

The internationalisation of competition policy: The EU and the WTO between boldness and rally

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In the first section, this article explains the reasons for the internationalisation of competition policy. The second part seeks to make a critical reading of international rules and ongoing work within international fora and organisations and tries to explain why they have failed so far. The last section examines the legal system most suited to regulate competition on global markets.

1. INTRODUCTION

Aware of the challenges offered by economic globalisation and the growing interdependence of national economies, representatives of the most influential competition authorities in the world have agreed to open negotiations on drawing up international rules of competition at the summit of the World Trade Organization (WTO) held in Doha in November 2001.¹ The EU was the principal proponent of a Multilateral Agreement on Competition (MAC), and clearly wants to promote its competition law system as a 'test-bed for a globalized world'.² Facing consistent and strong oppositions from the developing countries and a 'two-faced' U.S. behaviour,³ the initial project of a MAC was dropped from the Doha Agenda in 2004. But the issue remains, more than ever, a hot topic to be discussed even outside the WTO.

Extensive cross-border mergers have indeed in recent years affected all sectors of the economy. The recent dispute in the GE-Honeywell merger is but one of these numerous cases that seem to call for a supranational regulation of competition policy. In addition, multinational companies took advantage of the environment created by trade liberalisation to increase anti-competitive practices, whose effects were felt in several regions of the world. It is therefore ironic to continue to defend the global liberalisation of trade and the dismantling of barriers to trade without putting limits on anti-competitive practices of private economic actors.

Does the globalisation of anti-competitive practices and mergers reflect the necessity for the internationalisation of competition law? Is there a need to rehabilitate the role of the State to regulate private economic powers and create a competitive World order? This

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¹The WTO was established by the *Marakesh Agreement Establishing the World Trade Organisation*, opened for signature 15th April 1994 (entered into force 1st January 1995).

²This formulation appears in a recent Opinion of the European Economic and Social Committee on 'The Challenges and Opportunities for the EU in the Context of Globalisation' OJ 2007/C 175/16.

³Emphasised by Aditya Bhattacharjya 'The Case for a Multilateral Agreement on Competition Policy: A Developing Country Perspective' (2006) J.I.E.L. 293.

article aims to examine the legal system most suited to regulate competition on global markets and to make a critical reading of international rules and ongoing work within international forums and organisations. Above all, this article will try to put in perspective this new trend of control by the States of the legal regulation of competition in increasingly globalised markets in order to safeguard common interests.

The first part explains the reasons that caused the search for strategies for the internationalisation of competition law. The second part seeks to present the proposals that have been and are prepared not only by States but also by working groups within international organisations or by scholars. The last section examines the orientation towards the establishment of cooperation on a multilateral basis to conclude that this mode of cooperation contributes effectively in a gradual harmonisation of legislation and promotes the development of international and supranational rules of competition.

2. REASONS FOR THE INTERNATIONALISATION OF COMPETITION POLICY

The internationalisation of competition policy has been on the agenda since States have realised that in an era of economic globalisation, world trade could develop only if accompanied by a parallel competition regulatory framework that could prevent multinational companies from erecting trade barriers (A). In addition, States want to bring an end to unilateral measures resulting from the extraterritorial application of national legislations, which creates political tensions (B).

(A) FIGHTING AGAINST TRADE BARRIERS

I. TRADE BARRIERS RESULTING FROM THE PRACTICES OF TRANS-NATIONAL ACTORS

As a general proposition, the multiplicity, power, and autonomy of trans-national actors can subsequently lead to the internationalisation of anticompetitive practices. The liberalisation of global markets and the development of economic sectors have indeed encouraged the emergence of trans-national actors. Nearly 4/5th of the international trade and investment is based on multinational companies, giving them an obvious political, social, economic and cultural impact.⁴ This is a well-known phenomenon: companies have increased their investments abroad and directed restructuring operations and alliances with international partners in order to meet the needs of an increased competition in their traditional markets. In addition, the growing of overseas operations has led companies to revise their organisation and their strategies for acquiring an international dimension. The acquisition of a company abroad would give them immediate access to production capacities, a distribution network or a brand known in the targeted market.⁵

⁴See World Investment Report 1998: Trends and Determinants, UNCTAD/WIR/1998.

⁵For a detailed account on this process see Jones & Sufrin, *EC Competition Law: Text, Cases and Materials* (3rd ed.) OUP, 2007, pages 58 and 679.

One could easily imagine that, following the globalisation of political and economic life, these companies become quasi-autonomous, acting in the shadow of 'official' international actors through their pressure on national governments and in international fora. They constitute real lobbies which call into question the sovereignty of States, unable to exercise their full and exclusive powers. The infringement of State sovereignty concerns in particular the developing countries where trans-national companies gain control over natural resources, production or finance. In addition, these players are keen to use their power to put pressure, either alone or together with institutions representing their interests, on national governments and international organisations.

The practices of international companies such as the formation of international cartels aiming at fixing prices or allocating markets; international mergers; or abuses of dominant position aiming at preventing the entry of new competitors in a market may obviously affect international markets. In such a hostile context, States have gradually understood that the internationalisation of competition policy is an indispensable instrument both at the global level –to ensure the efficient functioning of international trade– and at the national level in order to preserve competition in domestic markets.

II. INTERACTIONS BETWEEN COMPETITION POLICY AND INTERNATIONAL TRADE

AN OBVIOUS RELATIONSHIP

The principles governing the application of competition policy and international trade rules are intrinsically linked. As highlighted by Sweeney,⁶ it is undeniable that there is a philosophical and practical interaction between liberal trade policy and a welfare driven competition policy. His argument is based on the fact that, economically speaking, both policies stem from the proposition that markets, operating where possible without artificial constraints, have the capacity to deliver significant welfare gains and raise standards of living. There is indeed no reason to disagree with the conclusion that in both cases a notion of market access is a key element in realising that object.

The reciprocal interaction can also be identified practically. Restrictive trade practices may frustrate a liberal trade policy, just as a protectionist trade policy can prevent strong domestic competition laws from fully delivering expected welfare benefits. Thus, a domestic cartel may operate to effectively exclude imports from the domestic market even though import barriers are otherwise low.⁷ On the other hand, high import barriers, by deterring foreign firms from entering the domestic market, may deprive consumers of many of the benefits they might have expected from a legal regime that would otherwise promote a vigorous competition.

⁶Brendan Sweeney 'Globalisation of Competition Law and Policy: Some Aspects of the Interface Between Trade and Competition' (2004) *MelbJIL* 15.

⁷See in particular the concept of 'mixed export cartels' in Brendan Sweeney 'Export cartels: Is There A Need For Global Rules?' (2007) *J.I.E.L.* 87.

International trade rules therefore play an important role in the implementation of national competition laws thanks to the so-called '*vice-versa*' element,⁸ which refers to the reciprocal interaction existing between trade and competition policy. Competition policy is indeed an effective instrument to fight against certain types of practices and agreements that discriminate against foreign companies and are harmful to international exchanges. However, the objectives of competition policy would be limited to achieving economic efficiency, consumer welfare and economic development –whereby the maintenance of competition is not a goal in itself but a means to achieve those objectives.

The links between trade and competition policy also appear in some bilateral, regional or international agreements, which have explicitly recognised the fact that trade fosters an effective application of national competition law. Thus, in the cooperation agreement signed on October 7, 1999 between the Japanese government and the U.S. government, the preamble recognises that the effective application of competition rules in each of the signatory countries is crucial to ensure the proper functioning of their domestic markets and their respective trade relations.⁹ This is also a practical expression of the principle of reciprocity, which is one of the most important principles in international public law.

The obvious links between trade and competition have led some governments to propose the opening of negotiations on the development of competition rules within the WTO at the beginning of the Doha Round of Trade negotiations.¹⁰ Yet there are also obvious differences between trade and competition that must be taken into account before considering a possible internationalisation of competition policy. A comparison of anti-dumping rules and competition rules offers a shiny illustration of these contradictions.

DISTINCTION: ANTIDUMPING OR COMPETITION LAW

First of all, anti-dumping rules and competition rules have goals, principles and problems of their own. They are usually regulated by specific provisions that do not apply to each other. Competition rules are designed primarily to protect competition. On the contrary, anti-dumping duties are not intended to fight against practices condemned under competition law but to protect the domestic industry.

Consequently, anti-dumping rules address practices that are not necessarily anticompetitive *per se* (even if they may fit the concept of predatory pricing), and dumping will not necessarily be characterised as anticompetitive under most national competition laws. Moreover, as a commercial instrument, anti-dumping is intended to fight against dumping and indirectly against national policies harmful to international trade. National governments are indeed responsible for many dumping that they create, promote or condone, for example, by artificially advantaging some of their domestic companies so that they make profits and then export their product at a price below the price charged by competing industries of the importing country.

⁸See WTO Doc. Report (1999) of the Working Group on the Interaction between Trade and Competition Policy (WGTCP) to the General Council, WT/WGTCP/3 11th October 1999, at paragraph 18. The Group was established by the Singapore Ministerial Declaration, WT/MIN(96)/DEC, adopted 13th December 1996.

⁹See Agreement between the Government of Japan and the Government of the United States of America concerning cooperation on anticompetitive activities, 8th Oct. 1999, accessible at <http://www.jftc.go.jp/e-page/internationalrelations/index.html> (6th August 2008).

¹⁰Doha Ministerial Declaration, WT/MIN(01)/DEC/1, adopted on 14th November 2001, especially paragraphs 23-25.

The differences between anti-dumping and competition policy objectives were particularly clear in the *Extramet* case,¹¹ brought before the European Court of Justice (ECJ). In this case, following the complaint of the sole Community producer of calcium metal P echiney, an anti-dumping duty was imposed by the Community on calcium metal imported from China and (formerly) the USSR. Extramet contended that P echiney was abusing its dominant position and that the anti-dumping procedure was inappropriate. The Court held that:

'(...) account must be taken of such anti-competitive practices and that an anti-dumping duty must not be imposed if its effect would be to maintain an unjustified advantage in the Community market resulting from a cartel or an abuse of a dominant position';

'It must next be noted that, in order to refute Extramet's argument, the Council referred, in the proceedings before the Court, to recital 15 in the preamble to the contested regulation, contending that, because of its specific nature, an anti-dumping procedure cannot prevent other actions from being brought in order to penalize anti-competitive conduct'.¹²

Nevertheless, ties between anti-dumping and competition rules are strong. Anti-dumping measures are intended to counter predatory pricing as part of international trade, where competition law shares the same objective, only within a national market. Dumping is defined by Article VI of GATT 1994¹³ as a discriminatory pricing practice, 'when a product is introduced into the commerce of another country at less than its normal value'.¹⁴ As a result, some governments particularly affected by anti-dumping duties (such as Korea, Japan or China) are trying within the WTO to link discussions on the introduction of competition rules and the ADA. They suggest in particular to reform anti-dumping rules of the WTO or even to replace them with competition rules.¹⁵

This suggestion originates from the premise that the fight against dumping can be dealt with in the framework of the general principles of competition and national procedures against discrimination on prices. They believe further that the absence of an effective national competition law promotes the situation where a domestic producer can benefit from an anti-competitive situation on its domestic market to develop a harmful dumping practice against the producers of the importing country. The substitution of an agreement would therefore remove the main cause of dumping by imposing an effective national competition policy.

¹¹Case C-358/89, *Extramet Industry v. Council* [1992] ECR I-3813; It was more recently confirmed by the CFI in case T-58/99, *Mukand et al. v. Council* [2001] ECR II-2521.

¹²*Extramet* Judgment, at paragraphs 14 and 17.

¹³General Agreement on Tariffs and Trade revised in 1994 after the Uruguay Round of Trade Negotiations.

¹⁴Article 2.1 of the Agreement on Implementation of Article VI of the GATT 1994 (ADA).

¹⁵These proposals are made within the Working Group on the Interaction between Trade and Competition Policy; in particular, see WTO Doc.WT/WGTCP/M/8, 10th June 1999 and WTO Doc.WT/WGTCP/M/14, 2nd July 2001.

The U.S. strongly opposes such a substitution mainly on the basis that anti-dumping and competition rules do not share the same goal and politic rationale.¹⁶ In fact, the discussion over the possible substitution of antidumping rules by competition law appears artificial. For example, the EU managed to regulate competition law and intra-community dumping through specific texts and provisions.¹⁷ Better than a substitution, the creation of a genuine ad-hoc supranational system of competition policy could resolve these issues, but there are still other difficulties to overcome.

(B) AVOIDING TENSIONS ARISING FROM THE EXTRATERRITORIAL APPLICATION OF NATIONAL LAWS

I. THEORIES AND PRACTICES OF EXTRATERRITORIAL APPLICATION OF COMPETITION LAW: THE EU AND U.S. APPROACHES

More than an 'obstacle to further deepening of bi-lateral co-operation',¹⁸ the extraterritorial application of competition laws is one of the major problems caused by a lack of a supranational regulatory framework.

The proliferation of trans-national operations may lead to situations where several national competition laws can apply, for example when a trans-national operation has its effects located on several territories. The competition authorities concerned are often called upon to exceed the boundaries of the State on whose behalf they act, and enforce their national laws on other national territories under the effects-based theory (also known as the 'intended effects' test) creating obvious international tensions.¹⁹ As Geiger and Von Meibom explained, the problem is indeed that because of the trans-national nature of private actors, the practice of competition law reflects a continuing struggle between state sovereignty and the extraterritorial application of national laws. The internationalisation of competition policy is therefore seen as a means to address the difficulties arising from the extraterritorial application of national competition laws.

The most obvious case of extraterritorial application of competition law comes from the U.S. system. The interventional approach of U.S. Courts towards the conducts of undertakings situated outside the U.S. territory has long been analysed and criticised.

¹⁶See WTO Doc WT/WGTCP/W/88, 28th August 1998.

¹⁷See e.g. Council Regulation (EEC) No 812/86 of 14th March 1986 on protection against imports which are the subject of dumping between the Community of Ten and the new Member States or between the new Member States during the period throughout which the transitional measures laid down by the Act of Accession of Spain and Portugal apply (OJ L 78, 24.3.1986, pages 1–9).

¹⁸Alec Burnside and Yves Botteman 'Networking Amongst Competition Agencies' (2004) Int. T.L.R. 6.

¹⁹See Geiger, A. & Von Meibom, W. 'A World Competition Law as an Ultima Ratio' (2002) E.C.L.R. 446.

Burnside and Botteman rightly pointed out that the extraterritorial application of the Sherman Act, in particular through the ‘discovery procedure’, has limited the ability of the U.S. and EU governments to deepen their cooperation in the field of competition law enforcement.²⁰ It should however be added to their assertion that if the U.S. interventionist and extremist approach can be criticised, the EU’s soft conception of the effects-based theory is of no help to defuse the conflict.

In *Europemballage*²¹ the ECJ based its reasoning on the concept of the ‘economic entity’, meaning that the competence of the Commission relied on the fact that a company conducted its activities on the EC territory through a subsidiary, even though it was incorporated in a third State. The ECJ’s case-law evolved with the *Woodpulp* case.²² The Court had to decide on a case where the participants at a cartel had no physical presence, even in the form of subsidiary, in the EC territory. The court considered that it was the place where the agreement was being implemented which was decisive, not where it had been formed, irrespective of whether or not producers had appealed to their subsidiaries in the Community to make the contracts at the origin of the cartel at issue. According to the Court, ‘where producers established outside the Community sell directly to purchasers established in the Community and engage in price competition in order to win orders from those customers, that constitutes competition within the common market’.²³

The U.S. position allows the extraterritorial application of antitrust law if the practice takes effect or produces effects on American soil. The U.S. competition authorities have been recognised accordingly a discretionary power to apply U.S. antitrust law and can prosecute foreign companies on the basis of American law even when the anticompetitive restrictions do not directly impact on U.S. consumers.²⁴ In addition, the U.S. rules on discovery are criticised based on the fact that they may undermine EU procedures, especially in the context of leniency application.²⁵

A recent U.S. judgment allows tempering these concerns. The U.S. District Court for Northern California decided recently that communications made between a person and the European Commission pursuant to the latter’s leniency notice²⁶ cannot be produced on

²⁰Alec Burnside and Yves Botteman ‘Networking Amongst Competition Agencies’ (2004) Int. T.L.R. 1. However, it must be emphasised that one year later, Burnside adopted a more contrasted opinion on the topic, writing that ‘the most prominent bilateral relationship is of course that between the EU and the USA’, in Burnside, A. and Crossley, H. ‘Cooperation in Competition: A New Era?’ (2005) E.L.Rev. 234.

²¹Case 6/72, *Europemballage Corp and Continental Can Co Inc v. Commission* [1972] ECR 215, at paragraphs 14–16.

²²Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *Ahlström Osakeyhtiö and others v Commission of the European Communities (Woodpulp)* [1988] ECR I-5193.

²³*Woodpulp*, at paragraph 12.

²⁴Antitrust Enforcement Guidelines for International Operations, US Department of Justice and Federal Trade Commission, Apr. 1995, <http://www.usdoj.gov/atr/public/guidelines/internat.htm> (still in force as amended, 9/08/2008).

²⁵See Burnside, A. and Crossley, H. ‘Cooperation in Competition: A New Era?’ (2005) E.L.Rev. 252. The authors examine the effects of the discovery procedure in several landmark cases such as the cartel of vitamins, *Intel v. AMD*.

²⁶OJ C 45, 19.2.2002, pages 3–5.

discovery in the U.S.²⁷ If this decision means a decline of the discovery procedure, future co-operation will be easier which may prove a positive step. Indeed, unilateral tools such as the discovery procedure are useful, but there is always the risk that they will provoke hostility. In a hostile environment unilateralism is ultimately inefficient and politically dangerous. Therefore, further co-operation would facilitate the development of a global competition policy.

Burnside and Botteman commented that the differences between the 'implementation' doctrine applied by the ECJ and the 'substantial effects' doctrine applied by the U.S. antitrust authorities are 'of little significance and interest in practice'.²⁸ This position is questionable. Firstly, conflicts arising from the implementation of a State's competition law in another State actually show the importance that States attach to maintaining their sovereignty over their national territory. The differences between, in this case, the EU and the U.S. approaches therefore have a great practical impact.

Secondly, the political impact is even greater. The distinction existing between two conceptions over the territorial application of competition law directly affects State sovereignty. Indeed, handing jurisdiction to another State 'would involve a considerable sovereignty sacrifice because the exporting state would be relinquishing control over activities occurring within its borders probably involving its citizens'.²⁹ Often, the allocation of extraterritorial effect to a State standard is indeed nothing more than an attempt by a State authority to reach and impose its domestic law to a multinational company whose behaviour is contrary to its competition rules.

II. POLITICAL TENSIONS AND SUBSEQUENT ECONOMIC RISKS

DIRECT SOURCES OF CONFLICTS

The extraterritorial application of national competition laws is the source of many tensions between States because the simple application of a national law by a national court in a foreign territory with different competition rules poses obvious problems, which should prompt the adoption of international competition rules. Recent cases illustrate the difficulties that arise when several authorities are competent to apply the laws of different States. Thus, the well-known *Boeing-McDonnell Douglas* case almost led to a diplomatic crisis between the EU and the U.S.

Indeed, the U.S. authorities had approved the merger of these U.S. companies and had even lent their support to the operation, while the European Commission, anxious to maintain a sufficient level of competition in the market for air fleet, was not favourable. The green light given in *extremis* by the European Commission to the merger officially resulted

²⁷See the Order that was delivered by the US District Court of Northern California at: [http://www.cand.uscourts.gov/cand/judges.nsf/61fffe74f99516d088256d480060b72d/0f2bd10f52fd2f4e882572dc002faf0/\\$FILE/In%20re%20Rubber%20Chem%20Disc%20Order.pdf](http://www.cand.uscourts.gov/cand/judges.nsf/61fffe74f99516d088256d480060b72d/0f2bd10f52fd2f4e882572dc002faf0/$FILE/In%20re%20Rubber%20Chem%20Disc%20Order.pdf).

²⁸See above, note 18, Int. T.L.R. 7.

²⁹Sweeney, B. 'Export Cartels: Is There A Need For Global Rules?' (2007) J.I.E.L. 87.

from concessions made by Boeing, which accepted to abandon exclusive contracts with several airlines (especially those with American Continental and Delta Airlines).³⁰

The media and scholars later revealed that the diplomatic pressure of the American diplomacy and of some EC Member States (whose industries were receiving Boeing orders crucial to their survival) have played an important role in the Commission's final decision.³¹

NATIONAL RETALIATION

U.S. unilateral practices or extraterritorial application of competition law have led some States to go beyond diplomatic protests and to resort to retaliatory measures.³² These measures were particularly numerous within the framework of GATT 1947, where it was almost impossible to reach a binding settlement of disputes. Indeed, the dispute settlement mechanism was long and could easily be extended. Above all, it was too much based on a political consensus.

These retaliatory measures have adverse consequences for businesses and call for a supranational competition regulatory framework in order to defuse this vicious circle. Indeed, these conflicts are threatening legal certainty for companies because the public authorities may interpret national competition rules unexpectedly, succumbing to pressures from foreign governments and anxious to protect their national economy. Furthermore, they can cause a disruption of the international trade which may harm companies' commercial strategies. More generally, I think that the lack of any international competition policy increases businesses costs, which, for example, are forced to abide by the notification procedures of several competition authorities. Accordingly, they are sometimes cumulatively sanctioned by different authorities reaching amounts that are not always justified. Assuming that some international rule is necessary, the next question is whether existing international attempts and arrangements are adequate.

³⁰Commission Dec. IV/M.877/CE, 30 July 1997, Boeing/McDonnell Douglas: OJ L 336, 8th Dec. 1997, page 16. The GE-Honeywell and Gencor cases are also a good examples, see Case T-209/01 and T-210/01, *Honeywell v. Commission and General Electric v. Commission* [2005] ECR II-5527 and II-5575; Case T-102/96, *Gencor v. Commission* [1999] ECR II-753; See also Donna E. Patterson & Carl Shapiro 'Transatlantic Divergence in GE/Honeywell: Causes and Lessons' (2001) *Antitrust*, pages 18-26.

³¹See Steve Rolinitis, Illinois State University, 'The Boeing-McDonnell Douglas Merger', 17/04/1997, available at <http://www.econ.ilstu.edu/dloomis/320web/steve.PDF> (25/08/2008); 'Case Study: The Boeing-McDonnell Douglas Merger' in *Electronic Journals of the U.S. Information Agency*, Vol. 4, No. 1, February 1999, available at <http://usinfo.state.gov/journals/ites/0299/ijee/toc.htm> (25/08/2008).

³²These measures are often unilateral trade sanctions which again demonstrate the ties between trade rules and competition policy.

3. ATTEMPTS AND FAILURES TO DEVELOP INTERNATIONAL RULES OF COMPETITION

Numerous proposals were made within various fora (scholars, international organisations, States' institutions) (A). However, and accordingly, numerous difficulties jeopardised the success of these attempts (B).

(A) FROM MUNICH TO DOHA: PROJECTS AND PROPOSALS

I. PROJECTS AND PROPOSALS FROM SCHOLARS

Scholars were the first group to develop ambitious proposals on the form that the internationalisation of competition policy should take. Thus, some have proposed supranational competition rules. These international rules, hierarchically superior to national rules, would bind the involved States to commit themselves to respect and to include them in their national legal system. At the same time, they would accelerate a movement of international harmonisation of competition law in each State. Others favoured a more flexible approach.

Hence, the so-called 'Group of Munich' had in 1993 proposed the adoption of a Draft International Antitrust Code (DIAC).³³ This group of scholars, mainly German, elaborated an original project since it did not create a supranational directly applicable system of competition law but it only compelled the signatory States to abide by some competition standards as part of their domestic legislations. The code incorporated the GATT principle of national treatment and sought to develop a minimum set of rules that Member States would commit themselves to transcribe into their national legislation, which would be directly applicable in those who had not implemented. Obviously, this direct applicability was inspired by the European Community system. Possibly, this last feature ultimately relegated the project to a mere attempt.

In particular, an international agency would be established to ensure that national authorities are effectively implementing the principles of the DIAC. Again, it can be argued that such an International Antitrust Authority was inspired by the European Commission. Moreover, the DIAC was only applicable to those cases involving an international dimension, the same way as the European Commission only is competent over cases having a community dimension. Since the Community system serves as a basis to this initiative, it would be logical to think that the same mechanisms of integration may apply. Therefore, such an international antitrust code could involve a 'spill-over effect'³⁴ which would foster the elaboration of competition laws based on the same standard, ultimately creating a global harmonisation in the field. On the one hand, it can be argued that it would represent the best theoretical opportunity to achieve something genuinely original. On the other hand, it is clear that there are yet too many obstacles to such an idealistic outcome, which will be demonstrated below.

³³The Members of this Group were in alphabetical order J. Drexler, W. Fikentscher, E. Fox, A. Fuchs, A. Heineman, U. Immenga, H.P. Kunz-Hallstein, E.U. Petersmann, W.R. Shuep, A. Schoda, S.J. Soltysinski, L.A. Sullivan.

³⁴On this particular point, see Peter Lloyd 'When Should New Area Be Added to the WTO?' (2005) World T.R. 275.

II. PROPOSALS AND ATTEMPTS WITHIN INTERNATIONAL ORGANISATIONS

There have been many initiatives within international organisations to establish international rules on competition. The Havana Charter was one of the most impressive projects given its context of elaboration. Based on the concept of comprehensive rules covering both State and private practices, it devoted a whole chapter to restrictive business practices.³⁵ The Charter was never ratified and was followed by the more modest GATT 1947, which examined the trade-competition interactions several times in the 1960s but with no concrete result. In the 1970s an ersatz of a Competition Code was finally negotiated within the framework of UNCTAD³⁶ at the request of developing countries, but its provisions are not binding.³⁷ UNCTAD therefore contributes, albeit in a limited way, to promote a culture of international competition.³⁸ Similar to the OECD, it encourages cooperation and dialogue between the governments of developing countries and developed countries to promote the establishment of effective national competition rules and policies.

The OECD indeed also carried out an important prospective work in the area of international competition policy. It has adopted a recommendation that includes a non-binding but fully functional system of notification between competition agencies. More importantly, the Recommendation includes a voluntary dispute settlement procedure, which resembles the GATT's dispute settlement mechanism, but has never been used.³⁹ However, the OECD is based on a system of voluntary cooperation between Member States. Its recommendations are not binding. It has no dispute settlement mechanism and furthermore, it is not universal.

At the WTO level, there is no comprehensive agreement on competition law but a constellation of specific, sectorial provisions that are relatively unutilised. For many commentators, the WTO represents the best opportunity to develop a comprehensive international competition policy. One could argue that this is doubtful after the failure of the Doha Round on this particular topic, however it seems that the universality of the WTO dispute settlement mechanism and the possibility to elaborate sectorial competition rules invite us to narrow the possibilities to the sole WTO framework. As Gerber recently emphasised,⁴⁰ what really matters and should be discussed at the WTO level, is the lack

³⁵This Charter foresaw the establishment of an International Trade Organisation (Chapter V).

³⁶United Nations Conference on Trade and Development, see www.unctad.org.

³⁷UN Doc. A/35/48 (1980) '*Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*'.

³⁸See Brusick, P. 'UNCTAD's Role in Promoting Multilateral Co-operation on Competition Law and Policy' (2001) 1 *World Competition*, page 23.

³⁹Recommendation of the Council Concerning Cooperation between Member countries on Anticompetitive Practices affecting International Trade, C (95) 130/final, especially pages 8 to 10 for the conciliation procedure.

⁴⁰Gerber, D.J. 'Competition Law and the WTO: Rethinking the Relationship' (2007) *J.I.E.L.* 707.

of confidence in WTO norms, practices and procedures being based on a robust concept of 'community'. Professor Luca Rubini further added that:

'the fostering of this [Community] dimension, based on the generalised respect of rights, the reasonable alignment of rights/incentives, and the awareness of shared rights/interests at the political/institutional and economic level, is a necessary precondition for any successful initiative in the field of international competition law in the WTO'.⁴¹

All these limited initiatives reflect the need for a more binding system that is not based on consensus. Some States have also tried to propose the creation of original systems to internationally regulate competition. Some are too much idealistic and clearly will never come to existence. Some are interesting, and will be presented below.

III. STATE AND 'LIKE-STATE' PROPOSALS

POSITION OF THE EU

The position of the EU reflects an evolution. In its 1996 Communication titled 'Towards an international framework of competition rules'⁴² the Commission clearly shows the position that it wished to promote at the Singapore Conference;⁴³ complementing the existing WTO framework on anti-competitive practices as a preliminary step to more ambitious proposals based on the Community model of competition policy. It proposed a progressive approach in favour of the adoption of a framework agreement, which would commit all WTO States to the adoption of effective domestic competition laws and internal structures. Ultimately this would 'promote equal conditions of competition world-wide; facilitate closer cooperation between competition authorities and pave the way for the coordination of international enforcement activity; promote a gradual convergence of competition laws'.⁴⁴

The Commission also proposed the creation of an instrument of cooperation between competition authorities allowing them to exchange information, and to notify their investigations to each other. Finally, the Commission considered that the WTO dispute settlement mechanism could be used when a country failed to adopt appropriate competition rules or to respond to a request for an investigation by another country. Sadly, the subsequent positions adopted by the Commission in its contribution to the WGTCP appear progressively less ambitious.⁴⁵ They generally focus on the advantages

⁴¹Martin Taylor 'International Competition Law – A New Dimension for the WTO' Publication review by Luca Rubini (2008) E.L. Rev. 448, emphasis added.

⁴²Communication from the Commission to the Council, 'Towards an international framework of competition rules' COM (96) 284 final, 18.06.1996, see http://aei.pitt.edu/3971/01/000109_1.pdf (11/08/2008).

⁴³First WTO Ministerial Conference held in Singapore between 9th and 13th December 1996.

⁴⁴*Above*, Note 30, at page 10.

⁴⁵Communications of the European Community and its Member States to the WGTCP, WT/WGTCP/W/193, 1st July 2002; WT/WGTCP/W/184, 22nd April 2002; WT/WGTCP/W/175, 26th July 2001; WT/WGTCP/W/160, 14th March 2001; WT/WGTCP/W/152, 25th September 2000;

that developing countries would benefit if such an international competition law system were to be established.

The European Commission is now in favour of signing a multilateral framework agreement on competition that would require Member States to respect the fundamental principles of the WTO such as transparency, non-discrimination and adoption of substantive rules limited to the prohibition of certain practices such as hardcore cartels.⁴⁶ In contrast it is interesting to point at the recent opinion of the European Economic and Social Committee, which advocates a 'planetary State governed by the rule of law' with 'the EU as an example for others to follow'.⁴⁷ Although not only focused on competition law and policy issues, this opinion seems to advocate a more hegemonic attitude of the EU than ever. An easy comparison can be drawn between this position and that of the U.S., which confirms the previous remark made about the political impact resulting from the differences between two conceptions over the territorial application of competition law, and its link with the principle of sovereignty.⁴⁸

POSITION OF THE USA

The U.S. government has called for a deepening of voluntary cooperation between competition authorities within the framework of bilateral and multilateral relations.⁴⁹ But it takes a reluctant attitude on the establishment of an agreement on competition policy within the WTO. The U.S. considers that it would be difficult to reach such an agreement taking into account the diversity of countries represented and the heterogeneity of their legislations⁵⁰ and it firmly rejects the application of the WTO's Dispute Settlement Understanding in this matter.

Moreover, as Griffin highlighted, such an agreement should be a compromise between diverging national interests and be differentiated according to the policies covered by the WTO.⁵¹ This position means that an agreement on competition rules should be based on the lowest common standard, and would somewhat reflect a race to bottom rather than an improvement.

WT/WGTCP/W/140, 8th June 2000; WT/GC/W/191, 2nd June 1999; WT/WGTCP/W/78, 7th July 1998; WT/WGTCP/W/62, 5th March 1998; WT/WGTCP/W/34, 2nd March 1998; WT/WGTCP/W/45, 24th November 1997; WT/WGTCP/W/1, 11th June 1997.

⁴⁶See Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions, 'Global Europe Competing in the World' COM(2006) 567 final.
⁴⁷Opinion of the European Economic and Social Committee on 'The Challenges and Opportunities for the EU in the Context of Globalisation' OJ 2007/C 175/16.

⁴⁸See *above*, Section 2 (B) I.

⁴⁹See positions WT/WGTCP/W/204, 15 August 2002; WT/WGTCP/W/142, 3rd August 2000; WT/WGTCP/W/116, 25th May 1999.

⁵⁰WT/WGTCP/W/203, 15th August 2002.

⁵¹Griffin, J. 'The WTO Study of the Interaction Between Trade and Competition Policy: Timely and Controversial' (1997) 2 Int.T.L.J., page 39.

Indeed, in the same way it happens in the U.S. in company law with the 'Delaware Effect', some States would go beyond the minimum standard and others would stay above, offering a 'competition law forum shopping' where no harmonisation would be possible. In fact, such a system could merely work only if a principle of mutual recognition, as it exists in the EU, were to be imposed to everyone. The Most Favoured Nation Principle enshrined in Article I of the GATT 1994 agreement could serve as a basis for the mutual recognition, but it seems impossible given the limited integration currently existing at the WTO level.

(B) OBSTACLES TO THE DEVELOPMENT OF INTERNATIONAL UNIFORM RULES OF COMPETITION

Alongside the attachment of the States to the principle of sovereignty, which constitutes the current basis of the international legal order and has the effect to merely give a relative effectiveness to national and international courts because of a lack of private enforcement, other obstacles may hinder the elaboration of an international system of competition policy and have to be overcome.

I. DIVERSITY AND INCOMPATIBILITY OF LAWS AND NATIONAL INTERESTS

It was noted by Gerber that 'discussions of the potential role of competition law in the WTO often proceed as if the meaning of 'competition law' were self-evident. (...) Few address the question 'what kind of competition law would be introduced and what would the probable consequences of its operation be?'.⁵² A major obstacle to the adoption of a uniform international competition policy is indeed the cultural and historical heritage resulting in the different attitudes adopted by different countries towards economic power, freedom of contract, commercial law or equity. On top of these cultural differences appear differences in political or economic priorities established in accordance with objectives that meet the needs of each State at a particular time. Three main areas allow demonstrating the diversity and incompatibility that must first be tackled before envisaging a global system of competition policy. A comparison between the EU/U.S. systems provides a good example.

Firstly, concerning the method of analysis, it must be emphasised that the parameters taken into account in assessing practices or transactions subject to monitoring may vary according to the objectives pursued through competition laws. Thus, in recent decades economists have influenced competition policy. A specific character of the American analysis is based on the use of economics with the Herfindhal Hirschman Index (HHI), which takes into account the level of market concentration and its foreseeable increase after the proposed transaction to determine if it should be authorised. The EU authorities have traditionally followed a less economical approach than their U.S. counterparts; however following the modernisation process of competition law in the EU, the Commission now

⁵²Gerber, D.J. 'Competition Law and the WTO: Rethinking the Relationship' (2007) J.I.E.L 707.

uses a more economic based approach.⁵³ Concerning the control of concentrations, the U.S. authorities use the 'substantial lessening of competition' criterion in assessing the compatibility of a merger with existing rules. Under the EC Merger Regulation the Commission assesses if the operation threatens to 'significantly impede effective competition'.⁵⁴ Both tests have different consequences. Where the U.S. test is much wider and does not distinguish amongst the practices at stake, the European test allows relevant economic distinctions between coordinated and non-coordinated effects (unilateral price increases...).

Secondly, the incompatibilities are more obvious concerning the practicalities of implementation of competition policies. Although the European Commission now promotes a decentralised implementation of Community competition rules,⁵⁵ the European system is traditionally more centralised than the American system. The implementation of the EU competition law is entrusted mainly to the Commission and the role of Member States' authorities is comparatively reduced. In the U.S., the implementation of antitrust law is divided between the Department of Justice (DOJ), the Federal Trade Commission (FTC) and the States. Considerable differences also exist in terms of procedure. In particular, EC procedures are more informal than the U.S. antitrust law and procedural guarantees are less developed: The sanctions imposed by the DOJ have to be imposed by a judge, unlike in the EU where the Commission sometimes has a dual role of judge and party.⁵⁶

Finally, in terms of sanctions, the differences are again obvious and reflect different political, structural and economical approaches. Contrary to Community law, violations of Sections 1 and 2 of the Sherman Act may constitute crimes and be punished as such. The sanctions are particularly heavy and may result in imprisonment. The U.S. competition authorities are indeed convinced of the effectiveness of such a system in the fight against cartels, which is exemplified by the fine of 911 million dollars imposed in the Vitamin cartel case.⁵⁷ On the contrary, Article 23(5) of EC Regulation 1/2003 provides that the fines imposed by the Commission pursuant to the Regulation 'shall not be of a criminal nature'.⁵⁸

This is explained by the fact that Member States have not transferred their competence in criminal matters to the Community, which remains under the principle of national procedural autonomy. However, recent years have seen a clear shift in the Commission's

⁵³Especially in the field of vertical restraints, see Commission Regulation (EC) No 2790/1999 of 22nd December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ L 336, 29.12.1999, pages 21-25).

⁵⁴Council Regulation (EC) No 139/2004 of 20th January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, pages 1-22) Article 2.

⁵⁵The modernisation of EC competition law through Regulation 1/2003 was commented as promoting a decentralised enforcement of competition law.

⁵⁶See Jones & Sufrin, *EC Competition Law: Text, Cases and Materials* (3rd ed.) OUP, 2007, Chapter 1, page 21.

⁵⁷*USA v. Hoffmann La Roche Ltd*, Criminal No. 3: 99-CR-184-R, 20th May 1999.

⁵⁸Council Regulation (EC) No 1/2003 of 16th December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, pages 1-25).

approach towards the American antitrust practice, especially through the imposition of heavier fines. In the Vitamin cartels case the Commission thus imposed a total fine of 855.22 Million Euros, including a fine of 462 Million Euros imposed to Hoffman-La Roche.⁵⁹

This approximation movement is not meaningless and testifies to the current awareness to overcome existing legislative disparities in order to develop a close co-operation between NCAs and to ultimately elaborate a comprehensive international competition policy. On top of these obstacles, the adamant conduct of developing countries towards an international competition policy further hinders the debate.

II. DEFIANCE OF DEVELOPING COUNTRIES TOWARDS A UNIFORM COMPETITION LAW SYSTEM

Generally, private anticompetitive practices have long been a concern for developing countries. As the turnover of many international companies has come to surpass the GDP of middle size developing countries, the latter have seen a growing need for a minimum of discipline on the formers' conduct in their markets. As a result the UNCTAD competition code mentioned above was elaborated, but there was and still is a lack of participation and co-operation of developing countries in the process of elaboration. How could such reluctance be explained?

Aditya Bhattacharjea emphasised the conflict existing between the developing countries perspective and others WTO Members.⁶⁰ According to his analysis, developing countries oppose a 'one size fits all agreement' meaning that they wish to give a greater importance to policy objectives other than the promotion of competition, which would result in a rigid agreement probably advantaging developed countries interests over developing countries concerns. Since 2001, developing countries have consistently pointed to the fact that the development of a multilateral framework on competition policy would be acceptable provided that it fulfilled several conditions.⁶¹

These included integration of the development dimension in all of its component parts; application of special and differential treatment in a more effective and consistent way; provisions relating to flexibility and the putting in place of provisions for technical assistance for countries that do not have legislation on competition policy; the existence of voluntary cooperation between national competition authorities and safeguards for national strategic objectives in the form of exemptions. Moreover, developing countries are fiercely opposed to a framework based on 'voluntary' co-operation (mainly advocated by the U.S.), considering that developed countries would not assist or inform their investigators in a co-operative way. In general, the arguments of developing countries are backed up by the fact

⁵⁹See IP/01/1625 21 Nov. 2001. This fine was the first of a long lasting deterrence practice, See Morten Hviid and Andreas Stephan 'The Graphite Electrodes Cartel: Fines Which Deter?' (2007); Wils, W. P. J. 'Optimal Antitrust Fines: Theory and Practice' (2006) 29 World Competition, pages 183-208; Camilli, E. L. 'Optimal Fines in Cartel Cases and the Actual EC Fining Policy' (2006) 29 World Competition: Law & Economics Review, pages 575-605.

⁶⁰Aditya Bhattacharjea 'The Case For A Multilateral Agreement On Competition Policy: A Developing Country Perspective' (2006) J.I.E.L. 293.

⁶¹See Report of the WTGTCP (2001) WT/WGTCP/5, at paragraph 16; (2002) WT/WGTCP/6, paragraphs 17-20, 25-6, 70-76; (2003) WT/WGTCP/7, paragraphs 17, 24 and 38.

that they usually lack resources and experience in competition law. The lack of experience explains that they ask for an 'assistance agreement' on competition policy rather than a proper multilateral framework in which they could be marginalised. Finally, Bhattacharjea emphasises that the lack of resources explains the reluctance of developing countries towards the GATT/WTO dispute settlement mechanism, which may result in heavy trade sanctions.

4. TOWARDS A COOPERATION OF NATIONAL COMPETITION AUTHORITIES: THE CHOICE OF AN INTERMEDIATE APPROACH

Having analysed the reasons that underpin the internationalisation of competition policy and the historical and practical attempts to develop an international regulatory framework in this field, it is possible to formulate some remarks about the ideal system of international competition policy. In this respect, only two options appear to be acceptable both by scholars and authorities. They are either minimalist or extremist (A). It can be argued that the best solution rests on a genuinely new system, not necessarily within the WTO albeit based on it, which would borrow some features that have proven to be effective in the existing international practice (B).

(A) THE MINIMALIST AND EXTREMIST APPROACHES⁶²

The minimalist approach is advocated by the U.S. authorities and many American scholars. It is consistently explained and reiterated through the numerous contributions of the U.S. government to the WTO's DGTCF. The U.S. contest the opportunity to develop a binding multilateral framework within the WTO and are rather favourable to use the existing voluntary mechanisms for bilateral and multilateral cooperation including those established under the OECD. Taking forward their experience of bilateral cooperation, the U.S. authorities prefer to expand bilateral cooperation agreements with countries that already have antitrust legislation, and provide assistance in order to encourage other states to adopt their own competition laws. These agreements could then serve as a useful basis for seeking a convergence of national laws.

It is unlikely that this position could be translated into practice by a significant step forward. The dangers and difficulties of a unilateral application of antitrust law as well as the limitations of existing mechanisms on bilateral and multilateral cooperation and their failure to establish a credible foundation of a competitive international order were demonstrated above. In addition, such a position remains trapped in a nationalist vision animated by the desire to project at the multilateral level U.S. standards incorporated in the bilateral treaties that bind the U.S. to other States. The risk of a 'disguised unilateralism' could always resurface. Furthermore, it seems idealistic to establish a global competition policy or to

⁶²The rationale of my classification is the degree of harmonisation that would be achieved. The minimalist approach therefore refers to a minimalist harmonisation or to a situation where no harmonisation is possible at all. The extremist approach refers to a system where one single path is designed for everyone to follow, even developing countries.

expect a real convergence of national laws solely by means of the principle of positive comity or by means of voluntary cooperation between States. In addition, it is hard to see how a global initiative on competition policy could be, at first, limited to so few States, even if they are economically the most powerful. In fact this position appears dangerous.

This approach is based on a neo-liberal vision of competition law, which reduces its goal to a bare minimum, namely the elimination of State restrictions to competition impeding free access to the domestic market.⁶³ Accordingly, competition policy is not in itself worthy of being protected, contrary to trade liberalisation which remains, under this vision, the fundamental value. Unlike domestic laws that seek to strike a balance between trade and competition, an international legal order according to this approach would only serve the interests of free trade,⁶⁴ hence explaining the adamant position of developing countries mentioned above.

It has to be recalled that trade and competition, although closely related, have different purposes and goals and some areas continue to drastically separate them, sometimes creating a genuine antagonism. The multilateral trading system as resulting from GATT / WTO is a set of standards aimed at liberalising international trade and ensuring that governmental measures have not negatively affected foreign competitors within foreign markets. To serve this aim, the principle of market access puts primary emphasis on ensuring national treatment and non-discrimination between foreign and domestic competitors. However competition policy, taken in an objective sense, fulfils a regulatory purpose, trying to organise the competition on the market, which is not limited to the sole interest of competitors. An international competition policy, having regard to its purpose, would aim to be the regulator of private economic powers. Competition law is indeed more focused on private anticompetitive practices than on State measures.

The other extreme would aim at creating a genuine international competition legal order. This has already been proposed through the DIAC presented above. This proposal is undoubtedly the most audacious insofar as it seeks to create a true international competition legal order with the establishment both of an international competition authority and of a system of dispute settlement.

However, it has to be rejected. Although such a system represents, an ideal model to achieve, it must be recognised that States are not yet ready to support it, for all the reasons explained above, essentially because of its consequences on national sovereignty. Moreover, it is clear that such an approach would result in designing a single path for everyone to

⁶³Andreas Weibrecht 'From Freiburg to Chicago and Beyond – The First 50 Years of European Competition Law' (2008) E.C.L.R. 29(2), 81-88; R. A. Posner, *Antitrust Law* (2nd ed.) University of Chicago Press 2001, 24–6; Jones & Sufrin, (*above*) page 23.

⁶⁴Bork, R.H., *The Antitrust Paradox: A Policy at War with Itself*, Basic Books, 1978, (reprinted with a new Introduction and Epilogue, 1993), 426–9, quoted in Jones & Sufrin, (*above*) pages 25–26.

follow, without taking into account the needs and concerns of developing countries and the special and differential treatment, which is essential in the current international trade system.⁶⁵ It is thus interesting to consider a middle-way.

(B) THE DEVELOPMENT OF AN ORIGINAL 'MULTILATERAL AGREEMENT ON COMPETITION POLICY' (MACP)

I. THE MAIN CHARACTERISTICS OF THE MACP

As explained above the most representative proponent of this middle-way is the EU. Following the EU's contributions to the WGTCP the best opportunity appears to be the opening of negotiations between States in order to establish a multilateral agreement on competition whose content would consist of four elements:

- The definition of common basic principles within the WTO in order to ensure the effective adoption of competition laws by all WTO Members, including developing countries, and their effective implementation in accordance with the principles of transparency and non-discrimination;
- The adoption of substantive fundamental competition rules by seeking a consensus among States on a number of particularly harmful practices (hard-core cartels, abuses of dominant position...);
- The establishing of a multilateral cooperation between competition authorities, which includes the achievement of bilateral cooperation agreements, including those concluded between the EU and the U.S. with non-mandatory application of the principle of positive comity;
- The setting up of a system of dispute settlement and the question about the possibility of adapting the current WTO system to competition issues. Some authors seem to think that it would not be the most complicated step in this process as, according to them, the WTO has already held an antitrust case.⁶⁶

This system would be triggered when a State fails to comply with its international commitments stemming from the Multilateral Agreement (such as the obligation to adopt a competition law and ensure transparency and non-discrimination in the implementation of this Act). It would therefore look like the European system of implementation of Community law, with a possible action for enforcement brought by other Members, not by a supranational institution which would ensure a crucial equality between developed and developing countries.

⁶⁵Hunter Nottage 'Trade and Competition in the WTO: Pondering the Applicability of Special and Differential Treatment' (2003) J.I.E.L. 23.

⁶⁶Eleanor M. Fox 'The WTO's First Antitrust Case – Mexican Telecom: A Sleeping Victory for Trade and Competition' (2006) J.I.E.L. 9 (2), 271-292; Jung Y. 'Modelling a WTO Dispute Settlement Mechanism in an International Antitrust Agreement: An Impossible Dream?' (2000) J.W.T., page 89.

The best aspect of this approach is its practicality. It is a credible basis for a short and medium term development of the roots of a genuine internationalised competition policy, since it promotes the search for common binding principles and the use of a multilateral dedicated system of dispute settlement. This system will be detailed below.

II. THE FIRST AND SECOND PARTS OF THE MACP: THE SEARCH FOR COMMON CORE PRINCIPLES

Firstly, the general framework of the multilateral agreement should incorporate the basic principles of the WTO that are transparency, national treatment and most-favoured-nation treatment.⁶⁷ These would constitute the first part of the MACP. Especially concerning the principle of transparency, it would compel Member States to disclose competition-related laws, regulations and legal and administrative decisions. On top of this obligation, Member States could agree to notify to the WTO any other document contributing to further transparency, which could foster developing countries to trust their industrialised partners. This would be an adaptation of the existing Article X of the GATT, which requires States to promptly publish all measures affecting international trade and to administer these measures in a 'uniform, impartial and reasonable' manner.

Transparency could be further enhanced by more cooperation between NCAs. Burnside and Botteman have emphasised the fact that networking amongst competition agencies is a good palliative to the absence of a world competition policy.⁶⁸ They clearly explain that voluntary 'bilateral cooperation' may result in a 'multilateral convergence'; yet they also contend that there is not enough cooperation to achieve this vision. It could be possible therefore to turn the problem upside-down and use competition networks not as a catalyst but as a complementary tool for the enforcement of the MACP.

Moreover, it is clear that these principles recognise certain rights and guarantees to private actors. National treatment and most-favoured-nation treatment⁶⁹ in the context of competition policy would indeed guarantee a form of equality amongst domestic and foreign industries and companies. In this respect, such a practice could on a medium term basis result in a principle of mutual recognition as it exists within the EU, where foreign and domestic companies would benefit from the same procedural rights and remedies before NCAs. The development of the private enforcement of the MACP would only be a practical consequence of these principles, where private actors, both domestic and foreign, could invoke a violation of competition rules and eventually claim compensation.

⁶⁷See in this respect the WTO's Working Document on Competition W/WGTCP/W/114 'The Fundamental WTO Principles of National Treatment, Most-Favoured-Nation Treatment and Transparency'.

⁶⁸Alec Burnside & Yves Botteman 'Networking Amongst Competition Agencies' (2004) *Int. T.L.R.* 1.

⁶⁹Respectively Articles III and I of GATT 1994.

Secondly, the core substantive principles of the MACP would apply directly on these private actors in order to create a binding discipline and to combat international anti-competitive practices. It is not the purpose of this article to discuss which substantive rule should be included and which should not (and only a few examples will be made) but it is clear that these substantive principles would represent the most ambitious part of the MACP as they would be the fruit of the convergences resulting from the application of the Agreement.

At first, only few principles would be incorporated into the Agreement. A 'compromise by drafting' would settle disputes by the use of ambiguous language. For example, despite the divergences existing between competition laws, there is a unanimous fight against hard-core cartels. Therefore, common substantive rules would be easy to agree on this particular topic, especially in the light of OECD's recommendations.⁷⁰ The same reasoning can be applied to export cartels. They are a form of agreement made between domestic companies in order to limit competition on foreign markets by fixing export prices or allocating markets.⁷¹ States are usually more lenient towards this practice because it allows penetrating foreign markets and it has no harmful effect on consumer welfare. However, as Sweeney emphasised, several States expressed, within the WGTCP, the need for an export-cartel rule.⁷² On the basis of such a rule, export cartels could be condemned *per se* as contrary to the common core principles enumerated in the first part of the MACP (especially the principle of transparency). Other common substantive rules on abuses of dominant positions and mergers could later complete these examples.

To this purpose, a 'clause of progress' would ensure the flexibility and easy revision of the Agreement in order to add new substantive provisions (agreed throughout a timely implementation of the MACP and competition networking) especially concerning mergers and abuses of dominant positions on which a consensus is still very hard to attain. An obligation to periodically assess the need to include new substantive rules would ultimately lead to the elaboration of an International Competition Code. In addition, insofar as the MACP contains binding elements it is possible that a 'derogation clause' may be considered necessary, for a number of reasons. In some cases the essential interests of a Member State may indeed be felt to outweigh the enforcement interest of another Member. As highlighted by the European Commission in its 1996 communication, GATT/WTO Members are allowed in exceptional circumstances to derogate temporarily from their obligations and take safeguard action to protect their domestic industries. Such an approach could be envisaged in competition policy, 'provided measures taken are time-limited, justified, non-discriminatory and transparent'.⁷³

⁷⁰See OECD C(98) 35/Final.

⁷¹Sweeney, B. 'Export Cartels: Is There a Need for Global Rules?' (2007) J.I.E.L. 10(87).

⁷²Communication from India' WT/WGTCP/W/216 (2002) at paragraph 3; 'Communication from China' WT/WGTCP/W/241 (2003) at paragraph 6. See also 2003 WGTCP Report, at paragraph 110, noting comments by South Africa; Report of Meeting by the Secretariat, WT/WGTCP/M/22 (2003) at paragraph 45, noting comments by China.

⁷³COM (96) 284 final, 18.06.1996.

III. THE THIRD PART OF THE MACP: THE CREATION OF A COMPETITION POLICY MONITOR (CPM)

Disputes concerning the compliance of national competition laws to the obligations of States set out in the agreement on competition could be resolved according to existing WTO procedures, as it aims at examining the conformity of a national law with the standards of the agreement or at assessing whether the Act is applied in a transparent manner by national authorities.

However, this compliance would still not be guaranteed because it is clear that the dispute settlement mechanism of the WTO was originally set up to resolve trade related disputes between Member States and it does not always take into account the dimension of competition and the specificity of international conflicts in this area. Moreover, concerning the enforcement of competition law, the WTO dispute settlement mechanism is deprived of several useful tools such as the possibility to address injunctions or recommendations aiming at improving the behaviour of companies, the possibility to inflict fines or lump sums, and crucially, the total absence of a private enforcement scheme. In fact, the WTO system is not adapted to the specificity of competition law and policy, especially concerning the high technicality of the subject and the sanctions that may be ordered, since they essentially consist in allowing a State the possibility to take retaliatory measures. Finally, the multilateral framework of the WTO is not concerned at all with illegal practices committed by private operators.

Thus, the creation of a dedicated monitoring mechanism would allow establishing a framework for a collective and periodic evaluation of the Member States competition policies, including those which have not fulfilled their commitments arising from the application of the MACP. It has been emphasised that a coherent interpretation and application of international competition rules can only be achieved by a single independent authority.⁷⁴ A Special Secretary, with a recognised expertise on competition law and policy could be appointed CPM to prepare periodic reports on the application of the MACP by the States and on the compatibility of their national competition policies with the multilateral agreement. The publication of these reports accompanied by non-binding recommendations would ensure the necessary political pressure –as it exists in the EU with enforcement actions.⁷⁵

These reports could be made public and also contain non-binding recommendations for these failing States. It would be to ensure compliance by Member States of their obligations by making more transparent their regulatory practice and the practice of their national authorities. It would therefore be a complementary mechanism rather than the competitor of the WTO dispute settlement mechanism.

⁷⁴Nicolaides, P. 'For a World Competition Authority: The Role of Competition Policy in Economic Integration and the Role of Regional Blocs in Internationalizing Competition Policy' (1996) *J.W.T.* 30(4), page 131.

⁷⁵Article 226 EC, although the possibility of fines introduced by the Treaty of Nice added a repressive flavour to this system.

5. CONCLUSION

There is evidence to support the claim that private barriers to entry are restricting the growth of international trade. This problem is expected to increase as businesses become more globalised and as tariffs continue to be reduced. Some of the most effective private barriers to entry –both horizontal and vertical– are said to be anti-competitive restraints. As explained in this article, existing unilateral, bilateral and multilateral devices have had only limited success against these barriers. The Doha Round of Trade Negotiations apparently also failed to address this important issue, and the current situation is certainly unsatisfactory, but it now clearly calls for a new system of international competition policy that could be designed within the WTO or in a distinct but closely related framework.

As Geiger and Von Meibom rightly pointed out, 'as desirable as a World Competition Law may be from the economy's perspective, its realisation in the short term and in one rush seems to be impossible'.⁷⁶ The elaboration of a Multilateral Agreement on Competition Policy therefore seems to be a well-balanced solution that would, on the one hand, compel the signatory States to adapt their competition legislations to the common basic principles agreed in the Agreement; on the other hand, they would cooperate in order to define common substantive rules so that a progressive internationalisation of competition policy can be achieved not being hindered by a binding and stringent harmonisation process.⁷⁷

⁷⁶E.C.L.R. 2002, 23(9), 453.

⁷⁷See on this particular topic: William Kingston 'Why Harmonisation is a Trojan horse?' (2004) E.I.P.R. 26(10), 447–460.