



Trade, Competition Law and the WTO

Reconciling the Universal Aspirations of the Liberalised Trading System

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To my family I say thank you !

Thank you all for supporting me along this journey.

LIST OF ABBREVIATIONS AND ACRONYMS

AA	Agreement on Agriculture
ADA	Antidumping Agreement
CCA	Canadian Competition Act
CUP	Cambridge University Press
DSU	Dispute Settlement Understanding
EFTA	European Free Trade Area
EU	European Union
GATT	General Agreement on Trade and Tariffs
GATS	General Agreement on Trade in Services
GUPF	Grand Utility Possibility Frontier
FDI	Foreign Direct Investment
FTA	Free Trade Areas
IMF	International Monetary Fund
Ibid.	Ibidem
ICTSD	International Centre for Trade and Sustainable Development
ILO	International Labour Organisation
ITO	International Trade Organisation (*)
PTA	Preferential Trade Agreements
OECD	Organisation for Economic Co-operation and Development
OUP	Oxford University Press
RBP	Restrictive Business Practices
SPS	Sanitary and Phytosanitary Agreement
SCM	Subsidies and Countervailing Measures Agreement
TBT	Technical Barriers to Trade
TRIPS	Trade Related Aspects of Intellectual Property Rights
TFEU	Treat on the Functioning of the European Union
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
WIR	World Investment Report
WTO	World Trade Organisation

TABLE OF CASES & SELECT AGREEMENTS

- Åhlström Osakeyhtiö and others v Commission of the European Communities (1988) 5193
- Boeing/McDonnell Douglas, EC Case N° IV/M.877 (July 30, 1997).
- Commissioner of Competition v. Superior Propane Inc. (April 4, 2001) 11 C.P.R. (4th) 289, 139-41
- Commissioner of Competition v. Superior Propane Inc., 2000 Trib. 15, (August 30, 2000).
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- Japan - Measures Affecting Consumer Photographic Film and Paper, WTO Panel Report WT/DS44/R (December 6, 1998)
- Japan - Taxes on Alcoholic Beverages, panel report, WT/DS8 /R, WT/DS10/R and WT/DS11/ R (July 11, 1996)
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- Hartford Fire Insurance Co et al v. California et al. (1993)
- Laker Airways Ltd. v. Sabena Belgium World Airways (1984).
- Report of the Working Group on the Interaction Between Trade and Competition Policy to the General Council', WT/WGTCP/2, 8 December 1998
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- US - Tax Treatment for Foreign Sales Corporations 'FSC' WT/DS108/R (October 8, 1999)

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- Marrakesh Agreement instituting the World Trade Organisation (April 15, 1994)

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ABSTRACT

International trade law has for a long time struggled with the idea of incorporating competition rules into the international trading system to help harness markets that transcend state borders. From the very inception of the triumvirate that sought to break away from the mercantilist and imperialist aspirations that brought about great suffering all over the world throughout the early twentieth century, there has always been debate about the appropriate form of international economic regulation needed to restore, secure and maintain peace and prosperity for all.

Though this objective has meant and still means different things depending on what part of the globe one is situated, the undeniable desirability of such a mechanism is still to be matched to its feasibility in delivering on the task. It is a challenge that requires a strong sense of community and solidarity which is currently lacking in contemporary international relations, remarkably more so in international economic law, where instead, ideas about interpersonal comparisons of welfare are shunned and replaced by 'more' structured ideas bound in rational economic considerations based on efficiency rather than improving the net aggregate expected welfare of the members of our global society.

'Ideas', O'Brien and Williams (2010) say, 'are thoughts about how the human, human-made and natural worlds do or should operate.[...] At their most general, ideas are thoughts or mental pictures about the world works'. I contend that because ideas are out-there to be discovered, their discovery is best explained as a charitable act of our natural environment. Given that they do not come bound by any priorly defined inkling, their use ought to strive to replicate the original charitable act that is at the source of their discovery, with due regard to the equal proportion by which they are made accessible to all humans who share the natural environment within which they inhere.

Our social organisational arrangements, abound with aggregations of ideas and knowledge that rather seek only to materialise concepts that suit a few and as a result, are ever in search of balance. Markets, just like governments, are prone to failures and therefore need regulations to help embed them into the societies that partake in them. This is what is currently lacking in our global liberal economy for which reason I posit that a multilateral competition agreement, preferably within the WTO, is vital to our common peaceful subsistence - as promised by liberal theories.

Trade, Competition Law and the WTO: Reconciling the Universalistic Aspirations of the Liberalised Trading System

Introduction

From the very inception of the triumvirate¹ that sought to break away from the mercantilist and imperialist aspirations that brought about great suffering all over the world throughout the early twentieth century, there has always been debate about the appropriate form of international economic regulation needed to restore, secure and maintain peace and prosperity for all. Though this objective has meant and still means different things depending on what part of the globe one is situated, the undeniable desirability of such a mechanism is still to be matched to its feasibility in delivering on the task. It is a challenge that requires a strong sense of community and charitable solidarity which is currently lacking in contemporary international relations, where instead, interpersonal comparisons of welfare are shunned and replaced by rational economic considerations based on efficiency rather than improving the net aggregate expected welfare of the members of our global society.

Dating back from the 1940s, the Havana Charter for an International Trade Organisation which aimed to establish the third branch of the Triumvirate, the stillborn International Trade Organisation (ITO), sought to ensure that appropriate measures were taken against private, public and hybrid restraints to trade in order to maintain open markets in a liberal world trading system that promised growth and higher standards of living for all. The basic understanding at these negotiations was that despite governmental efforts to lift market access barriers, efficient foreign producers could still be prevented from entering markets if illegal private restraints, sometimes supported by governments,

¹ See Andreas Lowenfeld “International Economic Law”, Oxford University Press (2002) 21-24, 502. Born out of a perception by the victorious Allied states, that contrary to the 19th century, the early twentieth century was ‘a time of high tariffs, discriminatory economic arrangements, import quotas, unilateralism and bilateralism’ coupled with ‘a global depression and ... two devastating world wars’ and that any prospects for peace and prosperity could only come from the establishment of multilateral or universal organisations offering a framework for negotiations and for monitoring rules. The first two organisations to implement the ‘embedded liberalism’ program were established at the Bretton Woods Conference held from 1st to 22nd July 1944, these were the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (The World Bank). Agreement on a trade organisation only came later in the form of a previsionary code that was eventually institutionalised under the World Trade Organisation in 1994.

The basic idea behind this project, sometimes referred to as the ‘Washington Consensus’, was to convince the other allied states of the mutual benefit of an agreement on ‘a bundle of liberal prescriptions for economic development’. See O’Brien and Williams, note 4 below, 383.

were still in place. However, the Charter, as many other initiatives before it, never lived to be implemented given significant disagreement between the negotiating parties.

The General Agreement on Trade and Tariffs (GATT), which emerged in the stead of the ITO in 1947 and later evolved into the World Trade Organisation (WTO) in 1994, bears witness to the prevalent ideas and popular opinion of the time which was to leave competition law issues out of the multilateral trading system and, instead focus on gradually reducing tariff barriers to trade while sovereign states remained free and unencumbered in their choice of industrial and competition policies. It soon became evident to the members that, as tariff barriers and quotas were being reduced and eliminated respectively non-tariff barriers, strategic governmental policies and unregulated private restraints, falling outside the ambit of the GATT's discipline, were gaining ground. Cross border private anticompetitive behaviours were either encouraged or tolerated as they had the effect of favouring domestic firms while correlatively distorting comparative advantages and thereby blocking access to markets, thus shielding domestic industries from international competition.² By the end of the Uruguay round, in an attempt to fill the gap, several agreements had been added to the WTO covered agreements with the hope of establishing a balance between sovereign regulatory autonomy and non-discriminatory free trade.³ Instead, beyond the market access issues, these changes in the framework of the international trading regime, marked the final stages of a shift towards more aggressive global competition and a rupture point for priorly tolerated welfare policies.⁴ Yet, the interaction between competition and international trade laws was never really addressed as a likely source of the problems that some members were facing, given the increased level of economic integration that resulted from trade liberalisation.

² See Michael Trebilcock, Robert Howse and Antonia Eliason "The Regulation of International Trade", Routledge (2013) 288, citing Sylvia Ostry 'Beyond the Border: The New International Policy Arena' in Kantzenbach et al. (eds.), *Competition Policy in an Interdependent World Economy* (1993). These internal measures adopted to protect the health and safety of citizens, consumers and the environment championed by welfare states, which perceived these objectives as necessarily concomitant to economic prosperity, increased the tension between state autonomy and international trade rules, creating what Ostry calls 'system frictions'.

³ The Sanitary and Phytosanitary Agreement (SPS) focuses on the protection of human, animal and plant life and health while the Agreement on Technical Barriers to Trade (TBT) applies to technical regulations and standards. Despite divergences on intellectual property rights, a harmonised framework was also established with the Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement.

⁴ See Robert O'Brian and Marc Williams, 'Global Political Economy: Evolution and Dynamics', Palgrave Macmillan (2010) 130. As from the 70s, developed countries, exhausted by the costs of their welfare economies, had begun to prepare their citizens for acute global economic competition through reforms of their trade, financial and monetary regimes with the aim of giving a greater role to market forces and reducing the ability of the state to intervene in the economy. The main idea of what came to be known as the 'Washington Consensus' was to cut-back embedded liberalism from the economic system and roll-out a neoliberal agenda in both the domestic and international sphere.

Thus, the relative successes of the WTO regarding its preambular objectives amidst a rapidly globalising and interdependent world economy bore the germ of a deeper fracture. Some states, notably less developed countries, gradually became disillusioned as they failed to perceive any immediate mutually beneficial interest in the aggregate growth that resulted from their cooperation in the establishment of the multilateral trading system. The rise in production and effective demand for goods and services indeed generated wealth and potential for growth but failed to effectively raise living standards, ensure full employment and increase real income.⁵ The rate at which some GATT members became richer in proportion to the others, led some commentators to doubt the efficiency of the trading system in ensuring a fair and just redistribution of the overall wealth created, based on the underlying comparative advantage principle.⁶ Attempts were later made to address this inherent weaknesses of the WTO system when the Doha Round of negotiations was launched in 2001 with the objective to reduce inequalities in the global economy.⁷ As trade and competition issues were pushed out of the Doha Round three years later, any hope for a harmonised trade and competition law framework was put on hold and channeled through less constraining mechanisms seeking convergence.⁸

Trade and competition law and policy in domestic economies are generally well integrated to cater for the preferences of consumers, producers and the general good under the keen supervision of the state. At the international level however, besides the sharp distinction in the scope of both fields, trade policy alone is subjected to the WTO's discipline while competition law and policy are left loosely coordinated through voluntary guidelines and unilateral state enforcement when it is advantageous to do so.⁹ It is simply assumed that a multilateral framework for competition law 'is

⁵ See Marrakesh Agreement Establishing the World Trade Organisation, 15 April 1994, preamble.

⁶ See Amartya Sen "Mondialisation et justice sociale" in *Le Monde* June 20th 2006.

⁷ The Doha Development Agenda was officially launched at the WTO's Fourth Ministerial Conference in Qatar in November 2001 with a work programme comprising about 20 areas of trade with the aim to achieve major reform of the international trading system through the introduction of much lower trade barriers and a revision of the trade rules. The Working Group on the interaction between trade and competition policy was charged to focus on clarifying the core principles, notably transparency, non-discrimination and procedural fairness, and provisions on hard core cartels, modalities for voluntary cooperation and support for progressive reinforcement of competition institutions in developing countries through capacity building while also taking account of their needs and providing appropriate flexibilities to address them.

⁸ See the General Council's decision on the Doha Agenda work programme ('July Package') adopted on August 1st 2004 wherein the 'Council agrees that these issues, mentioned in the Doha Ministerial Declaration in paragraphs 20-22, 23-25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round.' WTO Doc. WT/L/579.

⁹ See Eric Posner and Alan Sykes 'Economic Foundations of International Law', Belknap Press (2013) 302. They observe that 'although cooperation on international competition policy is quite restricted, one cannot exclude the possibility that the absence of greater cooperation is efficient - the costs may simply exceed the benefits.'

not the best policy instrument for achieving a more equitable income distribution as it would be inefficient to attain this objective'.¹⁰

I will argue in this paper that international trade law and competition law are essential elements of the international legal system and are vital to the proper functioning of the global economy and thus ought to be integrated and entrusted to the supervision of the WTO. I base my argument on the fact that the challenges of today's highly integrated global economy need rules to ensure that global markets, just like domestic markets, function properly to meet the expectations of all those who participate in them or are adversely affected by them. Without effective rules, global markets would consistently fail in their wealth distribution functions and impose costs on societies that are far greater than any gains that the liberalised trading system may promise.

Contemporary economic activities are essentially global in nature while politics and law, however, are still primarily subjectively organised within nation states. Moreover, states often disagree on the appropriate means of dealing with their domestic economies and a fortiori with what they consider acceptable or unacceptable transboundary consequences of economic activities. At the same time, they have often cooperated with each other to further extend the reach of economic activities while ensuring that the same rules apply to all market actors, as is the case within the European Union (EU), for example. Other cooperative mechanisms, such the WTO system, guarantee only partial or limited integration without necessarily ensuring that the resulting benefits equally accrue to all the cooperating states. This marks a disjuncture between the economy - unhampered by state borders, and the law and politics, which are territorially bound. The picture is further complicated by the intermingling of the international and national dimensions of these categories.

Though this disjuncture between law, politics and the economy might appear fortuitous, it is worth tracing its evolution in order to show that it is not a natural phenomenon distinct from the norms, values, ideologies and ideas that underpin these categories.¹¹ Regarding the economy, "ideas shape, mould, facilitate and constrain the activities of economic agents", locking them into cognitive structures of production that are then represented as natural phenomena instead of a choice.¹² While this affirmation may also be stated *mutatis mutandis* with regard to law and politics,

¹⁰ Ibid, 303.

¹¹ See Robert O'Brien and Marc Williams, note 4 above, 49. Adopting a historicist approach, they contend that the evolution of the global political economy has a path-dependent nature to it, and it explains why some states and groups of people have become locked into particular development patterns. They thus argue that 'many developing countries export low-value commodities because their economies were oriented to this task during the age of imperialism'.

¹² Ibid.

there is an added aspect with regard to these two which is the role power plays in transforming and structuring social relations towards predefined desired outcomes.¹³ It does not therefore come as a surprise that contentions today have shifted to questioning the distribution of power between and within state economies, the conflicting normative foundations that drive resource distribution mechanisms and the resilience of sovereign nation states in mobilising present or future rules against rising inequality in an increasingly globalised world.¹⁴

This dissonance may be attributed to the fact that International law is a permissive and self-enforcing legal order whose sole subjects are said to be rational self-serving states that cooperate through fragmented regimes to resolve collective problems. I would argue that this specific feature of international law only accentuates deeply rooted assumptions derived from economic theory which seek to subject and use the law to pursue a preordained social ideal - economic efficiency - that is then claimed to fall beyond legal scrutiny. International law, and specifically international

¹³ Power here is understood in the Foucauldian sense, as a transgressive and ever changing social process, involving not only states but also other units such as non-state actors, public or private international organisations and individuals, engaged in a complex interplay of relations that alter the context of relationships between these various actors. Power is thus not only explained in the conventional sense as the influence of the strong over the weak or the state as the Leviathan and ultimate arbiter, or even as a dichotomous relation between subject and object, but rather as a mode of relationship between various social forces and actors that tend to influence and shape social decisions in a perpetually changing and ongoing manner. This transformative approach to power is thus not a form of subjection because the subject that constitutes it is actually part of the overall mechanism, which consists in 'using power as a part of the overall process that ebbs and flows with the tides of power'. So power tends to influence social forces just as it is influenced by prevalent social forces and is thus part of an ongoing and ever changing relationship of resistance to the assertion of power such that resistance is never exterior to the power process but forms a crucial 'role in not only creating and shaping new understanding[s] of power, but also in identifying and clarifying the power relations'. Most importantly, with regard to states for example, '[p]ower is not a conscious decision deriving from a state's exercise of sovereignty to assert a state's so-called will' given that the latter 'is too diffuse a concept and is subject to a host of influences...Rather, power can be better understood as a transgressive notion that is external to a conscious decision given the role that all individuals maintain in creating such a reality.' Hence, power is distributed through complex social actions which serve to modify the actions of others, and not because a dominant agent possesses power in any structured sense. What Foucault underlines with his transgressive approach to power and knowledge is that attention should be paid to 'the manner in which such a sense of power was fashioned in this transformative sense', that is '[w]hy an idea is understood to be the truth and how that came about is more important than [simply] understanding the eventual use of power, given that '... there might be social forces that will assert themselves at the expense of other individuals [states, firms, and so on] by virtue of their position'. It seems from this perspective that 'power does not act solely as a disciplinary mechanism imposed by the state', nor is it 'the sole means of regulation, ...but as part of the process of distributing goods and meeting the decided ends of the actors involved.'

See Leonard Hammer, "A Foucauldian Approach to International Law: Descriptive Thoughts for Normative Issues" Ashgate Publishing Limited (2007) 25-47.

¹⁴ Jane Kelsey, 'International Economic Regulation', (ed.) Ashgate publishing (2002) xvi.

economic law, is replete with distinctions such as public/private,¹⁵ market/state, law/economy (facts/norms and positive/normative) that seek to legitimate the dominance of this specific social science's methods and ideology in jurisprudence. Based on a single metric, maximising utilities or economic efficiency, policy-makers are expected to feel comforted by subjective rational choices, above and beyond any other social value, be it equality or justice, human health or even a clean environment without any prior discussion on the desirability of this end as a social value worth pursuing and maximising by the community of sovereign states. Under this new dominant paradigm, the law is '*viewed as an instrument the rationality of which is entirely external to it.*'¹⁶ What states do and the externalities of their actions, with regard to what they include or exclude from their competition policies, may not therefore be subjected to any form of review or appreciation by an adjudicator. However, for such actions or inactions to be submitted to review, it is claimed that it would require prior consent to the basic objectives we seek, as a 'community', to pursue and that '*[t]he uncertainties and potential error costs associated with entrusting such matters to international arbitration [or adjudication] may simply be too great, or may at least be perceived to be too great.*'¹⁷ Yet, from this perspective, where an adjudicator is called upon to rely solely on economic analysis to determine the nature and magnitude of an abuse of dominance or harmful conduct, then proponents of this dominant view deem it admissible. Professor Philippe Coppens invites us to rethink '*[l]a fonction du droit dans une économie globalisée*'¹⁸ and reminds us of our responsibility, in a plural society, to harmonise within the law discordant humane voices around the Aristotelian conception of justice as proportional equality.

With this view in mind, it is still essential, for the perennial coherence of international economic law, to harmonise international competition law within the WTO system, despite previous failed attempts. This is important because if we understand social relationships with Foucault's

¹⁵ See Balakrishnan Rajagopal, 'International Law and Social Movements: Challenges of Theorising Resistance' 41 *Columbia Journal of Transnational Law*, Volume 41, Issue 2 (2003) 397, 400. He invites readers to rethink of international law through social movements - seen as strategies of resistance - rather than through states or individuals as liberals and realists do. He shows that social actors are quite heterogeneous and thus constitute a multitude of power spheres that transcend formalist approaches. The individual oriented structure, prevalent in liberal institutions, overly relies on democratic political systems as justification for action and legitimacy, but this individualistic inclination has rather tended, in practice, toward undemocratic outcomes and the public/private distinction, of which it is an emanation, has equally tended to peter out as more localised social movements, non-state actors and private entities play active roles and fulfil erstwhile governmental functions, and often with all the attributes of states.

¹⁶ See Gerald Postema, 'Legal Philosophy in the Twentieth Century: The Common Law World' in "A Treatise of Legal Philosophy and General Jurisprudence" Vol. 1, ed. Enrico Pattaro, Springer (2011)183.

¹⁷ Posner & Sykes note 9 above, 302-3.

¹⁸ See Philippe Coppens, 'La fonction du droit dans une économie globalisée', in *Revue internationale de droit économique*, 2013/3 t. XXVI, 269-294.

transgressive approach to the complex mechanisms of power and knowledge in mind, that is, we focus on *‘how power is being used and what effects are produced as a result’*, then we bring to light *‘the variety of actors’ use of techniques and tactics of domination to understand the framework and forms of [social] relations.*¹⁹ The WTO must be brought to terms with the influence it has exerted and still exerts on societies and the forms of relationships it develops between the various members of the organisation. Without a competition law framework within the WTO, we may not talk of a proper multilateral trading system as the diffused sources of power relations which interact on global markets to marginalise some states, will never be tamed given the absence of a forum for discussing, contesting or asserting claims that may work in their favour.

In part I, I will present some of the problems that are currently hampering the realisation of the promises of the liberalised multilateral trade regime under the auspices of the WTO and relate them to the evolving global environment within which the global economy unfolds. Private businesses have taken advantage of liberalised trade to conquer foreign markets in unprecedented ways and have even adapted their production chains to fit the structures of global markets, leaving governments helpless in the face their growing economic powers.

Part II presents the fields of international trade law and competition law within the current architecture of international law. It first looks at the complementarity between both branches of law then reviews their points of divergence before turning onto their theoretical foundations and the economic theories underpinning them. Part III looks at prior attempts to integrate both disciplines under a multilateral framework. It proceeds to examine possible points of interaction of both fields within the current WTO agreements and reviews the scanty WTO jurisprudence that has tried to read competition laws into the basic principles of the WTO.

Part IV proceeds to review a few recent proposals to integrate both fields and then examines the role of law in the integration of global markets into societies and makes end with a proposal for harmonisation.

¹⁹ See Leonard Hammer, note 13 above, 19. He presents Foucault’s understanding of the legal authority of the state as ‘fragile’ given that ‘[t]here exist a host of influences that derive from a diverse array of actors external to the state and its apparatus that might be using their notion of power [as an ongoing process, ever changing and altering the context] for their benefit.’ As such, ‘[s]tate sovereignty undergoes constant changes and shifts to emerge more as a social product resulting from discourse and knowledge, rather than existing as a defined territorial entity’.

Part I Rising Global Inequality amid Failed Promises

Competition, as a process of economic exchange, has become a global concern and is at the centre of many social, political, cultural and economic problems that plague the world today. It affects what people eat, how they live, work and educate their children, irrespective of the country in which they reside. Yet, in the current state of international economic law, there is no coherent international framework for competition law and policy to govern global markets. The bulk of social life today unfolds in a world that has become highly integrated economically while remaining socio-culturally, politically and legally diverse. This diversity is sometimes perceived by powerful businesses as an invitation to exploit the loopholes in this incomplete social order, and at others, as an obstacle to unified modes of production and consumption that seek to transcend local interests in the global economy. Absent a global competition law framework, the de facto approach to cross border private anti-competitive practices is the adoption of national competition laws and policies to tackle such practices both domestically and internationally. That is, each jurisdiction subjectively determines which conducts can be considered illegal or legal under its laws and these laws are then applied universally as if deriving from a collective consciousness, but without any consideration for its effects on others.

International trade law, however, has been the theatre of ongoing international cooperation and is tightly knitted within the WTO system. Given that international trade and competition laws are bound to interact on global markets, national competition legislations, as far as private anticompetitive behaviours are concerned, have become the ‘natural’ complement to WTO discipline on governmental measures. While this fragmented approach raises questions as to the interaction between international trade and competition law in an increasingly global economy, it also brings into focus genuine concerns about the potential of global markets to provide opportunities to realise the goals of the liberalised trading system.²⁰ The reason for these questions is that global competition has ‘focused attention on global economic interdependence, revealing the extent to which not only economic prosperity, but also basic human needs and rights depend on how global markets operate.’²¹ More so, the realisation that global markets do not only promise milk and honey for all - especially as the ‘to whom’ and the ‘when’ aspect of the promise is hardly ever specified - many see them as posing concrete treats to individuals and communities that stand to

²⁰ See the preamble to the Marrakesh Agreement instituting the World Trade Organisation (April 15, 1994).

²¹ See David Gerber, “Global Competition: Law, Markets and Globalisation”, Oxford University Press (2010) 1.

lose jobs and control over their destinies to ever more distant political and economic actors, who care only about their narrow best interests.²²

The absence of a coherent international competition law and policy framework to govern global markets therefore brings into question the contemporary dominant approach to competition law in the way it integrates the social and structural changes that inhere in the environment within which the modern global economy unfolds. As there is no international cooperation towards harmonising competition laws, it is doubtful that any national legislation would integrate these changes and concerns with anything but their national welfare in mind, and even when it does integrate them, it does so in a truncated manner by appealing to loose coordination mechanisms.²³ Such mechanisms call into question the postulates of Westphalian approaches to solving collective problems which traditionally centred around the sovereign nation state. While it may be argued that states are no longer the sole actors engaged in law-making, general public international law has difficulties explaining its sources and doctrines in coherent terms when confronted by such mechanisms, yet they still hold sway in significant ways on the activities of states. Nonetheless, some commentators are adamant as they maintain that ‘[t]he possible benefits of international cooperation are readily apparent’ but observe that ‘the absence of cooperation on international competition policy may be efficient from a cost-benefit perspective’.²⁴

That notwithstanding, subjective international competition laws are inadequate and far removed from the realities and concerns of the majority of states. Despite increasing global economic interdependence between states, some states still struggle with the provision of basic human rights and the developmental needs to their citizens, this task is not made easier by the way global markets operate to unfairly concentrate wealth in a few industrialised states. This dominant approach faces pressure from multiple sources that seek to harness the negative impacts of global markets on domestic economies, or put differently, that seek to reintegrate domestic economies into global markets, and this, in turn, increases friction between states at all levels of interaction.

This pressure has been made more intense due to structural and organic changes in the global business environment and within the law itself that tends to obscure the root causes of social inequalities that stem from the poor distribution of wealth across the globe. The effects of these

²² See *ibid*, 2.

²³ See International Competition Network established in 2001, “The United Nations Set of Principles and Rules on Competition”, United Nations Conference on Trade and Development (UNCTAD) United Nations, Geneva (2000) [TD/RBP/CONF/10/Rev.2](#); OECD (2011), OECD Guidelines for Multilateral Enterprises, [OECD Publishing](#), Chapter X, 57. These loose coordination mechanisms exert little or no trust on judicial processes, even though the guarantees they offer in terms of mutual reciprocity may lead to convergence on some aspects.

²⁴ Posner, Eric & Alan Sykes, note 9 above, 302.

changes transpire into other policy areas such as trade which directly impact the livelihood of people, pushing them to migrate, and thus becoming security concerns for both originating and destination states.

The dominant approach therefore perpetuates divergences that have far reaching global welfare implications and causes frictions that require a holistic approach to eliminate. Some oppose this view and assert that the WTO should not be the forum for integrating trade and competition law and policy, though admitting to the mutually reinforcing roles they play in opening and deregulating markets for foreign goods, services and capital for the benefit of consumers or the general welfare.²⁵ Others more responsive to integrating both fields argue that the WTO would provide the optimal institutional vehicle for it, but propose a plurilateral competition agreement instead.²⁶ Some commentators simply consider both fields to be distinct and best kept separated to pursue their respective objectives - market access and protecting consumer or general welfare.²⁷

In this part, we will look at the tensions that result from the status quo and the effects of national competition laws on global market, making it desirable and urgent to reconsider a multilateral global competition law framework under the auspices of the WTO.

The Changing Environments of Trade and Competition Law and Policy

International Competition Law and International Trade Law initially developed in relative isolation from each other though there were, and still are, no irreconcilable reasons for their separate evolutions. Depending on the way they are implemented, it is generally accepted that they can be consistent, mutually reinforcing and complementary. However, given that competition law is enforced as national legislation, the potential for divergences are also great. Posner and Sykes observe that the fundamental problem with competition policy decisions is that, ‘they affect firms and consumers in other states, in ways that may lead governments to behave inefficiently from a global perspective because they care about their own firms and consumers but not about foreign firms and consumers. All states will benefit from a credible global commitment that all states will pursue globally efficient antitrust policies and not to sacrifice global efficiency for parochial

²⁵ See Kevin Kennedy, “Competition law and the World Trade Organisation: the Limits of Multilateralism”, Sweet and Maxwell Ltd. (2001) 2.

²⁶ See Martyn Taylor, “International Competition Law: A new Dimension for the WTO” Cambridge University Press (2006) 4. He considers that ‘[a] multilateral WTO competition agreement would not be politically achievable at this time’.

²⁷ David Gerber, note 21 above, 10.

national interest.²⁸ Though they pose the problem solely in economic efficiency terms, there is no denying that these divergences cause friction between legal systems that are territorially limited but seek to control conducts occurring essentially abroad and over which they may substantively disagree. The global nature of business activity today is a reality that poses a problem for competition law.

Globalisation

The major change that affects the implementation of international competition law through domestic legislations has been the ongoing process of globalisation.²⁹ Stiglitz describes globalisation as ‘[t]he closer integration of the countries and peoples of the world which has been brought about by enormous reduction of costs of transportation and communication, and the breaking down of artificial barriers to the flow of goods, services, capital, knowledge, and (to a lesser extent) people across borders.’³⁰ This process has profoundly reshaped the conduct of commercial activities. The changes are aptly portrayed by Friedman’s definition of economic globalisation as ‘the inexorable integration of markets, nation-states and technologies to a degree never witnessed before - in a way that is enabling individuals, corporations and nation-states to reach around the world farther, faster, deeper and cheaper than ever before, and in a way that is enabling the world to reach into individual corporations and nation-states farther, faster, deeper and cheaper than ever before.’³¹ This phenomenon affects not only the daily lives of an increasing number of people everywhere, it also effects profound structural changes on the world economy and politics.³² On the one hand, we see an increasing number of high and low value goods that are manufactured in global networks of suppliers of raw materials and intermediate goods whilst the producers of final goods, are located in multiple other countries. On the other hand, repeated failures at global cooperation and coordination - as illustrated by the ongoing negotiations of the Doha Round launched in 2001 by the WTO - has spurred a viral sequence of unilateral, bilateral, regional and even ‘experimental governance’³³ mechanisms attempting to build consensus on global

²⁸ Eric Posner and Alan Sykes, note 9 above, 297

²⁹ A term first used by Theodore Levitt to describe the process of realising a borderless global economy in which firms engage in international commerce with little regard to national frontiers. See Theodore Levitt, “The Globalisation of Markets”, Oxford University Press (1985).

³⁰ See Joseph Stiglitz, “Globalisation and Its Discontents”, Penguin (2002) 9.

³¹ Thomas Friedman “The Lexus and the Olive Tree: Understanding Globalisation”, First Anchor Books (2000) 9.

³² See Ernst-Ulrich Petersmann “International Economic Law in the 21st Century”, Hart Publishing Ltd. (2012) 1.

³³ Ibid. He alludes to the construction of regional monetary unions and carbon emission trading systems.

issues such as trade, finance and environmental rules.³⁴ Though economic globalisation may be challenging, it is not an unprecedented phenomenon. The period preceding the first world war was equally marked by large cross-border flows of goods and capital, and more than now, of people, driven by the lowering of trade barriers and significant reductions in transport costs resulting from technological innovations such as railways and steamships.³⁵

Nonetheless, corporations have seized the opportunities offered by globalisation to organise their business activities internationally to realise global economies of scale and scope, and to rationalise their production. Global Foreign Direct Investment (FDI) flows for 2015 indicate a rise of 38 per cent to a record high of 1.762 trillion dollars since the 2008 crisis, while cross-border mergers and acquisitions have surged to 721 billion dollars, from a 432 billion dollars mark in 2014.³⁶ This growth, owing partly to corporate reconfigurations, also draws attention to the challenges that states face in implementing foreign ownership rules, given the increasing complexity of corporate internal ownership structures and investor nationality mismatches. Though foreign ownership regulations in some industries are ubiquitous, the prevalent trend towards liberalisation must still be balanced with their regulatory objectives.³⁷ Ownership-based investment policies aim at promoting and facilitating investments for sustainable development.³⁸ They are often fully justified as states need to keep in sight an assessment of ownership chains, control, ultimate ownership and their disclosure for other

³⁴ It is worth noting that despite the claim that these initiatives aim at building consensus, it only does so from a realist perspective (in the IR sense of the term) that still assumes that even though the increased interconnectedness between economies and societies might make them more dependent on one another, power plays in these mechanisms still point to a one way traffic, that is, dominant values triumphing over any other worldview. See for example, Carolyn Deere, "The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries", Oxford University Press (2009) 88, where she argues that despite the enabling language of article 27.3 (b) TRIPS and open protest by developing countries to UPOV-like *sui generis* systems for plant variety protection, the Organisation Africaine de la Propriété Intellectuelle OAPI surprisingly and against all odds, adopted a 25 years protection for plant varieties while it was not obliged to.

³⁵ Peter Van den Bossche, "The Law and Policy of the World Trade Organisation", Cambridge University Press (2005) 4. Others trace its origin as far back as circa the second half of the fourth millennium BC, during the Sumerian civilisation, and thus suggesting that contemporary globalisation is just an acceleration of erstwhile ongoing processes. See also P. Coppens, note 18 above, 237.

³⁶ UNCTAD, 'World Investment Report 2016' (WIR16), United Nations, Geneva (2016) 1.

³⁷ Liberalisation on this aspect has mostly been through lifting these restrictions, increasing the threshold of allowed foreign shareholding, easing approvals and admission procedures for foreign investors.

³⁸ See, for example, Regulation EC N°1008/2008 (Regulation of the European Parliament and of the Council on common rules for the operation of air services in the community of 24 September 2008, OJ L 239, 31 October 2008) governing the licensing of air carriers on the condition that the undertaking satisfy certain operational, corporate and financial requirements, notably that it be established, registered or have its principal place of business in the member state issuing the licence, and member states and or their nationals must own more than 50 per cent of the undertaking and effectively control it either directly or indirectly (article 4(a) and (f)). US regulations provide similar conditions for the attribution of an authorisation by the Department of Transportation.

investment-related policy areas such as industrial development, competition policies and laws.³⁹ Maintaining these objectives however, is rendered more burdensome, as in the ‘Sogaz’⁴⁰ incident, by complex and lengthy ownership chains with multiple cross-border links, ownership hubs and shared ownership structures.⁴¹ This greater flexibility made possible by globalisation has empowered corporations to not only reap economies of scale and of scope, but to also circumvent domestic competition laws thereby exploiting differences in the national competition laws of the states in which they operate. Instances of such exploitative strategies can be observed in the beer and other industries in Africa⁴² and other countries with weak competition law enforcement. Thus, despite the fact that these countries do have competition laws, cross-border shareholdings and arrangements go largely undetected.

The Multiplicity of Overlapping Jurisdictions and Competition Laws

The dominant practice of adopting competition laws pursuing the same or similar policy objectives - combating anti-competitive behaviours - has grown exponentially. In the 1990s, barely 20 states had them but as of October 2013, about 127 states had enacted competition laws, 120 of which had functioning competition authorities.⁴³ Despite this explosion in the number of competition laws, some states still do not have them, and even where they exist and the rules are

³⁹ Ownership and control in investment policy are measures that differentiate between domestic and foreign corporations or between foreign investors of different nationality, and such rules include entry restrictions and ownership caps, operating restrictions or performance requirements, investment facilitation, incentives and protection. These measures are also often motivated by national security concerns, the protection of national and strategic assets, socio-cultural or political concerns and regional integration policies.

⁴⁰ Russia threatened to retaliate against US diplomatic missions as a result of JP Morgan Chase blocking a transfer from the Russian Embassy in Astana to Sogaz, an insurance company partly owned by Bank Rossiya which was the target of US sanctions. JP Morgan argued that it was obliged by US law to bloc the transfer. See [Financial Times](#) April 1, 2014, consulted on May 7th 2016.

⁴¹ see WIR16 at 129, 134-135. The report points out that though less than 1 per cent of Multinational Enterprises (MNEs) have more than 100 affiliates, these account for more than 30 per cent of all foreign affiliates and almost 60 per cent of global MNE value added. Yet on average the top 100 MNEs have more than 500 affiliates, more than two-thirds of which are overseas and with an average hierarchical depth of 7 to 17 levels for the largest of them.

⁴² See Frederic Jenny, “Competition Enforcement in Testing Times: Beyond the National Level”, [IDRC Pre-INC Forum on Competition and Development, Zurich, Switzerland, 2 June 2009](#). He makes a case that SABMiller, before the AB Inbev take-over, had brewing and beverages operations in 18 countries across Africa and was represented in 21 other countries through a strategic alliance with the Castel Group. The latter group held a 38 per cent share in SAB’s African subsidiary while SAB held a 20 per cent stake in Castel’s African operations. The strategic alliance was rationalised as hedging against political risk and capitalising on bulk purchasing but it also gave SAB a pre-emptive right to acquire Castel’s African operations. What transpired from the arrangements was that they were not in competition with each other in the allocated territories, but given the lack of a regional or global competition authority it was business as usual.

⁴³ See Antonio Capobianco, John Davies and Sean Ennis, “Implications of Globalisation for Competition Policy: The Need for International Cooperation in Merger and Cartel Enforcement”, E15Initiative, Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum (2015) 3. Available at www.e15initiative.org last visited on June 1st 2016.

similarly worded, the types of conduct falling under their scope and their interpretation is never harmonised. It is a truism that states hardly have the same competition policies, rather, their policies often conflict and this is further complicated by potentially inconsistent regulations affecting multinational firms. While this may be explained by the fact that states enact and enforce competition laws mainly when they estimate that the targeted anti-competitive practices are disruptive of their domestic markets only, they do not enforce them out of altruism for the ‘community’ of states. Likewise they tend to use their competition policies to pursue other objectives that may encroach on other policy areas such as trade law and most specifically with other state obligations under the WTO system.⁴⁴ They never consider the effects of an anti-competitive conduct on foreign markets, rather they would exempt, intentionally or not, those conducts they consider acceptable even if such behaviour would negatively affect a foreign market or the global economy, provided however that it increases domestic welfare.⁴⁵ The reasoning of the Tribunal in *Commissioner of Competition v Superior Propane*,⁴⁶ which was upheld by Federal Court of Appeal in 2003⁴⁷ underlines the perverted effect of having an international trade agreement that does not include competition policy. Under section 96 of the CCA, the Tribunal was obliged, in its assessment of the efficiency defence submitted by Superior Propane, to exclude the efficiency gains, dead weight losses and any other effects occurring in foreign markets even though they had

⁴⁴ Consider for example the Canadian Competition Act (R.S.C., 1985, c. C-34) of 1985. In its section 1.1, it states that ‘[t]he purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, ... to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, ...to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.’ Were all states to exercise their sovereign ‘autonomy’ to adopt like-worded texts, overall world production would not change but real income distribution disparities would certainly reduce and prompt appeals to rewrite the rules of the game.

⁴⁵ See, for example, the Canadian case of *Commissioner of Competition v. Superior Propane Inc.* (April 4, 2001) 11 C.P.R. (4th) 289, 139-41, discussed in Einer Elhauge and Damien Geradin “Global Competition Law and Economics”, Hart Publishing Ltd. (2011) 994-1003, 1196. The Federal Court of Appeal upheld, after remand, the decision of the Tribunal that had considered as valid the efficiency defence under section 96 of the Canada Competition Act (CCA) in a merger that would raise propane prices by 8 per cent on the grounds that the efficiency gains exceeded the deadweight loss from the price increase. The Court of Appeal further held that the Act’s efficiency defence requires the tribunal not to limit its assessment of the effects of an anticompetitive merger to the deadweight loss as required by the ‘total Canadian welfare standard’ but to also assess other socially adverse effects and it upheld the ‘balancing weights approach’ proposed by the commissioner for this assessment. Thus, as the transfers of wealth from the consumers to the merging firm’s shareholders were exceeded by the efficiencies obtained by the merger, the resulting concentration in the small Canadian market was necessary despite the lessening of competition given the firms need of those efficiencies to remain globally competitive.

⁴⁶ *Commissioner of Competition v. Superior Propane Inc.*, 2000 Trib. 15, (August 30, 2000).

⁴⁷ *Commissioner of Competition v. Superior Propane Inc.* 2003 FCA 53 (on re-appeal).

their origin in the approved anti-competitive merger in Canada.⁴⁸ Given the current state of WTO law, the CCA would not be considered discriminatory because article III(4) GATT only imposes a national treatment obligation to accord to imported goods no less favourable treatment than that afforded to like domestic products of national origin.⁴⁹ Given that the CCA's purpose clause states that it aims to maintain and encourage competition in Canada, in order to promote the efficiency and adaptability of the Canadian economy, applying the total (Canadian) welfare standard would therefore not make the CCA discriminatory and in violation of Canada's national treatment obligation under WTO law. That standard would apply in the same way to exclude from review the effects in foreign markets of an anti-competitive merger of two Canadian-owned firms in Canada, just as it would apply if the merging firms were owned by non residents. However, the total Canadian welfare standard would operate to block an anticompetitive merger between a foreign owned firm and a Canadian-owned firm that does not produce efficiencies in Canada, because the CCA obliges the tribunal, to exclude from its review of an anticompetitive merger, the effects (efficiencies or inefficiencies - dead weight losses) arising in foreign markets as a result of the merger.

Thus, states do indeed act like rationally motivated self-interested entities maximising their selfish desiderata. Hence, despite the wide adoption of competition laws, divergences therefore still

⁴⁸ From a Canadian perspective, the adjudicator seems faced with an impossible choice, meanwhile, I think it gives him enough latitude to choose protectionism over free trade to the detriment of all but the Canadian economy when the effects of the merger occur abroad. In fact, first, the Commissioner has to quantify by estimation all quantifiable anticompetitive effects that will or are likely to result from the merger, and back his estimates with evidence that can be challenged and weighed against efficiency gains realised in Canada. As to the qualitative anticompetitive effects which cannot readily be quantifiable (such as lessening of service or quality) the commissioner has to proceed by an assessment on a subjective basis involving a weighing of considerations that are apparently incommensurable as they have no common unit of measurement. But given that the purposes clause of the Act proclaims some objectives that are contradictory, the adjudicator under section 96 CCA is then empowered to make a value judgement when comparing the efficiencies realised to the redistributive effects resulting from the increase in price. Thus, using the total welfare standard to balance the effects of the merger leaves the adjudicator some manoeuvring space as he has to discard from his weighing exercise those effects that inure to foreign states or the global community. This implies that the efficiency gains of the merger will almost always out weight the wealth transfers from consumers in Canada if the merging firms' product is export bound because the portion of the transferred wealth emanating from Canadian consumers will hardly ever exceed the efficiency gains of the merger.

⁴⁹ Article III(4) GATT does not mention treating foreign consumers like domestic consumers, and even if it did, one can only agree with Elhauge and Geradin who consider that 'if one sees competition policy as a driver for economic efficiency, there is an apparent tension between [trade policies] and competition policies'. See Einer Elhauge and Damien Geradin (2011)1200, note 45 above.

exist regarding the objectives pursued and the behaviours being regulated.⁵⁰ In the US system, since the 1980s, the primary policy objective regarding the protection of competition seems to have shifted towards consumer welfare,⁵¹ steering away from Bork's⁵² view that the only permissible objective of competition laws is to enhance economic efficiency. However, the efficiency paradigm in competition law and policy seems to be very resilient and is even gaining ground outside the US based on an increasing reliance on economic analysis of law in competition adjudication. In the EU, protecting competition entails protecting market actors including consumers, and preserving freedom of trade within the common market.⁵³ However, recent modifications in both EU and US jurisdictions indicate that their regulations are drawing closer than it might seem from their objectives, and might even be converging as time goes by.⁵⁴ Still, significant substantive divergences remain over issues like the requirement of recoupment for below-cost predatory pricing and excessive unilateral pricing.⁵⁵ More so, even when states agree on these rules, it does not exclude opposition from other affected jurisdictions.

⁵⁰ Under Section 2 of the Sherman Act, maintaining or obtaining a monopoly (dominant position) is not treated as an antitrust (competition) violation, unless the potential or actual monopolist has engaged in "exclusionary conduct". In the *Trinko* case - the US Supreme Court stated that exclusionary conduct is conduct that makes no economic sense but for its tendency to eliminate or lessen competition. And in the *Aspen Skiing* case, the US Supreme Court held that exclusionary conduct is conduct that excludes rivals on basis other than the firm's efficiency. Thus, conduct by a dominant firm that makes economic sense in that it promotes that firm's efficiency does not violate Section 2 of the Sherman Act, even if such conduct harms existing or potential competitors irrespective of their size. But in *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir.), cert. denied, 122 S.Ct. S.Ct. 350 (2001), the Court of Appeals held that applications with platform software must be analysed under a rule of reason but said, en passant, that a monopolist's conduct might qualify as 'exclusionary' if it imposes anticompetitive harm that is disproportionately larger than any efficiencies it engenders.

⁵¹ See John B. Kirkwood and Robert H. Lande, 'The Fundamental Goal of Antitrust : Protecting Consumers, Not Increasing Efficiency' *Notre Dame Law Review*, Volume 84, Issue 1, (2008)192.

⁵² Robert H. Bork, "The Antitrust Paradox" (1993) 50.

⁵³ See Eleanor Fox above, 353, She states that the EU focuses more on abuse of dominance because such abuses harm potential market actors unfairly while the US system focuses most on cartel-like agreements because they unambiguously harm competition, raise prices, lower output and have no efficiency justifications.

⁵⁴ For the purposes of this paper, we will focus on US and EU and only incidentally consider other jurisdictions as the need arises. Regarding both monopolisation (Section 2 Sherman Act) and abuse of dominance (article 102 TFEU), the two systems are quite similar: they both require unilateral conduct by a firm wielding some degree of market power, they both require some form of anticompetitive conduct without providing an exhaustive list of what conducts constitute anticompetitive conduct; the requisite level of market power; cover various forms of agreements - exclusionary vertical agreements or conditions of sale agreements whose terms may foreclose rivals in a monopoly/dominance enhancing way like exclusive dealing, single branding, tying, loyalty discounts and bundled loyalty discounts.

⁵⁵ Einer Elhauge and Damien Geradin, (2011) 1136, note 45 above. They mention differences regarding rules on: above-cost predatory pricing; unilateral duties to deal; loyalty and volume-based discounts; vertical territorial restraints; and vertical and conglomerate mergers. They further observe that even when their rules are not diverging, their application can lead to conflicting conclusions when the courts or agencies differ in their assessment of facts or law.

Nonetheless, when self-interested policy objectives are implemented in an uncoordinated environment, externalities are necessarily to be expected, even though some may be unintended. As seen above, as businesses have tailored their modes of supply to foreign markets through various cross-border arrangements, this raises the question of the effectiveness and adequacy of these competition laws to regulate these complex global value chains.⁵⁶ Mindful of the spillover effects of externalities and their implications for legal certainty, some states, notably the hegemons, rather perceive this as an opportunity to continue imposing their conception of the optimal level of protection against cross-border anti-competitive practices.⁵⁷ Hence, through their substantive enactments or rules of conflict of laws,⁵⁸ they apply their domestic competition laws extraterritorially, thereby self-appointing themselves global enforcers against competition restricting practices. Applying domestic competition laws extraterritorially might not be an issue per se, the practice having been generalised as customary international law,⁵⁹ because not all states can bear the costs of such enforcement, and in that it creates positive externalities. However, it does not preclude affected state from invoking the illegality of the extraterritorial enforcement of domestic law and adopting national blocking statutes, or from prohibiting the production of documents necessary in the foreign competition proceedings, or even from prohibiting its nationals from complying with foreign judgement or orders issued thereafter.⁶⁰

⁵⁶ See Martyn Taylor (2006) 36, at note 26 above. Taylor makes the same point although he adopts three modes of supply into foreign markets: 'Inter-firm commerce, 'Intra-firm commerce' and 'Strategic alliances', and he observes that each 'particular mode of supply influences the underlying transaction structure which, in turn, affects the ability of domestic competition laws to regulate the [corresponding] cross-border business arrangement effectively'.

⁵⁷ In an exercise akin to the Foucauldian concept of 'governmentality', the dominant states, notably the US and The EU seek to draw convergence towards their conception of the process of market competition and their understanding of the role of the actors involved.

⁵⁸ Three types of domestic conflict of laws rules are often used for the application of domestic competition law to cross-border fact situations, they comprise the concept of pseudo-territoriality (a two-tiered approach most used by the EU), the effects principle (dominant in the US) and the balancing approach (which came about as a compromise between the first two concepts, though it was criticised on grounds of neutrality in *Laker Airways Ltd. v. Sabena Belgium World Airways* (1984).

⁵⁹ See Jürgen Basedow, 'International Antitrust or Competition Law' in "International Economic Law", eds. Franke Lachenmann and Rüdiger Wolfrum (The Max Plank Encyclopaedia of Public International Law, Volume I) Oxford University Press (2015) 27. He holds that the widespread codification of the effects doctrine in national conflict of laws legislations has introduced it amongst the general principles of public international law, but he recommends judicial moderation in its application especially where it would lead to subjecting private parties to contradictory obligations flowing from the laws of different States. In this last scenario, the balancing approach is preferred as was confirmed in *Hartford Fire Insurance Co et al v. California et al.* (1993) 798-99 and in *Åhlström Osakeyhtiö and others v Commission of the European Communities* (1988) 5193, paragraph 20.

⁶⁰ *Ibid*, 26.

Optimal Unilateral Regulation and Under - or Over Regulation

In an integrated global economy, the discretion to selectively target certain behaviours for remedial action creates the possibility that certain cross border corporate arrangements and behaviours would either be over-regulated or under-regulated.⁶¹ This is compounded by the absence of competition laws in certain jurisdictions. From an economic as well as legal perspective, both under- and over-regulation generate externalities, but the magnitude of the resulting costs for businesses, consumers, states and society in general varies depending on the particular behaviour under consideration and on where its effects are most widely felt. Dealing with these externalities is further complicated by the fact that whatever the level of optimality of the laws one state adopts, the laws of other states will always leave open the possibility for some undesired behaviour to go unregulated. This is most readily observable with regard to mergers as they often require approval in the impacted markets, though subsequent misconduct - post merger - will still raise issues.⁶² According to Elhauge and Geradin, this is due to uncertainties in information and adjudication, meaning that, 'any rule that regulates conduct optimally cannot eliminate under-deterrence, but rather can only minimise the sum of harm from under-and over-deterrence'.⁶³ So the important question becomes one of knowing if it is better to avoid the anticipated misconduct by preemptively blocking the merger given the ability or incentives for post merger misconduct or to impose remedial damages as reasonable accommodation for the losses suffered by local consumers as a result of the merger. One may wonder whether an alternative could consist in the jurisdictions concerned ceding jurisdiction based on a comity principle such that the jurisdiction whose consumers suffer the most from the merger assumes the leading role in coordinating the review of the effects of the merger and deciding with regard to all its effects on consumers in all the impacted

⁶¹ See Taylor, 45- 46, note 26 above. He perceives under regulation to be a scenario where a state's competition laws would permit an anti-competitive behaviour that ultimately reduces global welfare. Instances of this scenario can be observed when an anti-competitive behaviour is not at all regulated or where, despite being regulated, the regulation only offers sub-optimal protection to the extent that it generates an externality in regulatory decision-making. The economic consequence is that the decision not to regulate allows a behaviour that produces negative externalities that then spillover into other states.

Over regulation refers to the converse scenario where a state's competition laws would prevent an anticompetitive behaviour that would be welfare enhancing for the overall global community, that is, it prohibits the behaviour solely based on its domestic self-interest, regardless of the positive effects of that behaviour for states. Instances of such over regulation can be observed where a state in or more competition laws sets a level of regulation that goes beyond the collective globally optimal level or where the domestic competition laws of different states overlap. The economic consequence is that the decision to regulate prevents the realisation of a positive spillover that would have resulted from the behaviour.

⁶² This was one of the main contention points in the Canadian Superior Propane case discussed above.

⁶³ Einer Elhauge and Damien Geradin (2011), 1109, note 45 above.

countries.⁶⁴ The jurisdiction blocking the merger stands to lose the most depending on the extent to which its markets are affected. It would have to look at the effects of the resulting price increase on the competitiveness of its markets vis-à-vis the competitiveness of the country where efficiencies - cost savings, innovations - are realised. Its injunction to block could also be tempered by fines or, civil or punitive damages where the effects on consumers would indeed be absorbed, and if the opposing jurisdiction consents. This examination would necessarily entail observing the NT principle to prevent partiality of the decision. The decision would be the optimal solution only when it would have appropriately distributed the effects of the merger such that no competitive behaviour is characterised as anticompetitive in the deciding jurisdiction. This is difficult to achieve when each state gets to decide what constitutes a restrictive business practice. An illustrative example involving over-regulation can be observed in the *Boeing/McDonnell case*.⁶⁵

In the *Boeing/McDonnell* merger, both firms operated in the aircraft manufacture industry in the US but with subsidiaries effecting significant sales in EU markets. Boeing offered to acquire McDonnell and the US Federal Trade Commission (FTC) approved the deal as necessary for the survival of McDonnell but failed to consider the likely adverse effects of the merger on the EU market despite cognisance of the merging entities' operations within the EU. Airbus Industrie S.A.S contested the merger, and given that Boeing and McDonnell's joined sales on the EU market exceeded the threshold of EU merger regulations, the European Commission (EC) asserted jurisdiction over the merger on the basis of its effects on the EU market and ruled against the acquisition on the ground that it strengthened Boeing's dominant market position in the international market for jetliners.⁶⁶ In the aftermath of this decision was a spree of political rant between the US and the EU. The US exposed the EU as being 'partial to the effect of the acquisition on Airbus' and even passed a bill through the House of Representatives, voted 416 to 2, in favour of issuing a warning to the EC for what it regarded as 'an unwarranted and unprecedented interference

⁶⁴ See the suggestions made by Trebilcock et al., note 2 above, 775. The lead jurisdiction approach they propose, and its appended appeal mechanism to review only the conflict of laws rules as they were applied by the forum judge, could be a good solution to the jurisdictional conflict, and it strongly resembles arbitral proceedings. However, I think the DSU would be better placed to receive such claims and its comparative advantage as the natural judge of the NT and MFN treatment violations would give more credit to the final outcome of the disposition on the distribution of wealth from the merger to all the consumers of all the countries affected. This is vital because if not the national treatment principle they suggest would not operate to ensure that all consumers, that is purchasers of the products of the merged entity, are taken into account in the total welfare method of aggregating global welfare.

⁶⁵ *Boeing/McDonnell Douglas*, EC Case N° IV/M.877 (July 30, 1997).

⁶⁶ Martin Taylor's discussion of the case, note 26 above at 52. The EC decision contradicted the FTC's approval of the merger mainly because of the stricter treatment of vertical agreements in the EU. He also notes that the EC eventually admitted not having direct jurisdiction to block the merger but only 'threatened to levy crippling fees on the sales of Boeing' if the merger proceeded as approved by the FTC.

in a US business transaction'.⁶⁷ The tension was finally relieved when Boeing conceded a negotiated package of remedial measures with the EC.⁶⁸ While this solution is in conformity with the objectives of EU competition law, it could also be said to respect the NT principle. However, it may be interesting to observe that the aircraft manufacturing industry dominated by Airbus and Boeing can be analysed on a global scale as a very concentrated industry operating in ways similar to 'cartels' whose hosts are reluctant to be disciplined because they generate supra competitive profits and cost savings that are transferred to their respective consumers without regard to the effect on prices for all other consumers in other countries.

This jurisdictional conflict points to how politicised trade relations can be, especially when it comes to advancing the interests of national champions cloaked under the guise of national interests, and thus blurring the public-private distinction prevalent in mainstream doctrines of international economic law. There are clearly comparative advantages at stake for both countries that can be exploited to gain further specialisation. On a grand scale, the situation necessarily leads to an unequal distribution of wealth generated by economic activity on global markets. It also shows that the jurisdiction with the strictest rules would have the last word, especially when it wields sufficient power to enforce trade remedies or sanctions on the lax state's interests and this clearly unveils the 'dysfunction between the borderless nature of open markets and the territorial constraints affecting states called upon to regulate them'.⁶⁹

Nevertheless, the discretionary use of domestic competition laws to guard against anticompetitive behaviours transcending borders gives a great competitive advantage to the enforcing state as it gets to choose the optimal level of protection based on its own subjective national interest, all to the advantage of its national champions and domestic general welfare. The scenario even becomes more bleak when the state that has the ability to enforce its domestic competition laws extraterritorially, strategically underpins its competition regime with an industrial policy it knows constrains the possibilities of action of other states that have no choice but to submit to what it decrees as valid conduct in the unlimited space within which it ensures enforcement. From a collective global perspective, the issues discussed above, reveal the loosely knitted texture and incoherent juxtaposition of international economic regulatory mechanisms that operate to

⁶⁷ See Business Week online 'A Warning Shot to EU Over Boeing - McDonnell' (July 9, 1997) quoted in Martyn Taylor, note 22 above, 52.

⁶⁸ The concessions included Boeing modifying longterm supply contracts, patent sharing arrangements and continued separation of Boeing and McDonnell until 2007. See Taylor, note 22 above, 53.

⁶⁹ Basedow, note 59, 27.

mystify the attribution of responsibility for the social injustices legitimated by mainstream accounts of international economic law.

From what precedes, international trade law has facilitated the deregulation and liberalisation of global markets making it possible for private business to seize the opportunities offered by processes of economic globalisation to compete for markets across jurisdictions. The absence of global competition rules to discipline these markets has contributed to further exacerbate inequalities between and within nation states and thus ruining their chances to reap any meaningful gain from the concessions they made when joining the multilateral trading system. The fact that domestic competition law is inherently territorial while cross border private anti-competitive practices are inherently global, an international competition agreement is hence absolutely necessary to ensure a fair redistribution of wealth among and within all global market participants.

Part II International Trade and Competition Law and Policy

International Trade and competition law and policy share several common themes, diverge on several points but their complementarity makes them absolutely necessary within any viable global trading regime for the twenty-first century. This is evident from an examination of the underlying rationales and the theoretical assumptions that prevail in both fields. I will first look at the nature and objectives of trade and competition law, then examine their underlying rationales. They do diverge on the fringes but are, on the whole, mutually supportive and complementary in their objectives and there is no insurmountable obstacle to coherently integrating both regimes for the greater good of an inclusive global economy under a multilateral framework.

The Nature and Objectives of Competition Law

International competition law and policy has been an issue of debate since the late nineteenth century when the first competition statutes were adopted in the United States of America (US).⁷⁰ These laws at the time criminalised cartels and monopolies despite the fact that European states were rather complacent as they favoured or even made such practices compulsory.⁷¹ These divergences temporarily subsided with the inclusion of directly applicable prohibitions of cartels and abuses of dominant positions in the European Economic Community (EEC) Treaty that later became articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). As

⁷⁰ The first text was the Sherman Act of 1890, later supplemented by the Federal Trade Commission Act of 1914 and the Clayton Antitrust Act of the same year.

⁷¹ See Jürgen Basedow, note 59 above, 24.

the centrally planned economies of the former Eastern block lost traction to the market-economy model, many more countries in the world adopted competition laws and this further rendered the issues regarding competition law more complex. However, all these competition laws are underpinned by the same basic principles, with only slight variations regarding specific goals and procedures, but with huge variations regarding the intensity of political and cultural support.⁷²

International competition law is concerned with the enactment of legislations designed to eradicate private restrictions of competition, that is, laws and regulations that promote or maintain market competition by regulating anti-competitive practices that are not beneficial to society.⁷³ They are central for sustaining the competitive process and when properly implemented, they help maximise the benefits that competition can generate. They shape the conduct of markets and thereby contribute to their efficiency and to embed them into society.⁷⁴ International competition law improves market efficiency by eliminating hindrances to innovation and expansion and this positively stimulates incentives to compete. By relating market conducts to those affected by them, it has a huge potential to engender support for markets and thus can be said to ‘create[...], symbolize[...] and embod[y] ties between markets and the societies in which they operate.’⁷⁵ Most importantly, International competition law can promote the idea of competition as a desired social value and it can influence the distribution of economic benefits by discouraging particular forms of competition that are considered unfair.

Beyond efficiency, competition laws may also be used simultaneously by governments as policy vehicles to achieve distributional objectives that lead to greater social equity. However using competition laws to serve social justice functions is quite controversial and some states clearly disapprove of the practice while others consider it as an open possibility.⁷⁶

International competition law also has this specificity of being primarily enforced by state authorities, but some jurisdictions also have recourse to civil litigation while others, such as the US,

⁷² See David Gerber, note 21 above, 4.

⁷³ Although states as well may restrict competition by means of customs duties, subsidies, import and export quota, state monopolies and cartels, these instruments have mainly been dealt with under international trade law, where the main focus is on trade liberalisation, and these governmental measures are disciplined as market-access issues rather than measures to be eliminated in order to establish propitious conditions for effective global market competition.

⁷⁴ David Gerber, note 21 above, 4.

⁷⁵ Ibid.

⁷⁶ See Taylor, 25-26, note 26 above. US preference is to give pre-eminence to considerations of economic efficiency, while the EU has a tendency to prefer considerations of social equity and distributional fairness in its laws, especially given their role in the construction of the European common market. Taylor observes that policy instruments often weigh in one direction or the other depending on the enacting or administering governments’ inclination on the political spectrum.

resorts to criminal proceedings. Thus, depending on the enforcement mechanism, it either forms part of international administrative law, international criminal law or private international law whilst general public international law remains applicable in all instances.

Nature and objective of international trade law

International trade law is basically concerned with regulating governmental measures that restrain market access, with focus on the structural aspect of markets, and it has been widely harmonised under the WTO agreements. Only states are bound by the agreements and this implies that private conducts that may restrict trade fall under the discretionary powers of states. In view of promoting welfare maximising trade policies by nation states in an international trade context, the WTO aims at liberalising trade through reciprocal and mutually advantageous arrangements geared towards making markets accessible on non-discriminatory basis in order to obtain economic growth, high standards of living and full employment. Thus, the WTO may be said to pursue an increase in both the level and distribution of global and national welfare, though the level of liberalised trade tends to dominate 'fair trade' or distribution concerns.⁷⁷

To attain these objectives, the organisation functions as a forum or market for exchanging trade policy information, consultation, negotiations and it provides a mechanism for monitoring and settling trade disputes. Its trade liberalising objective also offers a framework for trade and competition given that governmental measures that restrict competition by discriminating against foreign goods or services are subjected to the discipline of the Dispute Settlement Body.⁷⁸ Though states negotiate concessions for market access, they do not actually do the trading, except in some rare cases, it is generally their firms that are beneficiaries of the concessions they exchange. As Cotterrell observed, '[i]f its form is public, its arena of ultimate effect is private.'⁷⁹

The international trading system relies on a widely accepted, though debatable, economic premise that free trade or liberalised trade is good for all as it averts the morally ruinous fallacies on

⁷⁷ See Jagdish Bhagwati "The Global Age: From a Sceptical South to a fearful North", Blackwell publishers Ltd. (1997) 271. He notes that developed countries now seek ways to induce developing countries to adopt policies that will reduce their comparative advantage in cheap unskilled labour so as to moderate their competitive threat.

⁷⁸ Wolfgang Benedek 'General Agreement on Tariffs and Trade - 1947 and 1994', in "International Economic Law", (eds.) Franke Lachenmann and Rüdiger Wolfrum (The Max Plank Encyclopaedia of Public International Law Volume I) Oxford University Press (2015) 302. He points out that the full employment aspect of the objectives of the WTO was left to the International Labour Organisation (ILO).

⁷⁹ Roger Cotterrell, 'Transnational networks of community and international economic law', in "Socio-legal Approaches to International Economic Law", ed. Amanda Kerry-Kessar, Routledge (2013) 134.

which mercantilist policies that led to the Great World Wars were based.⁸⁰ Thus, perfecting David Hume's 'price-specie-flow' mechanism and Adam Smith's specialisation theory to international trade, liberals have argued that Ricardo's law of 'comparative advantage'⁸¹ offers the most compelling case for free trade, that is, liberalised trade policies permit the unrestricted cross-border flow of the highest quality of goods and services at the lowest prices and therefore increases total world wealth.⁸² This theory therefore reasons that where each state specialises production in its sphere of comparative advantage and then freely trades its produce, the process of specialisation and exchange would lead to net welfare gains, in the sense that both productive and allocative efficiencies - that is, the total surplus in the neoliberal microeconomic sense - would increase.⁸³ Though this is nowhere explicitly stated in the WTO covered agreements, it is widely accepted that the economic rationale of the global trading regime adumbrates that comparative advantage makes possible the efficient allocation of resources across and within countries in response to competitive pressures from imports. Thus, exploiting comparative advantages under conditions of competition from imports 'lead[s] to product specialisation and increased firm-size that in turn lowers the unit cost of goods and services.'⁸⁴ It is also often stated that the substantial reduction of tariff barriers and the elimination of quotas through the WTO creates export opportunities and stimulates international competition and has brought about technological innovation, investment, lower prices for goods and services, and growth in world gross domestic product.⁸⁵ Hence, the multilateral trading system secures open access to international markets and thus enables firms to specialise in order to reap economies of scale and scope which in turn lead to product and process innovation that further drives down costs while correlatively expanding customer choice on international

⁸⁰ The economic foundations of the mercantilist school of the early seventeenth through the eighteenth centuries, backed by governmental regulation of international trade, were that, aggressive export but restrictive import policies were necessary to maintain a favourable balance of trade, and that the processing or manufacture of raw materials at home, rather than importing manufactured good that would threaten domestic production and employment, was to be maintained through export taxes on exported raw material and import levies on imported manufactured goods. See Trebilcock et al., note 2 above, 2.

⁸¹ The theory of comparative advantage, the bedrock of neoclassical trade theory, provides that even if a nation has an absolute disadvantage or is less efficient in the production of commodities, there is still a basis for mutually beneficial trade if the less efficient nation specialises in the production of, and exports, the commodity of its smallest absolute disadvantage or comparative advantage- and trades part of its output for other commodities. See David Ricardo, "The Principles of Political Economy and Taxation", Homewood, reprint 1963, (1817).

⁸² Kevin Kennedy, "Competition law and the World Trade Organisation: the Limits of Multilateralism", Sweet and Maxwell Ltd. (2001) 3.

⁸³ That is, producers will acquire desired products and services at the lowest possible price while consumers will have more diversity of choice.

⁸⁴ See Kevin Kennedy note 25 above, at 3.

⁸⁵ See WTO, "Annual Report 1999", 6. Note, however, that growth is still here considered the best measure for wellbeing and progress and pursued for its own sake as if it were a social value.

markets. As the WTO system relies on reciprocity and mutually advantageous concessions on markets, it is considered that any interference, public or private, with market access commitments will nullify the negotiated concessions and undermine the WTO system.⁸⁶

Policy Perspectives on International Trade and Competition Law

From a trade policy perspective, law and economics theory,⁸⁷ which heavily relies on economics for its analysis of behaviours and actions, has infused competition law and policy with particularistic understandings of harm or injury, and this is increasingly so as well with international trade law. In this school of thought's reading of the WTO agreements,⁸⁸ the existence of externalities arising from each states' desire to put up trade barriers in its national self-interest, calls for international regulatory intervention to correct these actions, considered as market failures, and it views the WTO as a policy instrument to achieve this end. This perspective of the WTO is premised on the existence of mutual gains from cooperation, as opposed to defection or non-cooperation, and consequently, co-operative activity is enforced by penalties for self-interested defection in the form of trade sanctions.⁸⁹

Competition policy, just like liberal trade policy, also promotes the efficient allocation of resources by ensuring that markets are open and competitive. Competitive markets depend on the legal environment within which firms operate, mainly because markets always need rules given their dynamic nature. On markets, decentralised individual preferences can only lead to the general welfare under conditions of effective competition guaranteed through rules imposed and accepted by market participants.⁹⁰ Otherwise, markets would fail to perform efficiently due to externalities

⁸⁶ As envisaged by non-violation complaints under article XXIII GATT on nullification and impairment of commitments.

⁸⁷ The Law and Economics Theory School of Thought views the law as a means to promote increased social welfare through greater economic efficiency and it regards the state as acting rationally in a self-interested manner to maximise its national welfare, regardless of the benefits or detriments that accrue to other nations, these, it considers as externalities. These externalities may be corrected through international cooperative agreements wherein governments formulate their own domestic policies with regard to the collective interests of the international society from a game theory perspective rather than in their individual self-interest.

⁸⁸ Other schools of thought such as Public Choice and Liberal Constitutional Theory, think highly of international agreements, and view them, for the latter, as important for the maintenance of harmonious international relations, fundamental democratic values and the Rule of Law, while for the former, given the possibility of governmental capture by special domestic interests, it views international agreements as counterbalancing these special domestic interests so as to influence governments toward behaviours that are beneficial to the public good. See Ernst Ulrich Petersmann, 'The Transformation of the World Trading System Through the 1994 Agreement Establishing the WTO,' 6(2) *European Journal of International Law*, 161 (1995)163.

⁸⁹ See Taylor, note 26 above, 166.

⁹⁰ See Frédéric Jenny, 'Globalisation, Competition and Trade Policy: Convergence, Divergence and Cooperation', in "Competition Policy in the Global Trading System" eds., Clifford Jones and Mitsuo Matsushita, Kluwer (2001) 301.

such as strategic impediments designed by firms to increase returns to scale, information asymmetry and ever present transaction costs. Even neo-classical economists admit the potential for markets to fail, just like public choice theorists recognise the potential of government capture, and recognise the need for state regulation to re-establish order and provide public goods and other non-economic goods that markets are incapable of optimally providing.⁹¹

A liberal approach⁹² to trade law and policy favours the reduction of government barriers to trade that shield domestic firms from import competition, while competition law and policy shields consumers from private firms that either unilaterally or collusively set prices higher than those that would prevail under normal competitive market conditions. When there are no barriers to market entry, it is assumed that firms are unlikely to have the market power that makes it possible for them to charge higher than competitive prices. Likewise, the reduction or elimination of governmental obstacles to market access makes markets more competitive because of lower-cost imports which make it more difficult for local firms to charge supra-competitive prices to consumers. Trade liberalisation would therefore, hardly be possible if anticompetitive practices by private firms, backed or not by states, are not regulated by effective competition laws. Without such laws, the benefits of free trade would be undermined by private businesses whose natural inclination is to eliminate all competition by deterring or preventing rivals from contesting the same markets with like goods and services.

Trade and competition law and policy have as overarching objectives to eliminate or reduce barriers to trade, to market entry, and market and trade distortions in order to achieve better economic efficiency and ‘global’ welfare through non-discriminatory, transparent and rule-based regimes. Thus, both fields appear consistent and mutually reinforcing. Achieving economic efficiency⁹³ and global welfare recurs in the economic considerations underlying both policy fields. Their basic objectives contribute to make domestic markets more competitive and to improve the allocation of resources, thus promoting efficiency and domestic consumer welfare. The basic non-discrimination principles of articles I and III GATT, for example, aim at promoting equality of competitive opportunities for all WTO members, subject only to well defined exceptions to trade

⁹¹ Adam Przeworski “The State and the Economy under Capitalism”, Routledge (1990),16.

⁹² Liberal constitutionalists share this basic understanding. See Ernst Ulrich Petersmann, note 85 above.

⁹³ See Kevin Kennedy, note 25 above, 4. Economic efficiency in this context would comprise efficiency in its static (allocative and productive efficiency) and dynamic senses. Allocative efficiency refers to the exchange and distribution of resources to meet consumer needs or demand, while productive efficiency ensures the optimal use of societies’ existing resources to achieve a given level of output at the lowest possible cost. Dynamic efficiency focuses on promoting the optimal introduction of new products, more efficient production processes and superior organisational structures to meet changing consumer wants.

restrictions under the covered agreements, notably the provisions of article XX on general exceptions and article VI on antidumping or the safeguard provision of article XIX.3(a) GATT. Trade and competition policy could thus be deemed complimentary because, whereas trade policy eliminates governmental barriers to international trade, competition policy tries to eliminate private obstacles such as abuse of market power or collusive practices that can negate the objectives of the liberalised trading system.⁹⁴ However looking only at their objectives as such does not account for the rationales of the prescriptions that are thus imposed on society, nor is the structuring role of economic and political power explained, just as little is said about the way different cost structures were established from the onset.⁹⁵

Points of Contention Between both Fields

Beyond this apparent consistency, there are practical difficulties in articulating competition and trade policies into workable rules for a truly global economy. Two related features of competition law and policy constitute serious impediments that may frustrate any attempts at reconciling both fields. First, as stated earlier, the fact that international competition law is essentially domestic law that also ought to be territorially applied, but is rather often extraterritorially applied, requires cooperation toward harmonisation, on substantive issues in particular. The reason being that international trade policy has facilitated the globalisation of markets but international trade rules do not deal with private anticompetitive behaviours or their effects on the quality of competitive conditions in global markets, and given that this is determined by domestic laws, international trade law cannot arbitrate the conflicting appreciations of anticompetitive conducts between states. As national legislations often reflect the needs, interest and values of the states that enforce them rather than the needs or preferences of all global market participants, divergences result in losses for the global economy.⁹⁶ Second, the economic theory underpinning competition policy tends to produce frictions depending on the self-centred manner in which they are expressed in rules and interpreted across the multitude of jurisdictions with or without competition laws. In this regard, the law fails to embed global markets into the societies that take part in them, and thus makes room for social sciences like economics to determine the content and interpretation of market conduct rules.⁹⁷

⁹⁴ Frédéric Jenny, note 90 above, 305.

⁹⁵ See Robert O'Brien & Marc Williams, note 4 above, 152. Pointing out that the liberal paradigms do not inquire into the origin of comparative and thus do not explain how different cost structures were established initially, but prescribe specialisation based on comparative advantages to improve individual state's and global welfare.

⁹⁶ See David Gerber, note 21 above, 3.

⁹⁷ See Phillippe Coppens, note 18 above.

While market access dominates in trade rules, market entry and consumer welfare or total surplus prevail in competition law, and each field remains tightly closed from the other. From a 'market access uber alles' approach to trade law, it is hard to admit that competition law may allow foreign and domestic competitors to be lawfully excluded from a market when this exclusion does not also substantially lessen competition.⁹⁸

One troubling feature of international trade policy is its multifaceted nature.⁹⁹ While trade liberalisation might be pursued as a process and an objective, some trade measures, like trade defence instruments or trade remedy laws, have the effect of restricting trade and hence stifling competition while remaining perfectly valid under exceptions provided for within the WTO system. More so, besides trade promotion, which is the most catchy objective and often stated as the mantra in making the case for free trade, other objectives of trade policy comprise raising revenue, protecting producers from import competition and protecting workers' jobs. Even under the WTO regime where market access is predicated on the non-discrimination principle, the covered agreements and WTO jurisprudence provide ample scope to pursue some other objectives that derogate from this principle.¹⁰⁰ So, both policy areas can work at cross purposes.

Furthermore, while it is widely admitted that trade liberalisation, due to specialisation on a comparative advantage basis, reallocates resources to industries that more efficiently create higher value, it also entails that industries that cannot outcompete foreign producers will lose. Consequently resources are reallocated from less efficient, and mostly less developed countries, to more efficient producers in foreign industrialised countries while adjustment costs become unbearable for small local economies. Developed countries end up being the winners of the liberalisation game by pursuing strategic industrial and protectionist policies in areas like agriculture and intellectual property protection, that have the effect of negating the natural comparative advantages of less developed countries, and by the same token hinders them from modifying the cycle of primary resource production they are locked into. These strategic actions constitute failures and distortions of global markets that raise doubts as to the non zero-sum game nature of liberalised trade. Looking at the beer industry in African countries, for example, foreign

⁹⁸ See Kevin Kennedy, note 25 above, 5

⁹⁹ See WTO report (1998). Some have even assumed that competition policy may substitute trade policy in some respects, they argue that competition law provisions relating to price discrimination might serve, in some circumstances, as substitute for anti-dumping measures as response to the 'schizophrenic' effect of trade remedy laws. The reasoning being that the elimination of existing trade barriers would have the effect of removing the incentives for enterprises to dump because goods exported at dumped prices could be shipped directly back to the country of export.

¹⁰⁰ The number of possible derogations from the nondiscrimination principles of the WTO are too many to list them all here, but I would note that even the Preferential Trade Agreements valid under article XXIV GATT that have become so prevalent today are often used to divert trade on a discriminatory basis rather than promote it.

firms dominate and control the markets given, among other reasons, their accumulated dynamic and productive efficiency gains. Local breweries are either absorbed by foreign firms or kicked out of the market and obliged to reassign their resources to supposedly high value industries where the country enjoys a comparative advantage. As beautiful as it sounds, this goes without saying that these local entrepreneurs will face similar fates in all other industries as well.¹⁰¹ Unless a hegemonic state harbouring these multinational corporation finds some incentive, which is highly unlikely, to enforce its competition laws extraterritorially, the conduct will pass unnoticed. Some developed countries with capabilities to enforce their competition laws against these behaviours rather exempt or even exclude them from the scope of their competition regimes despite their trade limiting effects.¹⁰² Bhagwati has argued that, for less developed countries to fully reap the efficiency and growth benefits of liberalisation, they must first take steps to develop their market economies.¹⁰³ While this is rationalised within the WTO by the recognition of time-bound special and differential treatment to developing and least developed countries, it does not address the crux of the matter, and the impacted countries are thus justified in arguing that liberalised trade through global market integration operates to generate inequalities while only nurturing the illusion of future gains and by turning a blind eye to the current sufferings of the most vulnerable.¹⁰⁴ Nonetheless, the same argument can be made with regard to competition law and policy. Before the benefit of competition can be fully realised, sufficient supply capabilities must be present in an economy, but

¹⁰¹ Let us assume that our entrepreneur who has been pushed out of the brewing industry reconverts his productive resources into agricultural production. His produce will still be faced with high product standards on export markets and subventions meted out to less efficient agro-producers in 'advanced' economies. Even more dramatic is the fact that powerful dominant foreign firms, tend to be vertically integrated in the downstream and upstream agricultural input industries and output distribution networks. From the production, sale and distribution of patented seeds and plant varieties, fertilisers, pesticides to farm machinery, private anti-competitive practices that produce all their negative effects in the foreign markets in which these firm operate, mostly in less developed countries, are not susceptible to be internalised by those who perform them.

¹⁰² This phenomenon is not limited to relations with less developed or developing countries. See the US complaint under the nullification and impairment provision of article XXIII against Japanese vertical integration and interlocking mechanisms in the auto parts industry (Keiretsu system) where the US argued that the Japanese government condoned such practices to bloc US firms from accessing the market. See also in a similar complaint by the US, Japan - Measures affecting Consumer Photographic Film and Paper (998) WTO Doc. WT/DS44/R. The important question remains whether Japan was obliged, in balancing the effects of such practices, to give more weight to the efficiencies realised by its firms or sacrifice them for the benefit of global consumers, and whether that choice is open to appreciation by WTO panels.

¹⁰³ See Jagdish Bhagwati, 'The General Theory of Distortions and Welfare', cited in F. Jenny, note 90 above, 297.

¹⁰⁴ In a not too dissimilar vein, see Coppens, note 18 above. He makes a strong argument that less developed countries have lost confidence in the WTO because liberalised free trade has not brought along the development and poverty reduction envisaged owing to the intentional poor redistribution of accumulated wealth, and neither should they be convinced that waiting any longer, whilst cognisant of the disconnect between the quantified neo-classical economic time and the duration in which humans live and die, will deliver them from their current predicament. He thus points to role of the law in the regulation of imperfect markets.

a strict application of competition laws could make this objective more onerous to achieve though desirable. This is especially true when implementing competition policies that would create unemployment or affect rival firms and industries in the domestic market.

Finally, it appears therefore that trade policy tends to focus on the interest of producers, and is thus amenable to capture by special interest groups, concerned with protecting competitors (rather than the competitive process), that do not hesitate to rig the domestic democratic process in order to achieve this objective. Hence, asserting that the rationale for trade liberalisation is to increase global welfare and achieve global ‘productive’ efficiency, while competition policy focuses on national consumer welfare is a half truth and as such can be illusory. Given that Global markets are highly integrated and unilateral ‘jurisdictionalism’¹⁰⁵ prevails in competition law enforcement, it becomes relatively understandable how international trade and competition policy makers, depending on the prevailing balance of power relationships, decide on the direction in which wealth flows within and between countries. They decide, solely on the basis of domestic considerations, whether to sacrifice consumers welfare or deviate from a welfare maximising competition policy for other goals¹⁰⁶ or for the sake of non-economic objectives.¹⁰⁷ This was the situation in the *Superior Propane merger case* discussed above.¹⁰⁸ The same applies for export cartels where, despite almost unanimous agreement that they are harmful, it remains highly unlikely that states would agree on a constraining multilateral agreement to combat them though such an agreement is desirable. Producers in exporting countries are privileged at the expense of consumers’ welfare in importing markets, even if total global welfare is reduced in the process.

Economic Rationales of Competition Law and Policy

Having seen that international trade and competition law and policy can be complementary but also diverge, and even work at cross purposes, it is interesting to observe that the underlying economic theories on their social welfare implications share a common vocabulary with only slight variations, and we have already seen some of these variations above regarding trade law and

¹⁰⁵ David Gerber uses the word to refer to the default position in international economic law whereby states, with sufficient economic leverage or political power, apply their own laws to conduct outside their territory, under certain conditions, without the obligation to take into account the interests of other states. It is synonymous to the extraterritorial application of domestic laws. See note 18, above, at 5-6.

¹⁰⁶ Like protecting producers or workers within an industry threatened by import competition.

¹⁰⁷ Non-economic objectives may comprise protecting ‘national champions’, preventing industrial concentration that would squeeze out politically influential small producers or even dispersing control of economic resources.

¹⁰⁸ See note 42 above.

policy.¹⁰⁹ Here we will look at the economic rationales of competition law in order to better understand its role in promoting market efficiencies, how it is said to contribute to increase economic welfare and growth. Most importantly, we will seek to understand how economics informs competition law approaches at reconciling the distributional tensions that inhere in its often conflicting objectives. Economics has acquired an increasing role in competition law and policy, and in so doing, it infuses into the law specific methods for determining harm to competition and correlatively tends to narrow the goals of competition laws to a set of economic claims and assumptions on the social implications of the behaviours under consideration.¹¹⁰

Economic justifications have reduced *per se* violations to a minimum. The simple realisation that a certain situation, anticompetitive behaviour or agreement exists does not suffice to consider it harmful and deserving attention from competition law, except where the underlying behaviour or situation is sufficiently predictable to constitute a harmful effect in economic and legal terms.¹¹¹ At stake is a jurisdiction's determination of what constitutes an anticompetitive behaviour, how and when it materialises in order to sanction it, and because economic analysis tends to be narrower or stricter than legal analysis of business conduct, the rule tends to ply to reflect the stricter economic analysis depending on the jurisdiction's acceptance of the culture of competition.

Regarding competition law and policy, the central issue revolves around determining the welfare implications of excessive market power that causes firms, acting unilaterally or in collusion with

¹⁰⁹ This is notably so with regard to market definition which makes reference to both its product and geographic dimensions, barriers to entry or barriers to trade, market structure, market power, competitive injury, horizontal and vertical restraints and mergers. As these concepts have their bearing in economics, it is difficult to predict, with legal certainty, the precise effects of specific behaviours without an understanding of the economics and environment that informs them and in which they unfold.

¹¹⁰ See, for example, the gradual disappearance of *per se* violations with regard to vertical restraints and horizontal agreements where neo-classical economics has introduced the 'rule of reason' as a logical methodological requirement. For vertical restraints, the commission introduced the idea that they would no longer be determined primarily by reference to the particular form of the agreement, but could only be determined by reference to its effects under the specific circumstances in which the agreement was used. The effects were to be determined by factors such as the characteristic of the market, the relationships among the contracting parties and their market power. This led to the adoption of Regulation 2790/99, 1999 OJ L 336/21 and its set of guidelines. Regarding Horizontal agreements, the Commission adopted the neoclassical economics 'consumer welfare' standard as the primary standard for applying article 81 EC (101TFEU), this led to Guidelines on the Application of Article 81 EC (2001) OJL3/2. Abuse of dominance cases however have been less amenable to these changes, notably when they involve price and market sharing or involved eliminating rivals or raising costs.

¹¹¹ See David Gerber, 21 above, 145.

others, to destabilise the ‘stable rationality of the market’.¹¹² Thus, before concluding that a firm abuses its market position, a relevant product and geographical market, wherein the firm holds a dominant position it is likely to abuse, needs be defined. A dominant position in a market is understood as ‘the ability to increase prices profitably above, or reduce non price dimensions of competition below, competitive levels by a non trivial amount for an extended period of time’,¹¹³ such that the price of goods and services no longer represent the true costs of the firm after discounting its marginal cost and benefits. Simply having that ability to increase price is not, per se, considered an abuse.¹¹⁴ Thus, considering the welfare implications of an abuse of dominance based on the consumer welfare standard will entail a factual inquiry to precisely determine the effect of the underlying conduct on price.

From an economics perspective, this inquiry will require ‘defining markets in ways that are consistent and replicable, assessing the factors that can be expected to influence price levels on the market, gathering data relevant to assessing the effects of the conduct’.¹¹⁵ Economic methods of analysis have relatively simplified this exercise but in so doing somehow denatured the legal process of determining harmful behaviour. So the conduct is presumed competitive for two reasons: first, it can be justified as aiming to improve the firm’s competitive position, and secondly, because actual or potential market entry can be expected to deter the dominant firm’s conduct that is intended only to exclude or harm competitors without improving the firm’s efficiency or performance.

Neoclassical micro-economic theory has provided the foundations and conceptual framework, mostly used by Law and Economics approaches, for analysing markets and behaviours relevant for competition law. Neoclassical economists analyse a dominant position relative to an equilibrium

¹¹² See Adam Przeworski, note 91 above, 1. In the dominant economic model-capitalism, scarce resources are privately owned, and within that system, the market is understood as a mechanism by which resources are allocated to uses and distributed to individuals or firms. In the market, productive resources - capital, land, labour capacities - are allocated by their owners and the distribution of consumption results from decentralised interactions. So individuals express their preferences for the allocation of resources in an uncoordinated manner through the price mechanism competing for the most efficient return for value. The market is hence considered the natural and efficient ordering mechanism of private economic activity.

¹¹³ See Trebilcock et al., note 2 above, 756, and this section draws largely from their work.

¹¹⁴ As seen above, the US and the EU diverge on this point. The US provides a leniency rule for cartel members who provide information to competition authorities, a weakened per se rule for horizontal agreements involving prices and market sharing, and the retirement of recoup costs for unilateral predation cases is still debated by academia. In the EU, dominant firms have a ‘special responsibility’ not to abuse their economic power and are held to stricter standards than other firms. See Gerber, note 21 above 146-7, 186, 196.

¹¹⁵ See David Gerber, note 21, 145

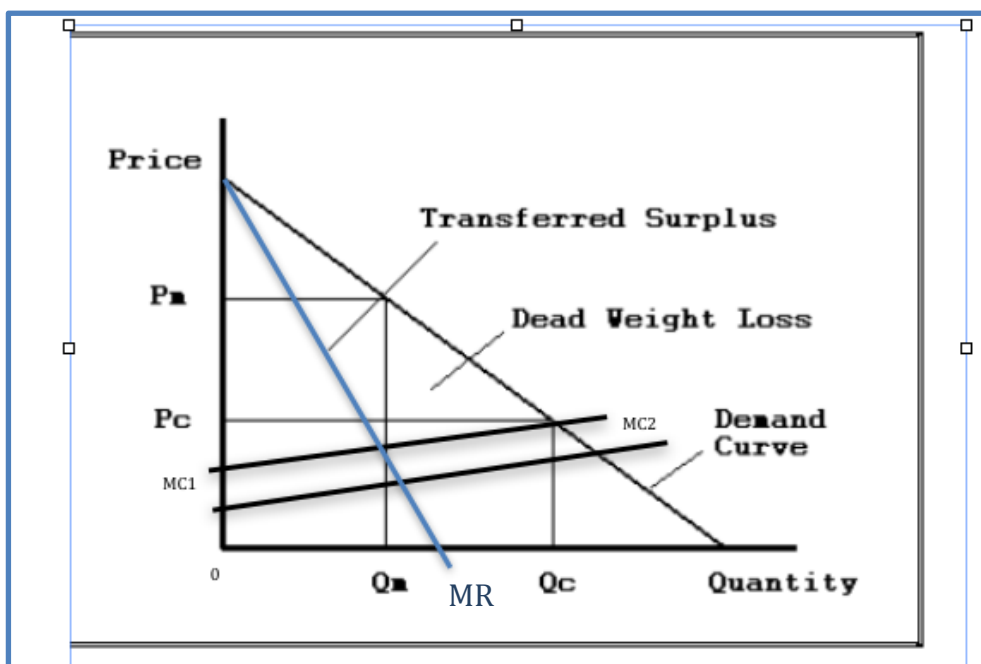


Figure 1*

market,¹¹⁶ in a static, homogeneous product model, without externalities, and this serves as the starting point for decrypting the undesirable social effects of abuse of dominance by market participants.¹¹⁷ In a perfectly competitive market,¹¹⁸ let us assume firms will price at P_c (at the intersection of the Marginal Cost Curve (MC1) and the industry Demand Curve), and they produce an output which is ' Q_c '. With ' Q_c ' output priced at ' P_c ', there are no significant profits to be made, but the dominant firm wishing to maximise its profits may restrict output from ' Q_c ' to ' Q_a ', at the intersection of its marginal cost (MC1) and marginal revenue (MR) curves, thus causing its price to rise to ' P_a '. The ability of the dominant firm to raise its price to ' P_a ' is a function of the elasticity of the demand for its product, to the effect that if demand is highly inelastic the dominant firm can

¹¹⁶ The concept of market under this theory, operates on the basis of key assumptions, notably that, markets allocate resources between competing end uses, and under conditions of competition, market efficiency is enhanced - market efficiency is understood as the optimal use and allocation of such resources- and it is beneficial to enhance it because it maximises social welfare. Market power, within this context, is anathema to the competitive processes because it may cause markets not to maximise social welfare. Competition law therefore regulated market power in order to promote competition and thus enhances economic efficiency and increases social welfare. See Adam Przeworsky, 1, note 90 above. See also, Taylor, 8, note 26 above. But see however, Ronald Dworkin 'Is Wealth a Value?', *The Journal of Legal Studies*, Vol. 9, No. 2 (March, 1980), pp.191-226, 208, arguing that wealth maximisation is not an intelligible social goal. It is often confused with the economic concept of Pareto Efficiency.

¹¹⁷ See Figure 1 below is taken from Trebilcock at al., note 2 above, 757, and Kirkwood & Lande, note 51 above, 198.

¹¹⁸ Taylor, note 26 above, 8. Market equilibrium is realised by the intersection of consumer demand and producer supply, that is, the equilibrium price P_c and quantity Q_c occur where the level of supply meets the level of demand such that an equilibrium number of market transactions occur.

significantly raise prices without losing any customers, assuming of course that there are very low supply-side substitution possibilities and every other thing being equal.¹¹⁹

Comparing a dominance scenario (P_a) with a perfectly competitive market (P_c), we observe that the consequences on welfare are significant. First, the reduction in output causes a correlative increase in price. Secondly, as a result of this increase in price, consumers on the demand curve between ' P_c ' and ' P_a ' are priced out of the market and forced to reallocate their expenditures to less preferred forms of consumption even though production costs (MC_1) are much lower than what they were willing to pay for the goods. The effect of this is the dead weight loss triangle which corresponds to an allocative inefficiency in the sense that resources on the market are no longer being allocated at their true or optimal value.¹²⁰ Thirdly, the consumers who remain on the demand curve above ' P_a ' are also forced to transfer part of the 'consumer surplus'¹²¹ that they would have gained had the market been genuinely competitive for the dominant firm. The surplus (consumer) corresponds to the rectangle between ' P_c ' and ' P_a ', and is the source of a controversy to which we will return in the next part. Nonetheless, this transfer of wealth from the consumer to the producer has a distributional effect but differs from a misallocation of resources such as in the case of the dead weight loss, yet can be a misallocation of resources. This may be the case when a dominant firm seeking exorbitant profits engages in socially wasteful investments, such as attempts at influencing some government measure or policy in its favour, that will raise prices and cause the transfer to be a misallocation of resources.

Fourthly, a dominant firm abusing its market power may also discriminate by charging different prices to inelastic customers on the demand curve above ' P_a ' and to the more elastic customers between ' P_a ' and ' P_c ' such that it would charge each customer on the demand curve a different price depending on his/her purchasing power and reap the entire consumer surplus under the

¹¹⁹ With the increasing role of economics in abuse of dominance cases, determining whether a dominant firm effectively exercises its market position does not only depend on whether the dominant firm's market share reveals a likelihood of unilateral or collusive abuse. The scale of market barriers to entry is also determinant and it depends on factors such as regulatory barriers, trade barriers, intellectual property rights, minimum viable scale of entry and the extent of entrants' sunk costs, access to critical inputs and distribution channels, and customer's switching costs.

¹²⁰ The concept of dead weight loss or allocative inefficiency refers to the fact that transfers of income necessarily cause inefficiency. The implication is that what is involved in the transfer is not just that some parties (consumers) will lose while some others (producers) will gain but rather that the society as a whole suffers a net loss. Put differently, the gains to the beneficiary are always smaller than the costs suffered by the losers because the transfers of income modify behaviour.

¹²¹ See Luis Cabral "Introduction to Industrial Organisation", MIT Press (2000) 16. 'Consumer surplus' is the difference between what something is worth to consumers and the price they pay for it.

demand curve and above 'Pc'.¹²² Though this type of perfect price discrimination may seem theoretical, a firm that in practice holds a dominant position in several markets across state borders may come to the same result in practice. That is, through strategic rebranding, it may sell its product at different prices to different customers in different geographical locations without really increasing output.

Finally, assuming that when moving from 'Pc' to 'Pa', the dominant firm manages to simultaneously reduce its production costs from 'MC1' to 'MC2' through economies of scale and scope, and that the savings resulting therefrom are reinvested into other areas of the economy, the move will generate opposing welfare effects. We will consider only one of them because the argument regarding dynamic inefficiency¹²³ is mostly common among state owned enterprises where, because of the monopoly rents they enjoy, they become sloppy and lack incentives to innovate. The prevalent effect is that the dominant firm will realise, through its savings on resources, productive efficiency¹²⁴ gains though the social welfare implications of the dead weight loss will still exist. The concern from a competition policy perspective then becomes one of knowing, if the efficiency gains of the dominant firm exceed the dead weight loss, that is, whether

¹²² While making such a move will require increasing output and thus eliminating the entire dead weight loss, it will also require knowing each customer's reservation price, which is highly unlikely in the real world.

¹²³ Dynamic efficiency, however, refers to the rate of technological innovation. It ensures that over time, producers continually develop better technologies at reduced costs because innovative technological improvements will increase the rate of realisation of productive efficiencies.

¹²⁴ Neoclassical microeconomic theory distinguishes three types of efficiencies: Productive efficiency is obtained where production is at the minimum possible total cost with available productive resources. It involves the use of both cost minimising inputs and maximum efforts to ensure cost minimisation. An improvement in productive efficiency will reduce production costs and shift the supply function of the market to the right and consequently the total surplus will increase.

Allocative efficiency is realised when resources are allocated to their highest valued use among competing uses through market processes. Improving allocative efficiency leads to products being allocated to more valued uses and will increase welfare. Producers will allocate products to those consumers willing to attribute the highest value to them, thus maximising the welfare of both producers and consumers (total surplus).

¹²⁵ Though economists use 'efficiency' as a sort of 'state of Pareto efficiency' - which designates a state of society or situation where it is impossible to make a Pareto improvement, that is, it is impossible to make a reallocation of resources that would increase the welfare of at least one person without decreasing that of any one else - the Kaldor-Hicks Efficiency (KHE) or principle is more practical and preferred as it allows compensation of losers when moving from one state to another. Under this criterion, a social state S1 is KHE relative to S2 just in case the winners in the move from S1 to S2 could compensate the losers such that no one would be worse off and at least one person would be better off. What matters is whether the winners gain enough to compensate the losers (and no attention is given to all other costs associated with actually making the compensating transfer) and there is enough left to make the move profitable to the winners. Note that it is harder to tell whether a move from one social state or situation is KHE than to tell whether it is Pareto superior, with or without compensation, because we need some way of telling whether the gains to the winners are large enough to finance hypothetical compensation to the losers. Postema argues that '...unless we make interpersonal comparisons of gains and losses, this may be impossible to do'. Nonetheless, Law & Economics theorists propose to overcome this difficulty by approximating all gains and losses to be measured in monetary units. See Gerald Postema, 192, note 16 above.

the underlying conduct or agreement that lessens competition would still be considered to have a negative effect on society. The legal concern, regarding the validity of an efficiencies defence,¹²⁶ for example, would thus depend on whether the social welfare implications are measured based on a consumer welfare or a 'total surplus'¹²⁷ standard. Some have argued, with regard to mergers, that depending on the elasticity of demand and the total surface area of the deadweight loss, where the post-merger dominant position is obtained as a result of a fairly small reduction in average costs, the net allocative effects of the merger would only be negative if the price increase was relatively high.¹²⁸ This argument suggests that where the effects are positive, the merger should be approved, based however on an evaluation under the total surplus standard, that is, an aggregation of both consumer and producer surplus but circumscribed within the confines of the domestic economy only and in total disregard of the ravaging effects on foreign consumers and the global welfare.

These are not however, the only concerns with an abusive market position, other legal concerns with market dominance stem from non-economic aspects such as the political effect of excessive concentration of economic power in the hands of a few, or the aim of protecting small businesses from anticompetitive practices. These other concerns however tend to be limited - given the underlying assumptions about government interventions and their effects on the social goal of efficiency - in the sense that enforcing them through competition would not lead to consumers having to be priced above competitive levels. It is thus often suggested that the least disruptive way

¹²⁶ We have seen above, note 45, in the Canadian case of *Commissioner of Competition v. Superior Propane Inc.*, that this efficiency defence involves making a trade off wherein the allocative efficiency implications of the economies are weighed against the market power implications of the merger that lessens competition. Put differently, the courts have to approve a merger which substantially lessens competition if the merging firms prove that the merger would substantially increase real efficiency in production and distribution. We also showed that when competition law is applied extraterritorially, while businesses operate in foreign markets, this approach leads to irreconcilable conflict with trade laws as it favours discrimination in favour of national champions, but given divide between both fields nothing can be done in the current state of the law.

¹²⁷ It is the aggregation of the cost savings realised as a result of the reduction costs and the dead weight loss, that is, the maximisation of the sum of producer and consumer surplus.

¹²⁸ Oliver Williamson, 'Economies as an Antitrust Defence Revisited', 125 *University of Pennsylvania Law Review* Issue 4 (1997) 709.

to tackle these problems is through lump sum wealth transfers through direct taxation or other policy instruments rather than through competition policy.¹²⁹

We must also underline here that despite the fact that an economic analysis of the welfare implications of abuse of dominance reveals a bias towards those effects that primarily impact consumers, and should not hasten to conclude that '[c]ompetition policy is thus primarily concerned with protecting consumer welfare, not preserving some given state of competition or number of competitors'.¹³⁰ Caution against this view is warranted because if the aim of such an argument is to seek alignment or consistency with liberal trade policy on the assessment of the global welfare effects of private restrictions on competition, one must not fail to understand that this contention is at best dubious because it relies on a concept that is subject to conflicting interpretations. Thus, stating that competition laws are '*[c]onceived of as consumer protection legislation, ...[and] should not normally be encumbered with other policy objectives such as protecting small businesses, or industrial policy concerns such as promoting 'national champions' , or democratic political objectives'*',¹³¹ is problematic because of the underlying assumptions regarding the predetermined social goal the law is expected to preserve.¹³²

It is also worth pointing out that while the express possibility is given to less developed countries, rationalised as Special and Differential Treatment under article XVIII of the GATT, to raise their consolidated tariff rates in view of attaining economic objectives such as protecting infant industries, it is doubtful that this new and shifting view regarding the sole purpose of competition laws being about protecting consumer welfare settles the underlying wealth distributional issues that form the crux of the problems currently blocking the negotiations for a viable international economic order, currently stagnant within the Doha Round.¹³³ Trebilcock et al.

¹²⁹ see Taylor, 26. He points out that social choice theory, based on the 'Second Fundamental Theorem of Welfare Economics' - which suggests that an economy may select which general competitive equilibrium it will achieve by way of lump sum transfers of welfare between individuals - relies on social justice theories to locate the socially optimal point on the grand utility possibility frontier (GUPF), then he goes on to note that competition laws do not operate in a constitutional, political or social vacuum and thus complement the overall set of laws and regulations that aim to promote the general interest. He concludes that welfare distributional issues weigh heavily on government policies and are motivated by diverging concerns from one country to another and yet is not bothered that, 'competition laws in almost all jurisdictions are recognised as primarily intended to increase economic efficiency by promoting and maintaining competition. See also Taylor, at 28.

¹³⁰ See Michael Trebilcock, note 2 above, 758.

¹³¹ See Ibid.

¹³² We have already seen with Dworkin that the standard of efficiency is not a value worth pursuing for its own sake as a public good which the law has to pursue as the only goal of competition law. see Dworkin, note 116 above.

¹³³ Though competition issues were taken out of the Doha Round agenda, the main obstacle to its inclusion was and is still the lack of any sense of community binding the members of the organisation, and this weakness is essentially one that the WTO must reckon with if it ever will survive the deadlock that the Doha Round is facing. The problems are interlinked.

interestingly draw our attention to these views or perspectives on the debate over the ‘effects on consumer welfare of particular practices in particular cases’ while at the same time pointing at the very hegemonic states, such as EU member states and US, that have consistently played or allowed the cheating game to be played globally over the past centuries. Whereas protecting infant industries, and adopting measures to better embed the promises of economic globalisation into the material and social environments of those suffering the iniquities of the international trading regime is denounced today, by those same states that have had the privilege to implement the same policies, sometimes with brutish force, we observe that the rules that outlaw such policies do not result in the dominant states really abandoning their privileged-use. The rules are construed such that without ever foregoing a behaviour that is considered illegal, the system would still function ‘efficiently’ if the illegal behaviour is analysed only within its specific context and in abstraction of historical antecedents. The normative stand that labels the protection of infant industries, and other social policy objectives as not relevant for the purposes of determining the goals of competition law, opens room for the generalisation of the idea of ‘consumer welfare’ as the sole *raison d’être* of competition law. Kirkwood and Lande have demonstrated that ‘consumer welfare’, as postulated by those who equate it with an economically efficient means to maximise the said ‘consumer welfare’¹³⁴, assume that the wealth extracted from consumers and transferred to firms with dominant positions on the market is the most efficient means to better serve the welfare of consumers, comprising collusive or single abusive dominant firms.¹³⁵ This is so because by not distinguishing between “real” consumers, that is, all purchasers of goods and services, and dominant firms that raise prices and extract wealth from the purchasers, it becomes easy to conclude that the extracted wealth from purchasers is transferred any way back to ‘consumers’ given that it is the most efficient way to maximise welfare. For this reason, we should be cautious about ‘Orwellian’ representations that serve no other purpose than to deny the rights of the ‘real’ consumers to their surplus.¹³⁶ The geometrical representation of the positive and negative efficiencies that constitute the total surplus minus losses might be an efficient indicator of the increase in global wealth, but it is deficient in that it allows wealth to be transferred and distributed

¹³⁴ Robert Bork, ‘Legislative Intent and the Policy of the Sherman Act,’ 9 *Journal of Law & Economics* (1966) 7. He argued that when the US Congress debated and passed the Sherman Act, its sole concern was to increase economic efficiency. He assumed that if the only harm to consumer welfare that can result from higher prices or reduced output is economic inefficiency, then disdain for market power can only stem from a concern about economic efficiency. Based on this assumption, he concluded that antitrust law must only be concerned about ‘consumer welfare’ which he equated to the ‘maximization of wealth or consumer want satisfaction’ and the aggregate efficiency of our economy.

¹³⁵ See John Kirkwood and Robert Lande, note 51 above, 199.

¹³⁶ *Ibid*, 199.

among producers and purchasers without any regard to proportionality or the plumbing of the structure. While most of the assumptions made above hold true in domestic economies, none of it applies to global markets, except of course when some dominant state feels affected. This also points to the lack of any sense of community in global markets despite the contributions of so many individuals and societies in the resource production cycles of multinational corporations operating global commodity chains across the globe.

Engaging with the Neoclassical Economic Rationale to Trade Law

The vocabulary of international trade law suffers from similar ambiguities in articulating the underlying principles into the domestic societies of the trading nations. The Most Favoured Nation (MFN) treatment principle that constitutes the other arm of the non-discrimination principle under article I and III GATT, expresses the idea that cooperation with other trading nations is beneficial to all members, to the extent that it promotes mutual growth for the cooperating nations. Once concessions are exchanged, any more favourable treatment accorded to goods and services from any party is unconditionally and immediately extended to like goods and services from all the other members. Neoclassical economists consider that discrimination between foreign suppliers distorts the proper functioning of markets by raising transaction costs and causes misallocations of resources by inducing a shift of resources toward relatively less efficient producers being favoured and away from the disfavoured, but more efficient producers. Hence, they claim that governments should not interfere with the market process of allocation of resources, as it is already efficient at properly allocating resources on its own, notably when transaction cost are null,¹³⁷ which unfortunately is never the case. The MFN principle itself testifies to its *raison d'être*, which is to dissuade free riders and parties renegeing on their agreements or refusing to bear the costs of making and enforcing concessions. However, in performing this function, it entertains exceptions that have negative and positive effects. The most troubling of the exceptions is article XXIV GATT. It permits the formation of regional trading agreements or blocs under various denominations such as Customs

¹³⁷ See Ronald Coase, 'The Problem of Social Cost', *Journal of Law and Economics*, Vol. 3 (October, 1960) pp. 1-44, 10, 44. He came up with the idea that since market exchanges are wealth maximising, and thus also Pareto optimal, when the cost of market transactions are null (that is, the pricing system is assumed to work smoothly) and individuals - just like states - act rationally in their best interest, any assignment of rights or any allocation of entitlements to resources will necessarily be efficient. The reasoning being that, where two individuals, for example, are capable of bargaining for a product (or a right for that matter) without any costs attached to the bargaining process, in terms of efficiency, it will not matter which of the two individuals gets it, because if the one who gets the product values it most, then the allocation is already efficient, and if the owner happens to value it less, then there must be some amount of money that the other individual will be willing to offer and the owner will be willing to accept it and make the transfer so that, in the end, the product will still go to the individual who values it most.

Unions (the EU, or example), Free Trade Areas (FTA) and Preferential Trade Agreements (PTA), some of which strongly resemble ‘cartel-like’ clubs for states wherein the dominant spirit is mercantilist and imperialist. The effects of these regional or economic blocs are positive when they generate trade among the members while not causing the average level of pre-agreement duties and other restrictions to rise vis-à-vis the general membership of the covered agreements. Nevertheless, they can also operate to divert trade, from one or more states toward preferred partners and away from disliked states thereby reintroducing discrimination into the multilateral trading system causing substantial damage to global welfare.¹³⁸ Even if substantially all trade is by the same token liberalised between the parties to the preferential agreement, the effects on the rest of the trading partners is crippling, and hence facilitates abusive practices towards producers and consumers in the disfavoured states. Thus, despite the concessions which the victim of the trade diversion has made, it loses its comparative advantage to far less efficient producers who will generate enough efficiency savings until they can sell at prices lower than offered by firms in the discriminated state.¹³⁹ This shows that patterns of specialisation and comparative advantage are not static, but conscientiously engineered by government policies concerned about domestic welfare, and with no regard to the proportion of factors of production available in other states.¹⁴⁰ With higher domestic prices, despite advantageous factors of production - low-wages, natural resources and so forth, domestic consumers rather transfer resources, not to domestic producers with whom they share a common fate, but to foreign firms, and their welfare is not taken into account by the foreign state whose private firms reap all the gains from the exchanges to the benefit of their domestic interests.

¹³⁸ See notably the initial phase of European regionalism - with European Economic Community (EEC) in 1957 - which was relatively turned towards inward trade thus diverting trade from low-cost suppliers from outside the community and replacing them by high-cost suppliers within the regional bloc. The same applies to the European Free Trade Area (EFTA). See O’Brien & Williams, 178-9, note 4 above.

¹³⁹ Then eventually they will seek national treatment for their exports in the affected states, and thus locking them into a vicious cycle of unrealistic development promises that look more like a carrots hanging from a stick attached to a donkey’s back. See for example, Theotonio Dos Santos, ‘The Structure of Dependence’, 60 *American Economic Review*, 2 (1970) 231-6.

¹⁴⁰ To illustrate this with past historical events, taken from O’Brien & Williams, 260, note 4 above. Given that, the liberal ideology that posits that the benefits of the division of labour and liberal policies flow down to the lowest members of a society, without accounting for the source of the division of labour, it likely assumes that the triangular transatlantic trade resulted from a natural division of labour whereby the Europeans exchanged manufactured cloth and guns for African slaves. The slaves forcibly shipped to the Caribbean and US plantations produced raw materials and goods sold at supra-competitive profit margins in Europe and farther East. Raw materials such as cotton were then transformed into textile in Europe and sold with similar margins. This division of labour increased productivity and stimulated the industrial revolution. It seems doubtful that the process which resulted in the African continent specialising in slaves, the Americas specialising in raw materials and Europe in manufacturing was not simply a product skills differentiation.

This exception thus casts doubt on what Ricardo had in mind regarding the sources of comparative advantage, because if discriminatory and abusive practices by private firms can neutralise the comparative advantages of the trading partners, it would not make sense to limit it to natural endowments in factors of production or even the abundant factors. It would be legitimate for the discriminated states to adjust and structure their productive resources such that at some point in time, domestic producers also compete with imported products and eventually export products that utilise their abundant factors of production. A dynamic approach to international specialisation and comparative advantage, coupled with the fact that the actual trading is not done by states but by private firms across borders, leads to the welfare of foreign consumers being sacrificed and their wealth transferred to supposedly more efficient foreign firms, such that, overall, there is an increase in global wealth that is not evenly distributed among the trading nations.

A fact of life today therefore is that globalisation, marked by fast economic integration, has rendered national comparative advantages even more volatile. Increased integration in world financial markets and firms' ability to break-up their transactions into global commodity chains coupled with convergence in technological know-how among industrialised countries locked in intellectual property rights has tightened competition among firms operating in networked-markets stretching beyond national borders.¹⁴¹ These changes further accentuate inequality between trading nations. The MFN principle thus impacts world income distribution in favour of 'advanced' or 'cost-efficient' states with a head start even though it yields positive effects on world production. Thus, a small country that has no economies of scale on its small market, and factoring in transportation cost, will always be faced with its exports being less competitive, even where special and differential treatment is granted to attenuate the effects of MFN tariff bindings. This will always be so, as long as developed countries keep priorly acquired power positions and prevent the implementation of policies that gave them the head start in the first place.

Having seen the objectives and rationales of international trade and international competition law and policy and how nation states have perfectly integrated both fields in their domestic economies, it becomes evident that there is a gap in the architecture of international economic law. International trade law may not yet be as inclusive as it ought to be but significant, and ongoing, progress has

¹⁴¹ Jagdish Bhagwati, 'The Global Age: From a Sceptical South to a Fearful North', in "International Economic Regulation" ed., Jane Kelsey, note 14 above, 266. Bhagwati argues that the margins of competitive advantage have reduced to the extent that 'a small shift in costs somewhere can now be deadly to [firms] competitiveness' due to their common pool of technology and capital, and as well as their capacity to delocalise. He concludes that as a result of this fierce competition, slight shifts in costs can now lead to shifting comparative advantage and this causes firms to be wary of differences in domestic policies as possible sources of their fragilised competitiveness vis à vis foreign producers.

been realised through the harmonisation of international trade law and policy under the auspices of the WTO system as supervised by its Dispute Settlement Understanding. International competition law however, has remained a prerogative of nation states, and notably the most powerful ones, without any review mechanism regarding the way states, short of common substantive rules, discipline or condone abusive or exploitative practices against foreign small businesses and consumers despite the fact that the global economy has irremediably linked the fate of all partaking in global markets. The absence of a coherent and constraining multilateral global competition law regime exacerbates the current defects of the multilateral trading system and widens the inequality gap among states.

Part III Multilateral Competition Law and Policy in the Global Economy

All past efforts at adopting multilateral rules on competition will not be reviewed here, but we will selectively mention a few that were made at various points in time, within the GATT and subsequently the WTO, simply to show that the issue has always been, in one way or another, under discussion.

Prior to the GATT, in the early 1920s, there had already been designs to use law to protect the process of global competition within a bigger framework of developing an international community around the global economy.¹⁴² It was hoped that a rules-based community would prevent the disasters of the Great War from happening again and stimulate international trade and recovery.¹⁴³ The idea of a global economy with an underlying community project to ensure that norms were established and respected, understood the global economy to be the primary problem the international ‘community’ had to tackle in order to quell the tensions that were rising around political and economic institutions involved in international trade.¹⁴⁴ Cartels were already then perceived as causing harmful effects that needed to be controlled. At the time, the only states

¹⁴² The idea of competition law on a global scale was first recognised at the World Economic Conference held in Geneva in 1927 under the auspices of the then League of Nations in which over fifty states took part. The conference focused on reducing governmental and private barriers to international trade.

¹⁴³ Here, Eurlich’s concept of ‘living law’ - that is, social norms that mirror or substitute in experience for the categories and functions of state law - as opposed to official juristic law of the state (which is some times ineffective) takes all its importance. He aimed to show that the authority of state-based laws, for legitimacy sake, permanently need these social norms for cultural and political relevance and grounding or for rootedness in relations of a community, and in interpersonal, or intergroup social and economic relations. The hope was therefore that a rules-based community will be imbued with social norms that would create ‘warm communal bonds’ rather than strife. See David Nelken, ‘Eugen Ehrlich, Living Law, and Plural Legalities’, *Theoretical Inquiries in Law*, vol.9(2),(2008) 444.

¹⁴⁴ See David Gerber, note 21 above, 20.

actively involved in foreign trade were hegemonic states whose colonies provided free or cheap resources they used to consolidate their dominion over certain peoples, while gradually cooperating with other imperialist states to formulate and implement rules to embed global markets into their domestic economies. It was not until the 1960s, when a greater number of newly liberated peoples won back their autonomy and gained sovereignty, that they discovered the role they would come to play in the new layout of the global economy of which they once were an essential pillar. The community project of the 1920s did not withstand the economic and political crisis that ensued and agreement could not be reached on a normative regime for international cartels.¹⁴⁵

Economic perspectives were rather ambiguous about cartels, considered as partly beneficial and partly harmful, and especially neoclassical economists, viewed them as harmful because they concentrated market power, distorted the economic system and rendered markets inefficient.¹⁴⁶ Other economists, notably institutional economists, agreed to the harmful effects of cartels but recognised that harm did not only result from impaired economic efficiency and disadvantaged consumers, but also from harm to producers, employees or domestic economic welfare.¹⁴⁷ The conference therefrom concluded that it was premature to establish an international regulatory regime with divergent national attitudes towards cartels. Others situated the debate over major systemic and historical questions, regarding the tension between capitalism and socialism, and the difficulty of locating a specific national economy or the global economy within the larger frame of historical evolution, on issues such as possible changes in the relationship between capital and labour.¹⁴⁸

The economic conundrums were further exacerbated by the tense political context which naturally reflected the fragility of the idea of ‘community’ and thus were intertwined in economic, political, social and cultural issues such as determining the level of cohesion between the international community and domestic communities. Interdependence and solidarity among states and peoples was however seen as the only way to effectively deal with the problems facing Europe and the world, and the problems posed by international business and cartel arrangements were considered elements of global order, and not only economic quibbles.¹⁴⁹

¹⁴⁵ Ibid, 29. The main views at the conference were that cartels are both beneficial and harmful and while some sought to control them, others feared such efforts would instead limit their benefits and deter their formation. ‘Good cartels’ were those that shared their supra-competitive profits with labour movements and did not raise consumer prices.

¹⁴⁶ Ibid, 33. Note that their concern already then was only about efficiency.

¹⁴⁷ Ibid, 32.

¹⁴⁸ Ibid, 34.

¹⁴⁹ Ibid, 34.

Further attempts were made towards a multilateral competition framework but the same divides have animated all subsequent endeavours to control cartels on global markets on a community basis. However, a comprehensive initiative for a global competition law agenda, embedded in a wider and more ambitious program, led by the US, resurfaced after the Second World War. The Bretton Woods program aimed to create an international system of institutions to provide a framework for the global economy and for political development.¹⁵⁰ The Havana Charter embodied the creation of one such institution, the International Trade Organisation (ITO) which comprised a code on Restrictive Business Practices (RBP) that were at the time widely hailed as nefarious for the global economy.¹⁵¹ Despite high hopes that the success of the Charter would correct the economic policy mistakes of the previous decades and spur international competition throughout the world while maintaining under legal control the major economic powers of the time, it never lived to be implemented due to lack of support on the part of the US, that had assumed the leading role for the Bretton Woods program. The United States Congress had considered that the ITO would unduly interfere with its domestic political sovereignty.¹⁵² Though the US did not contribute to the drafting of the code on RBPs, they were well aware of the exigencies of a competition law regime given their greater experience with such laws and the purpose they served in the domestic economy and they had been willing to have it approved. So the Charter attempt failed not from lack of support for the principle that the code on RBP was a desired and necessary mechanism, but for unrelated geo-political and national incidents that ensued, notably the Cold War (and its aversion for ‘community’) and the withdrawal of US support for equally unrelated reasons.¹⁵³

What is of note is that, the policy makers at the negotiations had agreed, that governmental efforts to lift market entry barriers would be pointless if efficient foreign producers could still be prevented from accessing markets by illegal private or hybrid restraints to trade. The Draft Charter proposed by the US had even advocated stricter controls on international RBP. It provided a rebuttable presumption for considering certain conducts anticompetitive, comprised of price fixing, market division, abusive arrangements, abuses of intellectual property rights and a comprehensive ban of any business practices that restrained competition or market access by abuse of dominance. It even contemplated the Charter under the supervision of the ITO, and granted standing for private

¹⁵⁰ The Bretton Woods Conference of July 1-22, 1944, held in New Hampshire (USA) that established the liberal trading and payment system, and which also facilitated and structured the development of transnational production.

¹⁵¹ Ibid 37.

¹⁵² Michael Trebilcock, note 2 above, 761.

¹⁵³ David Gerber, note 21 above, 52

parties and member states, with directive powers over actions to rectify practices it considered harmful.

The revised draft charter that became the Havana Charter however maintained some of the bite of the US proposals. Chapter five of the Charter clearly anticipated the interplay of trade-related prohibitions and specific disciplines on RBP and a ‘rule of reason’ approach to the effects of these practices on International trade.¹⁵⁴ The right to petition the ITO for investigatory measures was however reserved to states and the ITO could make recommendations, requesting the breaching party to take every remedial action possible to conform with both the request and its obligations under the Charter. It obliged member states to *‘take appropriate measures and ... co-operate with the Organisation to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives set forth’* in the charter.¹⁵⁵

Parties could also request consultations, investigations and decision-making and were likewise required to provide, on request, all information to the ITO for hearings, and it could publish its findings. However, there was a two-third majority vote from the members to be reached for the ITO to determine that a conduct or practice at a specific instance was a RBP.¹⁵⁶ States also had to pass competition legislations to the same effect.

Nonetheless, the multilateral competition law project resurfaced in the 1990s. The wide support for constructing an international competition regime for the global economy manifested itself within the present WTO system as it evolved from the GATT - and would likely continue to resurface until the project is completed. In spite of the great commitment to trade liberalisation among the twenty-three states which had bypassed the ITO project to form the GATT, the GATT was conceived as an interim stand alone agreement and did not contain any provisions on anticompetitive trade practices.

The GATT founding states had set up a complex mechanism for the progressive reduction of tariffs and quantitative restrictions to trade and there was no link between competition law and trade law, despite all having been involved in previous attempts to embed the global economy into societies through a rules-based regime. The specific objective of the GATT, to liberalise trade as a

¹⁵⁴ Article 46(3) (a) - (f).

¹⁵⁵ Article 46(1) Havana Charter, contained in the Final Act of the United Nations Conference on Trade and Employment signed in Havana on 24th March 1948, [UNDoc E/Conf.2/78](#) available on the WTO website.

¹⁵⁶ Martyn Taylor, note 26 above, 152.

means to enhance the wealth of all nations, certainly had a different implication at the time, given the overall distribution of global wealth and access to resources among the Contracting Parties. Most of the developing world, especially, Latin America, Africa, the Indies and many other territories and peoples, were under some form of domination, exploitation, oppression and abuse from the industrialised states. The initial attempts at a community-based global competition law framework faltered mostly because of the absence of any sense of ‘community’ regarding the distribution of wealth generated through international trade between the industrialised states and the dominated peoples and nations. One might assume that the basic principles of the GATT intended to maintain the status quo as it was, while through trade-related prohibitions, establishing a non-discriminatory regime for exchanging and sharing market access concessions into foreign markets. The GATT non-discrimination principles obliged each member to immediately and unconditionally extend the same favourable treatment that it had accorded to any other member, and obliged each of them to treat all imports no less favourably than like domestic goods. The GATT eventually gained momentum through successive rounds of negotiations and further disciplines on non-tariff barriers were added such that at the closing of the Uruguay Round it was a fully functional institutional mechanism for regulating international trade.¹⁵⁷

However, efforts to introduce competition law within the WTO were ongoing through out the GATT years and beyond.¹⁵⁸ The multilateral competition law project resurfaced within the WTO without having lost the support of the member states on the necessity of a competition regime for the global economy. This time however, the situation was slightly different, it was not so much about the same political and economic rhetoric over the control of abusive agreements because of their effects on the efficiency of global markets, or other related policy areas that equally had to absorb the effects of global competition. Nor was it about its importance to the survival of the interdependent communities that partook in social cultural, political and economic relations but remained marred in tensions, violence, oppression and war. The WTO had by then restructured and formulated concrete disciplines on most of the conflict generating aspects of international trade and managed to secure wide market access opportunities for the Members and had promised growth to all nations involved in liberalised trade. There was thus hope that the gains from global trade would trickle down to empower all trading states.

¹⁵⁷ Consisting of several agreements, among which the GATT, TBT, SPS, SCM, AA, TRIPS, GATS and other plurilateral agreements came to be englobed as ‘the covered agreements’.

¹⁵⁸ See Taylor, note 26 above, 155. He gives an account of various initiatives thought out the 1950s, 1960s, notably the Commission of competition law expert report on article XXV and the 1960 Resolution to cooperate in competition law issues.

More so, the very ambitious Doha Round of negotiations launched in 2001, with the objective to improve the trading prospects of developing countries,¹⁵⁹ took over the ‘Singapore Issues’ initiated in 1996 among which featured the question of the interaction between trade and competition policy, even though it was only to abandon it three years later.¹⁶⁰ Some commentators have observed that developing and least developed countries were cautious regarding the ‘Singapore Issues’ in reminiscence of the dupery they felt was dealt on them in the negotiations leading up to the TRIPS agreement and thus were not forthcoming with the idea of a multilateral framework for competition within the WTO that might slip towards becoming an instrument for deeper market access.¹⁶¹ Developed countries, equally marked by differences in their domestic competition regimes, further widened the fracture line on the desirability and practicality of a comprehensive multilateral framework on competition law and policy, and on the adequacy of the WTO to harness such a framework.¹⁶²

WTO Rules Impacting Competition Law and Policy

Despite insufficient consensus over the interrelation of competition and trade policy, by the Uruguay Round, a limited number of competition-related provisions had been introduced in some agreements¹⁶³ or as specific commitments under the covered agreements¹⁶⁴ and some pre-existing

¹⁵⁹ The Doha Development Agenda was officially launched at the WTO’s Fourth Ministerial Conference in Qatar in November 2001 with a work programme comprising about 20 areas of trade with the aim to achieve major reform of the international trading system through the introduction of much lower trade barriers and a revision of the trade rules. The Working Group on the interaction between trade and competition policy was charged to focus on clarifying the core principles, notably transparency, non-discrimination and procedural fairness, and provisions on hard core cartels, modalities for voluntary cooperation and support for progressive reinforcement of competition institutions in developing countries through capacity building while also taking account of their needs and providing appropriate flexibilities to address them.

¹⁶⁰ See the General Council’s decision on the Doha Agenda work programme (the ‘July Package’) adopted on August 1, 2004 wherein the ‘Council agrees that these issues, mentioned in the Doha Ministerial Declaration in paragraphs 20-22, 23-25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round.’ WTO Doc. WT/L/579 .

¹⁶¹ See Frédéric Jenny, closing remarks in Organisation for Economic Co-operation and Development (OECD) “Trade and Competition: From Doha to Cancun”, Paris, France: OECD (2003) 68. It is worth noting that calls for the integration and harmonisation of domestic intellectual property regimes that led to the TRIPS agreement can also justify demands for a similar harmonisation of domestic competition laws, and it is rather unfortunate that the ‘disappointing experience’ developing countries had with the TRIPS negotiations has negatively affected progress with the ‘Singapore issues’ despite the strong link between competition policy and their economic and social development objectives.

¹⁶² See the ‘Report of the Working Group on the Interaction Between Trade and Competition Policy to the General Council’, WT/WGTCP/2, 8 December 1998, paragraph 94, 32.

¹⁶³ See for example, article 40 TRIPS and article VIII GATS.

¹⁶⁴ Notable specific commitments are: the telecommunications Annex under the GATS, The Telecommunications Reference Paper on Regulatory Principles.

GATT rules had been interpreted by WTO jurisprudence as disciplining specific anticompetitive practices. Of these provisions, article III GATT in particular has often been interpreted by panels as requiring equality of competitive conditions.¹⁶⁵

While it is certain that the National Treatment (NT) Principle prohibits the adoption and application of laws, comprising competition laws, regulations, requirements, and to some extent decisions of domestic courts or competition authorities, that discriminate between foreign and domestic producers of like or directly competitive products, it is highly unlikely that this NT obligation can prohibit discrimination between foreign and domestic consumers as it ought to be in a deeply integrated global economy.¹⁶⁶ This observation stems from the manner in which the comparative advantage theory came to be implemented in the GATT through the non-discrimination principles which focus on effective market access rather than competitive markets in the absolute or consumer welfare.

With regard to trade in goods, for example, it provides that each party must not discriminate against imports once they have crossed the border by treating them less favourably than domestic products with which they are in direct or indirect competition in the importing domestic market. As the GATT only envisaged a progressive reduction or elimination of tariffs or other border measures, it conceded a wide discretionary margin to states in the determination of the extent to which they provided market access rights to foreign producers.¹⁶⁷ A risk thus remains that a party may undermine or reduce the value of its concessions by subsequently adopting substitute policies that have trade restricting effects comparable to the tariff rates it had previously bound itself to reduce. Thus in the absence a general free market access rule to discipline domestic policies that affect trade, the NT principle only tries to accommodate this risk that substantive domestic policy choices may undermine prior concessions while, at the same time, purporting to control the risk that such policies would discriminate between domestic and foreign producers of like or directly competitive products. This delicate balance between regulatory autonomy and equality of competitive conditions for foreign producers has subjected the NT principle to a number of intriguing interpretations which point to its inadequacy to serve the objective of constructing a community-

¹⁶⁵ There are many other provisions of the WTO that can impact the competition law concerns, but for space constrains, I will examine only article III GATT.

¹⁶⁶ The NT principle prohibits states from framing or enforcing their domestic competition laws, abuse of dominance, predatory pricing, vertical or horizontal restraints, so as to favour domestic producers over foreign producers of like or competitive products. See Trebilcock et al., note 2 above, 768.

¹⁶⁷ Unlike other treaties such as the TFEU which grants a swiping freedom of movement of goods, services and capital and people, subject only to limited exceptions, the GATT however, and probably because of the failure of the ITO, never recognised general market access rights to foreign producers.

based global competition law regime.¹⁶⁸ The questions still open to interpretation regarding the equality of competitive conditions for imported products, revolve around the nature of the differences that serve as basis to the favourable treatment, which is applied to domestic products as opposed to the unfavourable treatment meted out to imports. Differences regarding the formal aspects of the products, their origin, physical characteristics and tariff classification often conflict with differences based on their Production and Processing Methods (PPM) and those based on intrinsic values such as the environment, labour and social conditions, and the necessity or not of protectionist intent.

This conflict reveals the bargain struck in article III, meaning, that the second best choice was to ignore the risk that a state exercising its autonomy may modify its concessions through domestic policies and thereby impose higher costs on other parties who will have to yield further concessions for having taken the risk of exchanging concessions in the first place. Alternatively, it can be understood as a ‘solution’¹⁶⁹ that constrains domestic regulators and democratic governments by stopping them from making substantive public policy choices and changes that reflect the preferences of the domestic popular opinion. Hence, it is assumed that public policy regulations that treat foreign products less favourably to protect competing domestic products are not necessary to attain legitimate public policy objectives. Meanwhile the same public policy regulations often discriminate in order to undermine tariff concessions or to obtain better odds on the global market at the expense of foreign consumers.

Leaving aside WTO provisions that have been given a pro-competition twist, the issue of trade remedies remains. Under article VI GATT, for example, introducing a product or category thereof into export markets at less than the normal price of the ‘like product’ in the home market of the exporting state, constitutes dumping to which a party may impose antidumping measures pursuant to article 2.1 of the Antidumping Agreement (ADA), where injury or threat of material injury is found in its domestic industry producing like products. This exception to the NT principle permits discrimination as it allows trade remedy laws to apply price constraints on imports that are not imposed on domestic producers of like or directly competitive products. As domestic producers are not being excluded from foreign markets by the exporting firm, it is hard to understand why competition laws on predatory pricing rules are not applied instead of trade remedies where harm to

¹⁶⁸ See Trebilcock et al., note 2 above, 768. They propose a modified NT principle along with limited extraterritoriality to bridge the trade and competition law gap. That is, for inbound commerce, foreign conduct is sanctioned extraterritorially when it adversely impacts either consumer or total welfare, and the sanction must not result in a violation of NT.

¹⁶⁹ As argued by public choice theory on ‘government capture’ or regulatory capture by special interest groups.

producers, in the trade law sense, is not at issue, and only an eventual harm to consumers is feared.¹⁷⁰ The wide margin that states dispose of once they are exempted from the NT principles allows them to consider that where the price advantage is unfair to domestic producers, trade remedies would apply to offset the price differential, with the added advantage of not having to apply domestic competition law extraterritorially and having to justify the interests being protected in the course of it. This regulatory margin given to governments regarding trade remedies leads to policies that protect producers in the domestic market and not in the best interest of domestic consumers, but it is assumed that the losses of the consumers are compensated when weighed via the total surplus method. Domestic self-interest is thus made to prevail despite its effect on the global economy.

Jurisprudential Interpretation of the National Treatment Principle

The general approach to the interpretation of the NT principle of the GATT establishes a distinction between the Principle of Non-protectionism (article III (1)), the internal tax measures to which it applies (article III(2)) and the internal laws, regulations, requirements and other public policies, except taxation covered by article III(2), subsidies and government procurement under article III(8) (article III (4) GATT). Given that article III(4) excludes from its scope tax measures - covered under paragraph 2¹⁷¹- we will focus only on the internal laws, regulations, requirements and other public policies that might affect or modify conditions of competition covered by paragraph 4. More so, article III(4) applies *mutatis mutandis* to market access commitments under articles XVII GATS and article 3 of TRIPS. Moreover, though article 31 (3)(c) and 32 of the Vienna Convention on the Law of Treaties (VCLT) qualify as customary international law under article 3(2) DSU, we may not exaggerate the interpretative powers of the WTO Dispute Settlement Body, comprising panels and Appellate Body, because the same article circumscribes its mandate to

¹⁷⁰ Trebilcock et al., note 2 above, 772. They suggest that applying trade remedies reveals an internal inconsistency in the roles of trade and competition law. They observe that trade law is about harm to producers excluded from foreign markets whilst competition law is about harm to local consumers. They advocate for the abolition of anti-dumping measures and the use of non-discriminatory domestic predation or abuse of dominance laws.

¹⁷¹ For a complaining party to succeed under article III(2) GATT, it has two choices. First, to claim under the first sentence of article III(2), that is, by showing that the domestic and imported product are 'like' and that despite the likeness, the latter is taxed in excess of the former. Secondly, the claimant may act under article III(2) second sentence, read in conjunction with article III(1) and the Ad Note to paragraph 2, and would thus have to show three things - that the two products are directly competitive or substitutable; that the two products are not similarly taxed; and that the dissimilarity in taxation operates so as to afford protection to domestic production. See Japan - Taxes on Alcoholic Beverages, panel report, WT/DS8 /R, WT/DS10/R and WT/DS11/ R (July 11, 1996) 96-2651; and Japan - Taxes on Alcoholic Beverages, Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (October 4, 1996) 96-3951)

preserving the rights and obligations of Members under the covered agreements such that interpretation ‘cannot add to or diminish’ them.¹⁷² Given the lacunae in the GATT 1994 text regarding international competition law, it is doubtful that any interpretative construction would be realistic for both violation and non-violation complaints.

With these limitations in mind, a complainant alleging a violation of the NT obligation resulting from a non-fiscal measure under article III(4) would have to show four things, presented as follows: the measure complained of is a law, regulation, requirement or public policy; that affects the internal sale, offer for sale, purchase, transport, distribution or use of domestic and imported products; that are ‘like’ domestic products sold on the domestic market, but; have been afforded less favourable treatment than to the ‘like’ domestic products.

Governmental measures need not take the form of a mandatory regulation in order to fall within its scope, what matters is whether the measure has an effect on the behaviour of the regulated private entity.¹⁷³ This broad conception of measures comprises *de facto* schemes which modify the equality of competitive conditions between like products. In the Kodak - Fuji film case,¹⁷⁴ the panel estimated that this broad conception included ‘actions by private parties that may be assimilated to government action.’¹⁷⁵ It held that informal pressure or ‘sufficient incentives or disincentives for private parties to act in a particular manner [could] potentially have adverse effects on competitive conditions of market access’ even if they are non binding.¹⁷⁶

In the Kodak - Fuji film case, the US had claimed that Japan had failed to provide NT to imported products because the individual and collective effects of its measures operated such that US (Kodak) film was treated less favourably than Japanese (Fuji) film.¹⁷⁷ The US could not prove that the relevant measures afforded less favourable treatment to Kodak film relative to the like domestic product - Fuji film, and the Panel concluded that the measures did not, *pima facie*, discriminate against the foreign film and thus were not, *de jure*, discriminatory as to origin.¹⁷⁸

¹⁷² See Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), April 15, 1994, article 3(2), Annex 2, Marrakesh Agreement Establishing the WTO, “The Results of the Uruguay Round of Multilateral Trade Negotiations: the Legal Texts (1994) 404, 405.

¹⁷³ Trebilcock et al., note 2 above, 155, citing the Panel report in US - Tax Treatment for Foreign Sales Corporations ‘FSC’ WT/DS108/R (October 8, 1999) 99-4118.

¹⁷⁴ Japan - Measures Affecting Consumer Photographic Film and Paper, WTO Panel Report WT/DS44/R (December 6, 1998) hereinafter - Kodak -Fuji film.

¹⁷⁵ Ibid, paragraph 10.373 - 10.376.

¹⁷⁶ Ibid para. 10.49.

¹⁷⁷ The US avoided expressly stating that Fuji’s behaviour was anticompetitive, but its claims implicitly alleged exclusive dealings, vertical foreclosure. The US also made a claim under article XXIII(1)(b) which will not be examined here.

¹⁷⁸ See Kodak -Fuji film, note 174 above para. 10.380 - 10.381.

However, it reasoned that the absence of *de jure* discrimination did not mean that the US could not demonstrate *de facto* discrimination by showing that the measures have a disparate impact on imports despite their apparent neutrality.¹⁷⁹ Yet, the US could not prove that the measures modified competitive conditions of market access such that it disproportionately affected imports.

The Kodak - Fuji film case reveals the difficulty of interpreting WTO basic provisions to cover private restrictive business practices and the limitations of trade law in general to address concerns not related to market access or non trade values. While some interpretations have been favourable to non market access concerns, competition law related concerns require effective authority, which panels do not currently have, to consider the welfare implications of restrictive business practices on foreign consumers. Even though the concept of 'no less favourable treatment' or equality of competitive conditions to market access, allows a margin of appreciation whereby even-handed measures whose differential impact results from legitimate policy considerations are not considered to violate NT, as opposed to the origin of the product,¹⁸⁰ the limitation of the domain of trade law remains.

The other claim made by the US in the Kodak - Fuji film case was that various alleged Japanese governmental and quasi-governmental measures, individually or cumulatively, had the effect of excluding US film from the Japanese market as they had a disproportionate adverse effect on new entrants, and thus nullified or impaired WTO tariff concessions in breach of article XXIII(1)(b) of the GATT.¹⁸¹ Under this provision the complaining party must not prove that the responding party has failed to perform a WTO obligation. It must however demonstrate that an alleged governmental measure adopted or encouraged by the respondent has impaired or nullified the legitimate expectation of a benefit which would have accrued from previous concessions it had made under the WTO.¹⁸² The Panel, consistent with its examination under article III(4), decided that the Distribution and Promotion Countermeasures, and Large Retail Store Laws were governmental 'measures'. However, despite finding that a benefit had accrued to the US from the concessions that Japan had made during the previous rounds, the Panel considered that since some of the measures existed prior to the conclusion of the previous rounds, the US was presumed to have been aware of

¹⁷⁹ Ibid para.10.84 - 10.86.

¹⁸⁰ Won-Mog Choi and Freya Baetens, 'like Products', in Max Planck Encyclopaedia of Public International Law, Oxford University Press (2015).

¹⁸¹ Kodak - Fuji film, note 174 above, paras. 2.7. Although the US did not state it expressly, its case was giving the impression that Japan had used its competition laws and attendant exceptions to shield domestic firms from foreign competition. see in particular paras. 5.380 - 429.

¹⁸² See EEC - Payments and Subsidies Paid to processors and Producers of Oilseeds and Related Animal-feed Proteins, (L/6627 - 37S/86), adopted on January 25, 1990, paras 144, 149.

their existence. The Panel estimated that because the US had not rebutted the said presumption, the offsetting effects of the measures could not have frustrated any legitimate expectations given that they already existed before the concessions were made.¹⁸³ The Panel approved Japan's argument that the measures were origin neutral and thus not discriminatory, to the extent that it did not disproportionately affect imports.¹⁸⁴

There are therefore serious limitations to using article XXIII(1)(b) for competition related issues. Competition laws and regulations will certainly fall under the concept of unanticipated government 'measures' but it is doubtful that inaction from competition authorities will pass the test. Some however, equate governmental passivity over anticompetitive behaviours with tolerating such conduct, but it seems some caution must be exercised to temper such an approach.¹⁸⁵ Anticompetitive practices by private entities without any governmental involvement certainly do not qualify as 'measures' and the Panel had also observed that '...the GATT Contracting parties and WTO Members have approached this remedy with caution.... Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules'.¹⁸⁶

International trade law in its current positive perspective lacks the tools and necessary political impetus to combat private RBP on a global scale. Past efforts have all been fruitless at achieving substantive competition regulations to imbed the globalised economy into the daily lives of individuals and nations involved in global exchanges. The loopholes in the law reflect the political obstacles that, voluntarily or not, block the application of international trade and competition laws to eliminate certain private practices that adversely affect international trade. The Kodak-Fuji film case illustrates the inherent limitations of the WTO system to address private anti-competitive behaviours. Yet one cannot fail to observe that the formalism of the system is not owed to an 'external distortion in the law'...but is 'a necessary consequence of a view which holds that there is no naturally existing 'good life''.¹⁸⁷

¹⁸³ See Kodak - Fuji film case, note 174 above, paras. 10.61 - 65,

¹⁸⁴ *ibid*, para. 10.86

¹⁸⁵ See Bernard Hoekman and Petros Mavroidis, 'Competition, Competition Policy, and the GATT', World Economy volume 17 (1994) 141-145. They make a teleological argument that in particular cases, 'passive tolerance of a restrictive business practice' can qualify as the application of a measure.

¹⁸⁶ Kodak - Fuji film, note 174 above, para. 10.37.

¹⁸⁷ Martti Koskenniemi 'The Politics of International Law' 1 EJIL (1990) 4-32, 30. Koskenniemi draws our attention to a paradox, for he holds that, for sovereign independent states to legally agree on a substantive conception of communal life that would not imply a political choice, necessarily entails an illegitimate constraint.

Part IV Integrating Trade and Competition Law within the Multilateral Trading System

International trade and competition law present features that seem to make them difficult to integrate on a global scale despite the fact that they both operate in complementary and inseparable ways on global markets to determine the nature, content and extent of the rights of market participants. Their respective substantive contents make it increasingly necessary to integrate them within the broader system of general public international law of which they are but subsystems. Consumers and producers are pitted against each other while politics and the economics are disentangled within the global frame in which they compete for the satisfaction of preferences and needs. The welfare of diversity of disaggregated consumers is systematically ignored, yet aggregated producer interests are globally protected as if our society can function without consumers. We have seen above that multinational corporations (MNCs) have seized the opportunities presented by globalisation, powered by the multilateral trading system, to reorganise and structure their productive resources through global value chains that transcend multiple borders to modify, legally and most often illegally, the behaviours of consumers. This freedom to pursue profit maximisation is now portrayed as the ultimate social goal of the global economy. The sovereignty of consumers is however not perceived as a social objective worthy of protection though it has become increasingly pressing to do so. This disjuncture between trade and competition law introduces a fracture in the social organisation of a humanity that is bound to cohabit in the same social environment. Debate over harmonising the substantive provisions and enforcement mechanisms for a holistic approach to international competition law point to the perilous task policy makers face in grounding the idea of regulating global markets. The salient point is to determine the kind of normative ideals we need for our future global competition framework.¹⁸⁸ What objectives should we aim for? Are there some objectives that are more desirable than others? Should some of these values be preferred, can this preference depend on circumstances? How are we to implement them?

Recent Initiatives at Integration

Proposals made so far to integrate both fields are mostly inadequate and tend to point to a zero sum game approach to international exchanges, and thus fail to address the inequality-generating

¹⁸⁸ See Kim Them Do, 'On the Normative Foundations of the Global Competition Governance' (February 11, 2015) 2. Available at SSRN: <http://ssrn.com/abstract=2563685>.

effects prevalent in our globalised economy. Improving social welfare and redistributive justice concerns ought to be central in any endeavour to make global markets to work for all.¹⁸⁹ This however is hardly ever mentioned. These proposals all assume certain pre-established relationships between the state, the economy, the law and the market which make it difficult to transcend the cleavage between ‘liberal rationalism and its ideal of the rule of law’.¹⁹⁰

Trebilcock et al., for example, acknowledge the costs imposed by multiple and divergent national competition policies, yet wonder ‘why domestic competition laws - relative to other domestic laws - raise distortions that require special efforts at international harmonisation.’¹⁹¹ For them, the ‘costs from divergent policies in a number of areas are simply a fact of life in a world of nations states.’¹⁹² The underlying assumption is that adjusting the rules to make markets more responsive to the plight of those marginalised by market practices will impose unbearable costs on those presently gaining from a liberalised trading order. Their proposal reflects a lack of solidarity and a specific understanding of the economic theories that inform competition policy choices. It is thus limited to ‘rely[ing] in part on the NT principle’ and ‘a limited form of extraterritoriality’.¹⁹³ They reason that the NT principle prohibits states from framing or enforcing domestic competition laws so as to accord less favourable treatment to foreign producers than that afforded to domestic producers of like or competitive products. But given the divergences in domestic competition laws, with regard to abuse of dominance, for example, the importing state should rely on the first principles of its competition laws to extraterritorially sanction behaviours that affect the domestic economy.¹⁹⁴ Applying this reasoning to the EU and the US implies, that products imported at supra competitive prices into the EU from the US would be sanctioned by EU law, without requiring proof of exclusionary practices, and the NT principle even if the practice would have been tolerated in US

¹⁸⁹ See Amartya Sen, “Development as Freedom” Oxford University Press (1999), xii, 4. He argues that our individual freedoms, economic, social and political, are all intertwined such that any social institutional arrangements, be it the market, the state or the law, must contribute to enhance and guarantee the substantive freedoms of individuals, ‘seen as active agents of change, rather than as passive recipients of dispensed benefits’.

¹⁹⁰ See Martti Koskenniemi, note 187 above, 2.

¹⁹¹ See Trebilcock et al., note 2 above, 764. They thus seem to suggest that the structural imperfections of the legal architecture within which the global economy unfolds needs not be adjusted to reflect current socio-economic imbalances that result from the operation of global markets. They observe that other areas of domestic law diverge, and even represent a form of ‘tax’ on the international trade in goods, services, capital and people, but seem to give some weight to the fact that there has not been similar calls for harmonisation in other areas of law, thus implying a bias towards competition law, though at the same time admitting that a similar drive caused the adoption of the TBT and SPS agreements which prescribe the use of ‘harmonised’ international standards when domestic measures falling under these agreements diverge.

¹⁹² *Ibid*, 765.

¹⁹³ *Ibid*, 767-8.

¹⁹⁴ *Ibid* 767.

laws without such proof. Inversely, EU imports would only be sanctioned in the US with proof of predation or exclusionary behaviour.¹⁹⁵ So, the US jurisdictions will only sanction an EU firm where higher prices also necessarily reveal predatory or exclusionary conduct, and this will not be discriminatory because this law applies to all firms operating in the US and does not treat imports less favourably.

Trebilcock et al. assume therefore that a multilateral agreement within the WTO is not necessary because fundamental differences in approaches to competition law and parochial interests make it unfeasible given the potential associated costs. It is true that international trade law is already sufficiently complex enough by itself and does not need to be further rendered more complex by forcing onto it competition law issues. This also goes with fears that linking trade and competition law will favour developed countries and their firms at the detriment of developing countries. However, the WTO may perfectly harbour a competition agreement if the rules and procedures are adapted with regard to the international nature of the problems posed by applying national competition laws to global markets as seen above. International Trade law opens markets to foreign firms and it is only natural to expect that competition law would ensure an effective process of rivalry between all contending market participants while taking into account the structure and contestability of local markets, even if it entails temporarily restraining the competitive process. There cannot be competition when firms from some limited geographical location systematically eliminate their contenders unless the rules are not fair from the onset. Their proposal equally assumes that the basic objective of competition law is to protect consumers or total welfare from anti-competitive distortions based on subjective determinations of what constitutes welfare and how this has to be achieved. To oblige all states at different levels of economic development, to adopt such laws, thus paves the way for the increasing role of economic science in defining anticompetitive conducts in a way that is hardly transposable to fit national objectives in other jurisdictions. Their approach therefore does not account for the cross-border nature of current international exchanges and abstracts the need for sovereign horizontal participation in deliberations for determining the content of the rules that purport to deal with the adverse effects of anti-competitive behaviours.

Another proposal, by David Gerber, postulates a ‘commitment pathway’ which suggests ‘a normative framework’, phased out in time, whereby ‘states commit to a set of objectives and to a

¹⁹⁵ Ibid, 771-2.

process for moving towards those objectives.¹⁹⁶ The approach suggests that movement towards the set goals need not be in a single flow or in a linear-progression, as '[t]he indicia of movement may include, for example, the extent of political and institutional support for competition law objectives, the degree of reliance on competitive principles in economic policy, and predictability in the application of competition law norms'.¹⁹⁷ Thus, through their commitments, the participants are related to each other in an ongoing process whereby decisions made at subsequent points in time are related to previous or eventual decisions along the same path.¹⁹⁸ The advantage of this approach is that no immediate changes in domestic competition laws are expected, nor are agreements and implementation costs immediately borne by participants. Each participant gets to first examine the experiences of other participating states, share and exchange political and technical support, before agreeing to make any commitments. Hence the benefits are readily perceivable in that participants may use this established framework to 'gain favour with, and benefits from, other participants or gain negotiating advantages', though the risk remains that a state may only 'seek these advantages without serious intent to fulfill its obligations'.¹⁹⁹ This proposal strongly resembles convergence mechanisms under networks such as the International Competition Network (ICN), OECD and UNCTAD, and raises questions regarding the scope of the goals to be pursued along this path, given that a broad category of competition law goals exist, with significant differences from one state to another. The danger is therefore that, one or more states will, relying on economic analysis, for example, narrow these goals down to a strict minimum and then extend their application to all other participating states, thereby imposing convergence from the top rather than harmonisation of the substantive rules from the bottom. To avert this risk will require aiming for goals that are 'shared' or 'shareable' and will necessarily entail balancing between opposing concepts such as 'consumer welfare' and 'producer welfare' or 'total surplus' at various points in time along this pathway to a global competition law framework.²⁰⁰ Moreover, although the 'commitment pathway' suggests some form of international agreement, it takes into account the current economic power disparities

¹⁹⁶ David Gerber, note 21 above, 304. The approach has four basic elements: a set of objectives, delineated steps to be taken towards attaining the set objectives, an obligation to support these steps both in domestic policy and in relation to other participants, and an obligation to engage in regular and extensive feedback exchange with other participants in moving towards the agreed goals.

¹⁹⁷ *Ibid*, 305.

¹⁹⁸ *Ibid*, 304.

¹⁹⁹ *ibid*, 305.

²⁰⁰*Ibid*, 307. He acknowledges this historical risk and observes that regional or national efforts to protect some producers in the short-run may be justifiable in terms of their ultimate benefit for completion in the long-run, yet he holds that development oriented objectives of competition law need not be stated as a common goal to be pursued along the pathway approach because the pathway concept already integrates such concerns in the long-run.

among states and leaves room for sovereign non-economic objectives and even adumbrates a social embedding function to competition law, immense obstacles remain, notably on the content of substantive norms and the role of economics in the determination of these norms.²⁰¹ As seen above with regard to abuse of dominance, which unilateral conducts will be considered as harmful for the competitive process? Will such conduct be normatively determined by economics only or by reference to specified characteristics or relatively specific effects of the conducts without relying on their economic consequences in particular cases? To this challenge, Gerber suggests that ‘common scenarios in which anti-competitive effects can be presumed or excluded’ would be agreed upon by participating states, to the effect that each domestic competition authority or court would retain its own procedures, but rely on these scenarios as guidelines for their decisions and only digress from them when decisions are motivated by justified reasons. The question then becomes, who determines which justifications are valid and which ones are not?

Gerber’s ‘commitment pathway’ strategy differs from other proposals for full-scale harmonisation,²⁰² or Martyn’s limited harmonisation under the WTO²⁰³ or the proposal by Trebilcock et al. However they all seem to converge, in varying degrees, on the idea that a general consensus regarding the principal objective of competition law is to maintain and encourage competition in order to promote economic efficiency and total economic welfare as it is the tendency in the US and recently within the EU as well. Thus, none of these directly considers distributional objectives, or only mention them as being conflictual, hence betraying a certain bias in favour of economic objectives at the expense of non-economic values. Gerber’s approach comes closest to establishing a genuinely global competition law framework for global markets. It fails, however, to make it clear that it is desirable to do so in order to legally tilt the current economic structures towards addressing the inequalities resulting from global markets which domestic laws, limited in space, cannot effectively address in an inclusive manner.

The Law, the State and the Market

All the proposals made so far highlight the benefits of international cooperation, yet the idea that the absence of cooperation may be efficient from a cost benefit-perspective seems to be the biggest

²⁰¹ Ibid, 310-11. He also makes accommodation for unequal application of the same norms to all the participants (some form of Special and Differential Treatment for developing countries - which is contested by most developed countries in the area of competition law) premised on the fact that the commitment pathway ‘allows norms to be phased over in time depending on factors such as the economic conditions of the participant state’.

²⁰² See Andrew Guzman, ‘The Case for International Antitrust’ 22 *Berkeley Journal of International Law*, (2004) 355-374, 357.

²⁰³ Martyn Taylor, note 26, 430, proposes a binding plurilateral WTO competition agreement.

obstacle for moving forward.²⁰⁴ This view pervades mainstream accounts of international economic law and relies heavily on distinctions, such as the ‘market’ and the ‘law’, the ‘state’ and the ‘economy’, and the ‘public’ and the ‘private’ sphere. These distinctions seem to operate solely to separate the interests of a new liberal and capitalist ideology whose unwavering objective is to maximise the interest of individuals, acting singularly or collectively with other such individuals, from those of all human beings taken collectively. Our modern economy is basically underpinned by rules which have played varied roles in shaping, modelling and constructing our social institutions to reflect the designs which animated their adoption, and without which it would be impossible to trade in a profitable manner. Contrary to Coase’s Theorem,²⁰⁵ markets are so unstable that without rules it would be difficult to predict outcomes, rules therefore help stabilise expectations by coordinating the way preferences and choices are expressed in the competition for satisfaction of wants and needs given the scarcity of resources.

In a liberal economy, the law assigns property rights for use on the market. Though property is privately owned, the state may also decide on the allocation of resources despite the exclusive nature of these property rights. However, the state may not unduly burden the free exercise of private rights on the market. Thus, beyond securing benefits and reducing transaction costs - through taxation and other public policy laws and regulations - it is assumed that the government may not intervene at will in the private sphere as it renders the free exercise of private rights inefficient. On the international scene, this tension between the market and the state, though both are resource distribution mechanisms, appears to be mostly resolved in favour of the former, except where the state affected wields sufficient power to harness market forces in its interest. Thus, private contractual relations among market participants are considered the private sphere and private individuals are free to exercise their autonomy to dispose of their productive efficiency gains as they desire or even set up their own dispute resolution mechanisms that exclude democratically established court systems and international jurisdictions.²⁰⁶ It is now widely agreed that private entities have standing to act against states to enforce agreements and rights resulting

²⁰⁴ Posner & Sykes, note 9 above, 302.

²⁰⁵ Ronald Coase, note 137 above. Under the assumption that market exchanges are wealth maximising, that is, Pareto optimal, Coase demonstrated that when market transactions are costless and individuals act rationally, any assignment of entitlements to goods or resources will be efficient.

²⁰⁶ See Claire Cutler, “Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy” Cambridge University Press (2003) 108, referring to the law merchant, in Berthold Goldman’s word as ‘a venerable old lady who has twice disappeared from the face of the earth and twice been resuscitated’ but without the Roman *jus gentium* tradition that animated it before the successive transformations it has undergone. She notes that the *lex mercatoria* has changed in relation to changing social, political and economic conditions and has also contributed to transform them.

from treaties. The public-private distinction so dear to neoliberal international economic law mainly functions here to obscure the fact that the rules are partial from the very beginning. They hide the crossing point between ‘consent and coercion’, that is, hegemonic and coercive authority while ‘fraud marks the transition’ from one to the other.²⁰⁷ This points to the absurdity of the subject and sources doctrine in general public international law. The same ‘sources and subject doctrines [that] have historically operated to exclude the marginalised and oppressed peoples and developing countries by favouring existing positive law over potentially destabilising, if not revolutionary, customary law’²⁰⁸ now serve to empower the winners of the globalisation game against the recently civilised states. Mainstream international economic law thus obscures the fact that the same human being, whom we identify as autonomous and rational individual with a broad and coherent set of preferences which he always seeks to maximise in all circumstances, is the same even when portrayed as a citizen, consumer, a subject of law, a voter - expressing collective preferences for public agents to pursue in the general interest, a refugee or stateless person. These multiple identities often intermingle within the same individual acting within or across nations to weave the social fabric of which humanity is cloth.

The law serves two functions in the operation of global markets.²⁰⁹ First, it constructs markets by providing the background rights and obligations, such as establishing property rights, enforcing contractual rules and thus enhances their productive capacity. Secondly, it embeds the market into the social fabric by establishing conduct norms for markets such that both market participants and those affected by them can influence those whose conduct is considered harmful, and thus establishes a process for reconciling competing demands, interests and expectations. Whether spontaneously formed or based on consent, the law in its ordering and stabilising functions, ought to ensure that our society is not steered by a few who have risen to prominence at the expense of others. As the law identifies and enforces conduct standards for market participants, it thus represents the community’s values, interests, and symbolises its desired relationship to the market. The appeal and effectiveness of competition on markets hence depends on the way these constructive and embedding functions of the law are integrated into the society. Several instances of our collective distant and recent history suggest however that the law has often bequeathed its central role in the operation of global markets to economic theory, and thus failed to inspire

²⁰⁷ Ibid 258.

²⁰⁸ Ibid 260 -1.

²⁰⁹ David Gerber, note 21 above, 2-3.

acceptance of global competition on the premises of mainstream neoclassical economics.²¹⁰ Disaggregated consumers and others affected by global markets, unlike in domestic economies, have no means of holding political and economic actors responsible for the consequences of their decisions.

Neoclassical economic predictions applied to normatively determine the validity of market behaviours relegate the law to a secondary role, hence making economic efficiency the guiding principle for regulating global markets.²¹¹ Analysis of factual situations based on economic predictions assume that economic efficiency ought to be the social ideal towards which laws should aim, with the implication that the judiciary and legislators should use these predictions, which are external to legal rationality, as the guiding principles for determining justified or unjustified anticompetitive market practices. Seen from this perspective, the law ceases to provide structural coupling between social institutions and guidance for social interactions rather it becomes ‘noise’ in the environment in which market participants operate and would only be respected if ‘incentives or sanctions are attached to the rules or they can expect the behaviour of other people to conform to the rules’.²¹²

As seen above, the ‘rule of reason’ has been widely adopted in both the US and, to a limited extent, in the EU to assess abuse of dominance cases, and we equally saw that economic efficiency or wealth maximisation is not a social value which the law ought to pursue for its own sake as a public good.²¹³ Though economic predictions may help inform a judge on the complexity of the underlying economic implications of restrictive market practices, they may not replace the judge’s evaluation of facts to which he applies a rule, that is, his decision on a specific case does not seek to ensure that wealth is maximised by the conduct under consideration.²¹⁴ Economic discourse on efficiency only seeks to improve total economic welfare in absolute terms, based on Pareto optimal or KHE standards, and it corresponds more to an increase in the total surplus standard (comprising the sum of consumers’ and producers’ surplus) used in neoclassical economic analysis of the firm and the price mechanism, irrespective of the way wealth is distributed.²¹⁵ Thus, when it is said that

²¹⁰ The recent economic crisis of 2008 is a worthy example of the consequences of unregulated financial markets.

²¹¹ See Richard Posner, “Antitrust Law”, The University of Chicago Press Ltd. (2001) 30-32. He relies on Bork’s article cited above, note 131, to claim that the only objective of competition law is to enhance economic efficiency.

²¹² See Gerald Postema, note 16 above, 185.

²¹³ Ronald Dworkin, note 116 above.

²¹⁴ See Gerald Postema, note 16 above, 188, 194 and 202. He observes that the normative law and economics theory of adjudication must rely on a strong political-moral basis for the principle of efficiency to be likened to positive law, otherwise it would be ‘nothing more than a curiosity, like the shapes that cloud formations or constellations suggest to the imagination’.

²¹⁵ See Kirkwood and Lande, note 51 above, 200.

competition laws aim at protecting consumer welfare, from a law and economics perspective, this seems to mean improving economic efficiency without regard to the consumer (that is, all purchasers) surplus that a dominant firm receives as a result of an increase in price or other anticompetitive practices, and its effect on overall wealth distribution in the society.²¹⁶ In the *Superior Propane* case, the merger of the competitors was allowed even though it reduced consumer welfare due to an increase in price because the increase in productive efficiency outweighed the loss in allocative efficiency and caused a net gain in overall efficiency in the Canadian economy in the long run. The effects of the merger on global welfare were simply not taken into account in the court's analysis of the efficiencies.²¹⁷ If economic analysis of law may not pose a problem for the judiciary when considering anticompetitive behaviours in domestic economies or deeply integrated economies, as in the EU,²¹⁸ they may not be as easily transposable on a global markets given that the problems are global.

Multilateral rules for competition and trade law

The global economy needs a framework for ensuring effective rivalry and a genuine competitive process between firms operating in global markets. The current dominant approach to regulating global markets exacerbates rather than reduces private anticompetitive misconducts. International trade law has subjected market access restrictions to strict disciplines but entry barriers are still considerably high in most industries, and ought to remain high so long as there is no agreement on the redistribution of wealth generated by global markets. The problem is generally presented as a capabilities deficit or 'immature' economic models, often in small domestic economies that struggle to face off rapacious MNCs that make it impossible for local producers to prosper so that real rivalry operates to offer the highest benefits and choices to all consumers.²¹⁹ I am convinced that a multilateral WTO agreement ought to be the preferred form for cooperation towards an effective and coherent legal regime to deal with restrictive private business practices. The preambular objectives of the WTO are already sufficiently broad, but need to be modified to accommodate the

²¹⁶ Ibid, 242. They however observe that US courts do not consider this approach to be standard practice.

²¹⁷ See note 45 above.

²¹⁸ See Anne-Lise Sibony, "Le juge et le raisonnement économique en droit de la concurrence", LGDJ (2008),

²¹⁹ See for example the position of Nestlé in the agro-food industry in Africa where it uses its economic power to mould governments by all means possible to its liking. Nestlé alone has caused more bankruptcies than the aggregated economic crisis the continent has experienced. Yet, its investments in these various sectors count as FDIs that are claimed to be beneficial for economic development. A concrete incident, that was the object of the case between Codilait and Nestlé, has been documented by Judith Rueff "Le combat d'un industriel camerounais contre Nestlé" (May 5, 2014) [last visited January 24, 2015](#).

nefarious effects of power politics in international economic exchanges. The plurality of subjective completion law objectives and substantive contents indicate that we cannot reasonably stand by and observe consumer surpluses being transferred to supposedly efficient producers in a global economy without regard to the competitive process that enables such transfers. Domestic laws are by design oriented to favour domestic welfare and hence discriminatory. Markets, as resource distribution mechanisms, should be regulated to reflect the specificities and expectations of all market participants, and not just to favour powerful states who reap all the benefits of economic exchanges. The trickle-down approach to global wealth distribution has consistently failed to ensure that all societies enjoy a share of the benefits of cooperative arrangements, especially when such social arrangements are persistently trumped by powerful parochial interests. Wealth transfers and deadweight losses associated with market transactions largely explain the huge inequality gap and injustices of the current global economy and also explain why human beings are ready to ‘swim’ across oceans in search of expectations global markets are unwilling to provide. We may pretend that the flock of migrants piling up on western borders and coasts are not owed any duty of care, as it is the primary responsibility of their state of origin to protect them. It would however be naive to consider the matter only as a security issue that needs to be contained with tougher asylum and immigration laws, or to attribute it only to the result local governmental failures in the democratic process when pondering on solutions to address the problem. So long as we all share a common humanity and interact with each other to produce wealth, and this wealth benefits only a few, we are doomed to see the deprived ones flooding in to demand a share of the good life, even if the right to asylum is only a political favour and not an obligation. Another easy way out could be to deny any sense of community and consider the deprived ones as not yet human enough to warrant attention and continue business as usual. This approach has proven its limits and there is ample evidence to the contrary. A multilateral framework, however, suggests a genuine discussion on the aims and objectives to be pursued by international arrangements and imply agreement on the values and content of the rules that power the system. Achieving this requires us to first admit that the current rules create imbalances and allow those affected to adopt and implement policies that offset these imbalances. There cannot be competition or choice where a single or a few dominant firms trading in global markets determine who gains and who loses as per the rules of a single or few states.

Conclusion

Within the context of globalisation, international trade law has made it possible for firms to compete with distant markets but has failed to establish clear rules on the operation of global markets which, by definition, like domestic markets, are prone to failures. Competition law has however prospered only within domestic or regionally integrated legal systems but has been applied to regulate global markets with any prior agreement on the purposes and aims of the rules. Consequently, global markets have tended to reflect policy choices made by powerful states and made to operate in their favour. This has caused private restrictive business practices to go unregulated where they are the most needed: in global markets. Since the beginning of the current multilateral trading system, concerns have been raised with regard to their effects on the distribution of wealth within and among trading nations but responses to these concerns have systematically favoured cooperative solutions in which only a few privileged states participate.

We may assume, that, after all, no regulation is needed because the disruptive agents are only private actors who can answer for their misconducts in civil or criminal courts, but this, of course, will be turning a blind eye to the fact that these misconducts now occur in weak foreign states.

Yet the ‘laws of individual states govern global markets’ and the result appears to be that those affected by global markets can hardly influence behaviours that adversely impact their lives.²²⁰ The influence of a state’s conduct norms on global competition depends on the political and economic strength of the state itself, making it very difficult for all states to wield the capacity to influence the operation of global markets driven by private firms, some of which are even more powerful than some nation states.²²¹ When the law bequeaths its traditional functions, and rather creates distinctions and borders, tensions and conflicts emerge. Mainstream international economic law has been instrumental in setting up global markets. Positive law, which seems to situate the origin of the world around the post second world war II era, can barely justify the assaults of economic theory on the law, assaults that are rubbing it of its *raison d’être*, and subjecting nations to the logic of a revised form of global mercantilism. Tension is mounting and strategies of resistance are echoing within the very frames of the institutions that implemented this exploitative paradigm. The current standstill in the Doha round of negotiations proves this point and calls for profound reforms that would acknowledge the role power and violence, even in their symbolic forms, play in shaping and moulding the international trading system.

²²⁰ David Gerber, note 21 above, 3.

²²¹ See Judith Rueff, note 219 above.

I have sought to argue in this paper that the universalistic aspirations of international trade law that have facilitated the global expansion of markets by attributing rights to all participants in the global economy but yet creating hierarchies amongst right bearers such that a selective set of rights trump all other, as evidenced by the priority given to property rights over consumers right to choice, is not a viable ideal for the global economy. We saw in part I that the problems are currently hampering the realisation of the promises of the liberalised multilateral trade regime under the auspices of the WTO are global in nature and partly attributable to the WTO's relative success at attaining objectives. This was made possible by the fact private businesses have taken advantage of liberalised trade to conquer foreign markets in unprecedented ways and have even adapted their production chains to fit the structures of global markets, leaving governments helpless in the face their established global economic powers.

In Part II we noted that international trade law and competition law are essential branches within the current architecture of international law and observed that they are complementary but can diverge, though due mainly to some entrenched ideas grounded in the economic assumptions underpinning their theoretical foundations. Part III and IV then focused on prior and current attempts to integrate both disciplines under a multilateral framework. We noted that political and jurisprudential attempts to harness the interaction of international trade and competition law within the WTO have not produced positive results. These parts revealed that the dominant trend in current proposals rather favours convergence over harmonisation and as such fails to adequately address the great economic disparities between global market participants that only a community led negotiation can overcome. The global economy links societies in unprecedented ways but does not relate them in a constructive and mutually beneficial manner with genuine and commonly derived rules to effectively commit societies to cooperate to that effect.

International trade law and competition law are essential elements of the international legal system and are vital to the proper functioning of the global economy and thus ought to be integrated and entrusted to the supervision of the WTO. I based my argument on the fact that the challenges of today's highly integrated global economy need rules to ensure that global markets, just like domestic markets, function properly to meet the expectations of all those who participate in them or are adversely affected by them. Without effective rules, global markets would consistently fail in their wealth distribution functions and impose costs on societies that are far greater than any gains that the liberalised trading system may promise.

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