# 10 The International Trading System and Market Distortions

## *Revisiting the Need for Competition Rules within the WTO*

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**Keywords**
cross-border business activities, developing countries, multilateral competition rules, trade and competition, WTO

**Abstract**
As a result of the interconnectedness of the global economy, cross-border activities of economic operators are soaring. Their business practices are not governed by multilateral rules, but merely, if at all, by regional or national laws. As a result, they are potentially subject to over- or under-enforcement and -regulation or to conflicting rules. The resultant legal uncertainties and, therefore, potential lack of discipline for practices facilitates the development of dominant positions and anticompetitive behavior. This advances market distortions to the detriment of diverse offerings and the competitiveness of small market players, especially in economically weak developed countries. Such unfavorable developments could be reduced by preventing market concentration and disciplining anticompetitive behavior. I argue that multilateral rules alone would ensure that cross-border activities of economic operators are subject to uniform rules, irrespective of which country's or region's market is affected; and thus, provide legal certainty for current gaps. Moreover, in spite of the resistance of numerous countries to include competition disciplines within the World Trade Organization (WTO), rules aimed at dismantling barriers to trade created by private economic operators are not only theoretically desirable but indispensable in the long term to avoid an erosion of the WTO system by effectively replacing state-created barriers. The increasing role of supply chains and the rising volatility of international commodity prices should give all, albeit particularly the economically weak developed countries, reason to pause and revisit an issue that has significant implications for the competitiveness of their economic operators.

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## 10.1 Introduction

As a result of globalization and technological revolution markets transcend countries. Increasingly interconnected, borderless and digitalized (global) markets tend to develop mass markets, increase the integration of enterprises and so produce goods and provide services readily accessible for consumers. While this does improve knowledge transfer and raises economic expectations, the ever diminishing distinction between goods or services in these markets poses a threat to the diversity of offers and, consequently, to small market players. Thus, the rise of cross-border activities of public and private economic operators such as coordination of behavior, international mergers and filling dominant positions gives reason to pause and revisit the relationship between competition and trade. More precisely, it raises the question of whether and to what extent the behavior of cross-border active operators is currently disciplined, including the effect thereof. For this purpose, I first demonstrate the effect of unrestricted competition for markets and market participants in general. Thereafter, I determine the rules applicable to cross-border activities of economic operators and assess the implications of the current legal situation for the competitiveness of small market players, in particular in economically weak developed countries. I then provide some thoughts on how to remedy the current legal situation.

## 10.2 Unrestricted Competition and Market Distortions

Both the economic relations between World Trade Organization (WTO) members and most of their national economies are based, in principle, on a capitalist system; a system characterized by private or corporate ownership of most of the means of production and service supply and their operation for profit, by investments determined by private decisions, and by prices, production, service supply and the distribution of goods and services primarily determined by competition in these markets.[1] Competition strives for a so-called market balance, that is, a balance between demand and supply for the optimal satisfaction of demand amongst consumers while ensuring the profit of suppliers. Such a win-win situation for consumers and suppliers, in other words for society, where a fair price is

1 In detail on the notion of capitalism, *see e.g.* Marina V. Rosser & Barkley J. Jr. Rosser, *Comparative Economics in a Transforming World Economy*, MIT Press, 2018, p. 7; Chris Jenks, *Core Sociological Dichotomies*, SAGE, London, 1998, p. 383; Andrew Zimbalist *et al., Comparing Economic Systems: A Political-Economic Approach, Harcourt College Pub*, 1988, pp. 6-7. Various scholars convincingly argue that the use of the term market economy is a misapprehension (and ignorance) of reality, whereas capitalism would best describe the processes involved, namely using capital with the aim of making profit, whereby capital is efficient processes of production and constant advancement of technology (*e.g.* Joseph Schumpeter, *Capitalism, Socialism and Democracy*, Harper Perennial Modern Thought, 2008, p. 84. (first edition 1942); Wolfgang Streeck, *How will capitalism end?*, Juggernaut Books, New Delhi, 2017.

assumed to develop, emerges in case of a perfectly competitive market.[2] This theoretical (simplified)[3] model of a homogenous market is characterized by complete market transparency for fully informed commercial transactions and by unrestricted market access for all economic operators. It works on the assumption that there are no transaction costs and resources are available indefinitely.[4]

In reality though, these conditions are generally lacking, varying from market segment to market segment. Coupled with the supplier's pursuit of maximizing profits, which can only occur at the expense of competitors, at least in saturated markets, this results in a tendency for the development of dominant positions (*e.g.* monopolies, oligopolies).[5] Even though most competitors attempt to constantly increase their efficiency and production to offer the best possible range of goods and services at the best possible price,[6] usually only a few will outlast the competition. If no real competitors remain, it goes as far as eliminating competition. This is the paradox of unrestricted competition.

In addition to this tendency, without legal safeguards economic operators can abscond from competition through anticompetitive behavior, *i.e.* collusive practices between, or exclusionary practices by a single or few economic participant(s) (*e.g.* forming cartels, abusing dominant positions, boycotting, concluding exclusive and anticompetitive agreements such as anticompetitive mergers) to promote their interests. First, such practices can restrict imports and exports. This would erode the economic gains from reducing tariff and non-tariff barriers[7] and distort competition. Secondly, anticompetitive practices can prevent the efficient allocation of resources in a market, namely to provide the best range of choice and supply and the lowest price to consumers. Put differently, such practices jeopardize free pricing at the expense of consumers, more precisely at the expense of consumer welfare and the common good. This too, distorts competition. Consumers include economic operators that use products as inputs to, or services as enablers for, their own productive activities. Hence, anticompetitive behavior undermines the competitiveness

2 *See e.g.* John VC Nye, 'Standards of Living and Modern Economic Growth', *in The Concise Encyclopedia of Economics*, 2008, at www.econlib.org/library/Enc/StandardsofLivingandModernEconomicGrowth.html.

3 It facilitates the understanding and investigation of complex relationships (*e.g.* price formation).

4 A comprehensive definition in Phillip E. Areeda & Louis Kaplow, *Antitrust Analysis. Problems, Text, and Cases*, Aspen Publishers Inc, New York, 1997, p. 6, para. 107. *See* also Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust: An Integrated Handbook*, West Group, St Paul, 2000, p. 30. (competition is "ideal", if markets "comprise a large number of producers, none with a substantial market share, and each producing a fungible or undifferentiated product"); and W. Kip Viscusi *et al., Economics of Regulation and Antitrust*, MIT Press, 2000, p. 2.

5 This observation goes as far back as 1776 (Adam Smith in *The Wealth of Nations*) and 1867 (Karl Marx in *Das Kapital*).

6 If they do not, consumers have the choice to buy elsewhere.

7 *E.g.* Pascal Lamy, *The Geneva Consensus. Making Trade Work for All*, Cambridge University Press, Cambridge, 2013, p. 132.

of these (often smaller) economic participants that are often found in economically weaker developed countries, in both export- and import-competing markets.

Both eliminated and distorted competition frustrates a market balance, the very aim of competition, essential to a dynamic and healthy market in a capitalist system: the system the economic (trade) relations between WTO members (and most of their national economies) are based on. In essence, this is the link between trade and competition.[8]

## 10.3 Cross-Border Activities and Market Distortions

As a result of and the interconnectedness of the global economy, cross-border activities of economic operators are soaring: concentrations of businesses are no longer limited to specific territories,[9] anticompetitive agreements are concluded in increasingly globally active (international) cartels (*e.g.* vitamin cartel), and public and private economic operators are increasingly filling their dominant position in certain markets globally (*e.g.* Microsoft).[10] Such entrepreneurial activities can affect the competition, *i.e.* market balance in several states and could therefore be governed by the multilateral rules of the WTO, the primary forum for dealing with cross-border trade. Alternatively, these market behaviors may also be considered from the perspective of regional or national competition laws.

### *10.3.1 WTO Disciplines and Market Distortions*

WTO agreements address state created barriers to international trade. More specifically, international trade law is not based on the idea of unconditional free trade but characterized by the recognition that state interventions in the national economic order may be necessary and are therefore generally permitted. Numerous WTO rules limit this power of creating barriers to international trade to prevent their potential abuse. Examples are the non-dis-

8 The direct connection between world trade and competition is also emphasized in the WTO Working Group on the Interaction between Trade and Competition Policy. Study on Issues Relating to a Possible Multilateral Framework on Competition Policy. WT/WGTCP/W/228, WTO, Geneva, 2003, pp. 9. *et seq*. On the link, *see* also Eleanor M. Fox, 'The WTO's First Antitrust Case – *Mexican* Telecom: A Sleeping Victory for Trade and Competition', *Journal of International Economic Law*, Vol. 9, Issue 2, 2006, pp. 271-292.

9 *E.g.* News Corporation (CEO and founder *Keith Rupert Murdoch*) has shares in book and newspaper publishers (*e.g.* in Australia, the UK and the US), in music production companies (*e.g.* MySpace Records), in rugby leagues (*e.g.* 50% of the Australian and New Zealand rugby league) and in film and television studios and internet companies (*e.g.* Fox News, The Wall Street Journal and Twentieth Century Fox).

10 The *Microsoft* case, for example, has been handled in parallel in the US, the EU and Japan. *See* in detail Jörg P. Terhechte, 'Das internationale Kartell- und Fusionskontrollverfahrensrecht zwischen Kooperation und Konvergenz', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 68, Issue 3, 2018, pp. 689. *et seq*., 700. *et seq.*

crimination obligations. They essentially aim at ensuring a level playing field, namely fair conditions of trade. This includes largely undistorted competition between products, services and IP-right holders from different member states and between foreign and domestic products, services and IP-right holders.[11] The latter presupposes market access. Market access is facilitated by the progressive dismantling of state-created barriers to trade through further reducing binding tariffs and trying to eliminate non-tariff barriers (NTBs) [*e.g.* quantitative restrictions,[12] technical barriers to trade (TBT)[13] and sanitary and phytosanitary (SPS) measures[14]].

Notably, numerous commercial practices of cross-border active economic operators also constitute barriers to international trade that distort competition amongst foreign, and between domestic and foreign products, services and IP-right holders (*e.g.* exploitation of dominant positions, coordination of behavior). Withal, the steady dismantling of state-created barriers to trade even increases their leeway, escalating the risk of their anticompetitive behavior with the described anti-competitive effects. Hence, state-created barriers to international trade have been, and may continue to effectively be, replaced with those created by cross-border active economic operators. This erodes the economic gains from tariff reductions and the removal of NTBs.[15] While this possibility has already been emphasized by the panel in the GATT Decision on Restrictive Business Practices back in 1960,[16] the WTO agreements hardly include any provision that aims at counteracting distortions of international trade and competition caused by cross-border active economic operators.[17] And this despite the fact that WTO members are guided by the desire "to

11 So too are the rules on trade remedies, *e.g.* on dumping (exporting below cost to gain market share) and export subsidies.

12 Article XI.1 of the WTO General Agreement on Tariffs and Trade (GATT).

13 *E.g.* Articles 2, 3 and 4 of the WTO Agreement on Technical Barriers to Trade (TBT).

14 *E.g.* Articles 2, 3 and 4 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS).

15 *See* also Jürgen Basedow, 'International Antitrust or Competition Law', *in* Rüdiger Wolfrum (ed.), *Encyclopedia of Public International Law*, Max Planck Institute for Comparative Public Law and International Law, September 2009, para 20.

16 GATT, Decision on Restrictive Business Practices: Arrangement for Consultation, *BISD* 9S/28, 1960, Recital (1).

17 *E.g.* Articles 8.2 and 40 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (states may adopt measures to prevent abuses and adverse effects on trade), Article 10bis of the Paris Convention read with Article 2.1 of the TRIPS (states to *assure* nationals of all WTO members "effective protection against unfair competition"), Article VIII.2 of the WTO General Agreement on Trade in Services (GATS) (states shall adopt measures to ensure that monopolies adhere to non-discrimination principles) and Article IX GATS (shall enter into consultation) contain specific provisions on anti-competitive behavior. The trade remedies in the WTO Agreements on Subsidies and Countervailing Measures, on Anti- Dumping and on Safeguards merely allow for countervailing measures and do not directly counteract corporate pricing policy. *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44, 31 March 1998, para. 10.49, private commercial restrictions were subject of the proceedings for the first time. The Panel noted that WTO rules only apply, if there is a satisfactory degree of state involvement. Mere tolerance of privately created trade barriers is by no means sufficient.

reduce distortions and impediments to international trade";[18] despite the very essence of the basic principles of the WTO[19] aspiring to create equal competitive conditions for products, services and IP-right holders;[20] despite undistorted competition (a market balance) being essential in a capitalist system, the system the economic relations between WTO members (and most of their national economies) are based on; and despite undistorted competition requiring legal safeguards.

### *10.3.2 National (and Regional) Disciplines and Market Distortions*

Due to the absence of framework conditions for competition at international level, cross-border activities of economic operators are governed by national or regional competition rules. Their applicability can arise both from the territorial principle and, extraterritorially, from the impact principle.[21] Jurisdiction therefore, is not only given when entrepreneurial practices occur and are initiated in the rules' country of origin, but also when such practices are initiated in another country and merely affect competition in the rules' country of origin. Therefore, as an example, price bundling of globally active economic operators and mergers of two companies based in different countries can be investigated and assessed simultaneously by different competition authorities applying different competition rules based on varying legal and economic standards. The disparity of the more than 130 competition laws worldwide may lead to undesirable market distortions due to potential over- or under-enforcement and -regulation, and conflicts at either the substantive or procedural level.

Firstly, it is not regulated how an economic operator should conduct itself if its behavior is regulated or judged differently by the relevant competition laws. Without guarantee for a uniform application of law, there is no legal certainty;[22] a situation that facilitates market concentration and anticompetitive behavior.

Secondly, it is important to note that as long as the national or regional competition rules and their application are consistent with WTO obligations (that is, in principle, to not restrict market access and to apply all rules equally to foreign and domestic goods, services, operators and IP-right holders, subject to their commitments), a WTO member

18 Recital 1 of the Preamble to TRIPS.

19 *E.g.* the non-discrimination obligation.

20 *See e.g. Understanding the WTO*, WTO, Geneva, 2008, p. 12. ("The WTO […] is a system of rules dedicated to open, fair and undistorted competition.").

21 On externalities of one jurisdiction's regulatory acts on another's and the effect that behavior occurring in one jurisdiction can have elsewhere *see e.g.* Michael S. Gal, 'Regional Competition Law Agreements: An Important Step in International Antitrust', *University of Toronto Law Journal*, Vol. 60, Issue 2, 2010, p. 240.

22 See Terhechte's analysis using the example of international agency cooperation (Terhechte 2018, pp. 755. *et seq*.).

cannot successfully challenge the competition laws of another member as being restrictive to trade. This provides states with a very distinct and well-developed national, supranational or regional competition law (*e.g.* US and EU-members) with a wide scope to design rules that, for example, protect domestic industries in their territory. For WTO members with a rudimentary national or regional competition law (or without any), this possibility does not exist. Many economically weak developed countries cannot raise the necessary funds to introduce, implement and enforce effective national or regional competition rules. The disproportionately high implementation and enforcement costs in relation to the minimum standards to be guaranteed at national level under TRIPS reduce affordability even more,[23] leading to the aforementioned under-enforcement or -regulation. Therefore, in these markets the behavior of dominant economic operators is not disciplined, which enables them to consolidate their (dominant) position. As a result, other providers (and competitors) may be (further) displaced and their market entry impeded. This affects their competitiveness, generally restricts competition and may adversely affect the diversity of offers in the long term.

In order to avoid distortions, over- or under-enforcement and -regulation and conflicts of extraterritorial application, numerous states have concluded bilateral and regional agreements.[24] They improve and enhance cooperation between the various competition authorities and promote understanding of differences in the design of national and supranational competition rules and policies. At the same time, these agreements presuppose that the relevant rules protect the same interests and include comparable standards and levels of protection. While this applies to most developed countries, often the emerging and developing countries' standards still differ considerably. Hence, the latter concluded only a few bilateral or regional agreements both with developing countries and amongst themselves. This may be, however, slowly changing. African states, for example, are currently negotiating competition chapters within the African Continental Free Trade Area (AfCFTA) that entered into force on 30 May 2019[25] and within the Tripartite Free Trade

23 In detail Franziska Sucker, 'Why an Absent International Regulatory Framework for Competition and Strong Copyright Protection Harms Diversity of Expressions and What to Do About it', *in* Klaus Matthis & Avishalom Tor (eds.), *New Developments in Competition Law and Economics*, Vol. 7, Springer, 2019, p. 186. On the high administrative costs and the political pressure for economically weak developed countries to implement TRIPS, *see e.g.* Laurence R. Helfer, 'Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking', *Yale Journal of International Law*, Vol. 29, Issue 1, 2004, p. 70.

24 On the rise of competition chapters in regional agreements, *see* Valerie Demedts 'Which Future for Competition in the Global Trade System: Competition Chapters in FTAs', *Journal of World Trade*, Vol. 49, Issue 3, 2015, pp. 407-436.

25 Agreement Establishing the African Continental Free Trade Area (adopted 21 March 2018, entered into force 30 May 2019) (AfCFTA).

Area (TFTA),[26] one of the three building blocks for the AfCFTA. An African regional competition law could close, or at least narrow, the gap that exists in 24 African countries without national competition laws and discipline the behavior of economic operators that affect the competition of markets within Africa (cross-African activities), thereby contributing to the reduction of market distortions among African countries.[27]

### *10.3.3 Concluding Observation*

At multilateral level cross-border activities of economic operators are not disciplined. At national and regional level only those cross-border activities are disciplined (with legal certainty) that affect the competition of two or more markets within the territory of the relevant agreement. An entrepreneurial activity that affects the competition of two or more markets outside the relevant territory may be subject to two competition laws that conflict or differ, either in their application or due to their difference in over- or under-enforcement and regulation. The legal uncertainty in these cases, and thus the potential non-disciplining of the relevant entrepreneurial behavior, contributes to the development of market concentration and facilitates anticompetitive behavior. This strengthens oligopolies in their market positions, and insufficiently accounts for, and further displaces, small market players and market participants of economically weak developed countries.[28]

Companies think economically, act profit-oriented and try to take advantage of the current world trade system by essentially campaigning for a policy of maximum free trade without disciplining the behavior of economic operators to enable an unconstrained cross-border offering of goods and services while maximizing profits.[29] This should not be criti-

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26 Agreement Establishing a Tripartite Free Trade Area Among the Common Market for Eastern and Southern Africa the East African Community and the Southern African Development Community (adopted 10 June 2015, not in force) (TFTA).

27 On the advantages and disadvantages of national and regional competition laws for developing countries Josef Drexl, 'Economic Integration and Competition Law in Developing Countries', *in* Josef Drexl *et al.* (eds.), *Competition Policy and Regional Integration in Developing Countries*, Edward Elgar, 2012, pp. 231. *et seq;* and Gary C. Hufbauer & Jisun Kim, 'International Competition Policy and the WTO', presented at a conference *One Year Later: The Antitrust Modernization Commission's Report and the Challenges that Await Antitrust*, New York, 11 April 2008, at www.piie.com/commentary/speeches-papers/international-competition-policy-and-wto.

28 *See* also Thomas Gibbons, 'The Impact of Regulatory Competition on Measures to Promote Pluralism and Cultural Diversity in the Audiovisual Sector', *Cambridge Yearbook of European Legal Studies*, Vol. 9, 2006/2007, pp. 239-259.

29 This is often coupled with the highest possible degree of IP-protection. In relation to the media industry, *see e.g.* Christopher M. Bruner, 'Culture, Sovereignty, and Hollywood: UNESCO and the Future of Trade in Cultural Products', *NYU Journal of International Law and Politics*, Vol. 40, Issue 2, 2008, pp. 351-436, citing at p. 414. footnote 270 *Bonnie JK Richardson* (who has been Vice President for Trade and Federal Affairs with the Motion Picture Association of America and chief US negotiator for the services market access negotiations during the Uruguay Round): "In terms of maximizing the value of their products and

cized. It is, however, necessary to question the legal situation, which permits unfavorable developments, for example economic profits at the expense of diversity of offers and of smaller market participants, especially those of developing countries.

## 10.4 What to Do About It?

As illustrated above, markets that ensure economic efficiency and distributional equity do not work purely unaided by anything other than by market mechanisms themselves. Thus, some level of intervention is required.[30]

### *10.4.1 Reduction of Trade Barriers Created by Cross-Border Active Economic Operators*

The described market distortions can be decreased by reducing barriers to international trade created by public and private cross-border active economic operators. This can be accomplished by doing on the international market what is done as a matter of course by most governments on their domestic market to achieve market balance: preventing practices such as international market concentration and disciplining potential anticompetitive behavior. This would reduce the possibility to abuse their position and thus contribute to achieving largely undistorted competition. Largely undistorted competition, an essential characteristic in the current economic (capitalist) system, would serve as a corrective to the principles of free trade and the continuously progressing liberalization. It would help break the oligopolistic structure of many industries (which often derives from exclusive rights). Decentralized structures would create incentives to offer a larger variety of products at prices consumers are ready to pay, countering thereby the potential displacement of other economic operators. Hence, competition law mechanisms can serve as an instrument

expanding the market for them, protectionist intellectual property law and liberalist international trade law are of a piece."

30 The need for multilateral competition rules is widely recognized (even amongst opponents of the inclusion in the WTO) *see e.g.* Joanna Shelton, 'Competition Policy: What Chance for International Rules?', *Wilton Park Conference: Global Trade Area*, 1998, at www.oecd.org/dataoecd/34/39/1919969.pdf; Friedl Weiss, 'From World Trade Law to World Competition Law', *Fordham International Law Journal*, Vol. 23, Issue 6, 1999, pp. 250-273; Andrew T. Guzman, 'International Antitrust and the WTO: The Lesson from Intellectual Property', *Virginia Journal of International Law*, Vol. 43, Issue 4, 2002, pp. 933-957. On pro and cons of world antitrust laws *see e.g.* Code Jürgen Basedow, *Weltkartellrecht. Ausgangslage und Ziele, Methoden und Grenzen der internationalen Vereinheitlichung des Rechts der Wettbewerbsbeschränkungen*, Mohr Siebeck, Tübingen, 1998; Karl Matthias Meessen, 'Das Für und Wider eines Weltkartellrechts', *Wirtschaft und Wettbewerb*, 2000/1, pp. 5-16; and David J. Gerber, 'Competition Law and the WTO: Rethinking the Relationship', *Journal of International Economic Law*, Vol. 10, Issue 3, 2007, pp. 707-727.

to create a more conducive environment for small market players and market participants of economically weak developed countries.

Only multilateral disciplines can ensure that cross-border activities of economic operators are subject to uniform rules, irrespective of which country's or region's market is affected and thus provide legal certainty for current gaps arising from conflicts between two competition laws or from over- or under-enforcement and -regulation. Therefore, I revisit the WTO's role in this regard.

### *10.4.2 Revisiting the WTO's Role*

While the inclusion of competition issues as a corrective to free trade principles has been discussed among WTO members for quite some time,[31] the negotiation mandate restricts such endeavors, rendering their realization a distant prospect. It is, however, worth reflecting on the reasons for resistance and to highlight the benefits of multilateral competition rules.

#### 10.4.2.1 Negotiation Mandate

Since the first Ministerial Conference in Singapore in 1996, competition has been on the WTO agenda, with the ministers agreeing to establish a special Working Group on Competition Policy to examine the relationship between trade and competition policy.[32] At the Ministerial Conference in Doha in 2001, the ministers "[r]ecognized the case for a multilateral framework to enhance the contribution of competition policy to international trade and development" and decided to start negotiations on multilateral competition rules in 2003, provided all members agree on its modalities.[33] This, however, never went beyond the stage of a proposal by the then European Communities, with both the US and developing countries rejecting multilateral competition rules in general.

The US "argued that world antitrust would mean lowering standards to the lowest common denominator".[34] In particular, it feared that states would try to create laws that protect domestic companies from more efficient competitors "rather than cultivate efficiency",[35] and therefore that multilateral rules would "no longer effectively protect compe-

31 Already Article 46 of the Havana Charter contains a catalogue of restrictive practices.

32 Working Group on the Interaction between Trade and Competition Policy (*see* Singapore Ministerial Declaration WT/MIN(96)/DEC, December 1996).

33 Doha Ministerial Declaration WT/MIN(01)/DEC/1, November 2001, paras. 23-25.

34 Eleanor M. Fox & Mor Bakhoum, *Making Markets Work for Africa. Markets, Development, and Competition law in Sub-Saharan Africa*, Oxford University Press, Oxford, 2018, p. 13.

35 Id.

tition".[36] Moreover, the WTO, so they argued, is an inappropriate forum for competition rules since it is run by trade officials who bargain and make concessions, whereas competition laws are based on pro-market rules.[37] Developing countries pointed to their limited experience with competition rules and feared that multilateral rules based on US or EU concepts would not be compatible with their current preferred investment screening techniques and industrial policies.[38]

> "They feared they were being short-changed by principles of efficiency (of multinationals) without equity; that they would lose their policy space; that they would be increasingly marginalized; that they would suffer a new economic colonialism."[39]

Developing countries too, stressed that the introduction of a comprehensive and meaningful competition agreement costs a lot of time and money.[40] Furthermore, for those countries without national competitions laws it was believed, the enforcement of multilateral standards cannot be effectively guaranteed and cause too high a cost. In addition, with the Doha Round underway they feared taking on more obligations, notwithstanding that their negotiating capacity was already largely or full deployed and could not be stretched to incorporate more issues.[41]

The Cancun Ministerial Conference of 2003 failed primarily due to the then EC and US not offering "sufficiently sizable cutbacks in their agricultural subsidies"[42] to developing countries; subsidies that are particularly harmful for their economic operators. With the intention to revive the negotiations, in July 2004 the WTO General Council decided to remove several items from the agenda, including competition, which

> "will not form part of the Work Program 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 Development Round."[43]

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36 International Competition Policy Advisory Committee (ed.), *Final Report*, 2002, pp. 264. *et seq.*, at www.justice.gov/atr/icpac/finalreport.html.

37 Fox & Bakhoum 2018, p. 13.

38 Hufbauer & Kim 2008.

39 Fox & Bakhoum 2018, p. 13.

40 International Competition Policy Advisory Committee 2002, 267.

41 On the interests and perspective of developing countries in general, *see e.g.* Bernard Hoekman & Peter Holmes, 'Competition Policy, Developing Countries and the WTO', *Policy Research Working Paper World Bank 2211* (April 1999).

42 Fox & Bakhoum 2018, p. 15.

43 WTO General Council, Decision on the Doha Agenda Work Programme (July Package) WT/L/579, 1 August 2004, para. 1. lit. g.

Accordingly, competition is no longer covered by the WTO members' negotiating mandate. As a result, a serious discussion about a competition agreement within the WTO system can only be resume after the conclusion of the Doha Development Round.[44] To date, however, WTO members have not been able to resolve their fundamental conflict in relation to the so-called Singapore issues, most notably agricultural subsidies; a crucial issue for developing countries.[45]

#### 10.4.2.2 Reflections on the Reasons for Resistance

*(i) Developed countries.* To begin with, at international level competition has never been 'effectively protected'. As illustrated, undistorted competition needs legal safeguards since the open world market facilitates world cartels and monopolistic practices across borders.[46] Hence, what the US might actually fear when stating that a multilateral competition agreement would "no longer effectively protect competition"[47] is not "that protectionist trade will compromise antitrust, but that free-market antitrust will endanger protectionist trade."[48]

Another consideration is that WTO members that were, in the past, quite satisfied with not having multilateral rules disciplining their cross-border active public and private economic operators – mostly economically strong developed members with sufficient funds for subsidies and a high proportion of both net exporters and dominant cross-border active operators – realize that their domestic economic operators are exposed to increasing anti-competitive behavior from operators of so-called emerging markets (*e.g.* China, Brazil, India).[49] This potential limitation of trading opportunities and competitiveness for their economic operators may be the reason why the US has recently shown more willingness to cooperate with the EU, an advocate of a multilateral competition agreement. In relation to key aspects, however, they favor different approaches and standards; each their own. More specifically, the US's main concern refers to cartels (efficiency for the consumer); that of the EU relates to abuse of dominance (equity for smaller market players).[50]

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44 *See* also Josef Drexl, 'WTO und Kartellrecht. Zum Warum *und* Wie dieser Verbindung in Zeiten der Globalisierung', *Zeitschrift für Wettbewerbsrecht*, 2004, pp. 191. *et seq*. Somewhat optimistic Basedow 2009, para. 32: "The globalization of markets, which is evidenced and favored by world trade law, allows predicting further attempts at a substantive harmonization of principles of competition law in the foreseeable future."

45 *E.g.* Pierre Defraigne, 'The Doha Round Between a Narrow Escape and Freezing', *Studia Diplomatica*, Vol. LX, Issue 1, 2007, pp. 119-134; and 'Collapse in Cancun: The World Trade Agenda Gets Sidetracked', Knowledge@Wharton, University of Pennsylvania, 24 September 2003, https://knowledge.wharton.upenn.edu/article/collapse-in-cancun-the-world-trade-agenda-gets-sidetracked/.

46 *See also* Fox & Bakhoum 2018, p. 12.

47 International Competition Policy Advisory Committee 2002, pp. 264. *et seq*.

48 Eleanor M. Fox, 'International Antitrust and the Doha Dome', *Virginia Journal of International Law*, Vol. 43, Issue 4, 2003, pp. 911 and 931.

49 Id.

50 Fox & Bakhoum 2018, p. 13.

*(ii) Developing countries.* Meanwhile, the proliferation of national and regional competition laws in developing countries has allowed them to gain experience. As a result, they are now better prepared to deal with issues involved in a negotiation on competition. Moreover, their negotiation capacity is freed up due to the Doha Round negotiations being on hold. In any event, in the final declaration to the Doha Ministerial Conference the ministers requested the Director-General "to ensure that WTO technical assistance focuses, on a priority basis, on assisting developing countries […] on increasing their capacity to participate more effectively in future multilateral trade negotiations".[51] This could include staff training on the economic effects of various competition disciplines in differently developed economies, assisting them in developing their own voice in relation to suitable competition disciplines.[52]

The concern around high implementation and enforcement costs could be met by putting multilateral competition rules under the supervision and enforcement structures of the WTO institutions,[53] provided that the Appellate Body and WTO dispute settlement system will recover from its current crisis and continue to be able to provide security and predictability to the multilateral trading system as their central element.[54] In so doing, economically weak developed members would not bear the brunt of implementation, as was, and still is, the case in relation to the TRIPS agreement (due to national minimum standard protection despite primarily foreign IP right holders benefitting[55]), but paid primarily by economically strong developed WTO members. The WTO budget derives from contributions paid by its members based on their share of international trade. National minimum standards following the TRIPS model would anyway be insufficient for dismantling trade barriers created by public and private economic operators since members are permitted to adopt higher levels of protection. Thus, cross-border activities could still be subject to different rules, resulting in legal uncertainty.

The fear of being marginalized by developed countries with a focus on efficiency without equity can be allayed by referring both to the fact that the EU's main concern also relates to equity for smaller market players and that, in general, the negotiating power of

51 Doha Ministerial Conference, Fourth Session, Implementation-Related Issues and Concerns. Decision of 14 November 2001, final provisions Doc WT/MIN(01)/17, 20 November 2001, para. 14. In particular, the Africa group advocated for such a request (*see* Communication from Kenya on Behalf of the Africa Group, Preparations for the 1999 Ministerial Conference. The Interaction between Trade and Competition Policy WTO-Doc WT/GC/W/300, 06 August 1999).

52 On the need of assistance, *see* Kim Them Do, 'Competition Law and Policy and Economic Development in Developing Countries', *Manchester Journal of International Economic Law*, Vol. 8, Issue 1, 2011, pp. 18-35.

53 Similar already Alan O. Sykes, 'Externalities in Open Economy Antitrust and Implications and Their Implications for International Competition Policy', *Harvard Journal of Law and Public Policy*, Vol. 23, Issue 1, 1999/2000, p. 95. (should be orientated at the DSB and perhaps include a new competition council).

54 Article 3.2 sentence 1 of the WTO Dispute Settlement Understanding.

55 Sucker 2019, p. 186.

states is much more balanced at the multilateral than at the bilateral level. For example, the US and the EU, both generally in a strong bargaining position, used the often complicated bilateral investment contracts to influence the design of the national copyright laws of economically weak developed countries.[56] They pressed for higher IP-protection than stipulated in TRIPS (TRIPS-Plus Standard) as a 'standard deal' for gaining access to third markets. High IP-standards are generally advantageous for their (dominant) economic operators, but rather disadvantageous for economically weak developed countries.[57] The latter often had little to counter this development in a negotiation in which they are seeking access to the US or EU market. At the multilateral level, negotiating parties with weak bargaining power can join forces with like-minded countries to pursue their interests with more leverage and weight than they would have in bilateral negotiations. That way, imbalances in bargaining power can at least be reduced, as can the WTO transparency obligations. Moreover, negotiations at multilateral level involve exchange of arguments and points of views in numerous debates that are well suited for all countries to understand the advantages and disadvantages of different arrangements. The rising role of supply chains and the increasing volatility of international commodity prices should give all, albeit in particular economically weak developed countries reason to pause and revisit an issue that has significant implications for the competitiveness of their economic operators: market distortions that their, primarily small market players are confronted with due to unrestricted competition in the global market.

*(iii) Too diverse approaches to competition disciplines?* Some members still argue that the various analytical competition concepts included in the, by now, more than 100 enacted national competition laws are too diverse for building consensus at the multilateral level. However, with a view to the preliminary work of the Working Group on the Interaction between Trade and Competition Policy[58] and various other draft documents, such as the Draft International Antitrust Code developed by a group of leading antitrust regulators,[59] among 'Western' economies a common perspective has emerged according to which restrictions on competition and market distortions are particularly harmful.[60] Moreover,

56 In more detail Peter Drahos, 'BITS and BIPS. Bilateralism in Intellectual Property', *The Journal of World Intellectual Property*, Vol. 4, Issue 6, 2001, pp. 791. *et seq*., 806.

57 In detail Sucker 2019, 179-186.

58 On the work of the Working Group on the Interaction between Trade and Competition Policy, *e.g.* 'The Fundamental Principles of Competition Policy', WT/WGTCP/W/127, 7 June 1999; and, in general, at www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm. In the tradition of the EU, the working group emphasizes the direct relationship between trade and competition law (*see* Study on Issues Relating to a Possible Multilateral Framework on Competition Policy, 2003, pp. 9. *et seq*.).

59 On the Draft International Antitrust Code Basedow 1998, pp. 142. *et seq*. and Wolfgang Fikentscher & Josef Drexl, 'Der Draft International Antitrust Code', *Recht der Internationalen Wirtschaft*, 1994, pp. 93-99.

60 On the meaning of this common perspective, the consequences of globalization for state competition policy, the role of WTO law, and side effects, *see* Diane P. Wood, 'Antitrust at the Global Level', *University of Chicago Law Review*, Vol. 72, 2005, pp. 309-324; Basedow 2009, para. 17.

even though offering merely guidelines and recommendations, valuable capacity-building work has been done by the OECD Competition Committee and, very actively, by the UNCTAD Intergovernmental Group of Experts on Competition Law and Policy and the International Competition Network (ICN). The latter already consists of more than 130 competition authorities and numerous nongovernmental advisers devoted to building consensus and convergence, for example, on the treatment of cartels, merger standards, technical assistance, regulated industries, abuse of dominant position and the implementation of competition laws. Indeed, understanding and cooperation has increased, yet "predictably on Western terms".[61]

An inclusive building block for multilateral competition rules would require taking into account the legitimate interests of all groups of countries and, thus, the addition of a developing countries' perspective. Developing countries and regions are currently conducting conversations and testing collaborations of their own that have particular relevance for their context and their state of development (*e.g.* in the African Competition Forum, AfCFTA and TFTA). Thus, such a perspective could take shape in the near future.[62] In general, competition disciplines suitable for societies "ruled by few privileged families or firms or by autocrats",[63] with economies where markets do not work well, monopolies and state ownerships proliferate, barriers to market entry are high, and critical masses of people live near or below the poverty line, would have to seriously control the power of dominant operators and value equity for small market players.[64] Privileges hurt small market players. They reinforce a two-tier economy and constantly increase inequality gaps, with South Africa and five other Sub-Saharan African countries being the most unequal countries worldwide.[65]

It is likely to take a while until states agree on an inclusive common perspective about which restrictions on competition and market distortions are particularly harmful. Therefore, it may be worth reminding states of the following: As a matter of course, many governments adopted national competition laws to counter both the development of dominant positions and anticompetitive behavior. They are ultimately aimed at achieving largely undistorted competition, where fair prices can develop, maximizing benefits for

61 Fox & Bakhoum 2018, p. 16. In detail *see* Eleanor M. Fox, 'Linked-In: Antitrust and the Virtues of a Virtual Network', *International Law*, Vol. 43, 2009, pp. 151. *et seq*.

62 Gary C. Hufbauer & Jisun Kim, 'International Competition Policy and the WTO', *Antitrust Bulletin*, Vol. 54, Issue 2, 2009, pp. 327 and 334. (arguing that particularly bilateral and regional agreements allow developing countries to address their own "competition policy concerns").

63 Fox & Bakhoum 2018, p. 180.

64 Id. pp. xxi, xix, 180.

65 1. South Africa, 2. Namibia, 3. Botswana, 4. Zambia, 5. Central African Republic, 6. Lesotho and 7. Swaziland (World Bank most recent Gini index estimates).

all market participants; the maximum of welfare.[66] States that oppose competition disciplines at international level aimed at prohibiting the very same anticompetitive behavior that is illegal in their own jurisdiction, are hypocrites. As an example, almost all of the practices of multinational enterprises of which developing countries complained about in the 1970s "were then illegal per se under US antitrust law".[67] At the time, the US focus lay with economic democracy (*i.e.* to contain power and provide better conditions for the underdog), comparable to the EU's main concern today. Since the 1980s, the main US concern relates to efficiency (*i.e.* not to interfere with efficiency of large enterprises).[68]

## 10.5 Conclusion

Unrestricted competition facilitates market concentration and anticompetitive behavior. This can lead to eliminated or distorted competition which frustrates the market balance, the aim of competition, essential to a dynamic and healthy market in a capitalist system; the system the economic (trade) relations between WTO members (and most of their national economies) are based on. The absence of multilateral competition rules permits these most unfavorable developments to occur on the global market, for example, economic profits of various cross-border active economic operators at the expense of diversity of offers and smaller market participants, especially those of economically weak developed countries. While global market distortions are likely to remain in the international trading system, competition disciplines may internalize externalities (hold companies accountable for price-fixing, even foreign undertakings) and minimize disparities of legal rules among nationals and regions.

The impact of cross-border activities of private and public economic operators requires a holistic view of the global market, not merely an isolated assessment of successive regional or national markets.[69] Regional or bilateral agreements can discipline those cross-border activities with legal certainty that affect the competition of markets within their territory, but cannot replace multilateral disciplines for entrepreneurial activities that affect the competition of two or more markets outside their territorial scope. In spite of the hitherto

66 *See e.g.* Edward M. Graham & J. David Richardson, 'Issue Overview', *in* Edward M. Graham & J. David Richardson (eds.), *Global Competition Policy*, Columbia University Press, 1997, chapter 1, p. 3, who emphasize that worldwide national competition policies "commonly seek a blend of efficiency and fairness for domestic market"; and *Times-Picayune Publishing Co v. United States*, 345 U.S. 594, 1953 ("[b]asic to the faith that a free economy best promotes the public weal is that goods must stand the cold test of competition; that the public, acting through market's impersonal judgement, shall allocate the Nation's resources and thus direct the course its economic development will take."). On this, *see* Basedow 2009, para. 17.

67 Fox & Bakhoum 2018, p. 10.

68 Id. p. 11.

69 Id. p. 12.

expressed resistance to include competition disciplines within the WTO and the withdrawn negotiating mandate, rules aimed at dismantling barriers to international trade created by private or public economic operators are not only theoretically desirable but indispensable in the long term to avoid an erosion of the WTO system by effectively replacing state-created barriers.

The feasibility of the project depends on the strength and perseverance of progressive WTO members; that is, those who seriously pursue the objectives of the WTO proclaimed in the preamble and do not tolerate anticompetitive behavior of international economic operators whom they themselves consider unlawful at national level. Recital 5 of the preamble to the Marrakesh agreement states that WTO Members are "determined to uphold the fundamental principles [of the WTO Agreements] and to promote the achievement of its objectives." Achieving the goal of raising the common standard of living for all (not only for a few) requires a dynamic and healthy market underpinned by "inclusive, sustainable, economic growth, consistent with equity", for which a level playing field is as important as the reduction of tariffs and non-tariff barriers.[70] In fact, WTO members are guided by a desire "to reduce distortions and impediments to international trade",[71] with the very essence of WTO-rules being to create equally competitive conditions for products, services and IP-right holders. WTO members would then live up to their conviction that

> "there is need for positive efforts designed to ensure that developing countries, and especially the least developed amongst them, secure a share in the growth in international trade commensurate with the needs of their economic development",[72]

instead of protecting and subsidizing where it hurts them most.[73]

70 *See* also Lamy 2013, p. 132.
71 Recital 1 of the Preamble to the TRIPS.
72 Recital 2 of the Preamble to the Marrakesh Agreement.
73 On this, impressively, Martin Wolf, *Why Globalisation Works*, Yale University Press, 2004, pp. 212-218. ('hypocrisy of the rich').