCs' experience with the application of unfamiliar complicated systems of regulation, one cannot escape the conclusion that DCs' reasons in this respect are quite understandable. Therefore, the conclusions reached in this paper take the positions of the DCs regarding negotiations and sovereignty into account.

With regard to the second justification ("prior commitments"), it seems that international competition law could resolve the problems the international trade system is facing due to anti-competitive activity. The activity of global anti-competitive actors (mostly international hard-core cartels) has been reported to restrain international trade,[194] and

[193] Bederman, David J. *Globalization and International Law* (New York: Palgrave Macmillan, 2008) at 174-175.
[194] See the examples of Peru and Argentina, at WT/WGTCP/2, *supra* note 18 at paragraph 85-86.

thus this activity is contrary to the common commitments and efforts which were made by the Member States. This effect has been recognised at The United Nations set of Principles and Rules as well:[195]

> "*Recognizing also* the need to ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting international trade, particularly those affecting the trade and development of developing countries,"

And:

> "*Considering* the possible adverse impact of restrictive business practices, including among others those resulting from the increased activities of transnational corporations, on the trade and development of developing countries,"

The regulation of the international market will support the removal of hybrid non-tariff trade barriers (in the shape of anti-competitive conduct), and therefore ensure that any prior commitment the Member States have taken upon themselves will stay intact. International legislation may affirm some basic standards of legislation and thus for example, instances like the alleged actions of Japan in the *film case*, or the Mexican telecom legislation which was the centre of the *telecom case*, would be avoided.

International competition law will also ensure relative transparency, as it dictates an impartial set of rules, one which is aimed at fighting anti-competitive activity and not towards disguised protectionism.

Another advantage of international competition law is that it allows international thinking, which may eliminate the problem of "free riders" to a certain extent. As mentioned below, states may find it advantageous to host anti-competitive players as long as the effects of anti-competitive behaviours are felt mainly outside of their borders. Export cartels are another example of selfish thinking which may be eliminated by the existence of a binding international set of competition rules.

[195] The United Nations set of Principles and rules, *supra* note 7 at 8.

To conclude, it is clear that international competition law have several advantages, and few quite important disadvantages, for international competition laws. In my opinion, such legislation may not be a bad idea, but only at a later stage, as currently there are many significant problems in its application. Many jurisdictions are not yet ready to apply competition rules as their competition authorities are still inexperienced or not even in existence. Furthermore, and more importantly in my opinion, these jurisdictions are not currently in a position where they are able to conduct well-informed negotiations on the designing of these rules, rules which will govern their internal affairs.[196]

Another obstacle that the supporters of international competition legislation will have to confront is the fact that as mentioned above, this legislation is practically impossible to achieve due to the mentioned political objections. As I aspire to take a realistic approach in this paper, I believe international competition legislation will not be a suitable pathway, at least not in the near future.

b. Domestic competition law (or "national competition law")

The second type of competition laws which may be seen as a future possibility are domestic competition laws. Even though these laws are usually intended to regulate local markets, national laws can influence greatly the international market and international trade as well. For instance, national laws may allow anti-competitive practices which create trade barriers (as was argued at the *film case*; the *bovine hides case* and the *telecom case*) or permit the existence of export cartels. These laws may be used to prohibit or limit the activities of foreign investors within a state, thereby creating an unfair competitive advantage for local industry and impairing the market access which states have gained through trade negotiations. Maybe the most recent example of this type pf activity can be found in the Chinese competition authorities' rejection of Coca Cola's attempt to purchase Huiyuan, a local Chinese juice producer.[197] Some have attributed the Chinese competition authorities' decision to the mere fact that Coca Cola is a foreign

[196] I will elaborate on this issue below in the last part of this paper.
[197] See Coca Cola's failed merger with Huiyuan at "China's MOC Rejects Coca Cola's Takeover Of Huiyuan" *China Retail News* (March 23 2009), online: China Retail News <http://www.chinaretailnews.com/2009/03/23/2459-chinas-moc-rejects-coca-colas-takeover-of-huiyuan/>.

company, as no similar domestic deals have so far been rejected by the local authorities.[198]

Certain domestic competition laws can have some extra-territorial application.[199] Article 1 of the U.S. Sherman Act for example, has been interpreted as imposing jurisdiction over anti-competitive acts which took place outside the borders of the United States on the condition that this conduct has consequences within the borders of the United States (The "Effects Test").[200] The U.S. Foreign Trade Antitrust Improvements Act of 1982 (FTAIA)[201] sets a limitation to this approach, and makes it clear that this extraterritoriality will not be imposed unless such consequences will lead to a direct, substantial and reasonably foreseeable effect.[202] In *United States v. Aluminum Co. of America et al* the U.S. Court of Appeals specifically tied the domestic U.S. competition laws with international trade when it ruled that a violation of the Sherman Act (according to the Effect Test) occurs once imports are being affected.[203] The U.S. jurisprudence (and later on its legislation as well[204]) recognises therefore the negative affects anti-competitive activities pose on international trade, and illegalizes these actions (up to a certain extent[205]).

Article 2 of the Chinese Anti-Monopoly Law also carries some extra-judicial features, as it applies over "conduct outside the territory of the People's Republic of China if they eliminate or have restrictive effect on competition on the domestic market of the PRC."[206]

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[198] See at "Hard to Swallow: China indicates the real targets of its anti monopoly law; outsiders", *The Economist* (19 March 2009), Online: Economist.com <http://www.economist.com/businessfinance/displayStory.cfm?story_id=13331326 >.
[199] For a comprehensive overview of such rules, see at Matsushita Schoenbaum and Mavroidis, *supra* note 43.
[200] *United States v. Aluminum Co. of America et al.*, 148 F.2d 416 (2nd Cir. 1945) [Alcoa case], See further at Sprigman, *supra* note 145 at 265 sqq.
[201] Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a. [FTAIA]
[202] See also in *Hoffman – La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).
[203] Alcoa case, *supra* note 199 at 443-444.
[204] FTAIA, *supra* note 200 at § 6.
[205] See further at § 6, *Ibid.*
[206] Article 2, Anti-monopoly Law of the People's Republic of China, see online: <http://www.china.org.cn/government/laws/2009-02/10/content_17254169.htm>

The application of extra-territorial domestic law is subject to critique in that it may be considered as a breach of state's sovereignty,[207] (or as Guzman describes it, leads to "overregulation"[208]) and thus may lead to conflicts,[209] or if to use Fox's straight-forward words: "no one has elected the United States or the European Union to be enforcer for the world".[210]

Some international agreements require adaptation of national competition laws to conform to certain standards[211] (as Fox's third model dictate) and as mentioned above, the notion of creating a "WTO standard" for Member States' legislation has been suggested as well.[212]

There is experience with such a model under the WTO regime in other domains: Article 27 of the Agreement on trade-related aspects of Intellectual Property Rights (TRIPS)[213] for example, requires Member States to adopt domestic patent legislation in accordance with certain standards.[214]

To conclude, domestic competition laws may aid in the application of future pathways, but cannot on their own supply all the answers to the many existing problems. First, domestic competition laws do not supply international thinking: As mentioned before, domestic laws tend to focus on local markets and do not usually aspire to address global problems which do not coincide with the domestic interests, or if to use again the words of Fox: "Antitrust confined to national law obscures the full dimensions of world

[207] Weinrauch, Roland. Competition Law in the WTO: The Rational for a Framework Agreement (Graz: Neuer Wissenschafts-Verlag, 2004) [Weinrauch] at 76.
[208] Andrew T. Guzman, "Public Choice And Regulatory Competition" (2002) 90 Geo. L.J. 971 [Guzman, "Public Choice And Regulatory Competition"] at 973.
[209] Weinrauch, *supra* note 206 at 76 and 78, see also at Desta & Barnes, supra note 80 at 243.
[210] Fox, "international Antitrust", *supra* note 38 at 924.
[211] The Canada – Costa Rica Free Trade Agreement or the EC – South Africa Agreement ,see review in Qaqaya, Hassan & Lipimile, George (eds.), *The effects of anti-competitive business practices on developing countries and their development prospects* (New York: United Nations Conference on Trade and Development (UNCTAD), 2008).
[212] Fox, "international Antitrust", *supra* note 38 at 926.
[213] Agreement on trade-related aspects of Intellectual Property Rights, being part of annex IC to the Agreement Establishing the World Trade Organization, 15 April 1994, 33 I.L.M 1144. [TRIPS]
[214] See in article 27.1 of TRIPS: "patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application".

problems",[215] and thus naturally, without any international leadership these laws are insufficient in their coverage of the issue.

Secondly, any attempt by one national authority to regulate the world will be neither appropriate nor realistic. One state's authority cannot realistically aspire to regulate alone activities which takes place in many other jurisdictions. Furthermore, this overreaching approach may provoke disputes between states, as certain countries may not approve of the prosecution of activities which happen legally within their own jurisdictions. For all of the above, I believe that although domestic legislation has a role to play, it cannot on its own provide a future pathway for solving the existing problems.

c. International co-operation between national competition authorities

The third type of competition laws to which I will refer in this paper can be described as cooperation agreements between national competition authorities (or in short: "cooperation agreements").[216] The international co-operation between domestic competition authorities usually involves the exchange of information, informal connections between domestic authorities,[217] and as reported by the OECD,[218] in recent years domestic authorities are coordinating "surprise investigations" and raids as well. In February 2003, for the first time, four competition authorities coordinated and performed simultaneous searches on firms which were suspected of performing cartel activities in Japan, the U.S., the E.U and Canada.

Co-operation between domestic authorities is possible at three stages[219]: the pre-investigatory phase (targeting suspects, preventing the destruction of evidence, location of evidence, etc.); the investigatory phase (the gathering and analysing of evidence,

[215] Fox "Races up, down, and sideways", *supra* note 63 at 1802.
[216] For a full picture of bilateral/trilateral cooperation agreements, see chart at Julian L. Clarke, & Simon J. Evenett, *A Multilateral Framework for Competition Policy?* In Clarke Julian L. & Evenett Simon J. et al. (eds.) "The Singapore issues and the world trading system: the road to Cancun and beyond" (Bern: Seco-Publikation, 2003) Online: <http://www.evenett.com/research/chapters/wtoguidecompetition.pdf> [Clarke & Evenett, Multilateral Framework for Competition Policy?] at 21.
[217] Oecd report, *supra* note 14 at 31.
[218] Oecd report, *Ibid.*
[219] ICN Report on Co-operation, *supra* note 38 at 7.

coordination of raids, issuing subpoenas, information, or interviewing witnesses); and the post-investigatory phase (exchange of information with regard to prosecutions, adjudications, etc.).

The main objective of these agreements is usually the protection of domestic markets through co-operation between local authorities.[220] As mentioned above, in light of this objective, it can be said that international anti-competitive activity is not sufficiently covered by these agreements, which are often considered non-practical and non-deterring in this regard.[221]

The OECD reported in 2005 that the international co-operation between domestic authorities at the investigation and prosecution levels has reached 'unprecedented levels,[222] and in light of the current deadlock in the WTO negotiations and the weak practical prospect that a genuine international regime holds at the moment, Co-operation agreements can be regarded as the most practical pathway that the future of international competition law has to offer. It must be remembered however that international co-operation cannot exist if there are no domestic competition authorities to work with, and therefore it is important to ensure the existence and the competent function of these authorities.[223] Furthermore, the success of any cooperation depends on the ability of the cooperating parties to communicate and therefore it is important that a reasonable level of compatibility exists.

Qaqaya & Lipimile have mentioned on this aspect:[224]

> "different standards across jurisdictions represent obstacles not only for companies with cross-boarder business, but also to the effective enforcement and cooperation in the field of competition policy. A certain degree of harmonization may therefore be desirable"

[220] See for instance the preamble of the E.U –U.S Agreement: "Noting that the sound and effective enforcement of the Parties' competition laws would be enhanced by cooperation and, in appropriate cases, coordination between them in the application of those laws". U.S – E.U Agreement, *supra* note 40.
[221] Connor, *supra* note 25 at 575-576.
[222] Oecd report, *supra* note 14 at 29-31.
[223] EC Proposal 1, *supra* note 86 at 2.
[224] Qaqaya & Lipimile, *Supra* note 51 at 596.

Frederic Jenny has also remarked:[225]

> "it might be tempting to narrow the definition of cooperation between competition authorities to the cooperative procedure used to facilitate the enforcement of national antitrust laws. However, the successful enforcement of a meaningful national antitrust law does not exclusively depend on protocols to exchange case-specific information. It also depends on the design and coverage of the national laws of the cooperating countries, on the powers of the national competition agencies involved, on the similarity of the concepts used in substantive analysis etc. "

Consequently, it would seem that the reliance on co-operation agreements does not render redundant the need for common international rules with regard to domestic legislation.

The different types of cooperation frameworks:

Cooperation between domestic competition authorities is being made on a number of levels and can be found in bilateral, regional and multilateral frameworks:

c(i). Bilateral framework:

The most common form of cooperation between domestic authorities is the bilateral cooperation agreement. The E.U is currently party to three such agreements[226] (with the U.S, Japan and Canada). The U.S. is party to eight[227] (with Australia, Brazil, the E.U, Canada, Germany, Israel, Japan and Mexico), and the Canadian government is party to ten[228] (Brazil, Chile, Costa Rica, E.U, Japan, Mexico, Republic of Korea, U.S, U.K, New Zealand and Australia). Another form of bilateral commitment can be found in general

[225] Jenny, Frederic, "International Cooperation on Competition: Myth, Reality and Perspective" (2003) 48(4) Antitrust Bulletin 973 [Jenny] at 977.
[226] online: European Commission (Trade and Competition), <http://ec.europa.eu/competition/international/bilateral/>. [E.U competition agreements web page]
[227] online: U.S. Department of Justice (Antitrust division), <http://www.usdoj.gov/atr/public/international/int_arrangements.htm>. [U.S. bilateral agreements web page].
[228] Online, Competition Bureau Canada (International efforts) <http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/eng/02644.html>.

agreements between states (i.e. not competition agreements),[229] which sometimes include clauses with regard to competition enforcement.

The most prominent bilateral agreement is the one signed between the E.U and the U.S ("the E.U – U.S agreement"). [230] The E.U – U.S agreement includes clauses with regard to the exchange of information[231] (Article III), consultations (Article VII) and cooperation and coordination of enforcement activities (Article IV). The E.U – U.S agreement also includes a positive comity clause (Article V)[232] ,i.e., a party may request the other party to conduct an antitrust investigation under its jurisdiction, when the requesting party has a reason to believe that anti-competitive conduct is occurring.

I have reviewed earlier in this paper the main problem with co-operation agreements (the focus on the domestic markets instead of on the wide international picture) but there are further problems with regard to bilateral agreements which also warrant attention:
The first additional problem relates to transaction costs.[233] In order to cover the international market with co-operation agreements, hundreds (or even thousands) of agreements would have to be negotiated and signed. The international investment system for example is built up from bilateral investment agreements (BITs), and currently includes over 2800 such agreements.[234] An agreement made under a wide multilateral structure (such as the WTO), would significantly lower transaction costs.

Another problem with regard to these agreements is their limited scope. As they cover only two parties, they often prove to be insufficient and lacking whenever co-operation with a third party is necessary. The limited scope of these agreements also leads to the

[229] See for example chapter 3 of the *Euro-Mediterranean Agreement establishing an association between the European Communities and their member states, of the one part and the state of Israel, of the other part*, Israel and the European Union, June 21 2000, O.J.L 147/3. See other examples online: EC < http://ec.europa.eu/competition/international/legislation/brochure.pdf>.
[230] U.S – E.U Agreement, *supra* note 40.
[231] Including regular meeting between the sides, exchange of information with regard to enforcement activities, policies, and information which each party believes might be of importance to the other side.
[232] See online: U.S Federal Trade Commission <http://www.ftc.gov/bc/us-ec-pc.Shtm>.
[233] Guzman, "Public Choice and Regulatory Competition", *supra* note 207 at 980.
[234] See online: http://www.investmenttreatynews.org/cms/news/archive/2009/04/30/do-bilateral-investment-treaties-lead-to-more-foreign-investment.aspx

limited consideration of other parties' interests, as the parties are naturally acting only in accordance with their own best interests. This problem would be avoided through the use of a wide multilateral agreement.

c(ii). A regional framework

Cooperation between domestic authorities is also being conducted under regional structures. One good example of such an agreement can be found in Part IV of the Agreement on the European Economic Area ("EEA Agreement")[235] which governs the cooperation between the members of the E.U and EFTA.[236]

The EEA Agreement is a most comprehensive regional agreement in terms of scope and enforcement: Article 53 of the EEA Agreement provides a general prohibition of conduct which may:

> "affect trade between Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by this Agreement"

Also Article 53 provides a list of specific banned anti-competitive activities like price fixing (53(a)) cartelization (53(b)) and more. Article 54 provides a general ban on abusive behaviour by firms, and like Article 53, it follows with a list of specific prohibited conduct. The EEA Agreement also includes investigative and enforcing mechanisms (Articles 55–59).

The European Competition Network ("ECN") represents another regional cooperation oriented body.[237] Established by the E.U, the ECN's role is to coordinate and facilitate the application of Articles 81 and 82 of the EC Treaty, especially in relation to cross border anti-competitive practices. The ECN coordinates cross border investigations and the exchange of information between authorities. The ECN also serves as a forum for the

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[235] *Agreement on the European Economic Area,* European Union (EU) and The European Free Trade Association (EFTA), 2 May 1992, O.J.L.1/1, entered into force in January 1 1994. Online: EC <http://ec.europa.eu/competition/international/multilateral/eea_agreemt_comp.pdf>. [EEA]

[236] Though Switzerland haven't ratified the EEA Agreement yet.

[237] EC, *Commission Notice on cooperation within the Network of Competition Authorities*, OJ C 243 10.10.2003004/C 101/03, Online: EC <http://www.legaltext.ee/text/en/T81062.htm>.

discussion and development of policies, and several groups of experts are operating under its supervision.

The third draft of the negotiated Free Trade Area of the Americas Agreement ("FTAA")[238] represents a more active approach as its current version includes an actual commitment by the FTAA members to adopt competition laws which deal with specific areas,[239] and will probably aspire to achieve certain harmonization between the members' competition legislation.

A more limited form of regional cooperation agreements can be found in Chapter 15 of the North American Free Trade Agreement (NAFTA).[240] Article 1501 of NAFTA provides a general obligation for the Member States to regulate and enforce measures against anti-competitive conduct. The same Article requires the Member States' authorities to cooperate on competition issues as well.[241]

Today there are more than 100 Regional Trade Agreements ("RTAs") and BITs which include competition provisions.[242] Brusick, Alvarez & Cernat have analysed these provisions and scaled the RTA provisions on a spectrum - from the most binding and integrated degree to the lightest, or if to use their own wording: from "shallow obligations" to "deep obligations".[243] The most binding provisions (or "the deepest obligations") usually include limitations to trade remedies (mainly on the usage of anti-dumping measures) and a supra-national coordination mechanism. The lightest commitments ("the shallow obligations") deal almost only with the cooperation between

[238] FTAA draft agreement, *supra* note 79.
[239] FTAA draft agreement, *Ibid.* Section B Article 6.
[240] Chapter 15 of the *North American Free Trade Agreement* Canada, United States and Mexico, December 17 1992, Can T.S. 1994 No. 2, 32 I.L.M. 1480 entered into force in January 1 1994, online: Foreign Affairs and International Trade Canada
< http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/texte/chap15.aspx?lang=en>. [NAFTA].
[241] For further revision of competition law in RTAs, see Desta & Barnes, *supra* note 80 at 244.
[242] Brusick Philippe, Alvarez, Ana Maria, and Cernat, Lucian. (eds.) *Competition Provisions In Regional Trade Agreements: How to Assure Development Gains* (New York: United Nations Conference on Trade and Development (UNCTAD), 2005) [Brusick, Alvarez & Cernat] at vii-viii.
[243] Brusick, Alvarez & Cernat, *Ibid.* at viii.

domestic authorities. In the middle of the scale there are "upgraded" cooperation agreements which include positive comity and resort to dispute resolution clauses.

c(iii). A multilateral framework

By using the term "a multilateral framework" I will refer in this paper to frameworks which include a significant number of participants and are not based upon geographic criteria.

The main advantage of a multilateral framework is obvious – it achieves wide coverage and is therefore more efficient regarding the process of investigating and prosecuting international anti-competitive activities. It has been written on this aspect:[244]

> "Nowadays, cartel law enforcement is no longer the preserve of richer industrialized countries. However, problems remain as cartels can still find safe havens – in which to hide evidence of cartelization or to meet to organize and implement a cartel"

There are currently no global scaled multilateral cooperation treaties, as cooperation is usually done through bilateral and regional agreements. There are however, several examples for wide-scale global frameworks, the most prominent being the International Competition Network. The International Competition Network (ICN) is an important example of a multilateral (non-regional based) framework for international cooperation. It is important to note however that the ICN should not be regarded as a multilateral framework of governance, but rather as a platform for contacts; promoting dialogue, research of competition policies, technical support and the sharing of information by both domestic and international authorities. The ICN does not directly indulge in international enforcement and governance, but nevertheless the contacts, research and cooperation which are being achieved through it are extremely valuable in this matter. The ICN produces guidelines and recommendations, but does not posses any binding authority,[245] and as such its role is somewhat limited. Nevertheless, the existence of the ICN as a supplementary force for any future framework could be important as it provides a useful

[244] UNCTAD report, can DC benefit?, *supra* note 45, at iii.
[245] Its guidelines are mere recommendations. See online: International Competition Network <http://www.internationalcompetitionnetwork.org/index.php/en/about-icn>.

platform in which the exchange of information, informal dialogues and technical support can be carried out.[246]

The United Nations set of Principles and Rules and the OECD's 'recommendations and best practices' document[247] which were mentioned above are other good examples of a multilateral framework in which wide scaled multilateral cooperation may prosper.

The advantages of a multilateral framework of cooperation are clear. Global coverage could be achieved rendering these frameworks as preferable over regional or bilateral frameworks. A multilateral agreement framework may reduce transaction costs for cooperation as it will eliminate the need to negotiate and sign a network of vast multitude of bilateral or regional agreements. These agreements may also facilitate cooperation as they will most probably lead to harmonization of cooperation procedures. The global mutual network may also be advantageous as cooperation will be a means through which states may learn from each other and thus develop, and the better quality of authorities' performance may be achieved.

The main disadvantages for a cooperation agreement have already been discussed in this paper, and so I will only review these matter here very briefly: First and foremost, cooperation agreements do not provide an overall regulation of the international market, as they focus on domestic markets alone, and therefore international thinking is not achieved.

Nevertheless as I will argue below, of all of the above mentioned types of regulation, cooperation agreements are the most suitable form of regulation for the existing reality, and are most probably the most politically possible. As I will attempt to justify below, I believe the non-intrusive / non-binding nature of these agreements make them the most suitable form of regulation for dealing with the current situation. Cooperation agreements provide a suitable platform for future development and international work. Furthermore,

[246] Gehring "Sustainable Competition Law", *supra* note 101 at 131.
[247] OECD recommendations, *supra* note 7. See examples for the use of such multilateral framework at the Oecd report, *supra* note 14 at 31.

they offer a suitable vehicle attaining this aim in a non-intrusive manner, without imposing sets of binding legislation upon states which cannot support this legislation or even negotiate its terms.

V. The way forward: possible pathways

The above review of the different forms of laws which may have an effect on international competition policy highlights the tools and foundation on which future legal advancement may be based. Prior to addressing the different possibilities I would like to mention again some of the directions and objectives I have set myself in this paper: First, in this paper I have focused mainly on the adverse effects the international trade system has suffered due to the lack of an international competition framework. I will not attempt to propose an overall scheme for global competition regulation (although some of my suggestions may cover this aspect as well), but only suggest a solution which will deal with the effects of this on international trade.

Secondly, as has been argued above, it is my contention that any future advancement should be made under the WTO framework. Therefore all the proposals made in this chapter will relate to this framework.

Thirdly, it is important that proposed solutions be practical in the light of the existing circumstances. For this reason and others (which are mentioned below) I aspire to propose future pathways which will be politically possible. Therefore no proposal for a full "international competition law" type of multilateral agreement will be offered. Furthermore, after experiencing the first two phases which are suggested below in this part (a process which should take at least a decade), the Member States may arrive at the conclusion that this agreement is not necessary at all as the above mentioned deficiencies may be solved by competent well coordinated cooperation alone.

My proposed pathways include a three-headed plan: the first two parts ("judicial activism" and "capacity building only") should be applied as soon as possible, while the third part ("multilateral cooperation agreement") should be applied only later. The first part ("judicial activism") should be applied through the DSB. The other two parts are more of a two phased program which may lay the foundation for future advancement, and should be applied by the WTO members. The first two parts ("judicial activism" and "capacity building only") will address the problem which was described before as "prior

commitments", while the second and third parts will address what I have referred to as a "market without borders". All three parts will deal with the adverse effects that the lack of a competition law framework imposes on international trade.

Two matters should be clarified before continuing. First, the three pathways suggested should be regarded as a whole, as each one by itself does not offer a comprehensive solution and leaves certain aspects uncovered.

Secondly, these proposals by themselves will not solve all the problems that have been described above. The aim is to suggest a realistic way forward to a deadlocked situation and to provide the foundation for a future comprehensive solution. This future comprehensive solution, I will argue, can be designed only after these following pathways will be taken.

a. "Judicial Activism"? The DSB and Article XXIII of the GATT

In this section I will argue that the WTO's Dispute Settlement Body (DSB) should apply some form of what has been described by some as "judicial activism",[248] based on the framework established by Article XXIII:1(b) of the GATT.

But before continuing, it is necessary to mention the existence of Article 5 of the DSU which provides the alternative of voluntary mediation, conciliation and good offices, which in my opinion may be the best dispute resolution mechanism for this type of dispute. These mechanisms are voluntary and depend on the parties' good will and agreement to this process. I shall elaborate on the future role of Article 5 of the DSU below. In this part of my paper, I shall relate to the most common situation, where the parties do not choose the route of Article 5, but instead have chosen to litigate before a DSB arbitral panel.

[248]Alberto Alvarez-Jimenez, "Emerging WTO Competition Jurisprudence and its Possibilities for Future Development" (2004) 24 Nw. J. Int'l L. & Bus. 441 sqq. [Alvarez]. See also at Sung-joon Cho, "GATT Non-Violation Issues in the WTO Framework: Are They the Achilles' heel of the Dispute Settlement Process? (1998) 39(2) Harv. Int'l L.J. 311, [Cho] at 319, and Christophe Larouer, "WTO Non-Violation Complaints: A Misunderstood Remedy in the WTO Dispute Settlement System" (2006) 53 NILR 97 at 100.

My argument can be simplified as follows:

First, I argue that there is a definite possibility of applying hybrid trade barriers which do not fall within any written prohibition of any WTO agreement. This point has been already elaborated in this paper.[249]

Secondly, I argue that when deciding on a matter, the DSB should apply the concepts and ideals on which the WTO agreement and its annexes are based, rather than apply the strict interpretation of the "written word". Only with such an approach may true transparency be achieved.

Thirdly, I argue that following the first two arguments, the DSB should increase its use of the non-violation clause (Article XXIII of the GATT) and declare hybrid trade barriers as a violations of the WTO agreement and its annexes.

As mentioned above, I argue that the DSB should regard the basic concepts and commitments made by the members states, and not allow any sort of sophisticated unilateral avoidance of these concepts and commitments. Moreover, according to Article XXIII of the GATT and Article XXIII:3 of the GATS, the DSB is authorised to do just this.

Hybrid non-tariff trade barriers have become a "worrisome trend"[250] and are expected to become in the future even more sophisticated. The hybrid nature of these barriers makes them difficult cases to prosecute through the WTO, as the member state's role in the creation of these barriers may have been relatively passive: the state simply allows the anti-competitive activity to exist, and does not have to directly and actively impose the barriers. It is therefore the "perfect scheme": a state may host international cartels or allow national champions to control (and to seal) local markets on the one hand, but

[249] See in part II(b) of this paper.
[250] Gamberoni & Newfarmer, *supra* note 75.

demand full access to other markets on the other hand.[251] But yet, in most cases the state has the means at its disposal for dealing with this activity, and therefore the decision of letting the barrier stand, or putting it down, is in the state's hands.

As will be further elaborated below, a further difficulty with such prosecution arises from the overly cautious approach that the DSB has taken with regard to Article XXIII:1(b).

a(i). Article XXIII:1(b) of the GATT

Article XXIII:1(b) was originally drafted in order to maintain the reciprocity between the GATT members' commitments and preventing any backsliding.[252] The GATT 1947 drafters feared a situation in which the reciprocity between GATT members will be frustrated by means not yet thought of,[253] and that the delicate balance of interests and concessions on which a multilateral system relies will change through the passage of time. Article XXIII:1(b) was therefore drafted in order to ensure that this balance will remain sustainable in the light of changes not yet known at the time of the drafting.[254]

Articles XXIII:3 of the GATS and Articles XI:1 of the GATT which prohibit restrictions which are not duties, taxes or other charges, represent the same rationale as Article XXIII of the GATT.

The non-violation remedy in Article XXIII:1(b) is considered to be an exceptional remedy, one which should be applied with great caution.[255] The reason for this is clear:

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[251] Fox, Eleanor M. "The WTO's first antitrust case – Mexican Telecom: A sleeping victory for trade and development" (2006) 9(2) J. Int'l Econ. L. 271 [Fox, "Mexican Telecom"] at 271-272.
[252] See for the "drafting history of non-violation provision (GATT Article XXIII:1(b))" at Cho, *supra* note 248 at 314.
[253] *Ibid*, at 315.
[254] See at The Uruguay Round DSU negotiation history, "Note by the Secretariat: Non Violation Complaints Under GATT XXIII:2" GATT Doc MTN.GNG/NG13/W/31 (July 14 1989) online: Worldtradelaw.net, <http://www.worldtradelaw.net/history/urdsu/w31.pdf> at 6.
[255] *European Communities – Measures affecting Asbestos and Asbestos-Containing Products (Complaint by Canada)* (2000) WTO Doc. WT/DS135/AB/R (Appellate Body Report), online: WTO <http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDocuments/t/WT/DS/135ABR.doc> [EC asbestos]. at 66-67. See also at the film case, *supra* note 89 at para 10.37; Noonan, *supra* note 17 at 427.

First, there is the slippery slope argument and the fear of applying an overly intrusive judicial review of domestic legislation by the DSU, or to use Fox's words: [256]

> "To what extent should a WTO panel be entitled to second-guess fact-finding of the competition agency of the nation whose consumers were allegedly hurt."

Furthermore, using Article XXIII:1(b) in such an active manner may lead to the subjection of other policies to the jurisdiction of the WTO, which is contrary to the Member States intentions and wishes. The *film case* panel stated on this matter:

> "The reason for this caution is straightforward. Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules."[257]

Moreover, this activism may be regarded as an unauthorised diminishing of the states' sovereignty. The *European Communities – Measures affecting Asbestos and Asbestos-Containing Products*[258] ("EC Asbestos case") represents an interesting case study on this aspect. The EC claimed that asbestos related regulation should not be subject to Article XXIII:1(b), since Canada (the claimant) could not have legitimately expected the EC not to regulate health related issues (like the use of asbestos).[259] However, the Appellate Body rejected this claim and argued the inclusion in the text of "any measure" may justify claims with regard to health measures as well,[260] and in any event, what counts is whether a benefit has been nullified or impaired by a measure restricting market access, and not the nature of the impairing measure.[261]

Another avenue of thought regarding this issue[262] is that through such a wide scoped clause, the DSB would be able to insert policies which the Member States have chosen to reject. The subject matter of competition policy has indeed been constantly rejected by the Member States for over six decades, and it is argued that it is improper to let it in

[256] Fox, "Mexican telecom", *supra* note 251 at 275.
[257] The film case, *supra* note 89 at para 10.36.
[258] EC asbestos, *supra* note 255.
[259] EC asbestos, *Ibid.* at 66.
[260] EC asbestos, *Ibid.* at 69.
[261] EC asbestos, *Ibid.* at 69-70.
[262] Cho, *supra* note 248 at 313.

through the "back door" by DSB's acknowledgment of the lack of a proper competition policy as a violation of the GATT.

The drafting of Article 3(2) of the Understanding on the Rules and Procedures Governing the Settlement of Dispute (the DSU) adds weight to this conclusion as it specifically states that:[263]

> "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements".

To this Article 19(2) of the DSU adds:[264]

> In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.

For all of the above reasons it is argued that the DSB should apply a cautious approach and regard the use of Article XXIII:1(b) only as an exceptional measure.

I argue on the other hand that the changing nature of economies in particular and life in general requires the use of general Articles like Article XXIII:1(b) of the GATT. I believe this approach follows from the text and the legislative history of Article XXIII:1(b).

I argue that in order to avoid a "cat and mouse" chasing game, one that the stiff WTO regulation process will never be able to cope with, such a general and inclusive regulation is needed. First, according to Article XXIII:1(b), it is wrong to argue that the DSB is not authorised to interfere with domestic legislation, since the Article specifically mentions the application of "any measure", and thus domestic legislation may very well be included under this statement. The EC asbestos panel has mentioned in this regard:[265]

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[263] Emphasize is not in the origin. Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the Agreement Establishing the World Trade Organization, 15 April 1994, 33 I.L.M 1125 (entered into force 1 January 1995).
[264] Emphasize is not in the origin. *Ibid.*
[265] EC asbestos, *supra* note 255 at 69.

> "The use of the word "any" suggests that measures of all types may give rise to such a cause of action. The text does not distinguish between, or exclude, certain types of measure."

Secondly, as a mater of fact, the WTO is already interfering with domestic legislation which is not directly related to international trade, and so domestic legislation regarding intellectual property, service industry, health and safety measures and more are already being *de facto* regulated by the WTO.[266]

Thirdly, according to Article 26 of the DSU, direct effect on local legislation could easily be avoided and other less intrusive solutions could be used (like compensation or tariff retaliation). The remedy of Article XXIII:1(b) (as prescribed by Article 26 of the DSU) allows this conclusion as it specifically mentions that with regard to non-violation claims, the withdrawal of a measure is not mandatory. This point is very important, as it allows the avoidance of the intrusive application of trade remedies over domestic policies.

Other interpretations of Article XXIII:1(b) encourage the creation of hybrid trade barriers which may undermine the very existence of the WTO and the free flow of trade, as states are encouraged to act in a manner which allows them to benefit from other states' reduction of barriers, without "paying" with an actual promised reduction of tariffs.

a (ii). Article XXIII:1(b) and the burden of proof

Fox points out what seems to be the most significant problem with regard to the use of Article XXIII:1(b) when she mentions how difficult it is to prove a violation under Article XXIII:1(b).[267] According to the *film case* panel, in order to establish an Article XXIII:1(b) claim, a claimant must establish "1) application of a measure by a WTO Member; 2) a benefit accruing under the relevant agreement; and 3) nullification or impairment of the benefit as the result of the application of the measure".[268]

[266] Andrew T. Guzman, "Global Governance and the WTO" (2004) 45(2) Harv. Int'l L.J. 303 [Guzman, Global Governance] at 303.
[267] Fox, "Mexican telecom", *supra* note 251 at 275.
[268] The film case, *supra* note 89 at para. 10.41

According to Fox, the DSB panel may face great factual problems in trying to determine whether a certain anti-competitive activity actually existed in the local market, and even more if whether this activity has indeed created trade barriers and impaired claimants expected benefits.[269] Furthermore, the complex nature of hybrid barriers which includes private actors (which are not subject to WTO jurisdiction) and on some occasions the state's passive action alone, makes the threshold of this burden even higher.

Indeed the *film case* panel has determined that the U.S had not demonstrated that any of the Japanese measures actually nullified or impaired the benefits accruing to the U.S.

The same was true with regard to *the bovine hides Case* where the European Communities had failed to satisfy the burden and prove that the alleged anti-competitive activity by the Argentineans actually established the claimed violation of the GATT.

When regarding the high burden of proof that a claimant must raise in order to succeed in a non-violation claim, one must ask whether the arbitrators' strict (or "cautious") approach toward the use of Article XXIII:1(b) is necessary or even suitable. First, it seems that such a heavy burden of proof may act as a "filter" for non-violation claims, and thus no additional "cautious approach" is necessary. Once such a "filter" exists, there is no need to worry about the broad and intrusive use of Article XXIII:1(b) as not many claimants succeed in the first place in raising a non-violation claim. Therefore the role of this cautious approach is superfluous.

Secondly, the reasons for this cautious approach are doubtful. As mentioned before, the DSB is already dealing with domestic policies which are not directly linked to trade, and as Laird mentions, history shows that states actually do show prudence when approaching broad and general provisions and are avoiding abusive usage of such.[270]

[269] Fox, "Mexican telecom", *supra* note 251 at 275.
[270] Laird, *supra* note 132 at 247.

Thirdly, I believe that there is no other way to catch up with the dynamic, evolving and sophisticated nature of private actors. New "technically legal" ways will always be found, especially when the legislative body is slow to respond. The WTO legislation is almost unchangeable and as the legislation history of Article XXIII:1(b) shows, this Article was drafted in part to answer exactly this need.

a(iii). Interim conclusion:

From all of the above, my conclusion is that Article XXIII:1(b) is a suitable mechanism for dealing with the problems posed by hybrid competition trade barriers on international trade. I believe the Article's wide and adaptive nature enables the DSB to deal with sophisticated cases such as hybrid non-tariff trade barriers, and thus to ensure that the Member States' benefit are not diminished.

The flexible remedial mechanism of Article XXIII:1(b) is suitable as it allows "non-intrusive" remedies which do not require the removal of domestic measures in controversial fields such as competition law, where there is no consensus as to their inclusion within the WTO system.

I also conclude that the cautious approach which is being taken by arbitrators with regard to Article XXIII:1(b) should be abandoned, as it functions as a second unnecessary "filter" (the first is the heavy burden of proof) for an Article, which as I have argued, should be made more readily available to claimants.

b. The Foundations for a Future Advancement:

After reviewing the mechanism of Article XXIII:1(b) and the possibilities current judicial review may supply, the second part of this chapter will review possible pathways which may lay the foundation for a future multilateral framework.

In this paper I will not aspire to design a model for an international agreement on competition policy, but will rather state the necessary first steps which may build the

foundations for future advancement on the subject of international competition policy. The reasons for this are as follow:

First, as mentioned below, the attempts for the creation of international competition agreement have been infertile and the way towards this agreement seems to be blocked, mainly due to political reasons. The application of this agreement does not therefore seem like a practical goal, and thus I would like to suggest more realistic possibilities, such that may overcome the current political difficulties, and may prove to be fruitful in the future.

Secondly, several jurisdictions are not yet ready for the application of any such agreement or even for the negotiations on it. As mentioned above, some Member States do not yet have any domestic competition law, and many of those who recently adopted these laws do not yet have professional functioning authorities for the application of such. I have mentioned above the concerns DCs have expressed on the application of new type of systems which they do not fully understand and are not ready for, and therefore I believe it will neither be fair nor possible to negotiate this multilateral agreement, let alone to expect full compliance with it.

Thirdly, it is not yet clear that this comprehensive multilateral agreement will actually be needed. If one is to accept the assumption that negotiations should be fair and all members should have the opportunity to arrive to these negotiations with adequate knowledge and experience, and that therefore capacity building should take place and young authorities should gain some experience so policy makers will be able to better identify their goals (this point is further elaborated below), than one must agree as well to the notion that any negotiations could take place only in several years time.[271] The changes in policy and goals which may take place in this period of time are impossible to predict: for example, developments as the increasing importance of non-official forums for cooperation (like the ICN or maybe through the OECD) and the proliferation of

[271] United Nations Conference on Trade and Development, *Multilateral Competition Policy and Economic Development, A Developing Country Perspective on the European Community Proposals,* UNCTAD UN Doc. UNCTAD/DITC/CLP/2003/10 online UNCTAD <http://www.unctad.org/Templates/Page.asp?intItemID=4150&lang=1> [UNCTAD report, DC and the EC proposals] at 2.

cooperation agreements may eventually deal in an adequate way with most of the current problems, and an agreement may eventually not be needed at all. It is impossible therefore to predict now what kind of factual situation any such future agreement will have to deal.

I suggest below a three headed plan. The first part is my above mentioned call for the use of Article XXIII of GATT. The second part involves a two phased program: the first phase involves a capacity-building program which will provide those jurisdictions which do not posses the ability to deal with this subject-matter with the abilities to decide on their own what their objectives needs and expectations are from any such international agreement. This program (so I hope) may change the position of DCs with regard to competition policy, as they will not only better understand the dangers the non-regulated market carries, but will be able to design their own suggestions and schemes for such international modalities. Once this capacity-building is sufficiently provided, the second phase of ”cooperation only” may be initiated, upon which future development and agreements may be built.

This second phase includes a multilateral WTO cooperation agreement, one which will serve as a platform for international learning; cooperation and further development.

c. Phase one: capacity-building first and only[272]

According to the first phase, the Member States will commit to participate in a capacity building program under which Member States' representatives will receive ongoing assistance with a variety of issues. Until the adequate completion of this phase, no further advancement should be made, since no fair, equal and well-informed negotiations may occur. The objective of such phase is therefore to bring the Member States into a well-informed position in future negotiations on this field. Only after going through a thorough capacity-building phase and earning some experience in enforcement and enactment of domestic competition regulation and understanding the effects such have on international

[272] The "only" means that no other obligations will be attached to the described phase, and only upon its completion the next phase may begin.

trade (or at least achieving a more well-informed negotiations position), would *all* Member States be able to take well-informed decisions with regard to any future progress (or lack of progress); what kind of obligation they should undertake, and what kind of goals they should pursue. In simpler words, fairer negotiations may take place.

The foundations for such capacity building already exist, and can be found at the EC proposals with regard to competition law[273] and mainly at the Competition and Consumer Policies Branch of UNCTAD programmes.[274] The UNCTAD capacity building program was established following the WTO call at the Doha declaration,[275] and an attempt to engage representatives both from the WTO and the different ministries of trade in meetings is indeed being made.[276]

UNCTAD work includes regional programmes such as COMPAL (Competition and Consumer Protection for Latin America)[277] and the AFRICOMP (Competition Programme for Africa),[278] and country-specific technical assistance, and its field-work includes mainly workshops, advisory services and study tours to developed competition authorities.[279]

Beside providing assistance with the preparation of competition legislation; establishing basic educational foundations for the legal and economic community (through establishing competition courses at universities) and training of the professional body of personal and institution building, an important role of such capacity building should be

[273] EC Proposal 1, *supra* note 86 at 3.
[274] See for example the UNCTAD capacity building report, *supra* note 87.
[275] See at para. 24 of the *Doha Ministerial Declaration*, WTO, *The Doha Ministerial Declaration, Ministerial Conference, Fourth Session*, WTO Doc. WT/MIN(01)/DEC/W/1 (2001), online: WTO <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm> [Doha Ministerial Declaration].
[276] UNCTAD Final Consolidated report on capacity building, *supra* note 166 at 2.
[277] Online: COMPAL <http://www.unctadxi.org/templates/Page____2989.aspx>.
[278] United Nations Conference on Trade and Development, *The Africa Competition Programme (AFRICOMP), Brief on the AFRICOMP Programme*, UNCTAD UN Doc. (2009) online: UNCTAD http://www.unctad.org/sections/ditc_ccpb/docs/ditc_ccpb0027_en.pdf
[279] United Nations Conference on Trade and Development, *Country-Specific Technical Assistance Provided by UNCTAD in the Area of Competition and Consumer Welfare, A consolidated report 2006-2009*, UNCTAD UN Doc. (2009) online: UNCTAD <http://www.unctad.org/sections/ditc_ccpb/docs/ditc_ccpb0026_en.pdf> [UNCTAD Technical Assistance Report].

the ongoing support of inexperienced competition authorities while they go through their first years.

Assisting inexperienced members states will allow them to identify what they need competition law for, i.e. to identify the objectives they would like to pursue through competition law (whether for the promotion of efficiency, the protection of local producers, etc.) or even if they are interested at all in applying any form of competition laws, and to understand the effects anti-competitive activity has on international trade. Such identification is crucial for any future advancement, and without it any progress should not be made.

If one is to learn the lessons of the "grand bargain" and the devastating effects it had on the willingness of DC to negotiate and to move forward with trade liberalization, one should realise that asking a state to commit itself to obligations such state is not fully prepared for is at the least not recommendable.[280] The above quoted words of Dr. John Abu reflect this notion.[281] Furthermore, it may not be just to expect inexperienced states to comply with such agreement as inexperienced competition authorities may not live to the standards such agreement may require, and thus are doomed to breach it.

Therefore I argue that even though I believe a multilateral WTO agreement will solve many of the current problems, the negotiations over such agreements should be made only from an equal and well-informed position, i.e. once the Member States are fully aware of their own interests, capabilities and objectives on this field.

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[280] Sylvia Ostry, an experienced Canadian negotiator, has testified that the Uruguay Round Agreements and their implications were poorly understood by DCs at the time. See in Michael J. Finger, "Implementation and imbalance: dealing with hangover from the Uruguay round" (2007) 23 Oxford Review of Economic Policy 440 at 443.

[281] Statement by Dr. John Abu, *supra* note 167:

"The experience of some of us with the implementation of the Uruguay Round Agreements has not been pleasant. This is not due to lack of efforts on our part. Our limited institutional and human resource capacities have made it difficult for us in adapting our laws, regulations and institutions to meet the demands of the WTO Agreements. Consequently we have been labouring to fulfil obligations without being able to enjoy corresponding benefits. Certainly the poor performance of Africa in the multilateral trading system must be reversed, for Ghana firmly believes that benefits from the global trading system should be evenly shared so as to offer gains to all, especially, African countries. "

One key feature which such a capacity-building program should focus on is the relationship between competition laws and trade; how the first can facilitate the other, or frustrate prior state commitments on the other hand. As I argue above, the normative source for the application of competition policy within the international level is the trade barriers and the frustration of existing trade commitments by anti-competitive activity. Therefore I believe such capacity building should focus on both subject matters, and should include representatives from both competition and trade offices, as understanding of the "full picture" is crucial on this matter.

I believe such capacity-building program should be made as part of a global scheme, and should be accompanied by a declaration of the Member States with regard to the goals of such program, their commitment to such and a schedule for the implementation of such. This plan should aim to increase capacity and awareness with regard to competition law and the interaction between such and international trade. The final objective of such program should be eventually to bring the Member States to a well informed position for negotiation on the next step - a multilateral "shallow formed" cooperation agreement which will be defined as a non-binding platform of cooperation (see further below).

Whether such negotiation will actually take place or not is currently irrelevant, as long as a decision to omit such negotiations is made from a well informed position and the full understanding of the matter. As described below, I believe such negotiations on a "shallow formed" agreement will indeed eventually take place.

Another feature such capacity building should emphasize is a mechanism of voluntary peer reviews under which states will be able to measure their advancement and performance. Both the UNCTAD and the OECD apply such mechanisms. The OECD model of voluntary peer reviews is based on reports and questionnaires the reviewed country files, which are being examined and evaluated by a Competition Committee

made of representatives of two other countries.[282] The Committee produces Policy Options and Recommendations, which are not mandatory, but as reported, are often fulfilled.[283] Representatives of DCs indeed expressed their satisfaction from the OECD peer reviews process and its outcomes,[284] and thus I believe it will be a good idea to incorporate such under the global capacity building scheme.

***c(i) The role of the ICN in capacity building*:**

The ICN should play an important role in this capacity building scheme. The virtual nature of the ICN (it operates online) makes its resources and line of experts available without relevancy to geographic location, as discussions and exchange of knowledge occurs mainly via e-mails.[285] The ICN incorporate many private experts as well as governmental officials. Its contact list includes dozens of participants from numerous countries,[286] and thus a sufficient plurality; representation of different ideologies and extensive knowledge are guarantied. The ICN working groups produce manuals, recommended practice documents, reports and working papers which inexperienced countries may find extremely useful.

But nevertheless, the support of the ICN alone is not sufficient: First, internet (on which the ICN is basing its activities) may not always be available on a reliable basis. Furthermore, it seems that due to the intensive nature of such task, effective capacity building requires "field agents", i.e. the physical presence of experts who will work directly with local personnel and will understand the local conditions.[287]

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[282] See in United Nations Conference on Trade and Development, Roles of Possible Dispute Mediation Mechanisms and Alternatives Arrangements, Including Voluntary Peer Reviews, in Competition Policy, UNCTAD UN Doc. TD/RBP/CONF.6/11/Rev.1 and TD/B/COM.2/CLP/37/Rev.3 (2006) online: UNCTAD <http://www.unctad.org/en/docs/tdrbpconf6d11rev1_en.pdf> [UNCTAD "dispute mediation mechanisms"]. at 4. See examples for OECD peer reviews at <http://www.oecd.org/document/43/0,3343,en_2649_34685_2489707_1_1_1_1,00.html>.
[283] UNCTAD "dispute mediation mechanisms", *Ibid.*at 5.
[284] UNCTAD "dispute mediation mechanisms", *Ibid* at 8-9.
[285] Elizabeth F. Kraus & Maria B. Coppola, "The International Competition Network: A virtual Reality" (2004) 4 Mergers and Acquisitions Newsl. 25, online: FTC <http://www.ftc.gov/bc/international/docs/krauscoppolaicn04.pdf> [Kraus & Coppola] at 2.
[286] See online: ICN < http://www.internationalcompetitionnetwork.org/pdf/ICN_Contact_List.pdf>.
[287] UNCTAD capacity building report, *supra* note 87 at 1-2.

Secondly, one must remember that as enthusiastic as its participants may be, the ICN's experts and participants are all volunteers and not permanent staff, and thus may not be available for the performance of such an extensive task which requires dedicated full-time employed personnel.

But nevertheless the ICN in its present capacity can and should play a supportive role to the overall capacity building scheme, and any agreement which may start with such a capacity building program should aspire to cooperate with the ICN for this task.[288]

c(ii). Interim conclusion:

Such a capacity building program as I am advocating can be based on existing frameworks such as those of the UNCTAD; OECD and the ICN. The main objective of this plan should be to bring Member States to a well-informed position, toward future negotiations on a multilateral cooperation agreement (see phase two), and a key feature of this program should be the interaction and the adverse effects global and domestic anti-competitive activity have on international trade. Until such program is carried out in a satisfactory manner, no negotiation on further advancement should be made, as no well-informed negotiations can take place.

d. Phase two: creating a multilateral framework of cooperation only.

This phase will include a substantive WTO agreement, but one which will deal only with the shallowest forms of cooperation between domestic authorities, and will be voluntary and non-binding by nature, i.e. it will not be subject to the dispute settlement mechanism. As explained below, the shallow nature of this agreement is the key feature of this model and a crucial motive for future advancement in this topic.

The above title, "cooperation only", may be deceiving as cooperation may arrive in many different forms of integration. As mentioned above, Brusick, Alvarez & Cernat describe the scale of shapes such agreements may take - starting from the "deepest obligations"

[288] Gehring, *supra* note 144; Fox, "international Antitrust", *supra* note 38 at 929.

type of agreements to the "shallowest type".[289] While the Deepest forms of cooperation include an ultra-national supervisory body; dispute resolution mechanism and the globalisation of the entire system, this proposed phase two will start from the simplest and "shallowest" starting point of cooperation, one which will not even demand the enactment of competition laws, but only provide the platform for official cooperation, exchange of information, and technical assistance. Such agreement may even follow the example of existing agreements such as Article 2 of Chapter 14 of the Australia –New Zealand – AASEAN recently signed agreement,[290] which opens with the phrasing "the parties *may* engage in co-operation activities […]" and do not demand the member countries' full engagement in such. The enactment of a positive comity for example, shall be reserved only for later steps (if such will be necessary) as it may represent an overly intrusive tool for this phase, which should include only the lightest, most non-binding form of cooperation.

I believe such "shallow" nature to be necessary for two main reasons: First, politically speaking, it seems any other binding agreement would not have any chance of passing. The objections for any "stronger" form of agreements are fierce, and thus such a shallow agreement has more chance to pass.

Secondly, such agreement is more fair towards inexperienced authorities, as it offers a platform for learning and improving and excludes the possibility of "punishing" for low performance. In this moment, the world is not yet ready for competition negotiations: many authorities do not have the means to negotiate fairly and equally as they are not yet experienced in the subject matter of international competition, and thus do not yet have sufficient knowledge regarding their objectives, goals and commitment they may impose upon themselves. This agreement is therefore important as it is aimed towards the introduction of this system in a sympathetic manner, and creating a system under which

[289] Brusick, Alvarez & Cernat, *supra* note 242 at viii.
[290] *The Agreement Establishing the Association of Southeast Asian Nations (ASEAN)–Australia–New Zealand Free Trade Area (AANZFTA)*, 27 February 2009, online: dfat.gov.au <http://www.dfat.gov.au/trade/fta/asean/aanzfta/>.

inexperienced Member States will have the opportunity to learn and to gain necessary experience.

Despite its shallow nature, such agreement may achieve several goals: It will serve as a platform for aiding the different authorities in the coordination of international investigations and prosecutions. As mentioned before, international anti-competitive activity exists and an international framework for dealing with such is crucial.

Furthermore, such agreement will serve as a platform for learning the advantages of the international framework and gathering experience and knowledge in the operation of such framework. As mentioned above, this process is necessary in order to achieve equal and well-informed multilateral negotiations between the Member States.

Moreover, such agreement may start a "snow ball", one which may increase in size and effects if the Member States find such agreement to be useful. The topic of competition negotiations is currently deadlocked within the WTO framework and such agreement may start pushing things forward again, and not less important, will provide some infrastructure for future, more ambitious, plans (if that proves be necessary). This agreement will set a functioning mechanism, one which may be adjusted, improved or increased in scope according to the Member States' needs, in other words, it will be a start.

Multilateral wide agreement is necessary as it will lower transaction costs of agreements (one multilateral agreement instead a network of thousands bilateral and regional agreements). This agreement will harmonize the ways states cooperate with each other as it will provide harmonized procedures for cooperation which will facilitate such coordination. Most importantly, a multilateral cooperation agreement will achieve global coverage, i.e. when a certain domestic authority investigates certain conduct, it will enjoy the access to, and cooperation with, numerous other authorities. The need for a global coverage was demonstrated in a report prepared for the UNCTAD as Evenett reports of 40 international cartels which were prosecuted by the U.S. and the E.U. where the

headquarters of these cartels were spread over 31 different jurisdictions (eight of which were located at DCs).[291] The need for a vast international coverage is therefore obvious.

I also believe that such "shallow form" of agreement to be effective despite the fact that a dispute settlement option is excluded, as member state have much to gain and almost nothing to lose from such cooperation. One country's attempts to investigate the activity of an international cartel is often in the interest of others, as the activity and the damages of such activity are felt world wide.

It is true that, as mentioned above, several hosting states would aspire to protect anti-competitive players hosted by them, as such generates profits in term of employment and taxes to the hosting state. Nevertheless I believe that the reciprocity and the "repeating game" nature of such agreement (countries which will not cooperate, will not in return be aided), and the fact that such agreement will create for the first time a global framework which may be adapted, improved and developed in the future (such agreement may have a "snow ball" effect), one which will encourage and educate for "global thinking" instead of domestic, all of the above represents the great beneficial potential which such agreement may generate.

The advantage of such agreement lies also in its simplicity and its non-binding nature: DCs will find it easier at this stage to agree to an agreement which requires only cooperation and will not demand the negotiations over technical provisions, the adoption of competition policies and the possibility of technical litigation at the DSB.[292] Such agreement will therefore be politically sustainable and its application will be relatively fair (as all members are capable of understanding the subject matter, and it does not require much from the members).

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[291] UNCTAD report, can DC benefit? *supra* note 45 at 9, see also chart at 38.

[292] The EC as well proposed with regard to cooperation that such will not be subject to the DSU. See at WTO, *Working Group on the Interaction between Trade and Competition Policy, Communication from the European Community and its Member States*, WTO Doc. WT/WGTCP/W/229 (2003), online: WTO <http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDocuments/t/WT/WGTCP/W229.doc> [EC proposal 3] at para 9.

While the simplicity of such agreement makes it appealing and fair, such simplicity carries several downsides as well: As this phase does not suggest harmonization of laws, cooperation with other authorities will not always be fruitful. Sometimes necessary information for example will not be available as the investigated conduct will not be illegal in the other state and thus no information will be gathered and no investigation will take place.

The lack of harmonization of domestic legislation is disadvantaging also (as discussed above) as it denies the different authorities a common language and common goals.[293] In order to maximise the cooperation between the different authorities, some compatibility must exist.

Nevertheless such agreement may still be productive since, as mentioned above, certain basic elements seem to be shared between the different jurisdictions, and thus some level of compatibility may still be achieved.[294]

While it is true that many of the members are already parties to such agreements and may be able to apply such agreement almost immediately (and not only as "phase two"), I argue that as far as considering a multilateral framework, one which will enjoy global coverage, it is essential to wait a substantive period of time before enacting such a multilateral framework for cooperation. As mentioned above, I do not believe it would be neither fair nor wise (nor even politically possible) to negotiate any such agreement without giving the currently inexperienced members the opportunity to fully participate and understand the negotiation of such agreements, and for gaining the necessary experience in the application of competition law and enforcement.

d(i) Dispute Resolution: Mediation rather than Arbitration?

As I argued above, the possibility of bringing a claim against non-cooperating Member States can not and should not be adopted for several reasons: First, politically, DCs will

[293] Qaqaya & Lipimile, *supra* note 51 at 596; see also at Jenny, *supra* note 225 at 977.
[294] As may be seen at the comparative work presented at W128R3, *supra* note 163, most countries do share prohibition on horizontal and vertical restrains, abuse of dominant position, and mergers.

not agree to this possibility. Many DCs' domestic authorities are inexperienced (or non-existent) and thus more susceptible to failure in compliance with such agreement. DCs therefore will not agree to an agreement which will grant new grounds for sanctioning them.

Secondly, as mentioned above it will obviously not be fair to allow such litigation against DCs which genuinely do not have the means to fully cooperate with certain requests for cooperation.

Thirdly, such option will achieve the opposite purpose as the adversarial nature of arbitration will discourage cooperation instead of facilitating it. Kovach argues that once a dispute is being managed through adversarial litigation, it is seen as a "struggle" which should be resolved through a "win-lose" perspective.[295] Parties that would like to preserve their relationship would prefer therefore to avoid any such "battle," as it is anything but reconciliatory. These parties would prefer to allow a conciliatory solution instead of a "win-lose" solution, especially as this agreement is based on cooperation. Cooperation framework is built upon the work of repeating players, long terms relationships, and on the good-faith efforts of state officials from all sides. Therefore, Arbitration is obviously not advantageous on such occasions, as its adversarial nature has the potential to deteriorate relationships instead of reconciling them.

But nevertheless, the existence of a certain dispute resolution mechanism may be advantageous in order to facilitate cooperation and to resolve disagreements. Such system though, does not necessarily have to be one of an adversarial nature. Article 5 of the DSU ("Article 5") provides several alternative dispute resolution mechanisms such as Conciliation, Mediation and Good Offices, which may be more suitable for the resolution of such disputes.

Alternative dispute resolution mechanisms seems to evade all of the above mentioned problematic aspects of arbitration, and may positively contribute to the formation of

[295] Kovach, *supra* note 8 at 4.

cooperation: First, according to Article 5, Mediation and Conciliation are voluntary. Such voluntary nature guarantees the shallow – non-binding nature of the suggested cooperation agreement, and thus such dispute resolution alternative do not diminish from all the above mentioned advantageous of the suggested "shallow" cooperation agreement, as whoever wish to avoid it may do so.

Secondly, the parties remain in control of the outcomes of the mediation, and thus any decision will not be considered as intrusive or illegitimate by the sides.[296]

Thirdly, mediation and conciliation are more focused on reconciliation rather than on the legally correct solution of the dispute. Such focus is more appropriate to the nature of cooperation agreement, which is based on the parties' good will and ability to work together. Such is especially important in the situation described in this paper, where many of the participants in such dispute do not have the means to strictly follow its provision. By a common conciliatory approach, the parties have more chances to achieve a sustainable solution; one which will be based on the understanding of both sides' interests; will amend the disagreements and allow a smoother future cooperation.[297]

Fourthly, unlike the combative approach classical litigation takes, by the common work and the sharing of interests the parties may understand better the application of one's legislation on others' markets, and thus show more willingness to incorporate domestic legislation which will show more consideration to the adverse effects the other state is suffering from. Mediation and Conciliation therefore may achieve "educational" goals as well.

Furthermore, such "education" may be two-sided, as through mediation developed countries may better understand the reality DCs are facing. Mediation is based on the sharing of information and interests: through such process, all sides may understand

[296] See in Alexander, Nadja. "Global Trends in Mediation: Riding the Third Wave", in Nadja Alexander ed., *Global Trends in Mediation*, 2nd ed. (Hague: Kluwer, 2007) [Alexander] at 10-11.
[297] See about the characters of mediation in Alexander, *Ibid*.

better the difficulties and the realities others are facing, and thus policy makers may adjust states' policies based on more accurate information.

In order to summarise this part, I believe a "hard" version of dispute resolution mechanism may not be suitable for accompanying an agreement such as the one I have advanced. I believe though, a "softer" mechanism such as the one Article 5 is offering may not only facilitate the application of such agreement, but achieve other goals as well.

e. A plurilateral agreement?

Another feature which may be considered as part of any future framework is the framework of plurilateral agreements. Even though it seems like the WTO policy is to avoid such fragmentation, in light of the current deadlock in the negotiation on the topic (and in trade negotiations in general), the possibility of a plurilateral agreement should not be lightly rejected and should be included under the overall discussion of future pathways.

Unlike WTO *multilateral* agreements, under a WTO *plurilateral* agreement not all WTO members have to sign and be a part of such agreement. Therefore its opponents may choose not to sign and thus not to be obliged by it either. The faults of such approach are obvious: it creates fragmentation to the harmonized framework; it does not offer a global solution to this global problem and not many members may agree to such framework under which they undertake obligations while other states remain free of such. But still two important advantages remain: First, such agreement may be more practical to establish, and second, the establishment of such agreement may be a start; a foundation upon which further advancement may occur.

Plurilateral agreements may indeed lead to fragmentation as they create a different line of obligations and rights which apply towards only several of the Member States. But nevertheless, as the current deadlock in negotiations proceeds, it could very well be argued that some fragmentation may be needed in order to achieve further advancement. Furthermore, when speaking about a shallow cooperation agreement, the weight of such

obligations is significantly low and thus may not deter participants from joining it. Lawrence proposes the concept of the "club of clubs approach" for the WTO.[298] According to Lawrence, different "clubs' which are operating under separate codes operate under the "club of clubs' – the WTO. According to Lawrence the single undertaking approach has led many to argue that on the one hand, the WTO has gone too far as members undertook obligations which were not in their best interests or just not suitable for their needs and abilities (he refers mainly to the Uruguay grand bargain). On the other hand, other members believe the WTO has not gone far enough, as many topics (such as the Singapore issues) are still not accepted.[299] A plurilateral agreement may solve such dilemma, as it allows those who are interested in the promotion of such issues to proceed.

As I argue in this paper that the subject matter of competition policy should be dealt with as an international concern, and since it influences the entire global economy, I do not think the plurilateral approach is an optimal approach for the regulation of competition policy as a complete global coverage is not achieved. But nevertheless, the possibility of a plurilateral agreement on this topic may be a practical possibility for those who wish to evade the current deadlock in order to advance such policy.

A plurilateral WTO agreement may prove to be useful in several ways. First, it could be a start, a start which may have a "snow ball effect" as other states may choose in the future to join the agreement, especially if it will include obvious benefits such as the possibility of cooperation with other members in enforcement and technical support issues.

Moreover, the use of a plurilateral framework will allow the members who believe further integration should be made in this field to continue with such integration, to develop and negotiate new mechanisms and to gain experience.[300] Other non-members parties may benefit from such gained experience as well as they could decide according

[298] Robert Z. Lawrence "Rulemaking Amidst Growing Diversity: A club-of-clubs Approach to WTO Reform and New Issue Selection" (2006) 9(4) J. Int'l Econ. L. 823 [Lawrence].
[299] Lawrence, *Ibid.*at 824.
[300] Lawrence, *Ibid.*at 832.

to the success / failure of such agreement if they believe such may serve their interests or not.

Secondly, the participant of such agreement would enjoy the use of the WTO resources and Dispute Settlement Body. I already elaborated on the importance of such in this paper.

Thirdly, the fact that not all WTO members may take part in such agreement does not necessary mean it will not be effective. Once the E.U and Asian financial leaders such as Korea and Japan (all three are enthusiastic supporters of the promotion of global competition policy) will be able to find some common grounds together with the U.S (maybe based on the U.S. – E.U. agreement?), a very effective enforcement framework may be created; one with jurisdiction over substantive parts of the world market in terms of purchasing power and one that will host a substantive part of the world's producers. A plurilateral agreement therefore may achieve coverage of a substantive part of the world market after all.

In order to summarise this part I would state that plurilateral agreements may indeed mean fragmentation and thus represent the opposite of what the WTO may aspire to achieve, but, in light of the current deadlock and the other benefits such form of agreements may generate, this kind of framework should be considered as part of the future pathways competition policy may take under the WTO framework.

f. And what next?

Should the next step be a multilateral international competition agreement? I believe we currently do not have sufficient information in order to answer this question. In order to plan phases three, four, etc., one must first see how the situation will develop while the first two phases are being completed.

We are currently in the midst of an ongoing development: Countries are currently studying the possibilities international competition law has to offer; the youngest

competition authorities are gaining more experience; new agreements are being signed each day and cooperation between authorities, both officially or unofficially, is being strengthened.

Moreover, as the implementation of the first two phases should take several years, other solutions in the meantime may prove to be sufficient in order to solve the current problems. For instance, new platforms are emerging and increasing their importance for global regulation: Further integration through the ICN for example, may prove to be an adequate solution to the many existing inefficiencies. In several years from now, one may discover that the current web of international agreements provides a satisfactory solution for the situation, or maybe OECD based cooperation may serve as an efficient global enforcer.

My argument here is that while the capacity-building and global cooperation are being developed, the reality is changing. We do not know at this point what the problems multilateral competition law agreement will have to face, or whether this agreement will be necessary at all. Thus, planning such an agreement at this point is not a possible task, as the reality this agreement will have to deal with is currently unknown.

VI. Conclusion

The quote made by Kofi Annan with which I have opened this paper ("Globalization is a fact of life. But I believe we have underestimated its fragility") warns of the many less obvious dangers the process of globalisation is susceptible to, and indeed global anti-competitive activity poses many such threats to trade liberalisation. As some advancement is indeed being made with regard to such threats (mostly at cooperation between domestic authorities) such advancement is lacking a major component – international thinking. Therefore I call through this paper for a global leadership on this topic, and a global resolution for it as well.

In this paper I have explained the dangers posed by the lack of international effort with regard to international anti-competitive activity. I have argued that the WTO is the best institution for dealing with such dangers, and have scrutinized the possible forms of legislation which may be useful for the regulation of such field.

In the last part of this paper I have argued that the non-violation mechanism of Article XXIII:1(b) of the GATT is suitable for dealing with some of the threats the lack of international competition policy poses. I have argued as well that before any negotiations on the topic opens, a substantive phase of capacity-building should be performed.

I have suggested the framework of a shallow cooperation agreement as a second phase (after capacity-building will be performed in a satisfactory manner), and argued as well that the dispute settlement mechanism of Article 5 which offers Mediation, Conciliation and Good Offices, is recommendable for the facilitation of such agreement.

I believe that through such a start, the right (and just) foundations for future advancement can be laid and a sustainable solution may be achieved.

I have started this paper with the goal of exploring proper pathways on a specific sub-topic which I believed to be important for development and international trade. Through my work though, I believe I have learned greater lessons than those regarding

competition policy alone: I believe the most important conclusion of my study relates to the way advancement has been done, is being made and should be made in the future. I have learned that any approach which demands the common advancement of *all* Member States on a certain topic, should be made only after *all* Member States are well informed and fully understand the application of such advancement. A binding "learn as we go" approach may supply faster results, but is fundamentally unjust as it requires the commitment of certain states to rules they do not fully comprehend. This approach results in frustration, fear of advancement and suspicions, all of which make further common work difficult. My ultimate conclusion is that although advancement should not be completely stopped, it should be made in non-binding and shallow form, which will allow sympathetic learning and dismiss sanctioning. Only such form may allow the necessary balance which is needed in a complicated system as the World Trade Organization.

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