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FOR AN INTERNATIONAL COMPETITION POLICY: A GLOBAL WELFARE APPROACH

by

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of the requirements of the degree of Master of Laws (LL.M.)

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ABSTRACT

This study flows from fundamentals by describing the *raison d' être* of international competition policy: how competition law interacts with trade policy and why that interaction has become a critical concern that should be addressed in an international co-operative framework. From this observation, this thesis concludes that policy initiatives to establish international substantive competition rules are both desirable and feasible. They are desirable because they would avoid international trade disputes deriving from conflicting implementations of trade and competition policies. They are feasible through the application of a methodology which balances *efficiency*, *fairness* and *social objectives*. Such a methodology is proposed by the author for the determination of common substantive competition rules.

This set of proposals identifies changes that would be acceptable to most national participants in world trade and classifies trade practices into three categories: First, the trade practices prohibited *per se*, for which international standards can be reached in a short time; second, the trade practices examined under a *rule-of-reason* approach for which some common standards seem obtainable only in a mid-term frame given the existing divergent antitrust philosophies; third, *international mergers* and *antidumping laws* for which, given the strong industrial policy considerations, international substantive rules are not likely to emerge in the foreseeable future.

Finally, as practical illustration, this thesis explores the long-run potential for replacing anti-competitive aspects of current antidumping laws with more efficient and more equitable competition-policy safeguards. The substitution of the *international price discrimination* standard commonly applied in antidumping review by the *predatory pricing* standard favoured under antitrust investigations can be achieved through the introduction of two criteria: determination of the “*impact on the domestic economy as a whole*” and calculation of the *variable cost standard*.

RESUME

Cette étude explore les *raisons d'être* d'une politique internationale de la concurrence en examinant les fondements de l'interaction du droit de la concurrence avec les politiques commerciales ainsi que la nécessité d'aborder cette interaction dans un cadre de coopération internationale. De cette observation, la thèse conclut à l'intérêt ainsi qu'à la faisabilité des initiatives visant à établir des règles internationales substantives en droit de la concurrence. Une telle évolution permettra d'éviter les litiges commerciaux de dimension internationale fréquemment provoqués par l'application conflictuelle des politiques commerciales et du droit de la concurrence. La détermination de règles internationales substantives en droit de la concurrence apparaît réalisable en appliquant une méthodologie pondérant l'objectif d'*efficience* avec les objectifs de *justice économique* et les objectifs *sociaux* diversement poursuivis par les États. Une telle méthodologie est proposée par l'auteur.

Ces propositions permettent d'identifier les changements acceptables pour la plupart des nations participantes au commerce mondiale et de classer les pratiques commerciales en trois catégories ; Les pratiques prohibées *per se* pour lesquelles des standards internationaux peuvent être adoptés à court terme ; Les pratiques examinées sous la *règle de raison* pour lesquelles des standards communs sont envisageables seulement à moyen terme étant données les divergentes conceptions philosophiques en droit antitrust ; Les fusions internationales ainsi que les lois antidumping, domaines où des règles internationales substantives ne semblent pas possibles dans un futur proche.

Enfin, en guise d'illustration pratique, l'auteur explore la possibilité de remplacer à long terme les aspects anticompétitifs des lois antidumping actuelles par des dispositions plus efficaces et équitables ressortant du droit de la concurrence. Substituer le standard de *discrimination sur le prix* généralement utilisé lors des procédures antidumping par le standard de *prédation du prix* privilégié par le droit antitrust est possible en introduisant deux critères : détermination de « *l'impact général sur l'économie nationale* » et calcul du *coût variable*.

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INTRODUCTION

In recent years, a number of high-profile international trade disputes have involved *restrictive business practices*. Although different definitions of these practices, which hinder market access have been suggested¹, the fundamental concept used to define what is a *restrictive business practice* is “restraint to competition”.² Now that traditional government-imposed trade barriers have been largely reduced by the General Tariff and Trade Agreement (GATT) negotiations,³ it is commonly understood that restrictions of trade by private parties and government action inducing private practices, represent real threats to the liberalisation of international trade.⁴

Firstly operated by purely national firms, these measures become more and more attributed to multinational enterprises.⁵ In that line, the *Boeing/McDonnell Douglas* case,

¹ See UNACTAD, *The Set of Multilateral Agreed Equitable Principles and Rules on the Control on Restrictive Business Practices*, UN Doc. TD/RBP/Conf/10 (May 2, 1980). See also, OECD Declaration on International Investment and Multilateral Enterprises, OECD Doc. 21 (76) 04/1 (1976). Definitions varying with different philosophies and purposes of Member States include such practices as price fixing, collusive tendering, market or customer allocation arrangements or concerted refusal of supplies to potential importers.

² See O. Schachter and R. Hellawell, *Competition in International Business-Law and Policy on Restrictive Practices* (New York: Columbia University Press, 1981) at.5.

³ See R. Bhala & K. Kennedy, *World Trade Law* (Charlottesville: Lexis Law Publishing, 1998) at 1-9. The General Agreement on Tariffs and Trade (GATT) is the main agreement governing international trade law. Originally signed by 32 nations, the GATT/WTO Charter, which was established in 1994 as the successor of the GATT 1947, has been joined by more than 130 nations. A series of negotiations (Dillon Round, 60-61; Kennedy Round, 1964-67; Tokyo Round 1973-79) have ended in a drastic diminution of tariffs barriers, and the on-going elimination of non-tariffs barriers. Consequently, the level of tariffs today is around 5% whereas several disciplines limit the use of the non-tariffs barriers (health and safety regulations, local content requirement).

⁴ M-C. Malaguti, “Restrictive Business Practices in International Trade and the Role of the World Trade Organisation” (1998) 3 J. World. T. at 117.

⁵ See OECD, *Restrictive Business Practices of Multinational Enterprises*, Report of the Committee of Experts on Restrictive Business Practices (1997) Paris at 17-18.

in opposing two conceptions of competition policy, stressed the necessity to fight against such practices whilst simultaneously revealing the limits of governmental regulations pursued on a global scale.⁶

Thus, the latter half of the twentieth century has brought unprecedented interdependence between nations through trade and investment. Today, border barriers for industrial products have almost disappeared. Import quotas are rare and tariffs low. Capital flows freely across the borders of most developed countries whereas the developing world and former communist world are embracing the international market and welcoming foreign investors. At the same time, domestic policies, viewed as entailing international effects, have come under increasingly close scrutiny in of their consequences for transnational trade.⁷ The controversy in the *Boeing-McDonnell Douglas* merger, stemming from a difference of interpretation of what constituted a significant impediment to competition, can be placed in the same frame where competition and trade policies collide and impact upon each other.⁸ This issue has become more important in recent years since, with

⁶ On August 8, 1997, the first and the third largest producers of civilian jets, The Boeing Company and McDonnell Douglas Corporation merged to form a single company. After analysing the competitive position of both merging companies as well as their competitors in the world market, the US Federal Trade Commission (FTC) unconditionally approved the merger. But the European Commission also applied its antitrust provisions and imposed several conditions (for example, Boeing was forced to give up several exclusive contracts) before accepting the merger, See EC, *Commission Decision 97/816* [1997] O.J. L. 336/16 at 19-20; Federal Trade Commission, *Boeing/McDonnell Douglas*, File N° 971-0051 (1997).

⁷ See E. Iacobucci, "The Interdependence of Trade and Competition Policies" (1997) 2 *World Comp.* at 5. This evolution, originally noticeable in respect of domestic environmental and labour standards, is now perceived in the field of competition policy.

⁸ Practitioners and scholars agree that this controversy was the result of divergent antitrust laws pursuing national goals. The decision of the European Commission as well as the decision of the Federal Trade Commission in the United States, were largely consistent with the theoretical antitrust approaches taken in the past. Thus, the crisis has been provoked by two divergent philosophical conceptions of antitrust law pursuing national trade objectives. See A. Karpel, "Comment: The European Commission's Decision on the Boeing-McDonnell Douglas Merger and the Need for Greater U.S.-UE Co-operation in the Merger

expanding trade and international investment, many anti-trust cases have a significant international component. As companies continue to enlarge their operations into markets around the world, international competition and the role of international antitrust enforcement have become matters of critical importance.

Parochial notions of antitrust enforcement have to be redefined in this expanding global economy. So far the debate on restrictive business practices in international trade has focused upon how to solve the conflicts of extraterritorial antitrust enforcement.⁹ National antitrust authorities have expended substantial resources in this area during recent years to avoid international disputes in matters such as the *Boeing-McDonnell Douglas* case. These attempts have first been made on a purely national basis, as under the International Antitrust Enforcement Assistance Act issued by the United States¹⁰. A number of countries have also negotiated bilateral agreements in co-operation with their competition authorities in order to enforce their domestic competition regulations efficiently abroad.¹¹ Leaving aside any direct analysis of issues related to

Field" (1998) 47 Am. U. L. Rev. at 1034. See also F. Romano, "The Boeing/MDD Merger and the EC/US Agreement on the Application of their Antitrust Rules" (1998) 4/5 I.B.L.J. at 513.

⁹ The extraterritorial application of law is commonly defined as "the operation upon persons, rights, or jural relations, existing beyond the limits of the acting state or nation, but still amenable to its laws". See Henry Campbell Black in the *Black's Law Dictionary* (St Paul Minn: West Publishing Co., 5th Edition, 1979) at 528. In order to regulate anti-competitive practices occurring outside the national scope, national antitrust authorities try to apply extraterritorially their antitrust legislation. For an overview of this notion. See J. H. Shenefield, "Extraterritoriality in Antitrust" (1983) 15 Law & Pol. Int. Bus. at 1109-1120.

¹⁰ *International Antitrust Enforcement Assistance Act*, 15 U.S.C. §§ 6201-6207 (1994). This text empowers U.S. antitrust authorities to share confidential information with other nations' antitrust authorities.

¹¹ *Agreement Relating to Mutual Co-operation regarding Restrictive Business Practices, U.S.-F.R.G.*, 27 U.S.T. 1956 (1976); *Agreement Relating to Co-operation on Antitrust Matters, U.S.-Aust.*, 34 U.S.T. 388 (1982); EC, *Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws*, [1995], J.O. L. 132, 15/06/1995 completed by the *Agreement between the European Communities and the Government*

extraterritoriality and procedural co-operation, some reflections are now focusing on the role that should be played by an international competition policy to enhance market access world-wide.¹² Indeed, the definition of common competition rules, from a purely theoretical perspective¹³ has become an official issue in recent years.¹⁴

1. Purpose of the Thesis

The purpose of this thesis is to analyse the reasons for promoting international convergence of substantive antitrust law and to propose a methodology suited to the determination of common competition rules. Through the study of the interaction between trade and competition policies, that is increasingly being examined by policy-makers,¹⁵ we can first highlight the theoretical grounds for enforcing antitrust policy in international trade. Then, we will make a modest proposal for forging links between competition and trade in order to determine some common substantive antitrust principles. Finally, the replacement of antidumping laws by antitrust provisions will provide a practical illustration of the emergence of international competition rules in

of United States of America on the Application of Positive Comity Principles in the Enforcement of their Competition Laws, [04/06/1998].

¹² The most feasible ways to enhance market access "(...) lie in judicious experimentation with a blend of principles, policies, and institutions. The ingredients come from the worlds of competition policy and international trade policy". See E. M. Graham, J. D. Richardson, *Competition Policies for a Global Economy* (Washington DC: Institute for International Economics, 1997) 2.

¹³ A number of scholars asked for the determination of international competition rules. See *The Munich International Antitrust Code* (reproduced in *World Trade Materials* (1993) 5 126-196).

¹⁴ The European Commission requested that examination under the WTO. See EC, Commission, *Communication to the Council: Towards an International Framework of Competition Rules*, [1996], COM (96) 296 final.

¹⁵ The Ministerial Conference held in Singapore in 1996 established the "Working Group on the Interaction Between Trade and Competition Policy". See Para. 20, document WT/MIN (96)/Dec presented at the WTO Meeting held at Singapore in December 1996.

international trade.

2. Structure of the Thesis

This study flows from fundamentals by describing the *raison d'être* of international competition policy: how competition law interacts with trade policy and why that interaction has become a critical concern that should be addressed in an international co-operative framework.

The strategic use of trade instruments appears to have an anti-competitive impact on national economies. But as this thesis argues, the international community is now engaged in a process of replacing the traditional protection of *national welfare* interests ensured by domestic policy-makers with the preservation of the *global welfare* policy balancing various national interests. From that observation, we conclude that policy initiatives to establish international substantive competition rules are both desirable and feasible. They are desirable because they would avoid international trade disputes deriving from the conflicting implementations of the two policies. They are feasible through the application of a methodology which balances efficiency, fairness and social objectives. Such a methodology proposed by this thesis for the determination of common substantive competition rules identifies changes that would be acceptable to most national participants in world trade.

Taking into account the State proposals and given the methodology proposed, this thesis classifies anti-competitive practices impacting upon the *global welfare* into three

categories: First, the trade practices prohibited *per se*, for which international standards can be reached in a short time; second, the trade practices examined under a *rule-of-reason* approach for which some common standards seem obtainable only in a mid-term frame given the existing divergent antitrust philosophies; third, *international mergers* and *antidumping laws* for which, given the strong industrial policy considerations, international substantive rules are not likely to emerge in the foreseeable future.

Finally, as practical illustration, we explore the long-run potential for replacing anti-competitive aspects of current anti-dumping laws with more efficient and more equitable competition-policy safeguards. The substitution of the *international price discrimination* standard commonly applied in antidumping review by the *predatory pricing* standard favoured under antitrust investigations can be achieved through the introduction of two criteria: determination of the “*impact on the domestic economy as a whole*” and calculation of the *variable cost standard*.

The **first Chapter** examines what role competition policy should play in the new global trading system. The **second Chapter** proposes a methodology to resolve the tension between trade and competition policy in order to establish a truly international competition policy. In a long-term perspective, the **third Chapter** offers a practical illustration by focusing upon the replacement of the *international price discrimination* standard, commonly applied in antidumping review, by the *predatory pricing* standard preferred in antitrust investigations.

Chapter 1-The Role of Competition Policy in the New Global Trading System

In this section, we will examine the possible reasons for promoting the international convergence of antitrust laws, with a focus on the effects of trade measures on competition policies. Two important theoretical grounds for enforcing antitrust policy in international law are introduced here. First, we will look at how the tension between trade and competition policy constitutes a brake on the international competitive environment (I). Then, we will argue that given the fact that competition issues can no longer be separated from trade issues, it does not make sense for national competition policies to continue to focus on the preservation of *national welfare*. Indeed, it is time to set up an international competition policy in order to protect *global welfare* (II).

I. The Tension Between Trade and Competition Law: Placing a Brake on the International Competitive Environment

Traditionally, trade law and competition policy act together to open markets and liberalise international trade (A). But with the fall of tariffs, we are seeing the emergence of “*system friction*” that stems from the fact that divergent market models are being used by different nations. The anti-competitive effects of certain trade instruments are used by nations to open foreign markets. Strategic trade policies are devoted to shift the rents existing in imperfectly competitive markets from foreign firms to domestic firms. Consequently, some tensions arise between trading partners. Such conflicts impede further trade liberalisation and create an opposition between the *global welfare* and the *national welfare*, which is prejudicial to international trade (B).

A. The Trade/Competition Law Dynamic: Liberalisation and Welfare Perspective

Under the General Agreement on Tariffs and Trade (GATT) the major trading nations have agreed to eliminate non-tariff barriers to trade and through several rounds of negotiations have drastically reduced tariffs. But the fact that invisible barriers continue to hinder trade means that the objectives of the GATT are being partially frustrated. Competition policy therefore plays an important complementary role in opening up markets and protecting consumer welfare (1) "*at the border*" and "*behind the border*" (2).

1. Common Goals: Market Access and Consumer Welfare

The Working Group established pursuant to the Singapore Ministerial Declaration of December 1996, has as its mandate to "study issues raised by the Members regarding the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework".¹⁶ If the WTO has chosen this approach as a first step towards the harmonisation of competition rules, it is because the evolution of international economic relations has created a rising consensus on the interrelation of competition and trade issues. Indeed, trade policy and competition policy share the same perspective and proceed together to liberalise international trade.

¹⁶ The working group is named Working Group "on the interaction between trade and competition policy". To avoid all dispute "the Group's mandate makes it clear that its task is to study issues raised by Members" clarifies the introduction of the 1998 report. See WTO, *Report of the Working Group on the Interaction Between Trade and Competition Policy to the General Council* (8 December 1998), WTO Doc. WT/WGTCP/2.

The international economy comprises sovereign nations, each free to choose its own economic policies. Yet, in our integrated world economy, one country's economic policies usually affect other countries as well. Since the end of the Second World War, the international links between domestic economies have grown considerably. These links now take on many forms: international trade, direct investment, transnational joint ventures and mergers. As a result, economic interdependence among nations has increased sharply. A fundamental problem in international economics is figuring out how to produce an acceptable degree of harmony among the trade policies of different countries. For the last fifty years, the GATT Treaty has governed international trade policies while extensive multilateral negotiations have been held.¹⁷

In this on-going process of trade liberalisation, national competition and trade policies traditionally appear as complementary and mutually reinforcing. Both policies are based on the recognition that a market without distortions should be installed in order to maximize efficiencies and the allocation of resources within national economies.¹⁸ To do so, trade policy as well as competition policy seeks to remove obstacles to efficient markets. In addition, their ultimate goal is to provide consumers with access to an array of competitively priced goods and services.

For this purpose, the preamble of the 1947 GATT enunciates the goals of the Organisation :

¹⁷ See R. Bhala and K. Kennedy, *supra* note 3 at 1-9.

¹⁸ See OCDE, *Consistencies and Inconsistencies Between Trade and Competition Policies*, O.E.C.D., Joint Group on Trade and Competition, COM/D/DAFFE/CLP (98) 25/FINAL at 6.

“(...) 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 resources of the world and expanding the production and exchange of goods.”¹⁹

In order to achieve this ambitious objective, Member States have, since World War II, substantially reduced tariffs and other barriers to trade, and have worked towards the elimination of discriminatory treatment in international commerce. Consequently, most national governments began to lower their barriers in order to make them more permeable. The theory underlying international trade policy was that open trade provides collective benefits to the citizens of every trading nation.²⁰ Since then, trade liberalisation has been achieved through negotiated concessions in order to remove tariff, non-tariff and internally based barriers. The ultimate purpose of this “*market access*” policy has been to serve the interests of consumers throughout the world. Thus, the effort to lower tariff barriers comes from the premise that free and open trade provides collective benefits to the citizens of trading nations.²¹

The objectives of competition laws are quite similar to those of trade policies: the elimination or reduction of barriers to markets and the protection of consumer welfare. National competition policy can be defined simply as the set of rules and disciplines

¹⁹ See WTO, *Preamble of the GATT*, online WTO <<http://www.wto.org/wto/inbrief/inbr01.htm>> (date accessed: 10 September 1999).

²⁰ Ricardo's theory of comparative advantage characterised the liberal policy applied by States in their international economic relations. Simply stated, this doctrine affirms that through international trade each nation can specialise in producing the goods and services in whose supply its business enterprises have comparative advantages, that is for which they have relatively low supply costs. See R. Bhala, *International Trade Law* (Charlotteville: Contemporary Legal Education Series, 1996) at 6-7.

²¹ In that way see the OECD paper (*Supra* note 18 at 7) stating that “(...) the underlying rationale of multilaterally-based trade liberalisation is generally to set terms and conditions at the international level which will be compatible with global consumer welfare”.

maintained by governments that regulate agreements between firms. But the determination of the objectives pursued by such policies is still currently at the heart of a fierce debate.²² In any case, it is fair to assume that the main common goal of antitrust policies is to set up the conditions of efficiency for rival businesses to have equal opportunities in competing for business.²³

With this end in mind, competition laws prohibit or monitor anti-competitive practices as well as practices that are contrary to the public interest such as collusive activity among firms to jointly fix prices or outputs. Policy-makers thereby seek to remove restraints upon and barriers to competitive transacting within a specific national market. This approach reflects the traditional concern of trade negotiators which is to be found in the notion of “*market access*”. Much like that of trade policies, the final goal of competition

²² In the American debate, the opposing arguments are clearly defined. Either antitrust laws are designed solely to maximise *consumer welfare* through maximising allocative efficiency in American industry, or they are designed to achieve and protect a bundle of social and political values like the avoidance of the concentration of economic power in the hands of a few firms. In the European Union, several objectives are clearly pursued. They are based on the Treaty of Rome philosophy that is to seek the promotion of economic co-operation throughout the Community, through the unification of the separate national economies into one common market, within which goods and services are to move freely. On that view, competition policy understood as a one way of achieving this general policy has three basic objectives: keep the market open and unified; maintain a competitive structure in Community markets (control of the concentration of economic power), and maintain a degree of fairness (promotion of small and medium-sized firms). This concept of fairness embraces the idea of *consumer welfare* but it is a clear departure from the strict economic efficiency approach favoured by the American policy-makers. Thus, it characterises the philosophical oppositions between United States and the European Union on the competition policy objectives. See T. Frazer, *Monopoly, Competition and the Law: The regulation of Business Activity in Britain, Europe and America* (New York : Harvester, Wheatsheaf 1992) at 1-3.

²³ Indeed the efficiency objective is present in every competition policy because such policies generally seek to ensure the efficient allocation of resources by means of open and competitive markets. Efficiency results from a number of factors (for example, the use of specialised resources to best advantage or the provision to each nation's consumers of a wide variety of goods and services from which they can choose) and creates a vigorous competition flow. As a result, the prices are cut down and the firms introduce superior new products and production processes. For an overview of the notion of efficiency, see F.M Scherer, *Competition Policies for an Integrated World Economy* (Washington, D.C.: The Brookings Institution, 1994) at 3.

law is to protect *consumer welfare*.²⁴ By opening markets, the competition policies protect the interests of consumers from private firms, which unilaterally or collectively set prices higher than those prevailing under competitive market conditions. Thus, we find that competition policy and trade policy play complementary roles in implementing these common objectives.

2. Complementary Roles: Efficiency “*at the border*” and “*behind the border*”

The liberalisation of *market-access* barriers imposed by governments has been for years the priority of trade negotiators. Trade negotiations have focused on the liberalisation of “*at the border*” governmental measures that can or do distort trade flows.²⁵ Successive rounds of negotiations, since the end of the Second World War, have resulted in an important reduction in tariffs. With the last conferences in Japan and in Uruguay, significant progress has also been made in strengthening the rules needed to ensure that non-tariff measures do not unfairly distort trade. In this manner, the GATT and the WTO are creating new opportunities for exports and spurring international commercial competition.²⁶

²⁴ A competition policy operating to create free economic conditions and well-operating markets will aim at maximisation of the *consumers' welfare*. Despite the other objectives pursued, this economic view plays a central role as the basis of the authorities' action in virtually every antitrust system. See J. Fejo, *Monopoly, Law and Market* (Boston: Kluwer, 1990) at 28.

²⁵ See O.E.C.D., *Consistencies and Inconsistencies Between Trade and Competition Policies*, *supra* note 18 at 4. The joint Group on Trade and Competition set up by the OCDE has extensively studied the tension between trade and competition policy. The Group stressed the distinction between the “*at the border*” emphasis in trade policy and the “*behind the border*” nature of competition policy.

²⁶ See R. Krugman and M. Obstfeld, *International Economics: Theory and Policy* (New York: Addison-Wesley, 1997) at 237.

But, although the elimination of trade barriers is necessary for ensuring that the international market is genuinely competitive, it is not a sufficient condition. The real challenge for governments is to reduce protection for all firms, both nationally and internationally. Indeed, removing border barriers may free foreign firms from the obligation to pay tariffs, but their ability to compete is still impaired by domestic regulations that organise competition.²⁷ This is why national competition policies must also focus on ensuring competitive conditions “*behind the border*,” within national jurisdictions of competition policy.²⁸

National policy-makers can ensure the efficient functioning of markets by removing or controlling *restrictive business practices* and thereby play an important role in the integration process that is currently occurring in the world. The institutional framework established by integrating countries or regional blocs is necessary for the enforcement of common rules on competition.²⁹ In the process of integration, the role of competition policy is to promote market entry when the reduction of border barriers appears insufficient to foster free and fair trade.

Nevertheless, despite the fact that international trade policy and competition policy share similar basic goals, they work to achieve these goals through diametrically different

²⁷ If domestic firms can fix prices, restrict output, allocate market shares, or engage in practices such as “tying” and “exclusive dealing”, the global competition environment is affected.

²⁸ See OECD, Joint Group on Trade and Competition, *Complementarities Between Trade and Competition Policies* COM/D/DAFFE/CLP (98) 98/FINAL at 4.

²⁹ P. Nicolaidis, “For a world Competition Authority-The Role of Competition Policy in Economic Integration and the Role of Regional Blocs in Internationalizing Competition Policy” (1996) 4 J. World Trade at 133.

instruments. Proceeding together they improve overall economic welfare and standards of living but trade policy drives the actions of States while competition law regulates the activities of firms.³⁰ Assuming this distinction, we can foresee the growing dilemma between the strict interests of States and the broader economic benefits required by competition policy.

B. Conflict Between Trade and Competition: *National Welfare v. Foreign Welfare*

Cooperation between trade and competition law appears as an ideal method to liberalise the markets. But a number of frictions lead more and more to an opposition between the two policies. The increasing sensitivity of national economies to events and policies originating abroad creates dilemmas for policy-makers: respect the free trade principle or pursue the national interests by means of anti-competitive measures (1). Indeed, we can foresee the opposition between *national welfare* and *foreign welfare* (2).

1. Anti-Competitive Measures: the National Use of Trade Law

It has become common knowledge that the benefits deriving from the removal of State imposed-barriers to trade can be undermined by non-tariff measures like regulatory and standards issues, labour standards, environmental issues, rules on investment and anti-competitive practices. Thus, in recent years, a number of trade policy measures that have been implemented by means of non-tariff barriers are considered as anti-competitive. Policy-makers have begun to criticize the impact of such measures on the global

³⁰ To this extent Scherer (*supra* note 23 at 36) states that: "Trade policy seeks to avoid strategic behaviour and to secure co-operative solutions among trading nations; competition policy fosters non-co-operative solutions among the business enterprises facing one another in the marketplace".

competitive environment.³¹

What are these anti-competitive measures? How do we define them? In the last years, the OECD and many scholars have devoted efforts to identifying and possibly ranking all trade practices “that may affect market access by creating trade or investment barriers”.³² The trade measures that are considered to be anti-competitive are very diverse. Indeed, companies use a wide variety of practices that can affect international trade³³ as do governmental policies with trade law remedies.³⁴ Even if the ranking trial of these practices with respect to their effect on trade are now considered useless,³⁵ the identification of certain anti-competitive measures clearly illustrates the kind of tensions that arise between trade and competition policy and that affect the competitive environment.

³¹ The O.E.C.D Council meeting at Ministerial level in 1982 requested the Committee of Experts on Restrictive Business Practices “to examine, in particular, possible longer-term approaches for dealing with the problems arising at the frontier of competition and trade policies” See O.E.C.D. C(82)58(Final).

³² See OECD, *Report on Competition and Trade Policies: Their Interaction* (Paris: OECD 1994). See also OECD, Joint Report by the Trade Committee and the Committee on Competition Law and Policy, *Strengthening the Coherence Between Trade and Competition Policies*, OCDE/GD (96)90 at 6.

³³ For example, export cartels, import cartels, trading companies, voluntary export restraints, territorial restrictions linked to exclusive dealing or licensing agreements, counter-trade and intra-group arrangements by multinational enterprises are considered.

³⁴ There are three principal forms of trade remedy laws (antidumping, subsidies and countervailing duties and safeguards. The use of these remedies is permitted by the GATT/WTO to national governments in order to protect their domestic industries from unfair or injurious trade practices by other member-states. See OECD, *Consistencies and Inconsistencies Between Trade and Competition Policies*, *supra* note 18. The addendum of this paper examines the relationships between competition law and trade remedies.

³⁵ OECD, *Joint Report by the Trade Committee and the Committee on Competition Law and Policy*, *supra* note 32. The Committee primarily seeks an empirical basis for such work.

These tensions derive from divergences in the implementation of both competition and trade policy. Deviating from their initial objective of achieving trade liberalisation, governments pursue active trade policies for a variety of reasons on the basis of purely domestic needs: raising national revenue, protecting specific industries, achieving foreign policy goals and security goals, restricting the consumption of specific goods, etc.³⁶ Whereas international trade serves to sharpen competition in domestic markets, those trade barriers that shelter particular domestic industries can have anti-competitive effects.

In that line of analysis, the growing resort to Voluntary Export Restraints (VERs) as a means of controlling or limiting imports is considered as a tool for protecting domestic industries. This technique is resorted to by governments and individual firms, especially in sectors such as the steel and the automobile industry.³⁷ VERs are used or tolerated by governments to lessen competitive pressures on domestic producers. They produce short-term benefits for a national economy but conflict with the fundamental objectives of competition policy which is to ensure the efficient allocation of resources by means of an open and competitive market.

At the international level, tensions can also arise due to conflicts between the promotion of trade in one country and the competition policies pursued by another country. This is the case when trade law encourages domestic exporters to seek monopoly profits on their

³⁶ See B. Hoekman & P. C. Mavroidis, "Dumping, Antidumping and Antitrust" (1996) 1 J. World Trade at 29. Outlining precisely the issue, these authors state that "competition law aims at protecting competition (and thus economic efficiency), while trade policy aims at protecting competitors (or factors of production).

³⁷ See OECD, *Report of the Working Group on the Interaction Between Trade and Competition Policy*, *supra* note 32 at 13.

sales in foreign markets and exempt export cartels from prosecution, even if competition law prohibits such collusion.³⁸ These exemptions encourage exporters to follow practices in international markets that would be prohibited in their national markets, thereby generating a competition law problem for foreign nations. The importing country is confronted with the effects of a cartel located outside its borders while the arrangement is potentially providing scale efficiency and thus expanding trade opportunities for the exporting country.³⁹ Even a preferential liberalisation agreement can facilitate a cartel if the partner-country and home-country firms overturn the issuing of certificates of origin and of compliance with technical standards for their products in order to arrange an anti-competitive agreement.⁴⁰ In this manner, a cartelised market-structure can be transferred to a partner country through the process of economic integration.

The same conflict arises with the laws governing injurious or unfair trade practices. Among them, antidumping laws prohibit imports sold at less than the “fair value” if these imports injure a domestic industry. Much like competition laws do, these laws seek the removal of artificial distortions in the market place. But they achieve this goal in a different manner. Unfair trade practices aim to protect domestic industries from unfair import pressures causing injury to domestic competitors. Antidumping laws seek to diminish import competition and thus to decrease the level of competition in domestic markets. In contrast, competition law tries to preserve and increase domestic competition.

³⁸ Export cartels are generally considered to be arrangements between firms which have substituted an agreement on prices for independent decision-making.

³⁹ See OECD, *supra* note 32 at 11.

⁴⁰ Nicolaides, *supra* note 29 at 133.

In this regard, antidumping rules are increasingly revealing themselves to be trade restrictive devices that are creating tensions opposing different States (Nation A's competitively low-priced goods are taxed on entry into Nation B) as well as creating tensions that are internal to each nation.⁴¹

All these trade policy measures can have important detrimental effects on domestic market structures by diminishing competition. They result in discrimination among competitors, they distort competitive adjustment in each country and thereby undermine the role of competition policy in *leveling the playing field*.⁴² But, on the other hand, trade policy can significantly promote the competitive ability of a nation. For example, a trade-measure that permits domestic firms to coordinate internationally also facilitates coordination of domestic sales and therefore serves the economic competitiveness of the State.⁴³ It seems to be the struggle for *national welfare* that is dictating the use of anti-competitive trade measures.

2. Strategic Policies: the Struggle for the *National Welfare*

The tensions created by trade tools must be placed in the larger context of strategic policies, a classical economic theory that is still extensively used by nation states. Thus,

⁴¹ According to E. Fox in the United States, one of the main disturbing tensions is the relationship between U.S. antitrust policy, which encourages sustainable low pricing, and U.S. antidumping policy which discourages low pricing in order to shield a domestic industry from "unfair" prices. See E. Fox, "Competition law and the Agenda for the WTO: Forging the Links of Competition and Trade" in John O. Haley, Hiroshi Iyori. *Antitrust: a new international trade remedy?* (Washington, Pacific Rim Law & Policy Association, 1995) 24.

⁴² See OECD, *supra* note 32 at. 15.

⁴³ *Ibid.*

even in the process of liberalisation, nations have incentives to deviate from free trade in order to pursue their narrow interests by using national trade strategies. The strategic trade policy is devoted to shifting the rents that exist in imperfectly competitive markets from foreign firms to domestic firms.⁴⁴ Such trade-manipulating strategies can be profitable if implemented unilaterally while other nations practice free trade. Nations use *domestic market failures* against free trade (2.1) in order to enhance *domestic welfare* at the expense of *foreign welfare* (2.2).

2.1. Domestic Markets Failures Against Free Trade

Despite the rapid growth of international trade, the world's income is still generated by a relatively small number of advanced economies. Developing nations have to improve their economic performance while developed countries seek to keep their ranks. Although most economists argue that deviations from free trade reduce *national welfare*, there are, in fact, some theoretical grounds for believing that activist trade policies can sometimes increase the welfare of the nation as a whole. This analysis is reinforced by the reality of economic integration where national political sovereignties increasingly come into conflict. In this evolution lead by the unavoidable globalisation process, the effective domains of economic markets coincide less and less with national governmental jurisdictions.

According to Ricardo's theory of comparative advantage, global welfare will be maximized by each nation pursuing its own specialization as nations engage in free trade. Most economists continue to hold up free trade as a desirable policy for international

⁴⁴ E. Iacobucci, *supra* note 7 at 13.

trade. They assume that markets are perfectly competitive as soon as free trade is respected.⁴⁵ Yet, neither complete free trade nor perfectly competitive markets exist. Nations use *domestic market failure* arguments against free trade. This argument is part of a theory known in economics as *the theory of the second best*, stating that governmental intervention can increase welfare by offsetting the consequence of markets malfunctioning.⁴⁶ Therefore, to improve their economic performance, States use *strategic trade policies*, promoting exports or discouraging imports in particular sectors.

Hence, countries may choose to establish trade restraints in order to pursue strategic gains or in response to lobbying.⁴⁷ Assuming this simplified view of the opportunities facing States, we can argue that all nations play the strategic game for a simple reason: in order to increase *domestic welfare*. Indeed, all governments are inclined to favour their “own” national firms against foreign firms and to turn the terms of trade in their favour through competition-disturbing interventions. Because, as previously noted, the ultimate goal of trade law is to promote welfare by opening markets, policy-makers invariably choose a strategic game that improves *national welfare*.

⁴⁵ See Krugman and Obstfeld, *supra* note 26 at. 245.

⁴⁶ *Ibid.* at. 227. For example if the labour market is malfunctioning and fails to deliver full employment, a policy of subsidizing labour-intensive industries, which would be undesirable in a full-employment economy, might turn out to be a good solution. It would be better to fix the labour market by making wages more flexible. But if for some reason it is not possible (because, for example, of lack of political will) intervening in other markets may be a “second-best” way of alleviating the problem. In that way, an import quota of automobiles can be supported on the grounds that it is necessary to save the job of autoworkers.

⁴⁷ Scherer, *supra* note 23 at 4. This is “the Prisoner’s Dilemma” where each nation is assumed to face a simplified strategy choice dichotomy: openness or the erection of trade barriers.

2.2. *Home Welfare v. Foreign Welfare*

Home welfare may be improved by a strategic use of *export subsidies* when a domestic firm competes with a foreign firm in a homogenous goods market. If certain conditions are met (for example, both countries export all of their production, each firm faces identical costs of production and transportation, etc.), an export subsidy imposed by the home country may successfully shift profits from the foreign producer to the home producer.⁴⁸ Such a policy enhances *domestic welfare* while reducing *foreign welfare*. This activist trade policy has better results for the domestic consumers than traditional laissez-faire trade but the welfare effects on the consumers of third countries are ignored.⁴⁹

Similarly, a country can set up *strategic export taxes* when competition is over price as opposed to quantity. In this competitive model, two firms export to a third country agreeing to certain conditions (each firm produces a good that is an imperfect substitute for the other, each firm sets its price according to the anticipated price of the other firm, etc.).⁵⁰ As such, price competition between the domestic firm and the foreign firm is weakened and, consequently, *domestic welfare* is improved but the third country's welfare is lowered since it faces higher prices.

⁴⁸ This is what the economists Brander and Spencer call the Cournot duopoly model. Krugman and Obstfeld (See *supra* note 26 at 282 and 283) give as an example the policy pursued by United States and the European Union towards Boeing and Airbus.

⁴⁹ Iacobucci *supra* note 7 at 9.

⁵⁰ *Ibid.* at 10-11. This is the Bertrand competition model discussed by Eaton and Grossman.

These strategic trade policies give rise to organised governmental intervention in order to promote *domestic welfare*. The *public choice theory* suggests that corporations may lobby to earn greater profits in the absence of competition.⁵¹ But it is important to note that, even when applied systematically by a government, strategic policies are effective because the market is imperfectly competitive. Iaccobucci, in his study, analyses the effects of competitive markets on the strategic trade policies. In every case, whether it be strategic use of export subsidies or strategic export taxes, the strategic tariffs are neutralised when the competition is present.⁵² Also affected by the competitiveness of the market are the lobbies introduced by the *public choice theory*. The incentive for firms to lobby in order to reduce competition is lowered and even if a lobby is set up, it is less successful because of difficulties in coordinating. Therefore, if a country pursues an active competition policy, the market is more competitive, the gains from strategic trade policy fall, trade conflicts are reduced and the global welfare increases.

These arguments lead to the conclusion that the tension between trade and competition law is created by the tendency followed by policy-makers to choose *national welfare* over *foreign welfare*. But the international community now seems engaged in a comprehensive reframing of its theoretical models. Indeed, the emergence of a global policy geared towards *global welfare* is foreseeable. It is therefore time to limit the use of strategic trade policies and to choose a global welfare-increasing path.

⁵¹ *Ibid.* at 12.

⁵² *Ibid.* at 14.

II. A Global Policy to Resolve the Tension Between Trade and Competition: From *National Welfare* to *Global Welfare*

Current competition policies cannot properly resolve the tension between trade and competition policy. The emergence of “*system frictions*” reveal that trade policies and competition policies should be seen and treated as one global policy. Through the efforts of States and of multilateral organisations (OECD and WTO) to set up an international competitive environment, the international community now appears to be engaged in the process of replacing the *national welfare* policy by a *global welfare* policy in various sectors: environmental, labour and competition issues (A). However, the national competition policies and the bilateral agreements remain inadequate to achieve the objectives of the new *global welfare* approach (B). We need to adopt an international solution. For the first time since the Havana Charter, the new order established by the Marrakech Agreement modified the negotiation context so as to permit an extension of the scope of multilateral cooperation into competition law. Such a *global policy* links trade and competition issues(C).

A. Emergence of a *Global Welfare* Policy

The expression *global welfare* used by some scholars⁵³ as well as by official documents⁵⁴

⁵³ Eleanor Fox and Januz Ordovery propose a definition of “*world welfare*” that we understand in the same sense as *global welfare*. According to both authors, the *national welfare* should be understood as an economic concept representing the total real income of a nation’s population, a short-term concept welcoming some anti-competitive measures. By opposition they propose an alternative concept, the “*world welfare*” standard understood as “the aggregate level of consumer benefits and profits realised by consumers and firms in all pertinent countries”. This is a long-term and global concept requiring a consensus definition of accepted industrial policies and rejected industrial policies. This definition, limited to the competition policy field, is useful to approach the broader *global welfare* notion that drives now all the reflections of the international community. See Fox, E. M. Fox and J. A. Ordovery “The Harmonization of Competition and Trade Law- The case for Modest Linkages of Law and Limits to Parochial State Action” (1995) 2 World Comp. at 14-15.

has not yet been defined with precision. The notion of “*general welfare*” that once described governmental concerns for the public policies aimed at citizens (such as health, peace, morals, safety policies)⁵⁵, appears narrower than the notion of *global welfare*, as it is too focused on national issues. Rather, the notion of *global welfare* has to be understood as a global policy reconciling trade and competition issues. This new global approach to trade relations drives most of the current reflections going on in the international community.

As governments find their economies increasingly integrated in a world of expanding international commerce, they discover that their domestic social policies have greater impact on each other. From these frictions is born the idea of “*fair trade*” conduct, a very broad notion that is uneasy to define.⁵⁶ The “*fairness*” label has been deployed with increasing frequency in discussions of varied aspects of international economic life. All trade practices that adversely affect import-competing industries and all governmental policies linked to such trade practices are said to constitute sources of unfair competition.⁵⁷ This is a specific manner to apply public and private policies that aims at

⁵⁴ The WTO Working Group proposes to examine trade policy measures that reduce the “global economic welfare”. See WTO, *Report of the Working Group on the Interaction Between Trade and Competition Policy to the General Council* (8 December 1998), WTO Doc. WT/WGTCP/2 [hereinafter WGTCP 1998 Report] at par. 136.

⁵⁵ Definition given by Henry Campbell Black in the *Black's Law Dictionary* (St Paul Minn: West Publishing Co., 5th Edition, 1979) at 617.

⁵⁶ J. Bhagwati and R. E. Hudec, *Fair Trade and Harmonisation: Prerequisites for Free Trade?* (Massachusetts: The MIT Press, 1996) at 2 [hereinafter *Fair Trade and Harmonisation*]. This notion has to be assumed in a broader sense than the “unfair trade practices” used in the field of antitrust law to legitimise antidumping law.

⁵⁷ See R. A. Cass and R. D. Botluck, “Antidumping and Countervailing-Duty Law: The Mirage of Equitable International Competition” (in *Fair Trade and Harmonisation*, *supra* note 56 at 351).

maintaining a *level playing field* in order to impose true competition between commercial rivals, States and firms.

Some of the theoretical developments about “*fairness*” are useful in order to understand the concept of *global welfare*. Equitable international competition can only be achieved with the adoption of a common policy rejecting those national interests that contradict the common goal of *global welfare*. The current debate surrounding labour policy and environmental policy, where differences in national domestic policies seem to be causing the most significant problems in international trade relations, confirm the relevance of this analysis with regard to the competition policy issue.⁵⁸ The efforts of the international community to set up some common rules in these areas also derive from this idea of “fairness” and demonstrate the increasing importance of the *global welfare* concept.

A number of trade economists agree that exploitative practices in many low-wage exporting countries artificially depress labour costs, leading to unfair competitive advantages in world markets.⁵⁹ This points to an improvement of the economic situation in developing countries and to a deterioration of the *national welfare* in developed countries.⁶⁰ For countries already having a comparative advantage in unskilled labour-intensive industries (such as clothing or footwear) that situation results in a strengthening of their comparative advantage. Therefore, international harmonisation has been seen for a long time as a necessary condition to a *level the playing field* through the adoption of

⁵⁸ J. Bhagwati and R. E. Hudec, *supra* note 56 at 1.

⁵⁹ R. Z. Lawrence, D. Rodrik and J. Whalley, *Emerging Agenda: For Global Trade: High Stakes for Developing Countries* (Washington, DC: Johns Hopkins University Press, 1996) at 40.

common higher standards. Under the International Labour Organisation (ILO), States approved a numbers of conventions representing a universal set of labour standards. Meanwhile the labour issue is also on the NAFTA agenda. The adoption of standards can affect trade and foreign investment and therefore threaten the *national welfare* of developing countries. Nevertheless, the GATT /WTO is currently trying to define the notion of “*social dimension*”, a common policy in the field of labour policy.⁶¹ It appears therefore, that in the view of policy-makers, national interests should increasingly be replaced by a common goal.⁶² We can read that new approach as one of the first manifestations of the so-called *global welfare* notion. In the world market, a domestic policy cannot serve the competitive advantage of one nation and at the same time disregard the interests of the other nations. For the benefit of international trade, the notion of welfare has now to be thought of more globally.

A similar reasoning can be followed with regard to environmental issues. Indeed, the link between trade and the environment has become a high profile issue in the international community in the last few years. Nations have always had different environmental policies with, at one end of the spectrum, the “high-level” countries having rigorous laws and, at the other end, the “low-level” countries with less rigorous laws, or with no laws at

⁶⁰ *Ibid.* at 36.

⁶¹ V. A. Leary, “Workers’ Rights an International Trade: The social Clause”, in *Fair Trade and Harmonisation*, *supra* note 56 at. 193. The idea is so set up a certain minimum social protection on everyone to avoid the use of labour policy as competitive advantage and allow an equitable share of the benefits resulting from the liberalisation of international trade.

⁶² *Ibid.* at 178. Leary suggests that a basic principle seems to be that comparative advantage in trade should not be based on the violation of the most important fundamental workers’ rights.

all.⁶³ However, since major environmental issues (global warming, ozone depletion, etc.) are now seen in the wider policy community as having world-wide implications, the drafters of the WTO Agreement took into consideration the protection of the environment and the preservation of nature as global issues.⁶⁴ What we found was that high-level countries are more and more favourable to the imposition of some trade restrictions against goods from countries pursuing a less rigorous policy.⁶⁵ Using a less burdensome environmental policy as competitive advantage is now seriously challenged when it is in disagreement with the interests of foreign nations. States are still legally bound not to use environmental restrictions as a disguised restriction on trade.⁶⁶ Nevertheless, the possibility that now exists to contest the strategic use of environmental policies constitutes proof that we are already adopting a *global welfare* perspective and accepting that the *national welfare* interests have, in certain areas, to be limited.⁶⁷

⁶³ D. A. Farber and R. E. Hudec, "GATT Legal Restraints on Domestic Environmental Regulations" in *Fair Trade and Harmonisation*, *supra* note 56 at 59.

⁶⁴ Protection of the environment is one of the purposes of the WTO provided in the preamble. A number of agreements address some environmental measures to protect the environment. A Committee on Trade and the Environment has been set up too.

⁶⁵ An example is the Montreal Protocol's ban on trade in materials, capital goods, and technology needed for the production of the CFC gasses. United States adopted also for nature protection purposes an embargo on tuna imports from countries allowing their tuna fleets to employ fishing methods that cause the death of large numbers of dolphins. See R. E. Hudec, "GATT Legal Restraints on the Use of Trade Measures against Foreign Environmental Practices" in *Fair Trade and Harmonisation*, *supra* note 56 at 116-117.

⁶⁶ The current trade-and-environment debate involves some potential conflict between trade and environmental policies. For example, international trade conflicts can arise whenever domestic environmental regulations discriminate against imports when they have a distinctively burdensome commercial impact on imports. If the burdensome qualities of those environmental regulations cannot be justified by some credible regulatory purpose, they can be attacked as trade barriers in violation of GATT obligations. To that extent is it fair to note that two GATT panel reports (Tuna/Dolphin I and II) found the United States restrictions in violation of the GATT provisions.

⁶⁷ In that way, R.E. Hudec (*supra* note 65 at 120) commenting the Tuna/Dolphin case proposes to permit within the GATT, the use of environmental trade restrictions like the Montreal Protocol.

Given the fact that such evolution is driven by the international society's preoccupation for fairness, it should be the case that antitrust policies also take into account *global welfare*. Since competition is increasingly global, the decentralised application of competition policies inevitably creates some frictions. Competition policy appears therefore to be the third pillar of a global competitive environment.⁶⁸ In order to *level the playing field*, states as well as firms should compete fairly. To do so, the national use of a domestic policy cannot disregard the interests of other States. Given the new orientation taken by the international community, *national welfare* must be replaced by *global welfare* in the field of competition policy. This leads us to an assessment of the ability of national competition policies to take *global welfare* into account.

B. National Competition Policy as an Inadequate Tool to Promote *Global Welfare*

We are living in a global village. It would therefore make sense for all national policies to apply the best common solution for the world society; national competition policies serving the general consumer's interest. But, in reality, national policies have a limited ability to resolve the tension between trade and competition policy, and therefore to promote *global welfare* (1). Only a truly global policy can avoid the disturbance of *system frictions* (2).

1. The Failures of Competition Policy: Limited Jurisdiction and Protection of the *National Welfare*

The question here is to what extent traditional procedures used by domestic competition policies can battle the anti-competitive practices that threaten the world trading system.

⁶⁸ See R. Z. Lawrence, D. Rodrik and J. Whalley, *supra* note 59 at 17.

Are the actual competition policies able to take into account the new *global welfare* policy previously described? The current national competition policies (1.1.) as well as the existing bilateral agreements (2.2) fail to address this issue.

1.1. Shortcomings of National Competition Policies

This issue has first to be placed in the broader context of the relations between the different national antitrust laws. The tensions between the objectives and the application of domestic competition laws and international trade policy are rooted in the political birth of antitrust laws. Competition policies vary considerably across nations. There are a variety of political, economic and cultural reasons explaining why competition policies differ from country to country.⁶⁹ Moreover, procedures, time limits and the criteria for taking decisions are distinct from one jurisdiction to another. All of these differences, in and of themselves, increase uncertainties and may therefore constitute barriers to the expansion of trade and international investment.⁷⁰

Simultaneously, competition authorities are experiencing first hand the reality of the “global economy”. The same business activity can fall within the jurisdiction of two or

⁶⁹ Competition laws were enacted first in Canada and in United States. The United States as hegemonic power after the Second World War imposed a competition law in Germany and Japan. The reason (much more political than economic here) was to avoid the resurgence of authoritarian States using international cartels as happened before the war. The emergence of a competition policy for the European Economic Community in the late 1950s was seen as an integral element of the process of economic integration, designed to prevent private economic actors from recreating the market division abolished by the Treaty of Rome. See M. J. Trebilcock, “Competition Policy and Trade Policy- Mediating the Interface” (1996) [30] J. World Trade at. 72.

⁷⁰ The divergences also push up prices (more procedures, higher legal costs, etc). See EC, *Report of the Group of Experts: Competition Policy in the new Trade Order: Strengthening International Co-operation and Rules*, [1995], Mimeo European Commission, on line European Commission <<http://www.europa.eu.int/en/comm/dg04>> (date accessed: 30 November 1998).

more competition authorities each able to apply its own national rules.⁷¹ Multiple investigations or transactions involving firms located in different countries are now common.⁷² But for the moment no authority has the power to conduct investigations throughout the universal jurisdiction.

Due to the limits in the scope of jurisdiction,⁷³ States deal with practices occurring in a foreign territory by applying their national competition law extraterritorially.⁷⁴ But in doing so, the focus of national competition law is necessarily on the competitive effects *behind the border*, in their domestic markets and on their consumers. Even when competition policies tend to focus on international cartel activity and on international mergers, they traditionally take into account the anti-competitive effects inside the

⁷¹ See J. L. McDavis, "Globalisation of Premerger Notification and Review: Practical Problems and Solutions" at 6 (in Conference Material, Fordham Corporate Law Institute, Twenty-Sixth Annual Conference on International Antitrust Law & Policy, October 14 and 15, 1999). The author recalls that in the United States, 25% of the mergers filed in 1997 with the FTC involved parties or assets in at least two different countries.

⁷² In the *Grand Met/Guinness* case (62 Fed. Reg. 66867 (1997)) the FTC required divestiture of certain competing premium brands of liquor and also satisfied the concerns of competition authorities in the EU, Canada, Mexico, and Australia. In *Federal Mogul/T&N* (63 Fed. Reg. 13410 (1998)) after co-operation with the competition authorities in France, Germany, Italy, and the UK, the FTC required Federal Mogul to divest T&N's overseas thin wall engine bearings business.

⁷³ The debate on the State jurisdiction capacity is open since the *Lotus case* decided by the International Court of Justice in 1927. The most commonly invoked theory of general jurisdiction is the *principle of territoriality* which gives a state the right to apply its laws to conduct occurring fully or partially within its boundaries. Another widely accepted basis for the state jurisdiction is *nationality*, which allows a state to apply its laws to its own citizens, regardless of where the activity takes place. However, the *effects doctrine* is the most frequently used and the most controversial justification for extraterritorial antitrust jurisdiction. For an overview of the American Courts conceptions See H. K. Walker, "Extraterritorial Application of Antitrust Laws: the Effect of the EC/US Antitrust Agreement" (1992) 33 Harv. Int'l L.J. 583-585.

⁷⁴ Section 7 of the Sherman Act (26 U.S.C.A. §§ 1-7 (1987)) allows extraterritorial application of U.S. law to firms located abroad when there is direct effect on American business. The European Commission follows the same reasoning in applying Article 85 and 86 of the Treaty of Rome (see EC, *Commission Decision Bendix/Mertens en Straet*, [1964] O. J. L 92/1126). The European Court of Justice accepted this analysis too (see EC, *Commission Decision Matières colorantes*, [1969] O. J. L. 195/11).

national jurisdiction, not in another country.⁷⁵ Thus, the jurisdictional limitation is at the source of the national antitrust authorities' incapacity to condemn accurately multi-jurisdictional anti-competitive practices.⁷⁶

Given these shortcomings of national competition policies, the conflict created by the struggle for *national welfare*, far from being expunged is revived. In this same line of thinking, one of the critiques commonly raised is that national competition authorities do not diligently enforce their competition laws in order to protect their firms and their *national welfare* from foreign competition.⁷⁷ Instead of fighting against the perverse effects of trade policies, they welcome some anti-competitive measures. For example, exemptions from national competition laws of cartels directed solely at foreign buyers are made possible in a number of nations that supposedly follow a strong competition

⁷⁵ As noticed by Van Miert this situation derives from the increasing power of multinational companies. In such a world where business activities are being carried on a global scale, the ability of governments or regional organisations such as the EU to monitor the activities of MNEs is severely limited. See K. Van Miert. « Transatlantic relations and Competition Policy », (26 November 1996) Speech given at the American Chamber of commerce in Belgium, on line: European Commission <<http://europa.eu.int/comm/dg04/speech/six/en/sp96060.htm>> (date accessed 24 November 1998) 3.

⁷⁶ The problems posed by the multi-jurisdictional merger review were summarised in a report released by the OECD Competition Law and Policy Committee in 1994. The report noted that "(...) From the point of view of the business community, this can have undesirable consequences, due to factors such as disagreements over the proper scope of jurisdiction, frustration in efforts to collect information located within another State, different opinions about the proper remedy, and, perhaps most importantly, policy differences about appropriate regulatory response."

⁷⁷ R. Pitofsky makes this argument while studying the effect of global trade on the antitrust enforcement. He stresses that in our world, where trade success is so essential to national welfare, it is tempting to interpret antitrust laws to help achieve trade-related goals. The American official assesses that the United States, resisting the pressure of international trade, still applies the orthodox economical principles stated by Michael Porter in *The Competitive Advantage of Nations*. But it is fair to note that, at the same time, he admits that there are rare exceptions (for example, national defence) where the United States favours its own national welfare in enforcing competition laws. See R. Pitofsky, "The Effect of Global Trade on United States Competition Law and Enforcement Policies" in Conference Material, Fordham Corporate Law Institute, Twenty-Sixth Annual Conference on International Antitrust Law & Policy, October 14 and 15, 1999 at 5-7.

policy.⁷⁸ The merger *Aerospatial-Alenia / de Havilland*⁷⁹ illustrates perfectly well the implications of trade policy in the work of the competition authorities. In this case, the European Commission rejected the merger as anti-competitive while the Canadian Bureau of Competition Policy approved it because of the insignificance of the merger on the Canadian consumers.⁸⁰ In applying the national competition policies, *national welfare* is still granted priority at the expense of *foreign welfare*.

1.2. Shortcomings of Bilateral Agreements

While the probability of inconsistent decisions by competition authorities has risen due to the spread of trans-national antitrust issues across the globe, efforts to harmonise such decisions have increased. Some co-operation agreements in the field of antitrust engaged a number of countries on a bilateral basis. Germany, Canada, Australia, the European Community members are only some of the States bound internationally by competition provisions. But the cooperation established to avoid the extraterritorial application of competition law remains mainly procedural. These technical agreements are all built on the same basis: notification by one party of the enforcement activities that may affect the important interests of the other; information exchange in certain circumstances;

⁷⁸ Such exemptions are made possible under the Webb-Pomerene Act in the U.S. and the Transactions Law in Japan. The E.U. competition rules do not expressly exempt cartels formed solely for the purpose of exploiting foreign buyers. However, Article 85 forbids "the concerted practices which may affect trade between the Member States and which have as their object or effect the prevention, restriction or distortion of competition *within* the common market".

⁷⁹ See EC, Commission Decision *Aerospatiale-Alenia/de Havilland* (1991) O.J. Euro Comm. L334/42.

⁸⁰ Iacobucci (*supra* note 7 at. 22) cites George Addy, director of the Canadian Bureau of Competition Policy describing the factors taken into account by the Canadian competition authority: "Despite the fact that the relevant geographic market was found to be the world, individual review agencies are entrusted to look after the competition interests within their jurisdiction only. The Bureau of Competition Policy therefore considered the competitive effects of the transaction within the European Community". In consequence, the Canadian authorities were relatively unconcerned about consumers' welfare in Europe.

consultation, co-operation and avoidance of conflicts over enforcement activities.

As showed by the increasing success of the EU/USA agreements, procedural cooperation allows States to respond to the increasing number of multi-jurisdictional cases. Even though procedures are limited by confidentiality, they permit competition authorities to test their differences of approaches and of substantial rules in concrete situations.⁸¹ In this respect, these types of agreements ease the extraterritorial application of competition laws and permit improvements to be made in the prospect of competition policy convergence. But they do not respond to the global policy expectation, which is to protect *global welfare*.

Even the *Positive Comity* instrument⁸² whereby a country agrees to consider another country's request to initiate a competition law enforcement proceeding against conduct harming the interest of the requesting country is not oriented in that way. The choice of whether or not to take into account the foreign interests is left to the discretion of the country where the multi-jurisdictional anti-competitive practices occur. Consequently, we can argue that despite being a party to *Positive Comity*, a nation can still pursue its own *national welfare* in a manner that disturbs the interests of foreign countries.⁸³ Thus,

⁸¹ In the Royal Dutch/Montedison S.P.A. case, the EU and the FTC engaged in numerous discussions concerning the global impact of the transaction which eventually led to a global approach to such issues as competitive effects, market definition and then potential remedies. See EC, *Commission Report to the Council and the European Parliament on the Application of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws*, [11/11/1998], online: European Commission <<http://www.europa.eu.int/en/comm/dg04>> (last modifications: 30 November 1998). The automatic notification procedure was used 78 times in 1998.

⁸² Article V.2.

⁸³ This analysis is validated by R. Pitofsky arguing that procedural co-operation does not have to lead ineluctably to common attitudes towards anti-competitive practices. This is due to the slightly different

even through bilateral cooperation, domestic governments may still pursue policies designed to maximise *domestic welfare* at the expense of foreign nations.⁸⁴ As such, global policy-making is necessary in order to avoid the frictions resulting from conflicting policies pursued by sovereign nations.

2. System Frictions, Global Policy and International Competition Policy

The increasing number of trade disputes that competition policy fails to resolve has given rise to a new form of conflict called "*system friction*", which is a clash between different market models. This theory, set up by Sylvia Ostry⁸⁵, explains the opposition between sovereign States or a group of sovereigns such as the European Union. One sovereign can deploy macro-economic and micro-economic policies that negatively affect its international trading partners. The best example of system friction is the relation between the United States and Japan in the early 1980s provoked by the uniqueness of the Japanese market system which, according to the American point of view, created an unfair advantage for Japanese firms in international markets.⁸⁶

goals pursued in the various countries and rooted in their different cultures. The *Boeing/McDonnell* case is an example of that limitation. The US FTC and the European Commission, after analysing the competitive position of Boeing and MDC as well as their competitors in the world market fail to use the positive comity and reach different positions. See R. Pitofsky, "Competition Policy in a Global Economy--Today And Tomorrow" (November 4, 1998), online: Federal Trade Commission <<http://www.ftc.gov/speeches/pitofsky/global.htm>> (date accessed: 18 December 1998).

⁸⁴ That analysis joins Iaccobucci's assessment on the detrimental effect of *beggar-thy-neighbour competition* on the *foreign welfare*. See Iaccobucci, *supra* note 7 at. 20.

⁸⁵ See S. Ostry, *The Post-Cold War Trading System: Who's on first* (Chicago: The University of Chicago Press, 1997) at. 114.

⁸⁶ See J. Tamura "Comments" in Scherer, F.M., *Competition Policies for an Integrated World Economy* (Washington, D.C.: The Brookings Institution, 1994) 111 at 111-116. The American and the Europeans have extensively condemned the Japan's trade regime, especially the Keiretsu. Japan's sixty billion U.S dollar trade surplus with the United States in 1987 gave the signal for countermeasures. Trade frictions exists also in the aircraft industry between United States and the European Union. The bone of contention was the direct subsidies accorded to Airbus by certain EU countries and the indirect subsidies given to U.S.

One can argue that these frictions are rather rare. Indeed, the commercial wars opposing nations are not a common custom in current international trade relations. Only a few cases are notable since the beginning of the process of economic liberalization, post-World War II. Nevertheless, with the tariff walls down, the “*system friction*” stemming from different markets models used by different nations has revealed itself more distinctly. Many scholars foresee an aggravation of these frictions in the future with the emergence of a more integrated world welcoming new trading blocs (in East Asia for example with APEC) or new economic giants such as China.⁸⁷ Finding a solution to avoid these disturbing practices appears as a necessity for the long-term stability of the global trading system.

The jurisdictional limitation facing antitrust authorities remains absolute and fosters the persisting struggle for *national welfare*. In order to avoid these “frictions” we are therefore left with only one option, which is to impose an international competition policy that will aim to protect *global welfare*. This implies first the harmonisation of trade policy and competition policy in order to *level the playing field* within the market structure of every partner and to counter the pressures exerted by businesses on governments to obtain special treatment.⁸⁸ And then, in order to avoid the recurrence of

aircraft industry by the U.S. Defence Department. Each party claimed that the effect of these subsidies has been to harm their economic interests and to benefit the economic interests of the other party.

⁸⁷ See E. M. Fox, “The Harmonization of Competition and Trade Law- The case for Modest Linkages of Law and Limits to Parochial State Action” (1995) 2 World Comp. at 6. Sylviane Ostry (*supra* note 85 at 234) sees also an aggravation of the “system friction” because the United States is far less tolerant of differences than the Europeans or the Japanese. She states that “(i)n a framework of deeper integration, the more marked the structural asymmetries of access, the more intrusive will be the policy content of liberalisation: hence the emergence of a new, broad, and constantly evolving system friction”.

⁸⁸ I. De Leon, “Should We Promote Antitrust in International Trade” (1997) 2 World Comp. at 135.

these conflicts, competition issues have to be linked very closely to trade policies.

From a *global welfare* perspective, international competition policy should be understood as the balance between divergent trade policies serving diverse understandings of *national welfare*. The determination of trade policies authorised by the international competition exigency and serving the *global welfare* appears to be the only way to reconcile trade and competition policy. It is therefore important to explore practical possibilities for giving greater weight to competition policy considerations in the decision-making process on trade and trade-related issues which have a significant impact on competition. Based on previous attempts to impose international competition rules, it is possible to imagine such a global policy, linking trade and competition issues.

C. Reconciling Trade and Competition Law: Towards an International Competition Policy

International approaches to competition policy are not new. By the turn of the century, increasing trade interdependency among nations was already significant enough to adversely affect the private interests of domestic producers. The League of Nations identified international cartels as an enemy of world trade.⁸⁹ From the Havana Charter to the Marrakech Agreement, all attempts at setting up an international competition policy ended in political failure (1). Since then, the world community has changed considerably insofar as States' political commitments are concerned. Renewed by the Havana spirit, the market integration is now increasingly linking competition issues with trade policies

⁸⁹ See E. M. Fox, "Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade", in J. O. Haley and H. Iyori, *supra* note 41.

in a global perspective (2).

1. From the Havana Charter to the Marrakech Agreement: International Competition Policy Ideas and Political Failures

The first multilateral attempt to set up international antitrust rules was the 1948 Havana Charter, which would have established an International Trade Organisation (ITO) along with the other institutions of Bretton Woods (IMF and IBRD) created by the United Nations.⁹⁰ The Charter was an ambitious project linking together several trade issues and including a chapter devoted to *Restrictive Business Practices*.⁹¹ Indeed, Chapter V of the Charter requested that each Member State “[...] take appropriate measures and cooperate to prevent business practices from affecting international trade, restricting competition, limiting access to markets or fostering monopolistic control whenever such practices had harmful effects on the expansion of production or trade and contradict the objectives of the charter”.⁹² But the Havana Charter was never adopted. Nations ratified the GATT as a means of saving at least some parts of the ITO Charter. The initial General Agreement on Tariffs and Trade therefore codified only the results of the negotiations on the reduction of tariffs. It reproduced the content of Chapter IV of the Havana Charter relating to trade policy but did not address any competition issue. While the failure to adopt this convention stemmed from a number of factors, the opposition of the United

⁹⁰The General Agreement on Tariffs and Trade signed at Geneva in 1947 was not itself intended to remain in force. As a provisional agreement, it was designed to cover the period prior to the entry into force of the Havana Charter.

⁹¹ The Havana Charter comprised, in addition to the tariffs concessions (the future GATT), chapters relating to employment and economic activity, economic development and reconstruction, restrictive trade practices, as well as agreements on primary products.

⁹² See US Department of State, Division of Publications, Office of Public Affairs, *Havana Charter for an International Trade Organisation*, publication 3206, September 1948, art. 46.

States seems to have been the main explanation for rejection.⁹³ The refusal to implement more stringent tools was not only because of one country, but also for a large part because the world of trading nations could not foresee at this time a global policy to resolve the tension between trade and competition law.⁹⁴

The debate over international competition policy shifted to other international organisations but expectations were reduced. The Economic and Social Council of the United Nations (UNESCO) and the Organisation for Economic Cooperation (OECD)⁹⁵ took up the issue of controlling restrictive business practices. After the UNESCO efforts were unsuccessful, the United Nations General Assembly adopted a set of non-binding principles on restrictive business practices: the Restrictive Business Practices (RBP) Code.⁹⁶ The OECD took the same *soft law* perspective when it established some procedures for the coordination of action and the exchange of information among states as well as a procedure for notification when competition law enforcement of one member

⁹³ See R. B. Starek, "International Aspects of Antitrust Enforcement" (1996) 3 World Comp. at 31. The Democrat majority of Congress opposed Republican President Truman and refused to authorise the ratification of the Havana Charter for reasons of domestic policy.

⁹⁴ According to M-C. Malaguti (*supra* note 4 at 121) "... the refusal to implement more stringent tools seems to have been based on the fact that there was as yet no consensus among countries upon which such an agreement could be based, and countries did not have sufficient experience of action in this field to be able to devise an effective control procedure".

⁹⁵ OECD, *Council Recommendation* (1967) C (67) 53 (Final).

⁹⁶ See, UNCTAD, *The set of Multilaterally Agreed Equitable Principles and Rules of the Control of Restrictive Business Practices*, UN Doc. TD/RBP/Conf/10 (1980), online UNCTAD: <<http://www.unctad.org/en/subsites/cpolicy/cpset.htm>>. The RBP Code provides that enterprises *should* refrain from "below cost-pricing to eliminate competitors" and from "discriminatory prices, terms or conditions, including by means of internal transfers". Moreover, it forbids forms of conduct which "limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade..."

state affected the interests of another State.⁹⁷ In its 1976 Declaration on International Investment and Multinational Enterprises, the OECD included a section on competition policy.⁹⁸ As in the former text, the OECD Guidelines remained vague and dealt with coordination and adjustment.⁹⁹ Apart from the non-biding character of these provisions, the global approach had been dropped. Although these texts assisted the agencies of member nations in coordinating international competition law issues, their main role remained in the area of coordination and adjustment of different national policies.¹⁰⁰ Moreover, they did not link trade issues with competition policy as the Havana Charter did. In fact, the promotion of a global approach to international competition policy was dropped until the Marrakech Agreement. It was not until the 1994 GATT negotiations, that the Havana spirit was revived.

2. Return to the Havana Spirit: Linking Trade Policy and Competition Issues in Global Policy

One can argue that with the evolution of international relations and the post-Uruguay-Round system, there is a renewal of the political will to set up a global policy. Members are now conscious of the relevance of restrictive business practices and the appropriateness of addressing them in a multidisciplinary context as demonstrated by the

⁹⁷ OECD, *Council Recommendation*, *supra* note 95. Its current recommendations on information exchanges were issued in 1986.

⁹⁸ See OECD, *Declaration on International Investment and Multilateral Enterprises*, OECD Doc. 21 (76) 04/1 (1976) online OECD: <<http://www.oecd.org/daf/cm/cmis/comtees.htm>>.

⁹⁹ The Guidelines states that MNEs should refrain from abusing a dominant position by means of, for example "predatory behaviour toward competitors, or discriminatory pricing...". See OECD Guidelines, on line OECD <<http://www.oecd.org/daf/cm/cmis/cime/mnemo.htm>>.

¹⁰⁰ See D. J. Gifford and M. Matsushita, "Antitrust or Competition Laws Viewed in a Trading Context: Harmony or Dissonance?" in *Fair Trade and Harmonisation*, *supra* note 56 at. 275.

OECD and the WTO studies. Derived from the spirit of the Havana Charter (2.1.), a global policy approach linking trade and competition issues has now been adopted by the WTO (2.2.).

2. 1. Trade and Competition Policy in the Havana Charter

The Havana Charter was an ambitious project to regulate international trade as a whole. The provisions on the reduction of tariffs and the elimination of preferences were complemented by some other provisions on employment and on world economic development, more generally. Chapter V, which relates to Restrictive Business Practices should therefore be examined in the perspective of a global policy.¹⁰¹ Indeed, the Charter provided that each member shall take appropriate measures to prevent all business practices affecting international trade “whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of *any of the other objectives*”.¹⁰² In fact, the other objectives of the ITO Charter were very diverse since the Convention had as its aim the regulation of all commercial relations between the Members States including all industrial policies, general economic development and social issues.¹⁰³

¹⁰¹ In relation to this, see Robert P. Terill, who classifies Chapter V as an important provision related to the key articles of the Charter: Equal Treatment (Article 16), Reduction of tariffs and elimination of preferences (Article 17) and General Elimination of Quantitative Restrictions (Article 20). See Robert P. Terill, “Guide to the Study of the ITO Charter” in Department of State, Division of Publications, Office of Public Affairs, *Havana Charter for an International Trade Organisation*, publication 3206, September 1948 at 7.

¹⁰² *Ibid.* art. 46(1).

¹⁰³ The Charter scope was very broad, broader than that of the original GATT. See Havana Charter, Chapter I. It is a commitment to “increase the production, consumption and exchange of goods”, to guarantee the “equal access to markets” and the “reduction of tariffs and other non-tariff barriers to trade” but also to “abstain from measures which would reduce productive employment”.

Consequently, it can be argued that any measures that were found to have a negative impact on the global competitive components (for example, employment or investment policy) were considered to be in contradiction to the purpose of the Charter. International competition was understood in a context where national trade policies and the global competitive objectives were intrinsically linked. The procedural provisions of Chapter V also took into account such a global perspective. The ITO had the power to evaluate not only whether a practice was “*restrictive*”¹⁰⁴, but also whether this practice should be forbidden because it contravened the general objectives of the Charter.¹⁰⁵ Essentially what this means is that every measure that contradicted the common social, industrial or investment policies could have been considered restrictive in the world competitive environment. The ITO would have to determine those national trade policies that were permissible and those that were not according to the exigencies of international competition.

2.2. Trade and Competition Policies in the WTO

The GATT 1994 has renewed the global perspective and, next to the dispositions devoted to trade policy, some provisions dealing with competition matters have been added. In the GATT 1947, it was commonly recognised that the primary objectives of international trade rules were to create conditions of equal opportunities of competition for the

¹⁰⁴ According to the criteria of Article 46.2 and 46.3.

¹⁰⁵ One should understand the objectives as expressed in the Article 1. See M-C. Malaguti, *supra* note 4 at 121.

products of different countries.¹⁰⁶ But no specific reference was made to adverse changes in competitive conditions due to market barriers produced by governmental actions or due to a combination of private and public action.¹⁰⁷ In contrast, the Marrakech Agreement contains some provisions specifically devoted to competition matters. Indeed, the new WTO's approach differs from the GATT approach by focusing on a number of integrated market-access guarantees in different trade fields.

This approach is reflected in several provisions explicitly addressing private anti-competitive practices and including some provisions dealing with *market access*.¹⁰⁸ For example, the Agreement on Technical Barriers to Trade includes some rules designed to ensure that the preparation, adoption and application of technical regulations, standards and conformity assessment procedures by non-governmental bodies are not more trade-restrictive than necessary.¹⁰⁹ Following the same goal, the Agreement on Governments Procurements is aimed at regulating the procedures so as to "ensure optimum effective international competition" and "equitable opportunities for suppliers or service

¹⁰⁶ The three principles of the most favoured nation (MNF), of national treatment and of the prohibition of quantitative restrictions embodied in the GATT 1947 were all aimed at the final objective of creating substantial equality of opportunities for goods irrespective of their origin.

¹⁰⁷ See Malaguati (*supra* note 4 at 123) who notices that some litigation on market access has been resolved through a bilateral arrangement. An example is the question of the access to the Japanese market in semi-conductors raised by the US industry in 1986 (GATT document L/6076). The issue was solved outside the GATT 1947 when US government agreed to withdraw unilateral retaliatory measures in exchange for positive action by the Japanese government to encourage the openness of its market.

¹⁰⁸ For an exhaustive list, see R-U. Petersmann, "International Competition Rules for Governments and for Private Business- The Case for Linking Future WTO Negotiations on Investment, Competition and Environmental Rules to Reforms of Anti-Dumping Laws" (1996) 3 J. World Trade at. 19-21.

¹⁰⁹ The Marrakech agreement clarifies and completes certain points of the original text concluded during the Tokyo Round. See Article 3, 4 and 8 of the WTO, *Agreement on Technical Barriers to Trade*, online WTO <http://www.wto.org/wto/legal/ursum_wp.htm#dAgreement> (date accessed: 17 September 1999). The Marrakech agreement clarifies and completes certain points of the original text concluded during the Tokyo Round.

providers".¹¹⁰

In addition to those provisions regulating private anti-competitive practices, the WTO Agreement focuses directly on certain competition policy aspects of other trade provisions. Thus, the Marrakech Agreement introduces more systematic and more comprehensive WTO rules on private anti-competitive practices, which appear as a necessary complement to the existing WTO trade law.¹¹¹ In this regard, the Agreement on Trade-Related Aspects of Intellectual Property (TRIP) represents the largest and most ambitious attempt to harmonise intellectual property rights on a world scale.¹¹² In order to avoid pernicious effects on trade, all Members are required to adopt competition rules so as to ensure "effective protection against unfair competition"¹¹³ and control of "anti-competitive practices".¹¹⁴ But the text dealing the most directly with competition issues is the General Agreement on Trade and Services (GATS).¹¹⁵ This plurilateral agreement establishes a framework for the liberalisation of trade in services and constitutes an attempt to transpose the GATT's principle of trade barriers elimination to the service

¹¹⁰ It is also an Agreement negotiated in the Tokyo Round and amended during the Uruguay Round. (See Article X of the WTO, *Agreement on Government Procurement*, online: WTO <http://www.wto.org/wto/legal/ursum_wp.htm#dAgreement> (date accessed: 17 September 1999). This text also refers to certain competition problems such as collusive tendering and "absence of competition" (Article XV).

¹¹¹ See R-U. Petersmann, *supra* note 108 at. 18. According to this author, the broader WTO approach corresponds better to the globalisation of production and markets and helps internationally the enterprises to choose an efficient commercial strategy.

¹¹² WTO, *Agreement on Trade Related Aspects on Intellectual Property*, online WTO: <http://www.wto.org/wto/legal/ursum_wp.htm#dAgreement> (date accessed: 17 September 1999).

¹¹³ Article 40.

¹¹⁴ Article 39.

¹¹⁵ See *General Agreement on Trade and Services*, Apr. 5, 1994.

sector. It is first recognised that “certain business practices of services suppliers [...] may restrain competition and thereby restrict trade in services”.¹¹⁶ Consequently, this provision (the only one in the GATT 1994 to be expressly devoted to “Business Practices”) states that Members must enter into consultations with a view to eliminating such practices. Another example underlining the change introduced by the GATT 1994 is the Trade-Related Investment Measures Agreement. These so-called TRIM Agreements deal with trade restrictions that sometimes face industries processing international investments; they link trade policies with competition issues by introducing some competition policy requirements¹¹⁷ next to the principles of trade policy.¹¹⁸

Based on the preceding review, we can conclude that the link between trade and competition policy is revived with the GATT’s renewed attempt at defining a global policy. The foundations for a common competition policy are present. But the methodology for defining those trade policies that are permissible and those that are not in light of the requirements of international competition are still missing. States first have to determine “what sort of common competition” they want and what are the “common

¹¹⁶ *Ibid.* Article IX.

¹¹⁷ Article 9 requires the WTO Council on Trade in Goods to “review the operation of this Agreement and...to consider whether it should be complemented with provisions on the investment policy and competition policy”. This provision was included at the request of the developing countries to meet their concern that governmental TRIMs may be necessary in order to counter anti-competitive practices of MNEs.

¹¹⁸ The agreement specifies in a general manner that the members of the WTO may not maintain TRIMs which are in breach of Article III, § 4 of the GATT (requiring the granting of national treatment to imported products) and Article XI (requiring the elimination of quantitative restrictions). See WTO, *Agreement on Trade-Related Investment Measures*, online: WTO <http://www.wto.org/wto/legal/ursum_wp.htm#dAgreement> (date accessed: 17 September 1999).

goals” to be pursued by an “international competition policy”.¹¹⁹

D. Conclusion

The conflicts between national trading strategies, international trade policy, and competition policies have been extensively addressed. It has been determined that the current use of anti-competitive trade instruments in fact serves the *national welfare* and is opposed to the *foreign welfare*. But the international community seems engaged now in a process of establishing an international competitive environment. A *global welfare* policy is emerging, calling for a common policy linking trade and competition issues.

¹¹⁹ See De Leon, *supra* note 88 at 59.

Chapter 2- Towards an International Competition Policy: Choosing a Methodology to Resolve the Tension Between Trade and Competition Policy

The international competition issue presented in this paper cannot be summarised merely as the need to harmonise domestic legislation according to a single set of multilateral antitrust principles. The question is much more complex. Nations have to rethink the whole international trade theory in order to resolve the tension between trade and competition policy. The essence of the task is therefore to determine the nature of trade restrictions, as perceived by policy-makers, and the role that competition policy should play in preventing these restrictions.¹²⁰ By looking at the discussions led within the international forums as well as at State proposals, this section will critically evaluate the different approaches to imposing competition rules in international trade. The central question is that of determining a method by which to impose an international competition policy. Defining standards that are in accordance with the notion of *global welfare* (I) appears to be an appropriate way in which to determine those anti-competitive practices that should be rejected or accepted by the nation states, as a whole (II).

I. Defining Standards in Accordance With the Notion of *Global Welfare*

While the world is organised politically into nation states, the economy is increasingly becoming global. Therefore, a critical issue is to know to what degree economic policies should be decided by nations independently and to what degree they should be subject to international agreement. In this regard, there is a profound tension between domestic

¹²⁰ I. De Leon, *supra* note 88 at 62.

sovereignty and *global welfare*. The definition of any standard in accordance with *global welfare* has to be reached bearing in mind the autonomy of each State to determine its own development strategy. Striking a balance between trade and competition objectives (A) allows us to identify the philosophical grounds (B) to be taken into account in establishing standards that are in accordance with the notion of *global welfare*.

A. The Balance Between Trade and Competition Objectives: Methodology for Evaluating *Global Welfare*

It is important to choose a method in order to identify the practices that are anti-competitive with respect to the *global welfare* (1). In this respect, the implications of “political sovereignty” have to be addressed (2).

1. Choice of a Method: Defining Impermissible Industrial Policies and Adopting Standards

To determine if an economy is closed or open, economists of international trade measure the welfare of a multi-household economy.¹²¹ Four major approaches are used to compare the welfare criteria in different national economies: the Pareto approach, the social welfare approach, the social utility approach, and the compensation approach.¹²² These are ways in which to calculate whether or not the trade policy pursued by each country affects the *world welfare*. While it is interesting that trade economists can

¹²¹ See Kar-yiu Wong, *International Trade in Goods and Factor of Mobility* (Massachusetts: The MIT Press, 1995) at 347.

¹²² *Ibid.* at 348-387. All these approaches measuring the “welfare” have been translated into economics theorems in order to analyse the impact of certain shocks (due to government policies or changes in economic conditions in the rest of the world) on the welfare of an economy and on the world.

calculate the effect of trade policy on the welfare of the world,¹²³ using these economic approaches in order to define with precision the antitrust rules of *global welfare* to be followed by more than one hundred countries seems unrealistic. The methods employed by the antitrust economists, no matter how many variables they include, cannot deal with the development policy of all countries simultaneously.¹²⁴ Moreover, the classical antitrust analysis focuses more particularly on a specific type of welfare: "consumer welfare"¹²⁵ in relation to a class of consumers in a defined market.¹²⁶ Competition policy enforcers are primarily concerned with this goal as opposed to being concerned with maximising producer profits, which is the goal pursued by strategic policies. Thus, defining "*welfare*" in such a manner appears to be too narrow an approach for dealing properly with the tension between trade and competition policy. Another more efficient method has to be discovered in order to seize the notion of *global welfare*.

Among the scholars in the field of international competition law, E. Fox and J. A. Ordover have come closest to defining the concept of *global welfare* in the context of

¹²³ *Ibid.* at 384. The author states some theorems calculating the loss for the welfare of the rest of the world. For example he asserts that during the expansion of a Customs Union, the welfare of the rest of the world can be made to remain unchanged if the member countries choose appropriate external tariffs and income taxes. But the non-member countries may be hurt if some other external tariffs and income taxes improve the welfare of the member countries.

¹²⁴ In that way, see De Leon, *supra* note 88 at 63. The complexity of competition as a social phenomenon limits the efficacy of all positive analysis. Kar-yiu Wong shows clearly the shortcomings of the mathematical models to provide a definite conclusion about the welfare changes (Concerning the Pareto approach see *supra* note 121 at 348).

¹²⁵ In the view of the American policy-makers, one of the basic purposes of antitrust is to promote consumer welfare by preserving competition in the private marketplace. See W. F. Shughart, *Antitrust Policy and Interest-Group Politics* (New York: Quorum Books, 1990) at 16-17. Consequently, the Courts and the antitrust authorities in U.S.A. protect the "consumer welfare" through the allocative efficiency approach of anti-competitive practices.

¹²⁶ OECD, *Consistencies and Inconsistencies Between Trade and Competition Policies*, *supra* note 18 at 7.

international competition. They propose the formulation of a consensus definition of what constitutes impermissible industrial policies and to devise sufficient incentives for nations to honour an agreement to refrain from taking such impermissible actions.¹²⁷ This appears as a very practical approach that allows the linking of trade policy requirements with the exigencies of competition law, both to be decided by policy-makers in the context of a broader national or regional economic and political organisation.

Markets can only function within a defined framework of rights generated by governments. When barriers at the borders were high, governments could differentiate international policies from domestic policies; nations were truly sovereign and had no regard for the effects of their policies on other nations. But increasingly, as previously mentioned, economic activities in one nation produce consequences that spill across borders and affect other nations.¹²⁸ The question now is therefore: what sort of competition policy is compatible with markets that are involved in international trade? The objective is to find a principle that would limit the use of competition policy as protectionism, while permitting individual countries to formulate their own domestic competition policy. National industrial policies have therefore to be limited by a common interest. This is the only way to reconcile trade and competition policy in order to achieve a common notion of *global welfare*.

¹²⁷ E. M. Fox and J. A. Ordover, *supra* note 53 at 16.

¹²⁸ That leads to a clash between "efficiency" and "sovereignty" when competition authorities welcome some anti-competitive practices in order to favour the "national welfare". See S. Ostry, *supra* note 85 at 232.

Adopting this approach involves the identification of specific tensions in our trading system that can be alleviated by linking antitrust and trade law. According to E. Fox and J. A. Ordover, the best way to do so would be to specify that “government action is impermissible where the harm it causes to *world welfare* perceptibly outweighs the benefit to the nation’s citizens in correcting a market imperfection in order to protect a national interest”.¹²⁹ In that way, the definition of standards that are likely to take into account the different political and economical organisations between States appears to be a fair method to identify impermissible industrial policies¹³⁰. This approach does not entail policy-makers having to weigh every single industrial policy in order to determine whether or not to allow a trade measure. Rather the balance between trade and competition policy objectives should be evaluated by each country where the measure has an impact.¹³¹ With regard to this method, it is useful to refer to the studies led within the International and Regional Organisations. Indeed, the WTO Working Group launched, as a first step toward international competition rules, some discussions in order

¹²⁹ See E. M. Fox and J. A. Ordover, *supra* note 53 at 16. A second approach proposed by the authors is to specify a hierarchy of social policy goals served by various industrial policies and to forbid policies that have as their main objective the shifting of profits from foreign firms to home firms. But this approach seems to be very difficult to apply. The placement in the hierarchy will depend upon a nation’s stated reasons which means an infinite multitude of reasons if we take into account all nations’ strategic industrial development. In addition, the true reasons for any particular policy can be camouflaged because the different industrial intervention can be consistent with more than one objective. Thus, it seems impossible that through this approach, a significant number of countries could reach an agreement on a hierarchy of remediable market failures and permissible policies.

¹³⁰ The definition of standards, a legal technique allowing the introduction of some flexible rules has also been proposed by the Professor Petersmann, in EC, *Report of the Group of Experts: Competition Policy in the new Trade Order: Strengthening International Co-operation and Rules*, [1995], Mimeo European Commission, on line European Commission <<http://www.europa.eu.int/en/comm/dg04>> (date accessed: 30 November 1998) at 37. Petersmann proposes that the procedural and jurisdictional provisions be supplemented by agreed minimum standards on substantive competition law for trans-border cases.

¹³¹ To this extent it is interesting to look more closely at the definition of the “world welfare” standard proposed by Fox and Ordover (*supra* note 53 at 16) “the aggregate level of consumer benefits and profits realised by consumers and firms *in all pertinent countries*”.

to highlight the existing areas of convergence and divergence in the various competition and trade policies of Members and to identify some common elements among them.¹³² Based on the proposals made by States to avoid anti-competitive practices as well as on current competition policies (taking more or less into account trade policy objectives), we will determine some useful standard-criteria for achieving *global welfare*.

2. Implications of Sovereignty for the *Global Welfare* Standard

Arguments for creating a level playing field are most troublesome when examined in light of current trade policy. The anti-competitive practices welcomed by States threaten the free trade process. Yet, international trade occurs precisely because of the differences among nations that allow each country to use its comparative advantage.¹³³ Indeed, every nation strives to find a place in the global market for its own “national champions”. Any method for defining a global policy should therefore let the different nations use their proper resource endowments, labour skills or consumers tastes to produce goods and services in which they are, relatively, most efficient. In that line, the *market access* approach traditionally used to determine international anti-competitive practices has to be broadened (2.1) and some flexible standards adopted (2.2).

¹³² See WGTCP Report, *supra* note 54 at par. 13. The Group decides to continue its “(...) work on stocktaking and analysis of existing instruments, standards and activities regarding trade and competition policy, with reference to existing WTO provisions, bilateral, regional, plurilateral and multilateral agreements and initiatives, and national legislation and policies”.

¹³³ See H. J. Aaron, R. C. Bryant, S. M. Collins and R. Z. Lawrence, “Preface to the Studies on Integrating National Economies” in F.M. Scherer, *Competition Policies for an Integrated World Economy* (Washington, D.C.: The Brookings Institution, 1994) at xvi. The authors state that finally the cross-border trade is valuable because the playing field is not level.

2.1. Broadening *Market Access* as an Approach to Determining International Anti-Competitive Practices

The existing world system is composed of nation states. Each nation is free to follow its own values and political arrangements. To set up a truly competitive environment, there is only one way: install a worldwide *level playing field* and remove all impediments to market entry so that a globally integrated production and distribution process can be established. Not only do private barriers to market entry have to be kept under review, but governmental actions towards cartels or State aid and subsidies as well¹³⁴.

The global *playing level field* cannot be understood as an organisation of nations that are homogeneous in all of their competitive aspects. Such an approach would run contrary to a fundamental characteristic of political sovereignty, which is to allow the citizens of a State to order their lives and property in accordance with their own preferences.¹³⁵ The propositions of developing countries underline this fact. The social and economic dislocation caused by the transition to a competition-based economy is one of the main concerns of developing States.¹³⁶ For example, in its official position presented before

¹³⁴ See E. M. Fox and J. A. Ordover *supra* note 53 at 31-32. The authors state that it is time to recognise the overuse and misuse of the sovereignty in the arena of world competition. They propose, for example, that nations and their states subdivisions agree to catalogue all States aids that have an impact on international competition, and to provide annual reports disclosing such States aids and explaining the justification therefor.

¹³⁵ H. J. Aaron, R. C. Bryant, S. M. Collins and R. Z. Lawrence. *supra* note 133 at xvii.

¹³⁶ See WTO, Working Group on the Interaction between Trade and Competition Policy, *Synthesis Paper on the Relationship of Trade and Competition Policy to Development and Economic Growth*, WTO Doc. WT/WGTCP/W/80 (18 September 1998) at par 39. The delegations have suggested that the application of competition policy may create unemployment and/or may affect the survival of firms and industries, including locally-based small and medium-sized enterprise.

the WTO¹³⁷, the ASEAN pays special attention to the relation between trade policy and competition policy, outlining a fundamental difference of view with developed countries on the role of State-owned monopolies:

« Parastatal institutions or conglomerates which, sometimes, operate as monopolies or oligopolies may be necessary - and even critical- in expeditiously galvanising economic resources and spearheading forays in unstated and unprofitable, but socially desirable, economic ventures »¹³⁸

Bearing this opinion in mind, methods to identify anti-competitive practices should be adapted in order to strike a balance between the objectives of trade policies and of competition. In this respect, in studying the existing elements of convergence and divergence in competition policies, Mexico proposes to analyse the interaction of competition law with other national policies impacting market access¹³⁹. In fact, the attempts to condemn some practices as anti-competitive in the international arena have always been focused on the *market access* principle. Both the Havana Charter and the UNCTAD Set suggest that business practices that do not restrain competition may be prohibited if they “limit access to markets”. Article 46 in Chapter V of the still-born Charter condemn “[...] business practices affecting international trade which restrain

¹³⁷ See WTO, *Relationship between the Objectives, Principles, Concepts, Scope and Instruments of Trade and Competition Policy and their Relationship with Development and Economic Growth*, Communication from ASEAN (26 September 1997), WTO Doc. WT/WGTCP/W/33.

¹³⁸ That provision can be compared with the first paragraph of the Colombian Law 155 of 1959 prohibiting any practices affecting free trade on markets. This provision stipulates: “the Government may nevertheless authorize the conclusion of agreements or conventions, which, though they may limit free competition, are intended to protect the stability of a basic sector in the production of goods or services of interest to the economy as a whole”. See WTO, Working Group on the Interaction Between Trade and Competition Policy, *Submission from Colombia*, WTO Doc. WT/WGTCP/W/44 (22 January 1998).

¹³⁹ WTO, *Proposal by Mexico on issues to be analysed by the working group on the interaction between trade and competition Policy* WTO Doc. WT/WGTCP/W/13 (25 June 1997). This State outlines the importance of the exceptions to competition policies to State enterprises or to other activities.

competition, limit access to markets, or foster monopolistic control [...]”¹⁴⁰. Moreover, the Set of Multilateral Agreed Equitable Practices and Rules for the Control of Restrictive Practices concluded under the UNCTAD, defines the restrictive practices by reference to the *market access* principle¹⁴¹. Thus, the WTO Working Group addressed the interaction between trade and competition policy by focusing on the anti-competitive practices that deny or impede market access.¹⁴²

Following this approach strictly, we find that all barriers to *market access* lessen domestic competition by limiting the entry opportunities of foreign competitors.¹⁴³ The effect on international trade would appear to depend less on the form of the conduct, than on the extent to which the practice creates a barrier to foreign entry. Under that reasoning, the impact of the measure on the national trade policy itself does not seem to be a criterion to be taken into account. However, a policy that would merely prohibit practices that bar *market access* would ignore the fact that their lessening effect on domestic competition can be compensated by the efficiencies that result from the trade

¹⁴⁰ Article 46 Chap. IV of the Havana Charter, *supra* note 92 at 86.

¹⁴¹ See UNCTAD, *The set of Multilaterally Agreed Equitable Principles and Rules of the Control of Restrictive Business Practices*, UN Doc. TD/RBP/Conf/10 (1980), online: UNCTAD: <<http://www.unctad.org/en/subsites/cpolicy/cpset.htm>>. Definitions and scope of application, Part IV - Section Bi: “Restrictive business practices means acts or behaviour of enterprises which, through an abuse or acquisition and abuse of a dominant position of market power, limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries, or which through formal, informal, written or unwritten agreements or arrangements among enterprises, have the same impact.”

¹⁴² The WGTCP 1998 Report, *supra* note 54 at par. 77. The Group decided also to develop a common vocabulary addressing this notion (See also par. 30.)

¹⁴³ See P. B. Marsden, “Dealing with International Exclusion: The Right Focus for the WTO Working Group on Trade and Competition Policy” (1997) 2 World Comp. at 107.

practices themselves. The remarks of certain developing countries point to this very fact¹⁴⁴. In devising a *global welfare* approach, policy makers have to use a method that reconciles the trade policy goals with the competition policy objectives, and should avoid focusing only on the foreclosure of *market access*. In this regard, the input of Nigeria within the WTO Working Group is very interesting as an illustration of this new approach:

“As stated, there is a classical approach to competition policy which focuses largely on the antitrust approach to domestic competition. This approach is valuable and will be an important contribution to the effort of the Working Group. However, there is also now a broadening of approaches and assumptions to include a wider perspective that addresses the effects of globalization and the objectives of development. The classical assumption, the development assumption, both linked by shared concerns for efficiency in order to expand production of trade in goods and services, growth and development, should be discussed in the Working Group.”¹⁴⁵

Pursuing in the path indicated by this statement, we can conclude that the *market access* principle used until now to address antitrust concerns in international trade seems too narrow. In order to determine the anti-competitive practices that are detrimental to the *global welfare*, it seems appropriate that work on international competition rules begin by developing one unifying principle by which all restrictions of *market access* can be judged.¹⁴⁶ But in doing so, policy-makers should consider more than the trade-restrictive

¹⁴⁴ *Ibid.* at 106. It is interesting to notice that it is not only a preoccupation of developing countries, but a structural problem concerning also the developed countries. The author, speaking specifically about the case of the vertical restraints, makes the point that a prohibition of these practices based on the market access principle “may well allow a foreign entrant into the market, but might not necessarily result in a net increase in competition”.

¹⁴⁵ See WTO, Working Group on the Interaction between Trade and Competition Policy *Communication by the Nigeria*, WTO Doc. WT/WGTCP/W/16 (2 July 1997) at 2.

¹⁴⁶ See E. M. Fox, *supra* note 41 at 15. This author proposes an analytical framework to address this question. She proposes to study four distinct problems: what is the nature of the overlap or the difference between trade and antitrust concepts that safeguard market access? Is there a commonly understood antitrust rule that applies to foreclosure-type restraints? Is there a gap between recognised antitrust

effect of anti-competitive practices and also take into account the impact of competition policy on the industrial strategies of a country.¹⁴⁷

2.2. Flexible Standards

When one looks for examples of balancing trade and competition objectives in order to identify impermissible industrial policies, European integration appears as a model¹⁴⁸. Indeed, the ongoing competition between political sovereignty and economic integration illustrated the need for a balancing act. The ultimate role of competition policy in an integration bloc is to promote economic and social cohesion¹⁴⁹. At low stages of integration, competition policy assists in the elimination of barriers to trade. But as integration further deepens, the lack of common competition policies and enforcement rules can have a counterproductive effect. However, the introduction of a uniform competition policy can also have negative effects on the social reality of the poorest countries in the Community. In order to alleviate the negative effects of a common competition policy, the economic center of the regional block must be aware of the need to cushion the effects of trade liberalisation (the aim of competition policy) on the

principles that safeguard market access and appropriate principles for competition in world trade? Devise a meaningful and legitimate dispute resolution system to sanction the market access foreclosure.

¹⁴⁷ See the opinion of Marsden (*supra* note 143 at 109) who proposes to require, in addition of the trade-restrictive impact, proof that anti-competitive measures *substantially* lessen competition before they will be forbidden. According to a "world welfare" standard, the competition goals would therefore have to be weakened very much by a trade policy measures to be forbidden as contrary to an international antitrust policy.

¹⁴⁸ Petersmann notices (see *supra* note 130 at 34) that the EC's experience in administering international trade agreements with supplementary competition rules can serve as a model ("building blocks" approach) for negotiations on world-wide competition rules. Fox and Odover (see *supra* note 53 at 9-11) see the harmonisation of regulatory laws in pursuing free competition and free trade as an interesting example for the negotiations on an international competition policy.

¹⁴⁹ See P. Nicolaides, *supra* note 29 at 143.

industries and regions that need time to adjust. This is the reason why while introducing more competition, the EU also adopts policies to promote the economic and social cohesion in the poorest peripheral regions¹⁵⁰. A balance is thus achieved between the cohesion measures and the competition policy objectives. To resolve completely the tension between trade and competition policy while at the same time achieving their economics goals, nations have therefore to cooperate in adjusting their macroeconomic policies.

However, such an approach to achieving *global welfare* represents an ideal which requires a very advanced process of integration¹⁵¹. The recent evolution of the GATT/WTO system points in such a direction. As noted in the first chapter of this paper, the new WTO approach differs from the GATT approach by focusing on a number of integrated *market-access* guarantees in different trade fields. This is the basis that founds the WTO Working Group's decision to adopt a very broad approach in its study of the interaction between trade and competition policy. The Group is currently examining this tension in a number of diverse economic areas: the impact of anti-competitive practices

¹⁵⁰ *Ibid* at 142 -143. Since the establishment of the European Regional Development Fund in 1973, the cohesion principle has taken a greater importance in the EC Treaty. Article B of the Maastricht Treaty asks for a "strengthening of economic and social cohesion" considered as an objective of the EU. But a balance should be done with other provisions like the new Article 130 on industrial policy that requires that there should be no measures that distort competition. For example, the European Commission takes into account the consequences on intra-Community trade and competition in approving or disallowing State aids.

¹⁵¹ In that way the New-Zealand, speaking about its co-operation in competition and trade matters with Australia, outlines the reconciliation of the economic system of the two countries under the Australia-New Zealand Closer Economic Relations Trade Agreement (C. E. R.). With the institutional similarities this appears to have been a condition *sine qua non* of a successful co-operation. See WTO, Working Group on the Interaction Between Trade and Competition Policy, *Submission from New Zealand*, WTO Doc. WT/WGTCP/W/47 (25 November 1997) at 6.

of enterprises on international trade¹⁵², the impact of State monopolies, exclusive rights and regulatory policies¹⁵³, the relationship between trade-related aspects of intellectual property rights and competition policy¹⁵⁴, the relationship between investment and competition policy¹⁵⁵. Despite this broad basis for analysis, one must remember that the lack of political and economic integration among the WTO member countries persists.

In view of the diversity between States of policy emphasis and approaches to promoting competition, multilateral standards must be flexible enough to accommodate the differences in objectives and priorities in different economies.¹⁵⁶ This is of course a recurrent wish presented as a prerequisite by the developing countries¹⁵⁷. In identifying common principles of competition law and policy, the policy-makers should therefore recognise the need to envisage appropriate flexibility for developing countries, in particular the least developed among them.¹⁵⁸ Some specific conditions can be applied to

¹⁵² See the WGTCP 1998 Report, *supra* note 54 at par. 81-96.

¹⁵³ *Ibid* at par. 97-111.

¹⁵⁴ *Ibid* at par. 112-122.

¹⁵⁵ *Ibid* at 135-152.

¹⁵⁶ The "one size fits all" does not apply. See B. Hoekman, "Competition Policy and the Global Trading System: A Developing-Country Perspective" (1997) WTO Policy Research Working Paper n° 1735 at 11.

¹⁵⁷ See WTO, Working Group on the Interaction between Trade and Competition Policy, *Communication From Hong Kong China*, WTO Doc. WT/WGTCP/W/118 (26 May 1999) at 2. This State recalls that: "Attempts to harmonise the competition policies/rules of all WTO Members would not only undermine the specific development needs of developing economies but also the more sophisticated competition policies of developed economies. Viewed from this perspective, a WTO framework imposing rigid requirements on approaches, procedures and institutional set-up should not be pursued". Nigeria in its Communication (See *supra* note 145 at. 2) requests the termination of the classical approach to international competition policy, focusing largely on the antitrust approach, to adopt a broadening of assumptions to include a wider perspective that addresses the effects of globalization and the objectives of development.

¹⁵⁸ The developed countries are not opposed to this method commonly used within the GATT. See WTO, Working Group on the Interaction between Trade and Competition Policy, *Communication by the European Community*, WTO Doc. WT/WGTCP/W/62 (5 March 1998) at. 9.

them.¹⁵⁹ A degree of flexibility might well be appropriate in the application of competition policy in the developing countries.¹⁶⁰ On this topic, Japan, in its opinion presented to the Working Group, underlines the need to adapt competition policy to the size and the development stages of each economy.¹⁶¹ Hence, negotiations should aim at establishing a basic framework of binding principles and rules on competition policy that seek a balance between competition policy and the other economic and social objectives pursued by States.¹⁶²

This flexible approach also allows us to envisage that developed countries having a deeper economic and political integration could adopt some more burdensome competition provisions.¹⁶³ In this regard, the *rule of reason* method, which has been proposed to address litigious practices in cases where a truly international prohibition cannot be found *per se*¹⁶⁴, goes in the direction of the required flexibility. The *rule of*

¹⁵⁹ See EC, *Communication to the Council: Towards an International Framework of Competition Rules*, *supra* note 14 at 9. This Communication submitted by Leon Brittan and K. Van Miert, reflects the early acceptance (1996) by the European Union for a principle of differentiation in the introduction of international competition rules. A transitional period for the enforcement of international substantive rules, a different intensity of co-operation in the field of information exchange and a technical assistance are requested for those countries.

¹⁶⁰ WGTCP 1998 Report, *supra* note 54 at par. 37-38.

¹⁶¹ See WTO, Working Group on the Interaction between Trade and Competition Policy, *Communication from Japan*, WTO Doc. WT/WGTCP/W/134 (15 July 1999) at 5. Policy makers should therefore take account of the fact that some countries still in the process of working out competition policy have various difficulties in their systems. "It is, therefore, necessary that the framework must embrace realistic and flexible approaches within its original purposes."

¹⁶² Approach proposed by Korea. See WTO, Working Group on the Interaction between Trade and Competition Policy, *Communication from Korea*, WTO Doc. WT/WGTCP/W/298 (6 August 1999) at 2.

¹⁶³ See Petersmann, *supra* note 130 at 37. He proposes that the minimum standards on substantive competition law for trans-border cases could be progressively supplemented and should leave enough latitude to WTO members to develop their own competition laws and apply "higher" standards according to their particular needs.

¹⁶⁴ See the Report of the Group of Experts, *supra* note 130 at 17.

reason requires the courts and antitrust agencies to balance the pro and anti-competitive features of a specific agreement in order to determine whether the prohibition applies.¹⁶⁵ This legal mechanism, by depending on the criteria that are chosen to examine the litigious practices, allows the adaptation of the decision to each specific situation.¹⁶⁶ On an international basis, some minimum standards for national *rules of reason* can be defined to take into account the requests of adversely affected countries.¹⁶⁷ That way, the most advanced countries, which share a closer economic and antitrust background, will be able to adopt more precise standards.

Keeping in mind all of these practical prerequisites, we will now attempt to determine how the antitrust theory can help to define the *global welfare* guiding standards.

B. Global Welfare and Antitrust Theories: Limits to the Efficiency Approach

In order to understand the need for a future international competition policy, it is instructive to examine the possible philosophical underpinnings of such a policy. To do so, we need to compare the underlying goals of existing antitrust laws and study the propositions that have been offered by States. The notion of *global welfare* must be situated in the context of the antitrust theories and of the different antitrust policies applied by States. Moreover, a clear understanding of the goals to be promoted (such as

¹⁶⁵ For an extensive overview of this notion see J. Fejo, *supra* note 24 at. 79.

¹⁶⁶ *Ibid.* at 89.

¹⁶⁷ See the Report of the group of Experts, *supra* note 130 at. 19. The European Union experts favour a limited standard of review. The criteria could take into account whether the relevant procedural rules have been complied with, whether the statement of the reasons for the national decision is adequate, whether the facts have been accurately stated, whether there has been any “manifest error of appraisal” of the facts or whether there has been a “misuse of powers”.

consumer interests, efficiency or competition) needs to be developed. The efficiency model favoured by the United States (1) has to be balanced with the *public concerns* considered as critical issues by other countries (2).

1. Efficiency Model: the American Approach

The ability of competition policy to enhance economic efficiency provides a key link between such policy and the process of economic development. In this regard, a number of States within the WTO agree that an international competition policy can serve the goal of enhanced efficiency.¹⁶⁸ The American approach rooted in the country's long experience clearly expresses that view. Indeed, the protection of consumer welfare was one of the goals of the American antitrust law, at the moment of its introduction, among other objectives like the defence of small businesses against big firms. Since then, there has been a theoretical revolution focused primarily on the primacy of consumer welfare and economic efficiency.¹⁶⁹ The United States Supreme Court has responded to these new approaches by modifying or altering antitrust law in a long series of cases.¹⁷⁰

¹⁶⁸ See the WGTCP 1998 Report, *supra* note 54 at. 36. The benefice generating from the introduction of competition law is expected both for the static efficiency and dynamic efficiency. Static efficiency refers to the optimum utilisation of a society's existing resources to meet consumer wants ("allocative efficiency"), at the lowest possible cost ("productive efficiency"). Dynamic efficiency relates to the optimal introduction of new products, more efficient production processes and superior organisational structures over time.

¹⁶⁹ See W. J. Curran III, "Economic perspective: An Introduction" in *The Antitrust Impulse* (New York: Armonk, M.E. Sharpe, 1994) at 909-910. Early U.S. cases suggest that the purpose of the Clayton Act was to punish monopolies in their incipency. In that way, the *United States v. Von's Grocery* case (1966) clearly articulated the role of merger law to build up the small business sector. But with the ascendancy of the Chicago School economists, this trend has been reversed.

¹⁷⁰ See G. Myers, "The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law" (1993) 5 Minn. L. Rev., at 1101- 1106. The Courts employ an economic analysis in analysing the litigious practices. For example they verify that pricing policy of firms under review in fact harm the consumer welfare (e.g. *Matsushita Electric Industrial Co. v. Zenith Radio Corp*, 475 U.S. 574, 589-90 (1986)).

Similarly, this economic perspective has affected the focus of antitrust enforcement by the Department of Justice and the Federal Trade Commission.¹⁷¹ In most areas of US antitrust law, the analysis now focuses on economic efficiency and consumer welfare in terms of non-restriction of output and prices.¹⁷² Even though different schools of thought exist, there seems to be broad agreement among US antitrust lawyers and practitioners today that US antitrust laws should be interpreted according to the *allocative efficiency* model proposed by the Chicago School to protect competition and welfare rather than competitors.¹⁷³

In their Communication to the WTO, the United States recognises several objectives to be filled by competition policy. Free market entry is seen as an important condition in order to keep the prices down and to increase the diversity of supply in terms of product selection. The preservation of innovation is also considered by the American antitrust doctrine as major goal of competition policy. But it seems that the American Communication emphasises a third objective to be pursued by antitrust laws: efficiency. Indeed, the basic approach proposed by the U.S. in assessing how well a market works is to focus on the process by which the said market delivers goods and services to the consumer. Furthermore, the test proposed for measuring whether some restraint of commercial trade has an impact upon competition and thereby, upon consumer welfare,

¹⁷¹ The 1992 Merger Guidelines edited by the FTC recognises also efficiencies as a legitimate topic of consideration.

¹⁷² In the merger policy particularly, the introduction of economic analysis to apprehend the efficiency criteria is an important evolution of the American antitrust law. See J. P. Griffin and L. T. Sharp, "Efficiency Issues in Competition Analysis in Australia, the European Union and the United States" (1996) [64] Antitrust L. J. at. 654-665.

¹⁷³ See W. J. Curran III, *supra* note 169, at. 909-910.

is whether that restraint “reduces the importance of consumer preference in setting price and output”.¹⁷⁴ By focusing on protecting competitive markets and promoting consumer welfare, this approach highlights the U.S. inclination to impose the criterion of efficiency in the determination of a common competition policy. In fact, the U.S. representative argues that focusing on consumer welfare as the criterion for application of competition policy may help to avoid the potential for international conflicts associated with the “total welfare” approaches.¹⁷⁵

2. Public Concerns: A Requirement of the Other Countries

In other developed economies whereas competition laws and policies differ in terms of their respective emphasis on allocative efficiency, productive efficiency, public interest or consumer welfare principles, there seems to be a recent trend toward economic-based analyses focusing on economic efficiency and consumer benefits.¹⁷⁶ Nonetheless, there is currently no consensus on what should be the optimal objectives of a national competition policy. However, a generally shared objective is to ensure that markets work well by enhancing efficiency.

¹⁷⁴ See WTO, Working Group on the Interaction between Trade and Competition Policy *Communication from the United States*, WTO Doc. WT/WGTCP/W/35 (1 October 1997) at 2. This is the test applied in the US Supreme Courts Decision *NCAA v. Board of Regents of Univ. Off Okla.*, 468 US 85, 104 n.27 (1984) -cited in the Communication-. It stated that US antitrust laws rest “on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress”

¹⁷⁵ See WTO, Working Group on the Interaction between Trade and Competition Policy, *Synthesis Paper on the Relationship of Trade and Competition Policy to Development and Economic Growth*, WTO Doc. WT/WGTCP/W/80 (18 September 1998) at 4.

¹⁷⁶ See EU, Commission *Paper on Vertical Restraints in EC Competition Policy*, online EU <<http://www.eu.int>> (date accessed : 2 February 1999) at 1-6. The European Commission addressed the efficiency issue in a “green paper” about the future change in the European antitrust policy. It points out the evolution of all developed countries towards greater “efficiency”.

Such an approach that emphasises consumer welfare and economic efficiency constitutes a general guideline for most national competition policies. But national policies differ in the extent and degree to which they focus on the efficiency factor as well as on the nature of the other factors that are taken into consideration.¹⁷⁷ For example, apart from the consumer welfare, the traditional role of competition policy in Latin America has been as a price control mechanism.¹⁷⁸ In this way, governments, through the competition authorities, retain the power to control prices. The former Communist countries have adopted the same approach (Russia, for example) while UNCTAD has suggested that competition policy could be used in the short term to mitigate inflationary pressures following price liberalisation.¹⁷⁹ *Fairness* and *social objectives* appear still to be two important issues in several industrial countries (2.1.). *Social objectives* are considered as the main goal of competition policy by developing nations (2.2.).

2.1. Fairness and Social Objective

The widely diverging laws and policies among countries amply illustrate the necessity to take into account objectives other than efficiency. The treatment of mergers, resale price maintenance, parallel imports, the definition of a dominant position, etc. are different from one jurisdiction to another. Competition policy is usually tailored to sectoral public-interest regulation and most of the time tailored to industrial policies that favour the

¹⁷⁷ See WTO, *Communication from the United States*, *supra* note 174 at 3.

¹⁷⁸ See M. R. A. Palim, "The Worldwide Growth of Competition Law: An Empirical Analysis" (1998) 1 *Antitrust Bull.* at 105-146.

¹⁷⁹ *Ibid.* To this extent, the author cites the UNCTAD Secretariat, *Review of all aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, United Nations Publications TD/RBP/CONF.4/2 (1995).

sectors of strategic importance for the country.¹⁸⁰ This reflects differences in objectives, priorities, and economic philosophy. Even the OECD recognises that Member countries, which are *a priori* very similar, pursue various socio-economic objectives in implementing their competition policies.¹⁸¹ In assessing restrictive business practices, countries commonly apply a broad public interest test.¹⁸² While the goals of national competition legislation in most countries focus principally on the protection of consumers and the promotion of efficiency, the promotion of international competitiveness and the preservation of opportunities for small and medium-sized businesses to participate in the national economy are also important considerations.¹⁸³ For example, distribution laws that allow retailers to block the arrival of a new entrant protect small businesses in France and Japan.¹⁸⁴ Moreover, it cannot be ignored that the application of competition policy can create unemployment and/or affect the survival of firms and industries (especially locally-based and medium-sized enterprises). Consequently, while economic efficiency can be seen as a central objective of competition policy, other factors play an important role in determining its enforcement.

¹⁸⁰ Like agriculture or high-technology. See E. M. Graham, J. D. Richardson, *supra* note 12 at 33.

¹⁸¹ See OECD, *Report on Competition and Trade Policies: their Interaction*, *supra* note 32 at 74.

¹⁸² See WTO, Working Group on the Interaction between Trade and Competition Policy *Submission from Argentina*, WTO Doc. WT/WGTCP/W/55 (15 December 1997) at 4. Article 1 of the Law 22.262 enunciates the three elements on which the Law bases a decision as to whether a particular practice is punishable or not: distortion of competition, abuse of dominant position and adverse effect on the general economic interest. The first two elements are alternatives but the last is a necessary condition for there to be a violation within the meaning of the law.

¹⁸³ WGTCP 1998 Report, *supra* note 54 at par. 48.

¹⁸⁴ E. M. Graham and Richardson, *supra* note 12 at 343.

In this respect, during the Working Group discussions, a point made by a number of States was that, in many cases, competition law and policy has been implemented and strengthened not in isolation, but rather as one element of a package of interrelated reforms of policies aimed at promoting economic and social development¹⁸⁵. If some differences between the laws of different nations are arbitrary, others are rooted in culture and in a nation's choice of political economy. Competition policies are always modulated and influenced by broader *social objectives*. Because national objectives change, many policy-makers argue that the antitrust laws are designed to serve social and political objectives beyond economic efficiency. Consequently, antitrust enforcement is guided less by the efficiency orthodoxy and more by modern views of what constitutes a nation's policy.¹⁸⁶ When considering how a free market should operate, the negotiators of a future international competition agreement must also consider whether allocative efficiency should be the only guiding star.

This is the approach taken in Europe where most countries introduced competition laws only after World War II with a view to promoting not only economic efficiency, but also economic freedom, separation of political and economic power, and deregulation of their traditionally more protected economies. Even though the EC Treaty pursues the explicit objective of "a system ensuring that competition in the common market is not distorted" competition policy also includes non-efficiency related objectives such as "market

¹⁸⁵ WGTCP 1998 Report, *supra* note 54 at par 34.

¹⁸⁶ E. Gellhorn and W. E. Kovacic, *Antitrust Law and Economics in Nutshell* (St Paul, Minn: West Publishing Co, 1994) at 33.

integration” inside the EU¹⁸⁷. While the Community’s understanding of efficiency has evolved over the years, the other economic objectives (such as protection of small and medium-sized enterprises) as well as the social and political objectives are still being actively pursued.¹⁸⁸ In presenting its system to the WTO, the European Union insists on these other objectives.¹⁸⁹

2.2. The Social Objective as First Goal of Competition Policy

The majority of developing economies have so far not introduced national competition laws. But in those that have introduced such laws, their competition policies do not appear to be exclusively focused on economic efficiency and consumer benefits. They often seem to focus not only on the market behaviour of individual firms, but rather on objectives of restructuring, deregulating and privatising industries while taking into account the “social adjustment problems” of such policies.¹⁹⁰

¹⁸⁷ Article 3(f) of the Treaty of Rome. Moreover the preamble of the EEC Treaty mentions as objectives of European integration some social factors such as improving the working conditions of the people of Europe or reducing the differences in prosperity between the regions. See V. Korah, “From Legal Form Toward Economic Efficiency-Article 85 (1) of the EEC Treaty in Contrast to US Antitrust” in Kovaleff, T. P., *The Antitrust Impulse: An Economic, Historical, and Legal Analysis* (New York: Armonk, M.E. Sharpe, 1994) at 1112. Korah notices that the Commission perceived the first objective of competition policy as keeping the Market open and unified, the second as ensuring fairness and the third as protection of the legitimate interests of workers, users and consumers.

¹⁸⁸ See WTO, *Communication From Hong Kong, China*, *supra* note 157 at. 2. This entity understands the exemption practices pursued under EU competition law as means to protect small businesses.

¹⁸⁹ See 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/1 (11 June 1997) at 2.

¹⁹⁰ Comm Hong Kong, *supra* note 157 at. 2. Bolivia’s Constitution for example, merely states that the economic structure must be such that it is in harmony with principles of social justice with a view to ensuring that all residents enjoy a humane standard of living. (cited by S. A. Singham, “Shaping Competition Policy in the Americas: Scope for Transatlantic Co-operation” (1998) 2 *Brook. J. Int’l L.* at 395). In the same way, India in its Communication declares that “... it will also have to be kept in view that developing countries may have socio-economic and development priorities necessitating regulatory solutions until market forces mature”. (See WTO, Working Group on the Interaction between Trade and Competition Policy, *Communication from India*, WTO Doc. WT/WGTCP/W/111 (16 November 1998) at 3.

In its very exhaustive study of competition policy in central and North America, S. A. Singham outlines the attitude of these economies towards the efficiency model.¹⁹¹ All of these countries produced a competition policy that has more to do with politics than with the creation of an efficient market.¹⁹² This approach is reflected in the Communications presented by the developing countries in front of the WTO. Hong-Kong in its Communication considered as legitimate that, as long as the preconditions for an efficient market economy are not fully established, every competition policy applied to them should take into account the governmental *market access* barriers and short-term social disruptions of market competition.¹⁹³ While this State does not explicitly reject the efficiency criteria, it nevertheless is asking for an antitrust policy that is less economically oriented for developing countries as well as for the countries which have "economies in transition".¹⁹⁴

Developing countries have also reversed the argument of efficiency. By pointing out that, in the extreme case of a natural monopoly, economies of scale make production by one

¹⁹¹ S. A. Singham, *supra* note 190 at 388.

¹⁹² See for example the role of Article 5 of Law 22.262 which currently regulates anti-trust matters in Argentina (See *Submission from Argentina*, *supra* note 182 at 4). This article excludes from the Law's scope acts and practices specifically subject to special regimes, for example, legislation on state enterprise, legal monopolies, economic promotion regimes, markets with chronic excess supply, etc.

¹⁹³ See *Communication from Hong Kong*, *supra* note 157.

¹⁹⁴ See WTO, *Synthesis Paper on the Relationship of Trade and Competition Policy to Development and Economic Growth*, *supra* note 175 at 13. There may be a case for special rules that enable weak firms to merge with stronger competitors, at least in circumstances where it is clear that the weaker firm would otherwise exit the market. It is recalled that even United States antitrust laws provide such a measure for inefficient firms or industries. Indeed, United States merger policy provides a narrow exception for some mergers involving failing firms. The exception applies where the failing firm: (i) is unable to meet its financial obligations, (ii) is unable to recognise successfully under the bankruptcy laws, (iii) has made unsuccessful but good-faith efforts to find other buyers who may pose less harm to competition, and (iv) would be expected to exit the market, absent the merger in question.

firm the most efficient solution¹⁹⁵, they draw the conclusion that the use of the efficiency instrument is not necessary in all areas.¹⁹⁶ The survival of inefficient firms or industries is even seen as appropriate in the context of economic transition.¹⁹⁷ Other developing countries like Egypt and Madagascar expressed deep concern for the applicability of competition law to small and medium-sized countries.¹⁹⁸

C. Defining a Standard in Accordance With *Global Welfare*: Synopsis

Given all of the arguments developed above, we can summarise the necessary elements for defining a standard in accordance with *global welfare*:

- Defining the industrial policies that are not allowed in all relevant countries (countries affected by the anti-competitive practice being challenged).
- Developing one unifying principle by which the particular restriction of market access could be judged, taking into account the impact of competition policy on the industrial strategy of each country involved (common substantive legal provisions and the adoption of similar interpretations of the various legal concepts).

¹⁹⁵ *Ibid.* at. 12.

¹⁹⁶ *Ibid.* Some States like Peru have suggested that concentrations taking place in the context of economic liberalisation are less likely to be linked to anti-competitive practices, but rather to the adaptation of the domestic economy to the changes resulting from the new economic environment. In this context, all attempts to regulate the mergers could constitute an obstacle for economies undergoing transition.

¹⁹⁷ See Tunisia, M/3 (in WTO, *Synthesis Paper on the Relationship of Trade and Competition Policy to Development and Economic Growth*, *supra* note 175 at. 13.)

¹⁹⁸ See Communication of Egypt of 19 June 1997 cited in WTO, Working Group on the Interaction between Trade and Competition Policy, *Submission by the European Community and its Member States*, WTO Doc. WT/WGTCP/W/45 (24 November 1997).

- Adopting a flexible approach (application of specific conditions for developing countries and use of the *rule of reason* approach to ensure the adaptability of the rule).
- Balancing the efficiency approach with the public concerns approach (fairness and social objectives).

Such a flexible approach to *global welfare* makes any type of framework for imposing competition rules at an international level possible. However, it is not the goal of this study to examine all of the implications of this very important issue on which States and scholars disagree.¹⁹⁹ No matter what type of procedures States will choose (substantive principle enforced at the national or bilateral level²⁰⁰ or multilateral cooperation²⁰¹), the

¹⁹⁹ The EU proposals presented by Commissioner K. Van Miert at the WTO include common principles or rules on anti-competitive practices with an international dimension, the establishment of an instrument of co-operation between competition authorities and provide a binding dispute settlement for alleged government failures (See EC, *Communication to the Council: Towards an International Framework of Competition Rules*, *supra* note 14). Some scholars go further and ask for a World Competition Authority independent of all the partner countries to implement the common antitrust rules (See Nicolaides, *supra* note 29 at 142). Others outline the danger to agree only on some minimum substantives rules, refuse the idea of an International Antitrust Authority and favour a cosmopolitan framework of procedures and comity implemented in the domestic law of each country. (See E. M. Fox, "International Antitrust: Against Minimum Rules; for Cosmopolitan Principles" (1998) 1 Antitrust Bull 5 at 14).

Following that line, the United States appears still to be opposed to determination of substantive rules on a multilateral basis at this point in the negotiations. Joel I. Klein, Assistant Attorney General at the Antitrust Division of the U.S. Department of Justice, explains the arguments advanced by this country. (See OECD, "A Reality Check on Antitrust Rules in the World Trade Organisation, and a Practical Way Forward on International Antitrust", OECD Conference on Trade and Competition Paris, 29-30 June 1999, online OECD: <<http://www.oecd.org>> (date accessed 25 October 1999). If the United States agrees to participate in the WTO negotiations on antitrust rules, it does not anticipate world-wide consensus on the legal and economic principles for a common anti-trust enforcement. The USA proposes instead to create first a "culture of Competition" into national, regional, and multilateral institutions by increasing the technical co-operation between competition agencies, by establishing a antitrust-specific peer review. Only after that ("in the coming year" specifies the American official) some international antitrust rules would be defined.

²⁰⁰ See the Speech addressed by Melamed A. Douglas, "Principal Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice before Fordham Corporate Law Institute" (22 October 1998), New York, online: Federal Trade Commission <<http://www.ftc.gov/speeches/speech1.htm>> (date accessed 19 November 1998). The United States officials refuse for the coming years the idea of an

interaction between trade and competition can be achieved through different standard cooperation agreements.

International Competition Code, they propose to deepen the bilateral working relationships with antitrust agencies. In these fora an agreement on substantive rules could therefore be achieved.

²⁰¹ This is the wish of the European Union but also of a number of other countries.

II- Classification of the International Anti-Competitive Practices According to their Impact on *Global Welfare*

In order to promote a coherent and international pro-competitive policy, one suggestion is that the Working Group examines “trade policy measures that reduce global economic welfare, with particular reference to those having the largest impact”.²⁰² In this section, we will adopt this approach by determining the practices having the greatest impact on *global welfare*. As far as the trade practices commonly rejected are concerned, establishing standards promoting *global welfare* are attainable in a short-term period (A). In a medium time frame, some international substantive rules can also be considered (B). However, with regard to the position of States on a third category of anti-competitive rules, namely those dealing with mergers and anti-dumping policies, adoption of standards that respect *global welfare* is not likely in the foreseeable future (C).

A. Trade Practices That Are Prohibited *per se*- Standards Reachable in a Short-Time Period

There are two broad types of inter-firm cooperation: horizontal and vertical. Horizontal cooperation involves similar firms at similar stages in the production process while vertical cooperation involves complementary firms at different stages. Most competition laws analyse horizontal, vertical and abusive practices differently depending on the effects each of them have on competition. The necessity to bring such cooperation before the WTO depends first on the extent to which it creates a barrier to foreign entry.²⁰³ In this regard, competition policy is commonly very suspicious of horizontal cooperation.

²⁰² WGTCP 1998 Report, *supra* note 54 at par 135.

²⁰³ P. B. Marsden, *supra* note 143 at 106.

Indeed, one provision of competition law with strong market access implications is the prohibition of *cartels* and of boycotts that accomplish the objectives of *cartels*. These practices such as *horizontal price-fixing*, *bid-rigging*, *fixing quantities* to be produced or sold, *dividing markets* by allocating customers or territories, always tend to restrict competition by reducing output or raising prices. Such *cartels* have a clear impact on international trade and can have a significant limiting effect on competition, thereby limiting *market access*.²⁰⁴

Thus, an absolute ban on *import* and *export cartels* appears to gather general consensus when it is aimed at foreclosing the market entry. Developed nations strongly condemn such actions²⁰⁵. The OECD countries have already adopted a recommendation forbidding *hard core cartels*.²⁰⁶ But according to the standards-method developed above, *global welfare* would dictate that the impact of competition policy on the industrial strategy of

²⁰⁴ See for example the Carton-board Case (EC. Commission Decision Carton-board Case (Comm CE Dec. 94/601, 13.7.1994, OJ L 243)) where the Commission imposed fines totalling 132,000,000 ECU. Almost all the European producers of carton-board participated in setting up a clandestine cartel to fix prices and regulate their market. They agreed to bring into balance supply and demand. The main producers contributed by reaching a consensus on their respective market shares and by setting up machinery to collude on temporary plant stoppages so as to avoid excessive production. After a certain balance between supply and demand had been reached, participants started to increase prices from 1987 to 1990 and achieved a uniform price level across the Community.

²⁰⁵ See *Reflections of Professor Immenga* in EC, in the Report of the Group of Experts, *supra* note 70 at 25. In that way, the European Union asserts that "when there is market power, such agreements should be prohibited unless they have redeeming features." (See *Communication by the European Union*, *supra* note 198 at 5). The United States proposes that "basic competition laws should prohibit unreasonable restraints on trade, including cartels to fix prices, bid-rigging, agreements to fix production volumes or quantities sold and to divide markets by allocating consumers or territories" (See *Communication from the U.S.*, *supra* note 189 at 7). Canada's Competition Act even prohibits under criminal sanction these combinations, agreements or arrangements that prevent or lessen competition unduly (See WTO, Working Group on the Interaction between Trade and Competition Policy, *Communication from Canada*, WTO Doc. WT/WGTCP/W/70 (25 March 1998) at 2.

²⁰⁶ See OECD, *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels*, document C (98) 35/FINAL (25 March 1998).. This is still a non-binding text, which called on O.E.C.D. member countries to adopt measures to address such cartels and, to the extent consistent with national legislation, to co-operate with each other in the investigation and prosecution of relevant cases.

each country involved be taken into account by policy-makers. Following this line of reasoning, we find that while many countries firmly condemn *international price discrimination* that explicitly drives competitors out and keeps the market closed to competition, they are not so categorical when it comes to banning other forms of *cartels*.²⁰⁷ For example, in some jurisdictions, *export cartels* are exempted from the application of competition law whereas in others, they may be covered only if a significant impact is felt on the domestic market.²⁰⁸ Thus, in the near future, only a prohibition of *horizontal cartels* relating to *price fixing* seems possible.²⁰⁹ In any case, given the very regulated environment of many developing countries and their scarce resources, it seems that most of them can only adopt some standards imposing horizontal restrictions.²¹⁰ However, the flexibility required by the *global welfare* approach allows developed countries to adopt competition provisions that are more burdensome in other areas.²¹¹ For other trade measures considered to be anti-competitive, standard setting

²⁰⁷ See WTO, Working Group on the Interaction between Trade and Competition Policy *Communication from Singapore*, WTO Doc. WT/WGTCP/W/62 (12 April 1998) at 5. This State proposes to condemn price discrimination when it results in keeping the market closed so that monopolistic profits can be earned. However, this State does not consider directly the effects on pricing differences on all market participants such as the downstream producers.

²⁰⁸ See *Submission by the European Community and its Member States*, *supra* note 198 at 5.

²⁰⁹ See E. M. Graham, J. D. Richardson, *supra* note 12 at 42. In their attempt to identify the priority issues in international competition policies these authors found that the feasibility of further convergence in this domain is "High" given the good economic clarity of the practices and the high gains expected (efficiency gains and conflict reduction).

²¹⁰ See Palim, *supra* note 178 at 141. The author thinks that "... anything more than a ban on price fixing and other horizontal restrictive practices may be more of a burden than a benefit".

²¹¹ See L. Brittan, "The Need for Multilateral Framework of Competition Rules", OECD Conference on Trade and Competition, Paris, 29-30 June 1999, online: OECD <<http://www.oecd.org>> (date accessed : 9 August 1999). The Vice-President of the European Commission thinks that it is possible to find consensus to prohibit "hard core cartels but also in other areas. He based its assertion on a recent speech of Robert Pitofsky an F.T.C. official suggesting that in addition to hard-core cartels: "certain core types of conduct by single firms or collections of firms denying market access violate the law of many if not all jurisdictions". The deepening of the bilateral co-operation seems to be the solution considered here.

should follow the *rule of reason* approach.

B- Trade Practices Examined Under the *rule-of-reason* Approach- Standards Reachable in a Medium Time Frame

A number of nations are favourable to the imposition of some international substantive rules in the domain of *horizontal* and *vertical agreements* (1) as well as for the anti-competitive practices that fit the categories of abuse of *dominant position* and *monopolisation* (2).

1. Horizontal and Vertical Agreements

If certain categories of *cartels* can be considered as anti-competitive, other types of cooperation among firms are in some cases economically desirable and do not present difficulties for competition or trade policy. Some horizontal practices (agreements for R&D cooperation and specialisation) or vertical restraints (distribution strategies) might improve rationalisation or even increase competition. But at the same time, they can produce severe anti-competitive effects or disguise “naked” *cartels*. Competition authorities follow different approaches to assess the competitive impact of these horizontal and vertical restrictions; indeed, common concern has been expressed about the impact on competition and access to markets of certain types of *exclusive distribution* and *supply agreements* which can substantially raise barriers to entry for foreign producers.²¹² Especially, the negative effects of vertical contractual arrangements can be particularly strong in small markets, given the low level of inter-brand competition that characterises such markets and the high costs of entry relative to the size of the market.

²¹² See *Submission by the European Community*, *supra* note 198 at 5.

But, on the other hand, such vertical arrangements could facilitate investments in distribution services, which are desperately needed by developing countries.²¹³

For these types of cooperation there should be a *rule of reason* approach since opinions differ with regard to the conditions under which they are acceptable from a competitive perspective.²¹⁴ This flexible approach seems to be the best way in which to adapt the decision to each specific situation and thereby to conciliate the interests of different States. That is why the main current competition policies provide a system of exemptions for these practices. For example, the European Commission has adopted two exemption regulations for certain categories of agreements on R&D and on specialisation²¹⁵. If the conditions of the exemption regulations are met, they are presumed to contribute to improving the production or distribution of goods or to promoting technical or economic progress and they are therefore considered legal.²¹⁶ To achieve the same flexible result, the United States now uses a *rule of reason* approach in reviewing certain horizontal practices and vertical restrictions.²¹⁷ This system appears to be very flexible and more

²¹³ WGTCP 1998 Report, *supra* note 54 at par 86.

²¹⁴ Report of the Group of Experts, *supra* note 70 at 17.

²¹⁵ A Specialisation Agreements Regulation (Reg. 417/85) set up the principle to favour these agreements leading to economies of scale and development of products and in addition another Regulation (418/85) set out the conditions under which certain R&D agreements are exempted.

²¹⁶ Article 1.1. of Regulation 418/85 grants exemption pursuant to Article 85(3) of the Treaty of Rome so that Article 85(1) is not to apply in respect of these agreements under certain conditions. These conditions include, for example, that all the parties have access to the results of the work or that each party is free to exploit the results of the joint R&D and any pre-existing technical knowledge necessary therefor independently.

²¹⁷ For example, the American Courts under a rule of reason standard examine the exclusive dealerships. In that way, the 1985 *Vertical Guidelines* edited by the Department of Justice recommend that non-price vertical restraints should be governed by the rule of reason. See D. M. Raybould and A. Firth *Law of Monopolies-Competition Law and Practices in the USA, EEC, Germany and the UK* (Boston: Graham & Trotman, 1991) at 52-53.

appropriate than the European exemption model, which is particularly difficult to achieve on an international level.²¹⁸ Given the political dimension of this issue and the practical divergences of national procedures, it seems unlikely that there will be agreement on common standards at this early stage of integration.²¹⁹ But a flexible approach, leaving the opportunity for some nations to formulate more burdensome provisions, is still there. In fact, some propositions have already been made concerning the criteria to be considered by competition authorities when assessing whether measures have a foreclosure effect. The determination of quantitative thresholds can be envisaged and referred to the balance against pro-competitive effects, the balance against efficiencies and the cooperation as a condition to enter a new market.²²⁰ But anti- and pro-competitive effects may vary in different countries. To achieve *global welfare*, the standard should therefore allow the impact of a competition policy on the industrial strategy of each country involved to be assessed.²²¹

2. Abuse of Dominant Position and Monopolisation

Certain practices, which are lawful on a competitive market, can be forbidden under most of the antitrust legislation if carried out by a firm or a number of firms with a collective

²¹⁸ See Immenga, *supra* note 70 at 26. This author remarks that the individual exemptions as provided by EC-law are impossible, as long as there is no supranational authority.

²¹⁹ See Fox and Ordover, *supra* note 53 at 30. They propose at a later point in time, an optimal system that might involve a world institution for economic law, entrusting one body with the obligation to examine such transactions "from the top" and make appropriate dispositions in view of world welfare.

²²⁰ Immenga, *supra* note 70 at 26.

²²¹ See Fox and Ordover, *supra* note 53 at 30. That prerequisite is taken into account in the clause model proposed: "Nations should agree to consider pro-competitive, efficiency and technological benefits of challenged transactions or conduct and of proposed relief against such transactions or conduct everywhere in the community of contracting nations, and to take these effects into account to the same extent that they would be if such effects fell in their own territory".

dominant position. Abuse of dominant position can have a significant impact on both trade and competition when they involve the exercise of market power in order to deter or foreclose actual or potential competition.²²² The European Union has condemned that kind of anti-competitive practice affecting international trade for many years.²²³ The United States has also asked for the prohibition of monopolisation and attempted monopolisation that restricts market access to new entrants.²²⁴ Developing countries have an interest in accepting the adoption of international review procedures directed at such practices, especially since they are generally conducted by MNCs outside of their jurisdiction.²²⁵ The fact of the matter is that these types of practices affect the imports of developing countries when the final outcome is a transfer of wealth from the developing countries to the owners of the firms, as well as their exports by lowering their

²²² See *Submission by the European Community*, *supra* note 198.

²²³ See EC, *Commission Decision, Hoffmann-La Roche Case* Com.[1976] O.J. L.223 and *CJCE Decision*, 13.2.79, 85/76, Rec. 1979 at 461. Roche, a multinational group with the headquarters in Switzerland which was the world's leading vitamin manufacturer, had entered into exclusive or preferential supply contracts with a number of major bulk vitamin users. Whether to compensate for the exclusivity or to encourage a preferential link, the contracts provided for fidelity rebates based not on the differences in costs related to the quantities supplied by Roche but on the proportion of the customer's requirements covered. Furthermore, the rebates were not calculated separately for each group of vitamins but were aggregated across all purchases from Roche, so that this company was able to benefit from fidelity arrangement even in respect of those vitamins for which it did not hold a dominant position in the market. The Commission considered that Roche was abusing its dominant position by concluding the contracts, since their effect was to tie the most important buyers of bulk vitamins and to prevent its chief competitors from supplying these products.

²²⁴ See *Communication from the United States*, *supra* note 174 at 7. The U.S.A. is particularly concerned with such monopolistic discrimination and exclusion from foreign telecommunications and government procurement markets.

²²⁵ The European Union in its *Communication* (*supra* note 189 at 6) gave an example of an abuse of dominant position in international transport (TPI T-24/93, 8 October 1996) having a direct impact on a number of Developing countries. The Court of First Instance has heavily condemned a case of "fighting ships" that is a practice by which a group of shipping companies with a dominant position resort to a very low price on a particular shipping line (between Northern Europe and the Republic of Congo) in order to eliminate a competitor. These kinds of practices primarily affect imports to developing countries.

competitiveness.²²⁶ The interest of the developing countries is therefore clearly to adopt and enforce effective competition law in order to address the anti-competitive practices carried out by companies located abroad, and which do not have to answer to any other competition authorities.

Nations have differing focuses in their laws against monopolisation or abuse of dominant positions. Two main systems are opposed: the European approach (Article 86 of the Treaty of Rome) and the American approach (Section 2 of the Sherman Act). The US law is relatively permissive toward the unilateral behaviour of firms, on the grounds that society is better off if firms are allowed to compete vigorously, even if the conduct increases the extent of a firm's power.²²⁷ In contrast, dominance is much easier to establish under Article 86 where the notion of dominant position is defined very broadly. It refers to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition by affording it the power to behave to an appreciable extent independently of its competitors, its providers, its customers and ultimately of the consumers.²²⁸ European Community law finds dominance to exist at much lower levels than US law finds monopoly power. The antitrust theories underlying these procedures highlight the difference. The US antitrust jurisprudence uses allocative efficiency in

²²⁶ *Ibid*, EU Comm. In the case of the abuse of dominant position, once the competitor has been eliminated, these practices result in higher transport costs, which will affect the price of the products bought by consumers in the developing countries. Moreover, higher transport prices make the products exported by the developing countries more expensive, and therefore affect their competitiveness.

²²⁷ See Fox and Ordover, *supra* note 53 at 26.

²²⁸ See D. M. Raybould and A. Firth, *supra* note 217 at 323.

order to measure what constitutes a monopoly.²²⁹ On the contrary, the European Communication recalls that while competition authorities can refer to market shares in order to establish the existence of a dominant position, this is only one criterion among others.²³⁰ Elements of the structure and the functioning of the market²³¹ as well as some factors in relation to the company²³² have to be taken into account. EC law incorporates values of fairness and favours the viability of small and middle-sized business.²³³

Given such procedural and theoretical differences, defining a standard that identifies some substantive international rules in this domain is unlikely in the foreseeable future.²³⁴ At any rate, the choice of standard criteria comes down to a choice between the American approach and the European one.²³⁵ As such, the *global welfare* standard requirements should balance the efficiency goal with the *fairness* and *social objectives* pursued by a number of countries. To this extent, it is interesting to note that many

²²⁹ See Fox and Ordover, *supra* note 53 at 26

²³⁰ See WTO, *Communication by the European Community*, *supra* note 158 at 2.

²³¹ *Ibid.* WTO EU, For example: the presence of barriers to entry, the expansion or decline of market, the number and size of competitors in comparison with the company subject to investigation or the potential competition.

²³² *Ibid.* The comparative advantage in management, innovation or commercial action.

²³³ Scholars classified rules against abuse of dominant position as conduct-oriented (protection of competition) or result-oriented (protection of competitors). The EC law appears primarily to protect competitors whereas U.S. law primarily protects competition.

²³⁴ According to classification established by E. M. Graham and J. D. Richardson (*supra* note 12 at 42), the feasibility of further convergence in the field of Abuse of market power is Low.

²³⁵ See Professor Immenga (*supra* note 70 at 28), who proposes the model of Article 86, with an application which is strictly conduct-oriented.

developing countries have adopted the notion of dominance used by the EC.²³⁶ These development strategies have to be respected in addressing the impacts of the anti-competitive practices on the *global welfare*.

C- Long Term Issues: Anti-competitive Mergers and Anti-dumping Laws

Given the strong industrial policy considerations attached to the merger policy and to the anti-dumping policy and because of the theoretical divergences and technical differences employed by States to address these practices, international substantive rules on these matters are difficult to envisage.

Pro-competitive merger policies keep domestic markets operating efficiently and open to entry by foreign firms. However, if merger control is used as an instrument of industrial policy to strengthen the competitive position of domestic firms at the expense of trading partners, or to undermine the position of foreign firms for non-competition reasons, trade interests can be negatively impacted in foreign country.²³⁷ But in this area of merger

²³⁶ See Shanker A. Singham, *supra* note 190 at 391-392. With the exception of Mexico and Costa Rica, all Latin American competition laws penalised abuse of dominant position, not the attempt to monopolise. See WTO, *Argentina Submission*, *supra* note 182 at 4. Article of the Law 22.262 regulating anti-trust matters in Argentina shows clearly the European roots chosen by this country. It defines the Law's objective as a prohibition of "acts or practices (...) that limit, restrict or distort competition or constitute abuse of a dominant position in a way that may adversely affect the general economic interest".

²³⁷ See *Communication by the European Community*, *supra* note 158 at 7. As in the Saint-Gobain/Wacker-Chemie/NOM case this kind of agreement affects competition in several countries. The Commission decided to oppose the creation of a joint venture between three European firms. It held that the proposed operation would have grouped together the two most important producers of silicon carbide in the European Economic Area and would have enabled them to attain market shares of more than 60 per cent in two markets: the SiC market intended for abrasives and the heat-resistant applications market. The three remaining competitors would have had market shares of less than 10 per cent. The Commission examined the situation of potential competitors in Eastern European countries (Russia and Ukraine) and in China but it appears that they will not be able to ensure efficient competition in these silicon markets for two or three years. This merger had, therefore, an anti-competitive effect.

policy, where divergences in industrial policies play an important role, an agreement on substantive rules seems very difficult to reach.²³⁸ For instance, the analysis in the European Community is less technical economically and more likely to be politically influenced than the analysis in the United States.²³⁹ Indeed, in the EC, merger regulation is recent²⁴⁰ and was devised by the European Commission in accordance with its goal of encouraging the creation of trans-national firms. The European Commission is not only concerned with efficiency requirements (such as price increase), but also with the merger's potential exclusionary effects on smaller competitors.²⁴¹

Given these theoretical differences and the strong industrial policies attached to these measures, a convergence of procedural requirements has priority. The European Union has proposed that the WTO Working Group should "[...] consider the scope for greater convergence of procedural requirements for merger notification and how cooperation among competition authorities can promote greater awareness".²⁴² Thus, convergence and harmonisation seems foreseeable in the areas of notifications, thresholds, time limits,

²³⁸ See Immenga, *supra* note 70 at 24.

²³⁹ See Fox and Ordover, *supra* note 53 at 27. The European Commission almost never prohibits a merger which has a significant impact on the industrial policy of the European Union. In the same way, the European standard of prohibition does not clearly cover mergers that increase oligopoly. By contrast, the interpretation of the U.S. anti-merger law (Section 7 of the Clayton Act) is stricter and focuses essentially on the merger's effects on competition and its effect on prices to consumers. Traditionally, the main substantive criteria taken into account by the Court and the Antitrust Authorities in U.S. is the degree of concentration in the relevant product and geographical markets (See D. M. Raybould and A. Firth, *supra* note 217 at 152-175).

²⁴⁰ The Treaty of Rome contains no express provision regulating mergers within the European Community. Until the adoption by the Council of the 1989 Regulation on the control of concentrations between undertakings (Regulation 4064/89), the powers to control anti-competitive mergers were to be found in the principal competition rules: Articles 85 and 86.

²⁴¹ See Shanker A. Singham, *supra* note 190 at 385-386.

²⁴² See WTO, *Communication by the European Union*, *supra* note 158 at 10.

and information specification.²⁴³ Nonetheless, the definition of standards incorporating some criteria on substantive rules for the treatment of anti-competitive mergers is a long-term objective for policy-makers. Some modest proposals have been made, including that of E. Fox and J. A. Ordover:

“If a Nation designates a process for authorization of certain anti-competitive mergers under specified circumstances, such process and the decision-making thereunder should be transparent, the criteria necessary for a grant of approval should be clear, anti-competitive harms to nationals should not be treated more seriously than harms to non-nationals and non-nationals should not be permitted to weigh in the balance in favour of approval of the merger.”²⁴⁴

We are far from establishing a standard that will determine the calculation of the product market and of the geographical market. But these factors are the first steps toward an international agreement in this area. The important point to bear in mind is that any standard-criteria for reviewing mergers should encompass both approaches: the efficiency objective as well as the more political goal of protecting small firms. This point is reflected in the E.U.’s proposal to exclude the mergers having an insignificant impact on competition and trade from the scope of an international competition law.²⁴⁵

Anti-dumping laws also have to be studied in the context of the tension between trade and competition law. Indeed, the aspect of trade policy that is applied by States with the least convergence is without any doubt its anti-dumping measures. As such, these

²⁴³ See Immenga, *supra* note 70 at 24.

²⁴⁴ See Fox and Ordover, *supra* note 53 at 29.

²⁴⁵ See WTO *Communication by the European Community*, *supra* note 158 at 3. The Commission holds the view that horizontal agreements that do not represent more than 5 per cent of the total market (10 per cent of the vertical agreements) do not fall under the prohibition of anti-competitive practices. She recalls also that the European Community Merger regulation does not apply when the turnover of the involved companies is below certain thresholds. This approach can be multilateralized.

measures are of great interest to the *global welfare* perspective since there is currently no world-wide consensus on the manner in which to resolve the tension in this area. The EU Communications have yet to address this topic while the US clearly states that “[...] there is no reasonable foundation for replacing the anti-dumping rules with competition laws [...]”.²⁴⁶ Given such strong opposition, it seems unlikely that competition rules will emerge to regulate these measures. However, other countries like Japan and Singapore are in favour of inserting international antitrust provisions into anti-dumping review. Thus, the philosophical and practical arguments of both sides illustrate the difficulties inherent in adopting a pragmatic approach to the *global welfare*.

Conclusion

In this chapter, a methodology to resolve the tension between trade and competition policy has been proposed. The definition of impermissible industrial policies by means of standards appears to be, in a *global welfare* perspective, an efficient way to strike a balance between the objectives of trade policies and of competition. But the principle of *sovereignty* that is still driving the international community imposes an obligation to broaden the *market access* approach traditionally used to determine the international anti-competitive practices and to adopt some flexible standards to accommodate the various priorities in national economies. In that line, the *efficiency* model and the strict protection of the *consumer welfare* favoured by the United States should be balanced with *public*

²⁴⁶ See Communication from the United States, WTO, Working Group on the Interaction between Trade and Competition Policy, *Communication from the United States*, WTO Doc. WT/WGTCP/W/88 (28 August 1998) at I.

concerns like fairness and other social objectives. According to these criteria and after study of the states' proposals, three categories of trade practices can be identified: those prohibited *per se* for which some standards are reachable in a short-term period; those examined under a *rule of reason* approach for which standards are reachable in a mid-term frame; and those for which some international substantive rules are not likely in the foreseeable future. In this last category, the replacement of anti-dumping laws by antitrust provisions can serve as a practical illustration for the emergence of international competition rules in a long-term perspective.

Chapter 3-Practical Illustration: From Antidumping to Antitrust- Replacement of *International Price Discrimination* Standard by *Predatory Pricing* Standard

One of the main practical problems involved in pursuing an international competition policy is the role of antidumping laws. The limitation of these trade measures, which conflicts with competition objectives, appears to be a necessity in a *global welfare* approach. In the long-term perspective, given the strong industrial policy considerations attached to anti-dumping, it is fair to focus on this issue as a practical illustration of the emergence of international substantive rules. The argument for the replacement of the antidumping review by some antitrust provisions appears to be a *global welfare* issue (I). Choosing the way of adaptation, it would then be useful to determine how to make the application of antidumping more sensitive to competition considerations by focusing on the replacement of the *international price discrimination* standard by the *predatory pricing* standard (II).

I-From Anti-dumping Laws to Antitrust Policies: A *Global Welfare* Issue

The relation between the elaboration of a competition framework and the functioning of the existing trade instruments is a key issue in the trade-competition debate. In this regard, national legislation contains safeguard provisions against dumping and the other actions of "*unfair trade*". However, many scholars and policy-makers agree on the disguised trade protectionism behind antidumping policies. Antidumping rules increasingly appear as trade restrictive devices for international trade (A). The arguments for replacing anti-dumping laws with competition laws follow the direction of the *global welfare* approach (B).

A. Anti-competitive Effects of Anti-dumping Laws: *Home welfare v. Foreign Welfare*

Both trade law, which regulates trade policy, and competition law, ruling competition policy, have, despite varying perspectives, a common core objective: to maximise economic welfare by improving the efficiency with which resources are allocated. However, as pointed out in the first chapter, these two laws have complementary effects, as well as contradictory effects.

The negative impact is mainly due to the inefficiency of antidumping procedure. The vagueness of the rules used for the determination of dumping margins, the notions of “injury” or “threat of injury” to local production and the laxity deployed by domestic authorities in determining these elements, all tend to favour domestic producers.²⁴⁷ The *Steel case*²⁴⁸ for example, demonstrates the trade distortion effects that an anti-competitive anti-dumping suit can have on a foreign economic system. In this case, several anti-dumping suits were filed and an investigation by the US Department of Commerce was directed against Japanese imports of steel products because of the pressures of US producers and for strictly interior economic problems.²⁴⁹ That action led

²⁴⁷ I. De Leon, *supra* note 88 at 39.

²⁴⁸ International Trade Administration, Fact Sheet — *Antidumping Investigations Stainless Steel Sheet and Strip in Coils from France, Germany, Italy, Japan, Mexico, South Korea, Taiwan and the United Kingdom (Preliminary Determination)* 12/18/98, online: Department of Commerce <<http://www.ita.doc.gov/>> (date accessed: 10 October 1999).

²⁴⁹ See *Communication from Japan*, Working Group on the Interaction between Trade and Competition Policy, WTO Doc. WT/WGTCP/W/122 (28 May 1999) at 3-4. During the January-June 1998 period, US steel consumption increased by 6.4 per cent in year-on-year terms, an increase of about 4.5 million tons in volume. This expansion in steel demand was covered with increased supplies from the domestic industry and with increased imports. In June, employees of General Motors went on strike. Owing to this strike in combination with other reasons, US steel-makers saw their profits decline drastically (by 47 per cent for several firms). That is, according to Japan, the main reason why twelve US steel-makers and two steel labour unions filed some anti-dumping suits on 30 September 1998.

to a decline in exports from the Japanese steel industry and can be considered as the reason why most of the Japanese steel export companies announced their intention to leave the US market.²⁵⁰ The anti-competitive effect of the anti-dumping law has been created by the political protectionism views reigning in USA at this moment. Clearly, this case shows how government plays the *national welfare* game in applying anti-dumping laws at the expense of the *global welfare*. This anti-competitive impact due to the procedural vagueness of anti-dumping laws is not exceptional. Empirical studies confirm that national anti-dumping measures are often imposed without evidence of “*monopolising dumping*” and proof that they have reduced competition and consumer welfare in the importing economies.²⁵¹

In the same way, the WTO rules on the determination of dumping, injury and causality are very broadly drafted.²⁵² This provision is considered by a number of countries as being so broadly drafted that anti-dumping measures are often imposed even if international price differentiation is economically justified and if dumping neither

²⁵⁰ *Ibid.* at 4. Japanese steel exports to the US showed a continuous decline for the five months from October 1998 to February 1999 and also a decrease on a year to year basis for three consecutive months, from December 1998 to February 1999. Concerning specifically the Japanese exports of hot-rolled steel, the subject of the anti-dumping suit, exports were down by 99.5 per cent in February 1999 compared to February 1998.

²⁵¹ See OECD Economics Department Working Paper No. 165, Trade and Competition: Frictions after the Uruguay Round, Paris 1996.

²⁵² See Article VI.1. GATT 1947. Anti-dumping is allowed only in response to the practice of “dumping” defined by the GATT Members as: “a situation where an exporter sells its product abroad at lower prices than it does at home or at prices that are below cost” that causes “material injuries” to producers of the product in the importing country. Once these facts are established, the national investigating authorities may impose duties to offset prospectively the injurious dumping.

endangers nor distorts competition in the importing economy.²⁵³ Thus, anti-dumping measures are often used for restricting import competition and for complementing domestic restraints of competition. As in the *Steel case*, some firms in one country can exploit these trade measures to subvert competition in a partner-country. Governments subscribe to this anti-competitive effect in order to favour the *national welfare* against the *foreign welfare*.

B- Arguments For the Replacement of Anti-dumping Law by Antitrust Policy

Given its negative impact, a number of scholars and states ask for the replacement of the anti-dumping laws' review by some anti-trust provisions. The main arguments against that evolution, focusing on the producers' protection and the *price discrimination* standard, come from the *national welfare* reminiscence (1). But in a *global welfare* approach, anti-dumping policy should focus more on the competition protection and apply a *predatory pricing* standard (2).

1. Producer Protection, Price Discrimination Standard and *National Welfare* Reminiscence

The opponents to the replacement of antitrust by antidumping law use several arguments. The more common is the lack of "integration" of the current international society. The incorporation of competition provisions into trade law would lessen the need to have recourse to instruments of commercial defense. But competition instruments cannot be

²⁵³ See WTO, Working Group on the Interaction between Trade and Competition Policy, *Communication From Hong Kong China*, WTO Doc. WT/WGTCP/W/85 (27 August 1998) at 3. Hong-Kong, China gives two examples of this protectionist use of antidumping laws. When the international *price discrimination* is economically justified because of anticipated change in tastes or different elasticity in various economies and when the small market shares of allegedly dumped imports renders abuses of market power impossible, this country considers the use of anti-dumping laws protectionist.

seen as substitutes for trade instruments because these lose their *raison d'être* only in the context of fully integrated markets.²⁵⁴ But the WTO society is far from being an integrated world. A framework of international competition rules can therefore complete present trade law and create new mechanisms to address anti-competitive behaviour. Still, in any case, it will be able to supplant the present trade instruments.²⁵⁵

But the main argument is the specificity of anti-dumping policy itself. Most trade agreements contain some safeguards motivated to block a sudden or unforeseen influx of imports in order to avoid costly domestic adjustment.²⁵⁶ Thus, motivations for anti-dumping use appear to be purely motivated by the need to avoid politically costly domestic adjustment to imports.²⁵⁷ This argument comes directly from a philosophical conception favoured by the developed nations like the United States, where anti-dumping law is considered as a trade tool directed against "*unfair practices*" in a broad sense. Under this approach the role of anti-dumping policy is to protect government industrial policies or key aspects of the national economic system.²⁵⁸ This is a corpus of law that

²⁵⁴ EC, *Communication to the Council: Towards an International Framework of Competition Rules*, *supra* note 14 at 10. The European Commission is opposed to the replacement of anti-dumping by antitrust law.

²⁵⁵ *Ibid.* The text points out the differences between the European integration and the trade disciplines inside the WTO. Antidumping action has been excluded in intra-Community trade, as this is a fully integrated market requiring the elimination of tariffs, the elimination of measures of equivalent effect to tariffs (which is a wider concept than the GATT's national treatment obligation). In the same way, Member States have adopted four freedoms: goods, services (including establishment), capital (including investment), and labour. The single market programme and relative currency stability have been added to that. Competition law has been applied effectively to integrate the markets of Member States. All of these elements are currently absent from the World Trade Organisation even if some topics are under review (e.g., labour policy).

²⁵⁶ See P. Nicolaides, *supra* note 29 at 134.

²⁵⁷ *Ibid.* at 135.

²⁵⁸ See WTO, Working Group on the Interaction between Trade and Competition Policy, *Communication from the United States*, WTO Doc. WT/WGTCP/W/88 (28 August 1998) at 2.

should be considered as a trade remedy accepted by all the WTO Members as necessary to the maintenance of the multilateral trading system.²⁵⁹ In this line, all the governmental industrial measures or practices that are not fully subject to any of the WTO prohibitions can be challenged. Consequently, when a government seeks to protect a domestic industry by applying its domestic competition with laxity, anti-dumping laws guarantee a “fair” competition between this state and the others.²⁶⁰ They play the same role when a government uses domestic prices control to support domestic industries²⁶¹, or to provide subsidies to national producers or state trading arrangements²⁶².

Following this reasoning, competition law is clearly not considered as a substitute for the antidumping rules that are implemented first in order to protect the *national welfare*. Indeed, the scope of the anti-dumping policy is broader than the antitrust one. The national industrial policies are objectionable simply because they distort market structures and, in that way, provide artificial advantages to home market producers. The focus of anti-dumping law is not competition within a national market and the protection

²⁵⁹ *Ibid.* As a consequence, the United States argued that anti-dumping rules are not intended as a remedy for the *predatory pricing* practices of firms.

²⁶⁰ *Ibid.* at 8. The USA considers that government policies limiting the number of producers in a particular industry, such as the restrictive award of licenses, State monopolies, standards, testing, labeling and certification requirements and the lack of protection of intellectual property rights, should be considered as market-distortive government policies.

²⁶¹ *Ibid.* at 9. The main scenario is when a government sets the domestic price of a product at an artificially high level, while it uses prohibitively high tariffs to prevent foreign producers from undercutting this price. Even though the domestic producers of the product may be inefficient and have relatively high costs, the domestic price is often set high enough for them to reap supra-competitive profits. The domestic producers can therefore use this artificial advantage as leverage for exports at low prices.

²⁶² *Ibid.* at 10. Domestic producers are allowed to sell goods to a state trading company at prices equal to their costs, and then the state trading company dumps the goods abroad at whatever prices it can obtain. Normally, this price will be the lower world market price, and over time this world market price may even decline if the state trading arrangements induce significant excess production of the goods.

of the *consumer welfare* as required under the antitrust provisions. Rather, governments aim at protecting the national producers and the *national welfare* at the expense of the *foreign welfare*.²⁶³ Adopting that approach, the actual GATT system appears as largely sufficient to regulate the use of anti-dumping laws.

Then, it is fair to say that the whole stance taken by the U. S. is motivated by the desire to protect national interests as paramount. We are very far from the *global welfare* approach to the anti-competitive practices necessary to resolve the tension between trade and competition policy. Yet, this point of view is more and more challenged by another philosophy regarding anti-dumping policy as an instrument for the protection of world competition and whose global economic impact should be limited.

2. Competition Protection, Predatory Pricing Standard and *Global Welfare* Approach

Why should it be better to replace anti-dumping law by antitrust policy? A number of arguments are given. According to the "*market access*" argument, attempts are often made to justify anti-dumping measures on the grounds that the exporters enjoy a protected home market. However, it is clear that anti-dumping measures do not solve the problem of market protection. Indeed, antidumping duties put pressure on affected firms to lobby their government to abolish private business practices that restrict entry. However, they do not address foreign market closure at their sources: the national

²⁶³ *Ibid.* at 3. From this perspective, the anti-dumping rules represent an effort to maintain a *level playing field* among producers in different countries. Another point that has to be underlined is the rejection of the "efficiency" argument by the United States when adopting this reasoning. After all the argument in favour of the adoption of the allocative efficiency approach to deal with the other anti-competitive practices, is a point of view that demonstrates clearly that this country does not consider the anti-dumping laws on the same level.

competitive environments.²⁶⁴ There is therefore a need to address the problems at their sources. Thus, to counter the dumping practices and block the “unfairness” of the business activity, states should enforce a harmonised competition policy inside the two countries rather than add remedial measures at the borders.²⁶⁵ This antitrust correction would reinforce markets, making them more transparent. Indeed, the first goal of an alternative competition policy in international trade should be “to enhance the predictability of market participants through the reduction of uncertainty over their individual rights.”²⁶⁶ Under some antitrust provisions clearly established, the political treatment of the anti-dumping review should be limited.

Other arguments are related to the procedural limitation on antidumping law, which is responsible for creating some anti-competitive practices. These arguments are more directly based on the capacity of competition law to protect the *welfare*. Competition aims at ensuring that, in the long run, resources are used more efficiently and *consumer welfare* is optimised through the greatest possible product choices at lowest possible prices. This objective is missing when states apply the current anti-dumping procedures.

²⁶⁴ See WTO, Working Group on the Interaction between Trade and Competition Policy, *Communication from Japan*, WTO Doc. WT/WGTCP/W/92 (21 September 1998) at 5. Economic analysis consistent with the Chicago School’s view, indicates that it is irrational for private companies to sell their products below cost in foreign markets without the prospect for future predation profits, regardless of the existence of monopoly profits in their closed market. When companies make monopoly profits in their home market, they will normally prefer keeping them rather than merely losing them in the export market through below-cost sales.

²⁶⁵ Nicolaides (*supra* note 29 at 134) points out that “the most efficient intervention to counter such actions would be at the root of the problem, which is the firms themselves, rather than at the border.” The enforcement of remedial measures at the border appears as the second if not third-best option because, “it is now widely understood that these measures tend to afford protection to domestic firms rather than to remedy distortions in competition”.

²⁶⁶ See DeLeon, *supra* note 88 at 62.

As seen before in the *Steel case*, they have direct anti-competitive impact, and also, the threat of action leads exporting firms to alter production in a way that reduces *welfare*. Many economists have thus concluded that the *welfare* costs associated with the use of anti-dumping policy could be reduced if account was taken of its widespread economic impact.²⁶⁷ The anti-dumping review should then be modified in order to apprehend the *global welfare* policy.

Under this approach, the current anti-dumping policies are criticised since they are implemented in significantly different ways to antitrust laws. The antitrust procedure seeks to eliminate only *predatory pricing*²⁶⁸ whereas anti-dumping law deals with *international price discrimination*. In this regard, a common reproach made by exporting countries is the double-standard system. A very rigorous standard is applied to forbid *predatory pricing* for domestic competitors under the competition policy, whereas a very relaxed standard is used for foreign exports under the anti-dumping exigencies.²⁶⁹ Accordingly, the application of anti-dumping measures based on the current provision sometimes may result in restricting *price discrimination* that would not be illegal under domestic competition laws.²⁷⁰ Thus, anti-dumping law appears to be focused on the

²⁶⁷ B. Hoekman and P. C. Mavroidis, *supra* note 36 at 30.

²⁶⁸ Predatory pricing occurs when firms reap supra-normal profits in a protected home market and use these profits to finance exports sales at abnormal prices.

²⁶⁹ For example the 1921 US Anti-dumping law required only the criteria of "*international price discrimination*" and "*injury*" to a domestic industry for imposing anti-dumping measures. To determine the *price discrimination*, this provision requires simply the existence of a difference between prices in the domestic market and those in the exporting country. See Act of May 27, 1921, c.14, tit. II, 42 Stat. 11, 1921(codified as amended at 19 U.S.C. § 160).

²⁷⁰ The Congressional Budget Office of the US says in its report *Anti-dumping Action in the United States and Around the World: An analysis of International Data* (1998) that "... the vast majority of cases in

protection of competitors, whilst antitrust law, aimed at protecting the competition and the *welfare*, is far more likely to respect the foreign interests and to reinforce the international competitive environment.²⁷¹ In that line, the anti-dumping policy should first be concerned with *predatory pricing* as competition law is. Member States discussions continue in this area. The practical proposals to replace anti-dumping by antitrust have to be addressed.

which antidumping duties are imposed do not involve predatory pricing". (Cited in *Communication from Japan*, *supra* note 264 at 3).

²⁷¹ In relation to this issue, see Petersmann (*supra* note 108 at 32) who states that reforming anti-dumping laws will be beneficial to consumers, to national economies at large, and also to the legal consistency, transparency and effectiveness of national and international trade laws.

II-From the *Price Discrimination* Standard to the *Predatory Pricing* Standard

An agreement to replace the antidumping laws with the antitrust provisions is not foreseeable in the near future (A). Nevertheless, some attempts can be made to replace the *price discrimination* standard used under the antidumping review with the *predatory pricing* standard, an antitrust provision more focused on the *global welfare* protection (B). In this regard some practical propositions can be made (C).

A. Preliminary Remark

As demonstrated by the different philosophical views expressed, an agreement within the WTO to replace anti-dumping laws with antitrust provisions is far from being reached. The powerful import-competing industries such as the steel lobbies are currently benefiting from the protection rents made possible by anti-dumping provisions.²⁷² Therefore for political reasons, a multilateral reform of anti-dumping is unlikely in the foreseeable future. In any case, the complete replacement of anti-dumping by antitrust procedure will not be possible without the strong support from export industries like the United States. An attempt can be made, however, to enhance the role of competition policy disciplines in the trade policy context. As long as the Working Group deals with the interaction between trade and competition policy, it should address the contradictory effects of trade and competition policy, especially the anti-competitive effects caused by

²⁷² *Ibid.* at 32. This author sees two main reasons to think that this situation will not be challenged. First, individual consumers and the citizen-at-large are "rationally ignorant" towards price increases. In addition, exports industries in the main "user countries" of anti-dumping measures (Australia, Canada, the EC and the United States) see no sufficient advantage in reforming anti-dumping laws, as long as they suffer less from these measures than many of their competitors who are politically and economically less powerful (e.g., Japan and other Asian export industries).

trade measures on market competition.²⁷³

Several options can be explored. For example, the introduction of a “*public-interests*” clause²⁷⁴ or the use of non-violation complaints²⁷⁵. The solution favoured in the Nation States’ proposals focuses more particularly on the inclusion of antitrust criteria in the anti-dumping procedure. In that way, the examination of the dumper’s dominant market position on the basis of an antitrust definition of the relevant market has been proposed.²⁷⁶ Yet the main proposal concerns the replacement of the *international price discrimination* standard used in the anti-dumping review with the *predatory pricing* standard utilised under the antitrust procedure. It seems therefore fair to focus on that particular issue extensively addressed in the States proposals within the WTO Working Group.

²⁷³ See *Communication from Japan*, *supra* note 264 at 1.

²⁷⁴ See B. Hoekman and P. C. Mavroidis, *supra* note 36 at 45-49. The authors propose to multi-lateralise the “public-interest” clause requiring that, before duties are imposed, investigating authorities examine the impact which anti-dumping measures would have on the users of the allegedly dumped import and the final consumers of goods that embody the imports concerned. A model is Article 12 of the EC’s anti-dumping legislation (EC, *Council Regulation 2423/88 of 11 July 1988*, [1988] O.J. L. 209 at 1). This provision calls for imposition of anti-dumping duties in cases “where the facts as finally established show that there is dumping or subsidisation during the period under investigation and injury caused thereby, and the interests of the Community call for Community intervention”. A multilateral application of this provision rarely used so far is possible.

²⁷⁵ *Ibid.* at 42-43. Non-violation complaints are legal mechanisms designed to address the concern of contracting parties relating to modification of negotiated competitive conditions in areas that are either not addressed by the GATT or do not violate GATT obligations.

²⁷⁶ See Petersmann, *supra* note 108 at 33. Contrary to the “*like-product concept*” of the anti-dumping law, the “*relevant market*” definition also takes into account the consumers’ perspective.

B. International *Price Discrimination* Standard v. *Predatory Pricing* Standard

Price discrimination is generally legally accepted under competition laws (1) and under the GATT provisions (2).

1. Price Discrimination Under Competition Laws

Price discrimination itself is not generally unlawful from the perspective of national regulating policies. According to the economic theory, *price discrimination* for each customer enables the transfer of consumer surplus to producer surplus and causes a decrease in consumer surplus.²⁷⁷ But, any loss in economic efficiency is created by that shift since the net surplus in the whole economy remains the same as before. In addition, it is not economically irrational for prices in one market to be below prices in another market.²⁷⁸ Endorsing this approach, the *Robinson-Patman Act*, regulating *price discrimination* in the United States, asserts that this measure is unlawful only if it has a distorting effect on competition.²⁷⁹ Therefore, this law concerns not *price discrimination* itself, but the distortion of market competition caused by price discrimination.²⁸⁰

²⁷⁷ *Communication from Japan*, *supra* note 264 at 3. There is only an increase in producer surplus offsetting a decrease in consumer surplus.

²⁷⁸ For example, in a case where the brand name is less popular in one market than in another, sales prices in the latter market would be expected to be lower than in the former as sellers try to increase competitiveness by offering more attractive prices to offset a weak brand image. Another example would be the price difference resulting from the existence of active competitors. Sellers may offer lower prices in one market to match prices of their competitors, while setting higher prices in another less competitive market.

²⁷⁹ Robinson-Patman Act, 15 U.S.C. Sections 13a-13b, 21 a. (1936). This text amends the Clayton Act, Section 2. For an overview see Raybould and Firth, *Law of Monopolies*, *supra* note 217 at 83-98.

²⁸⁰ *Communication from Japan*, *supra* note 264 at 4. Specifically, price discrimination has been found to have a distorting effect on competition only if "the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly, in any line of commerce, or to injure, destroy, or prevent competition".

The treatment of *predatory pricing* under national competition policies adopted the same approach. Under the *Sherman Act*, illegal *predatory pricing* is defined as pricing below the costs appropriately measured coupled with intention to eliminate competitors, or with the “*specific intent*” to monopolise²⁸¹. The US Courts are following the views expressed in the landmark US Supreme Court decision on *predatory pricing* made in *Zenith vs. Matsushita*.²⁸² In this decision the Court concluded that a low price alone is not enough to support a finding of *predatory pricing*. A low price is only illegal if it can be shown that there is a dangerous probability that such pricing would permit the elimination of competitors thereby allowing the predator to raise prices later and recoup the original losses from low pricing. In the same way, in the EU where there is no specific law on *price discrimination*, the pricing policy of dominant firms is examined under Article 86.²⁸³ In doing so, the European Commission condemned only excessively low prices maintained with the intention of driving out a competitor or preventing new entry²⁸⁴.

Accordingly, both competition laws are only concerned with *price discrimination* in the context of *predatory pricing* and *price discrimination* itself is not a problem under competition standards.²⁸⁵ Indeed, low price sales are illegal in the case of pricing below marginal costs and with predatory intent because that affects directly the *welfare* of the

²⁸¹ See *Sherman Act*, Section 2.

²⁸² United States Supreme Court, *Zenith Radio Corp. v Matsushita Electric Ind. Co. Ltd.*, 402 F. Supp. 244.

²⁸³ Excessive pricing is certainly abusive and can be considered as unfair within the meaning of paragraph Article 86 (a).

²⁸⁴ See EC, *Commission Decision 85/609*, [1985] O.J. L 374 at 20.

²⁸⁵ See J. Miranda, “Should Antidumping Laws Be Dumped” (1996) 1 L. & Pol’y Int’l Bus. at 268. According to this author, although this point is not explained in the competition literature, there is some sort of implicit principle in the predatory pricing laws that the monopolisation of markets is not bad *per se*.

consumers. However, among all types of dumping, only *predatory pricing* dumping appears as a strategy aiming really at shutting down competitors in the country of import so as to monopolise this market.²⁸⁶ Thus, promoting competition policy in the exporting economy provides the solution to install fair trade when price differentiation results from some predatory practices²⁸⁷. When monopolising *predatory pricing* occurs, enforcement of antitrust rules in the importing country offers more efficient policy alternatives than anti-dumping laws.²⁸⁸

It is worth noting that within the domestic field, the American domestic disciplines on domestic price competition seem to be evolving in that way. In the *Brooke Group* case of 1993,²⁸⁹ the US Supreme Court ruled that the *Robinson-Patman Act* was essentially the same as the *Sherman Act* in disciplining *predatory pricing* as defined in ordinary competition law. The Court found that the existence of *price discrimination* itself would not constitute a violation of the law, and that the same criteria basically applied to both *price discrimination* under the *Robinson-Patman Act* and *predatory pricing* under the *Sherman Act*. Consequently, the distortion of market competition by *price discrimination*, which is illegal under competition law, should be judged by the existence of predatory intent in Section 2 of the *Sherman Act*. That domestic evolution can be adopted at an international level with regard to anti-dumping review since the GATT

²⁸⁶ *Ibid.* at 256-257.

²⁸⁷ See *Communication from Hong-Kong China*, *supra* note 258 at 3.

²⁸⁸ Peteresmann, *supra* note 108 at 30.

²⁸⁹ United States Supreme Court, *Brook Group Ltd. Vs. Brown & Williamson Tobacco Corp*, 509 U.S. 209 (1993).

provisions do not generally prohibit price differentiation.

2. Price Differentiation Under GATT Provisions

The primary nature of dumping is *price discrimination*. Indeed, generally speaking dumping is a kind of *price discrimination* that involves the absorption of freight and tariff differentials vis-à-vis other suppliers in the country of import.²⁹⁰ Yet firms charge different prices in different markets for a variety of reasons.²⁹¹ This situation is commonly accepted by the WTO rulings. Thus, GATT Article XVII on State Trading Enterprises does not prohibit public or private enterprises from practicing price differentiation in their sales.²⁹² The economic rationale for this provision is the recognition that there may be legitimate commercial reasons for enterprises to differentiate their international sales prices according to differences among the relevant markets, like the different consumer preferences, and according to what the market bears.²⁹³ In the same way, price differentiation is not prohibited under the WTO Agreement on Subsidies and Countervailing Measures, even though State subsidies may

²⁹⁰ See Miranda, *supra* note 285 at 256.

²⁹¹ *Ibid.* at 256-257. Dumping can also be attributed to the absorption of exchange rate movements. If the importing country adjusts its exchange rate upwards, exporters may choose to lower their foreign-currency denominated prices so that, when converted into local currency at the new exchange rate, such prices do not increase by the full amount of the devaluation. Other kinds of dumping originate from conditions in the country of export and world prices generated by import protection. For example, a dumping occurs when exporters with high fixed costs seek to bring down the costs on a per unit basis by spreading them over the largest volume of sales they can capture.

²⁹² See Paragraph 1 of the interpretative note regarding Article XVII that states: "(t)he charging by a state enterprise of different prices for its sale of a product in different markets is not precluded by the provisions of this Article, provided that such different prices are charged for commercial reasons, to meet conditions of supply and demand in export markets."

²⁹³ See *Communication of Hong Kong China*, *supra* note 253 at 2.

be liable to remedies and countervailing measures.²⁹⁴ Moreover, the GATT permits WTO Members to protect international price differentiation in certain circumstances. For example, by allowing the intellectual property rights holder to block parallel imports of genuine products²⁹⁵ outside contractual channels of distribution, many national laws, in conformity with the GATT system, enable the firms specialised in this field to separate markets and differentiate prices in different markets.²⁹⁶

Given these examples, some states like Japan, Singapore or Hong-Kong advocate the argument that the Anti-dumping Agreement should also be interpreted as prohibiting only *predatory pricing*. The GATT provisions relative to anti-dumping already do not prohibit international price differentiation. Dumping is condemned only “*if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry*”²⁹⁷. Article 3 of the WTO Antidumping Agreement requests that “*trade-restrictive practices and competition between the foreign and domestic producers*” be taken into account in the determination of the injury. These rules are required because anti-dumping initiatives are liable to come from industries dominated by a few domestic suppliers with the intention of limiting import competition in order to enable import-competing producers to maintain high

²⁹⁴ See WTO publication, *The Results of the Uruguay Round of Multilateral Trade Negotiations* (Genève, WTO Publication, 1995) at 264.

²⁹⁵ The importation of a good or service into a national or regional territory where it is protected by an Intellectual Property Right after it has been sold with the right holder’s consent outside that territory is commonly referred to as the “parallel importation” of that good or service.

²⁹⁶ Hong Kong (*supra* note 253 at 2) argues in that way when analysing the exemptions under Article XX (d).

²⁹⁷ Article VI 1. GATT1994.

consumer prices and protection rents.²⁹⁸ Furthermore, the WTO should now restrain the national anti-dumping laws in order to ensure that international price differentiation on its own would never be a pretext for an anti-competitive action. To do so, some proposals have been made to build the anti-dumping review upon a foundational *predatory pricing* standard.

C. Anti-dumping Review and *Predatory Pricing* Standard: Proposals

Given the divergent States' interests, at this stage any attempt to determine some precise standard in accordance with the methodology established above would be utopian. However, some criteria following the direction of the global welfare policy can be proposed in order to launch the anti-dumping investigation (1) and determine the existence of the predation (2).

1. Initiation of the Procedure: Determine the *Impact on the Domestic Economy As a Whole*

Since the original purpose of anti-dumping measures is to prevent *predatory pricing*, proof of future success in predation by low price exports should be required before applying anti-dumping measures. The examination of competition in the market of the importing country appears therefore as a prerequisite to any anti-dumping investigation. In that way, Japan proposes a stricter determination of "*injury to domestic industry*" in the investigation and above all, the introduction of the new concept of "*impact on the domestic economy as a whole*".²⁹⁹ When considering the application of anti-dumping

²⁹⁸ See *Communication of Hong Kong China*, *supra* note 253 at 2.

²⁹⁹ See *Communication from Japan*, *supra* note 249 at 5.

measures, each country should therefore take into consideration not only producer interests by focusing only on "*injury to domestic industry*", but also the consumer benefits that are expected to increase with the help of low-priced imports. If this balance is not made, the beneficial impact of low-priced imports on *consumer welfare* would suffer from the application of anti-dumping measures. Thus, any anti-dumping procedure might be initiated from the perspective of the impact of low-priced imports on the domestic economy as a whole. Japan proposed to modify the GATT Article VI according to this objective by requiring the proof that the "*overall economic welfare*" of the country has been deteriorated.³⁰⁰ This proposal follows the direction of the *global welfare* approach that makes it necessary to take into account the *foreign welfare* in using trade measures. If the *national welfare* is not seriously weakened by the foreign industrial policy, the anti-dumping weapon cannot be used. Thus, since the principle is to launch anti-dumping action when the predation is proved, policy-makers have to find some criteria to determine the existence of *predatory pricing*.

2. Calculation of the Predation: The *Variable Cost Standard*

Since there is significant doubt about the economic validity of the criteria for imposing anti-dumping measures, the possible action of reforms would be to improve the criteria by introducing the perspective of competition policy. It is therefore useful to review how the test for imposing *predatory pricing* has been put into practice under competition

³⁰⁰ *Ibid.* The text proposed is: "The contracting parties recognize that dumping, by which products of one country are introduced unfairly into the commerce of another country at substantially less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry and impairs competition in the market of a contracting party and deteriorates the overall economic welfare of the contracting party".

laws.

There is a debate on the proper measurement of predatory pricing. The *variable cost test* proposed by Professors Areeda and Turner has been used since 1975 by US Courts to determine whether pricing is predatory.³⁰¹ Over the years, the US Circuit Courts of Appeal have issued a large number of decisions in *predatory pricing* cases on the basis of a *variable cost* standard.³⁰² This test essentially considers the *consumers' welfare*, whether they are ultimately hurt by the predator firm, and therefore does not protect the producer welfare. An evolution in the measurement of the predation that occurred in the last years goes in the same way. Since the *Brooke* decision, the US Supreme Court uses also the "*recoupment test*" while dealing with *predatory prices*.³⁰³ This notion means that *predatory pricing* occurs only when the anticipated pay-off from future monopoly prices is large enough to permit the defendant to recoup its initial investment in below

³⁰¹ The Areeda-Turner test uses economic models to determine the predatory pricing. Stated simply, the price-cost element of this test is: (1) the correct number for identifying a price as predatory is short-run marginal cost; but (2) given that short-run marginal cost is very hard to measure in many cases, a substitute is the average variable cost, with variable costs defined more-or-less arbitrarily as everything that varies in the very short run, plus everything that is subject to use depreciation. See H. Hovenkamp, "The Areeda-Turner test in Antitrust Analysis" (1996) 4 Antitrust Bull. at 833.

³⁰² See Miranda, *supra* note 285 at 278. The author found that the practice of the US Courts of Justice has established three benchmarks. First rule: Prices lower than the average variable cost generate a presumption of predatory behaviour that can be rebutted based on the circumstances. Second principle: Prices higher than the average variable cost but lower than average total cost generate a presumption against predatory behaviour that can be rebutted based on the circumstances. Third benchmark: Prices higher than the average total cost generate a presumption against predatory behaviour that is practically irrefutable.

³⁰³ See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, *supra* note 289. Before that decision the US Supreme Court faced three cases of predatory pricing, *Utah Pie* (1967), *Matshushita* (1986) and *Cargill* (1986) but failed to define a test to identify the existence of predatory behaviour. See R. O. Zerbe Jr. And M. T. Mumford "Does Predatory Pricing Exist? Economic Theory and the Courts After Brooke Group" (1996) Antitrust Bull. at 967.

cost prices.³⁰⁴ In addition to evidence of below-cost pricing, a plaintiff must therefore also show that the defendant had a reasonable possibility of recouping his investment in below-cost prices by reaping profits once the rival has been eliminated for establishing the existence of predatory behaviour. The use of this test focused upon the price proves that, under the US practice, injury under predatory pricing laws is understood as injury to the consumer.³⁰⁵ That analysis follows the direction of the partisans for replacing antidumping laws by antitrust tools. By focusing on the *welfare* issue, this test seems able to apprehend the impact on the economy as a whole.

However, there is no world-wide consensus on the marginal cost test focusing on *consumer welfare*. Indeed, in contrast, the European practice protects the producers (not the consumer) against the alleged predator, and in doing so, it refuses to apply the *variable cost-test*. Foreseeing that problem, Japan admits that the “(..) marginal cost or average variable cost however, is not the absolute standard for the determination of anti-dumping”.³⁰⁶ It is therefore interesting to verify whether the other dominant legal system, the European law regarding the *predatory pricing*, provides some antitrust mechanism capable of replacing anti-dumping laws.

³⁰⁴ Hovenkamp, *supra* note 301 at 836.

³⁰⁵ See Miranda, *supra* note 285 at 288. That reasoning is based principally on the *Brook* case analysis.

To date the European Commission has investigated only a few *predatory pricing* cases. In the *Akzo case*, the Commission rejected a *cost-based test*.³⁰⁷ This decision emphasises the importance of proving the intention to eliminate the competitor. In *Elopak/Tetra Pak*, the Commission and the European Court of First Instance followed the same reasoning and concluded with the rejection of the *variable cost standard*.³⁰⁸ The Court of First Instance argued that the determinative factor for establishing predatory behaviour does not lie on a given cost test, but on whether one can infer predatory intent on the basis of the duration, the continuity, and the scale of the losses involved. In addition, the Court rules that the "*recoupment test*" is not mandatory for establishing predatory behaviour. That means that the injury analysis in these cases focuses "on injury to competitors of the predation firm and thus tracks the injury analysis done in antidumping cases".³⁰⁹ Thus the standards used for identifying *predatory pricing* under the European competition law cannot be considered more oriented towards the *consumer welfare* than the standards used under anti-dumping laws. Therefore, the replacement of the anti-dumping review by that type of antitrust procedure would not be efficient.

The adoption of the American approach appears as a necessity to ensure that the anti-dumping review focuses on *consumer welfare* protection. The price standard for

³⁰⁶ *Communication from Japan*, *supra* note 249 at. 5.

³⁰⁷ See EC, *Commission Decision 85/609*, [1985] O.J. L 374 at 20. (cited in D.M. Raybould and Firth, *supra* note 217 at 349) "A test based on the aggressor's costs alone will not cover all cases of unfair conduct designed to exclude or damage a competitor. Apart from the inherent difficulty of accurately establishing costs, no such test would give sufficient weight to the strategic aspect of the price-cutting behaviour".

³⁰⁸ See EC, *Commission Decision 92/163*, [1992] O.J. L 72 and *Tetra Pak v. Commission*, Court First Instance 1994.

³⁰⁹ See *Miranda*, *supra* note 285 at 276.

imposing anti-dumping measures would need to be *average variable costs* as in the case of *predatory pricing* under competition law.³¹⁰ The “*Marginal cost or average variable cost*” could be used as a basis for the definition of “*normal value*” in GATT Article VI as the *Areeda-Turner Test* suggests in the enforcement of US competition law against *predatory pricing*.³¹¹ Before the imposition of anti-dumping measures, the authorities would need to be required to prove the existence of predatory intention and the probability of future success in predation as required under the US domestic competition laws.³¹² These two requests will certainly prevent the anti-dumping measures from being abused and from causing anti-competitive results.

Conclusion

The anti-competitive impact due to the procedural vagueness of anti-dumping laws is not exceptional. Using this trade measure as a political weapon, national policy-makers play for the *national welfare* at the expense of the *foreign welfare*. Anti-dumping measures should regulate *predatory pricing* in international transactions, but restrict *price discrimination*. According to this view, antidumping duties make no sense since they prevent consumers from reaping the benefits of low import prices and protect the

³¹⁰ *Communication from Japan, supra* note 264 at 5. This State recalls that, even a high ex-official of the US government (Kenneth Flamm in “Mismanaged Trade: Strategic Policy and the Semiconductor Industry” (1996) Washington: Brookings Institution) admitted that marginal cost is desirable to use in assessing exports for anti-dumping measures.

³¹¹ *Communication from Japan, supra* note 249 at 5. Since sales at prices below “marginal cost or average variable cost” may realise the unfair elimination of competitors by low price sales and the recoupment of losses with subsequent price hikes, “marginal cost or average variable cost” is considered as a criterion of whether predatory pricing exists in the US.

³¹² *Communication from Japan, supra* note 264 at 5.

producers interests. Thus, the replacement of the anti-dumping procedural review by the antitrust provisions appears as a method of protecting the competition and the *welfare* in general, not the producers. Therefore, the appraisal of the predation by determining the *impact on the domestic economy as a whole* and calculating the *variable cost* follows that path.

Conclusion

The increasing sensitivity of national economies to events and policies originating abroad creates a dilemma for policy-makers. Trade instruments such as *export cartels* or *price fixing agreements* allegedly acting as *restrictive business practices* are usually prohibited under competition policy. Yet, deviating from their initial objectives of achieving trade liberalisation, governments pursue active trade policies and welcome these anti-competitive practices in order to serve national interests. Thus, if competition policy and international trade policy sharing the same goals traditionally play a complementary role designed at opening the market and protecting the *consumer welfare*, this efficiency action “*at the border*” and “*behind the border*” is lowered by the national use of trade law.

This thesis has presented an analysis of the relationship between trade and competition policy. It appears that the tendency of policy-makers to improve the *national welfare* at the expense of the *foreign welfare* creates a tension between trade and competition policy. This tension deriving from the conflicting implementations of the two policies has been revealed by the anti-competitive effects of strategic trade policies. But the international community is now engaged in an entire restructuring of its theoretical foundations. Given the effort of States and multilateral organisations to set up an international competitive environment, this thesis argues that the international community is now in a process of replacing the *national welfare* with a *global welfare* policy in various sectors of international economic life. In that line, the “*fairness*” label that is deployed with increasing frequency to appreciate the legality of national labour

and environmental competitive advantages appears as a manifestation of the *global welfare* policy. Henceforth, in the world market, a domestic policy cannot serve the competitive advantage of one nation and at the same time harm the interests of the others.

This fairness approach should be extended to antitrust policy. However, the current competition policies have a limited jurisdiction that inhibits national antitrust authorities from fighting efficiently against the anti-competitive practices which threaten the world trading system. Moreover, the national competition authorities do not diligently enforce their competition laws in order to protect their firms and their *national welfare* from foreign competition. Even when using the bilateral agreements implementing procedural co-operations, domestic governments may still pursue policies designed to maximise *domestic welfare* at the expense of foreign nations. Thus, the risk of international trade disputes due to these *restrictive business practices* remains persistent. To avoid these increasing “*frictions*” this thesis recommends an international competition policy linking trade and competition law in global policy. By focusing directly on the competition policy aspects of some trade provisions, the WTO resurrected this approach which had been abandoned since the Havana Charter, thereby laying the foundations of a common policy. But, the methodology necessary to strike a balance between trade objectives and competition policy is still missing.

In that direction, this thesis makes a modest proposal to resolve the tension between trade and competition policy. Given the discussions held within international forums, this thesis endorses an approach towards an international competition policy based on the

definition of standards in accordance with the global welfare in order to determine the anti-competitive practices rejected and accepted by nations as a whole. The criteria with which to define the common standards in accordance with the global welfare can be summarised as follows:

- Defining the industrial policies that are not allowed in all relevant countries (countries affected by the anti-competitive practice being challenged).
- Developing one unifying principle by which the particular restriction of market access could be judged, taking into account the impact of competition policy on the industrial strategy of each country involved (common substantive legal provisions and the adoption of similar interpretations of the various legal concepts).
- Adopting a flexible approach (application of specific conditions for developing countries and use of the *rule of reason* approach to ensure the adaptability of the rule).
- Balancing the efficiency approach with the public concerns approach (fairness and social objectives).

Taking into account the State proposals and given this methodology, the anti-competitive practices impacting upon the *global welfare* can be classified into three categories. The first category comprises the trade practices prohibited *per se*, for which international standards can be reached in a short time. An absolute ban of *hard core cartels* appears to have achieved general consensus. Nevertheless, in the near future only a prohibition *per*

se of *horizontal cartels* relating to *price fixing* seems possible. For most of the other trade practices that should be examined under a *rule-of-reason* approach, some common standards seem obtainable only in a mid-term frame given the existing divergent antitrust philosophies. Concerning these practices involving *horizontal and vertical agreements*, *abuse of dominant position* and *monopolisation*, the flexible approach proposed leaves open the opportunity for nations with convergent antitrust policies to formulate some more burdensome provisions. Finally, the third category groups together *the international mergers* and the *antidumping laws*. Given the strong industrial policy considerations attached to both these areas of law, international substantive rules are not likely to emerge in the foreseeable future.

In the long-term perspective, this thesis focuses on the replacement of antidumping laws by antitrust provisions as a matter of practical illustration of the emergence of international competition rules. Indeed, the debate for replacing the antidumping review with some antitrust provisions appears to be a *global welfare* issue. The dilemma between *home welfare* and *foreign welfare* confirms the anti-competitive effect of antidumping laws. Opponents to the proposed evolution, in focusing on the producers' protection and the defence of the *price discrimination* standard commonly used under the antidumping review, still play the *national welfare* game. Instead, the arguments for the introduction of the *predatory pricing* standard applied by the antitrust authorities permit the preservation of competition and focus on the *welfare* issue in the *global welfare* perspective. Indeed, antitrust authorities are only concerned with *price discrimination* in the context of *predatory pricing*. Besides, *price discrimination* in itself is generally

legally accepted under competition laws and under a number of GATT provisions. Furthermore, the WTO should now restrain national anti-dumping laws in order to ensure that international price differentiation on its own would never be a pretext for an anti-competitive action.

Given the different States' proposals, at this stage any attempt to determine some precise standards in accordance with the methodology established above would be utopian. However, this thesis recommends specifically the adoption of some criteria following the direction of the *global welfare* policy. First, when considering the application of anti-dumping measures, each country should initiate the procedure by determining the "*impact on the domestic economy as a whole*". In that way, not only the producers' interests but also the consumers' benefits would be taken into account. Second, to determine the *predatory pricing* existence, the variable cost standard seems to be the best means of addressing the *welfare* issue in a global perspective.

Concluding this study, it appears that nations are very far from agreeing upon a core of substantive principles permitting the avoidance of another *Boeing/McDonnell Douglas* crisis. For the moment, even though many policy-makers realise that economic integration poses new challenge for competition policy, they nonetheless agree to cede only a small piece of national sovereignty. Nevertheless, as the Seattle Ministerial Conference is launching major new negotiations to further liberalise international trade, the discussions in progress within the W.T.O as well as the expanding scope of bilateral co-operation, testify that the convergence of national competition policies is becoming an

on-going process towards the *global welfare*.

In our view, this evolution implies the adoption in a multilateral co-operative process of minimum standards covering all the policies crucial for international competition. In this regard, the pragmatic and progressive approach we have chosen to establish some international substantive rules needs absolutely to be implemented in the new framework of World Trade Organisation. By effectively regulating cross-border anti-competitive activities, international competition policy will contribute to achieving the objective of the WTO, particularly the promotion of international trade. Bilateral or regional co-operation helps to some degree, but both have limitations in terms of overall effectiveness. Issues arising out of the interaction between trade and competition policy will be more effectively addressed by enhancing multilateral co-operation. Competition-oriented reforms of existing WTO Agreements appear then to be *sine qua non* conditions for the better operation of the international trade system.

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