



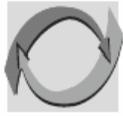
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PROCEDURAL FAIRNESS IN COMPETITION PROCEEDINGS

The emergence of a WTO antitrust jurisprudence through cross-fertilisation from other international antitrust regimes: the case for procedural fairness as a necessary precondition

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CENTRE FOR ANTITRUST AND REGULATORY STUDIES, UNIVERSITY OF WARSAW
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**The emergence of a WTO antitrust jurisprudence through cross-fertilisation from other international antitrust regimes:
the case for procedural fairness as a necessary precondition ***

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Abstract. Against the background of the asymmetric distribution of powers in antitrust matters among the WTO, the OECD, the UNCTAD, and the ICN, this paper explores the potential for the development of a WTO antitrust jurisprudence through legal transplants of antitrust substantive rules from the OECD, the UNCTAD, and the ICN. In view of the uneven compliance with procedural fairness standards by those antitrust regimes, this paper argues that adherence to those standards should be regarded as a necessary precondition for the development of a WTO antitrust jurisprudence through cross-fertilisation from other international antitrust regimes.

Keywords. WTO, OECD, UNCTAD, ICN, Antitrust, Competition, Cross-fertilization, Legal transplants, Dispute resolution.

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1. Introduction

With the on-going deadlock in WTO trade negotiations, cross-fertilisation between International Antitrust Regimes (IARs) constitutes a likely scenario in the development of international antitrust rules.¹ As Philip Marsden put it, it is “an ineluctable fact that new WTO competition rules [...] will be ‘created’ through interpretation in dispute settlement proceedings”.² In particular, antitrust concepts and principles set out in OECD, UNCTAD, and ICN³ documents may be relied upon by the WTO judiciary to flesh out the substantive antitrust provisions in WTO agreements in the context of a dispute.⁴ For instance, in the *Mexico – Telecoms* case,⁵ a WTO panel recalled OECD and UN soft-law documents to construe the prohibition on “anticompetitive practices” set out in Mexico’s schedule of commitments under the GATS. In view of the generic and open-ended wording of the WTO provisions dealing with competition matters, there is a potential for further legal transplants from other IARs through the conduit of the WTO dispute settlement system.

But what is the role of procedural fairness standards in the context of cross-fertilisation between IARs? Do both the potential donors (the OECD, the UNCTAD, and the ICN) and recipient (the WTO) of such legal transplants comply with those standards? If not, is cross-fertilisation desirable in the first place? In order to answer those questions, this paper will first examine those IARs and their powers in the antitrust domain. Second, this paper will explore the potential for legal transplants between IARs in the light of the *Mexico – Telecoms* panel report.⁶ Third, this work will assess compliance with procedural fairness standards by the potential donors and recipient of similar transplants. Finally, this paper will discuss the optimal conditions under which those transplants may take place.

¹ Cf. Reinhard Quick, 'Do We Need Trade and Environment Negotiations or Has the Appellate Body Done the Job?' (2013) 47 *Journal of World Trade*, Issue 5, pp. 957–983 (arguing that the WTO Appellate Body’s reports on environmental matters go far beyond the political discussions of WTO members and the Doha environmental mandate).

² Philip Marsden, *A Competition Policy for the WTO* (Cameron May, 2003) 253. See also Kathy Y Lee, *The WTO dispute settlement and anti-competitive practices: lessons learnt from trade disputes*, Oxford Centre for competition Law and Policy Working Paper 10/05, 44.

³ See, generally, Daniel Sokol, *International Antitrust Institutions* in Andrew T. Guzman (ed), *Cooperation, Comity and Competition Policy* (Oxford University Press 2011) 187. For a global overview and analysis of international and transnational competition networks, see Imelda Maher and Anestis Papadopoulos, *Competition agency networks around the world*, in Ezrachi (ed), *International Research Handbook on Competition Law* (Elgar, 2012), 60.

⁴ See Richard B. Stewart and Michelle Ratton Sanchez Badin, *The World Trade Organization and Global Administrative Law*, Public Law & Legal Theory Research Paper Series Working Paper No. 09-71, 11.

⁵ Panel Report, *Mexico—Measures Affecting Telecommunications Services*, T/DS204/R, adopted 1 June 2004 (hereafter: “Panel Report, *Mexico – Telecoms*”). Mexico did not appeal. See WT/DS204/9/Add.8, acknowledged 19 August 2005.

⁶ *Ibid.*

Before engaging in the analysis outlined above, a methodological note is in order: the “procedural fairness” standards surveyed in this paper are essentially due process (e.g. opportunity to be heard, full notice of allegations, independence of decision-makers, right to appeal, rules of evidence, etc.) and institutional performance norms (timeliness of dispositions, expertise of decision-makers, effectiveness of sanctions, predictability in the application of the law, transparency, accountability, etc.). Those standards have been carefully analysed and discussed in legal literature,⁷ notably in the context of the GAL Competition Project.⁸

2. IARs and their Powers in Antitrust Matters

2.1. The WTO

The WTO is the only IAR having case-by-case decision-making and enforcement powers. WTO does not rely on an antitrust agency or authority for the exercise of those powers, but rather on a private enforcement model. It is for each WTO member to monitor compliance by other members with WTO rules and, upon detection of a violation that harms that member’s commercial interests, to invoke the dispute resolution mechanism governed by the Dispute Settlement Understanding (DSU).⁹ If a report establishes that a member has infringed a provision of a WTO agreement, it is for the winning WTO member to activate the enforcement procedures set out in the DSU to ensure that recommendations are ultimately complied with by the offending member.

The WTO has no general antitrust competence, as that organization’s main focus is to lower trade barriers erected by states, rather than by companies. However, several provisions in the WTO agreements deal directly or indirectly with private anticompetitive conduct. Those provisions can be divided into three groups:¹⁰ i) *negative provisions*, which require

⁷ Benedict Kingsbury, Nico Krisch and Richard Stewart, *The Emergence of Global Administrative Law*, 68 *Law & Contemporary Problems* 15 (2005) 37-39; Daniel Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 *Yale Law Journal* 1490 (2006) 1523-1542; Benedict Kingsbury and Lorenzo Casini, *Global Administrative Law Dimensions of International Organizations Law*, IILJ Working Paper 2009/9.

⁸ Eleanor M. Fox and Michael J. Trebilcock, *Introduction: the GAL Competition Project: the Global Convergence of Process Norms*, in Eleanor M. Fox and Michael J. Trebilcock, *The Design of Competition Law Institutions: Global Norms, Local Choices* (OUP, 2013), 7-9 (discussing due process and institutional performance norms in the context of antitrust enforcement), 47-48 (setting out a template of the norms analyzed in the study).

⁹ For reasons of space, this paper will not address non-violation complaints and situation complaints, although they did contribute to the development of WTO’s antitrust jurisprudence. *See* Claus-Dieter Ehlermann and Lothar Ehring, *WTO Dispute Settlement and Competition Law: views from the Perspective of the Appellate Body’s Experience*, 26 *Fordham International Law Journal* 1505, 1554-1560 (2003).

¹⁰ *Cf.* Alberto Alvarez-Jiménez, *Merging WTO Competition Jurisprudence and its Possibilities for Future Development*, 24 *Northwestern Journal of International Law & Business* 441, 488-492 (2004) (suggesting a

WTO members to prevent firms from engaging in specific anticompetitive conducts; ii) *positive provisions*, which require WTO members to ensure that companies carry out specific pro-competitive behaviour; iii) *enabling provisions*, which highlight certain potentially anti-competitive practices and allow WTO members to adopt measures to address them.

2.1.1. Negative provisions

According to Article XI GATT WTO members must not institute or maintain import and export cartels.¹¹ In *China - Exportation of Raw Materials*, the panel ruled that under that provision WTO members are also prohibited from imposing export cartels under the guise of a “system of self-discipline” based on “informal statements and oral agreements between traders and export regulators”.¹² The prohibition set out in Article XI:1 GATT, possibly, also implies that state-owned or controlled firms may not be party to import or export cartels.¹³

Article VIII GATS requires each WTO member to ensure that its monopoly or exclusive service suppliers do not act in a manner inconsistent with that member’s specific commitments and MFN obligations both inside the scope of their monopoly rights, and, through abuse of their monopoly position, outside that ambit. Section 1(1) of the Telecommunications Reference Paper requires the scheduling WTO member to prevent its major suppliers from engaging in “anticompetitive practices” such as those listed in paragraph 2 thereof.¹⁴ As it will be discussed in further detail below, the panel in *Mexico–Telecoms*

tripartite classification of WTO antitrust provisions encompassing (i) pro-competition provisions, (ii) mandatory anti-restrictive business practices precepts, and (iii) exhortatory anti-restrictive business practices norms).

¹¹ See Article XI GATT (“No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product on the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party”) (Emphasis added).

¹² See Panel Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R, adopted 5 July 2011, para. 7.1082. On appeal, the Appellate Body found that found that the Panel erred under DSU Article 6.2 in making findings regarding the MEP requirement claims, and it therefore declared Panel's substantive findings on these issues to be "moot and of no legal effect". See Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/Appellate Body/R, WT/DS395/Appellate Body/R, WT/DS398/Appellate Body/R, adopted 30 January 2012, paras. 234-235. See also Marek Martyniszyn, Export Cartels: is it Legal to Target Your Neighbour? Analysis in Light of Recent Case Law, 15 Journal of International Economic Law 181, 215 (2012) (noting that although the Appellate Body report stripped the panel report of its legal effects, “the reasoning offered by the panelists reinforces a view advocating a greater role to be played by the trade regime in addressing transnational anticompetitive arrangements”).

¹³ See GATT Annex I, Ad Articles XI, XII, XIII, XIV and XVIII (“Throughout Articles XI, XII, XIII, XIV, and XVIII, the terms “import restrictions” or “export restrictions” include restrictions made effective through state-trading operations.”)

¹⁴ See Section 1(2) of the Reference Paper (referring to anticompetitive cross-subsidization, use of information obtained from competitors with anticompetitive results, and not making available to other services suppliers technical information about essential facilities and commercially relevant information which are necessary for them to provide services).

clarified that the list is not exclusive¹⁵ and also that anticompetitive horizontal agreements fall within the ban.¹⁶

Article 8.1, second sentence, of the TBT Agreement prohibits WTO members from taking measures that require or encourage non-governmental bodies operating conformity assessment procedures to act in a manner inconsistent with the principle of national treatment *vis-à-vis* foreign products, the obligation that technical regulations must not be more trade restrictive than necessary, and the aim to promote mutual recognition of technical regulations.¹⁷ The assumption underlying that provisions is that associations involving traders of a certain country may have incentives to discriminate against imported products.¹⁸

Article 11.1(b) of the Agreement on Safeguards stipulates: “a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side.”¹⁹ The direct ban on anticompetitive governmental action laid down in Article 11.1(b) of the Agreement on Safeguards is backed by an anti-circumvention provision, set out in Article 11.3, requiring WTO Members not to “encourage or support the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to” the ones above. The purpose of those provisions of the Agreement on Safeguards is to prohibit agreements between an exporting country and an importing one to restrict cross-border trade of a given product (voluntary export restraints).

2.1.2. Positive provisions

Article XVII:1 GATT requires WTO members to ensure that their State Trading Enterprises (STEs), in their purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment and, in particular, that STEs make such purchases or sales “solely in accordance with commercial considerations”. The Appellate Body in *Canada – Wheat* clarified that that provision seeks to prevent certain types of discriminatory behaviour, not to impose “comprehensive competition-law-type obligations on STEs”.²⁰

¹⁵ See Panel Report, *Mexico-Telecoms*, para. 7.232 (noting that the list in Section 1(2) of the Reference Paper only includes the most relevant unilateral practices to the telecommunications sector).

¹⁶ *Ibid.*, para. 7.234

¹⁷ See Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organization: law, practice, and policy* (Oxford; Oxford University Press, 2006), 546.

¹⁸ See, e.g., *National Macaroni Manufacturers Ass’n v. FTC*, 345 F.2d 421 (7th Cir. 1965); *United States v. Automobile Mfrs. Ass’n, Inc.*, 307 F. Supp. 617, 1969 Trade Cas. (CCH) para. 721, 907 (C.D. Cal. 1969).

¹⁹ Footnote 4 to that provision provides examples of similar measures: “export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection.”

²⁰ See Appellate Body Report, *Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/Appellate Body/R, adopted 30 August 2004, para. 145

Section 5(a) of the GATS Annex on Telecommunications provides that each member must ensure that any telecom service supplier of any other member is accorded “access to and use” of public telecommunications transport networks and services on “reasonable”²¹ and “non-discriminatory”²² terms and conditions for the supply of a service included in that member’s schedule of commitment. Section 2(2) of the Telecoms Reference Paper requires each scheduling WTO member to ensure that its major suppliers enable interconnection under non-discriminatory terms, in a timely fashion at cost-oriented rates²³ (having regard to economic feasibility),²⁴ and upon request, at points in addition to the network termination points offered to the majority of users.

Article 8.1, first sentence, of the TBT Agreement stipulates that WTO must take reasonable measures to ensure that non-governmental bodies that operate conformity assessment procedures comply with the principle of national treatment *vis-à-vis* foreign products, the obligation that technical regulations must not be more trade restrictive than necessary, and the aim to promote mutual recognition of technical regulations. That provision complements, by way of a positive obligation, the negative obligation set out in Article 8.1, second sentence, of the TBT Agreement.

2.1.3. Enabling provisions

Article 40.1 of the TRIPS Agreement states that some licensing practices or conditions pertaining to intellectual property rights may restrain competition. Article 40.2 of the TRIPS Agreement allows WTO members to specify in their legislation “licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights” and to adopt “appropriate measures to prevent or control such practices”. Article 40.3 sets out a consultation mechanism whereby if an IPR holder residing in a WTO member state is alleged to have acted in a manner inconsistent with another member’s (antitrust) legislation, the former must consult with the latter and supply “publicly available non-confidential information of relevance to the matter in question” as well as “other information available.”²⁵ The goal of this consultation process is to facilitate the provision of the necessary information to the investigating authorities or antitrust agencies of WTO Members in cross-border licensing cases involving anticompetitive restrictions. This consultation mechanism is

²¹ See Panel Report, *Mexico-Telecoms*, para. 7.334.

²² “Non-discriminatory” is defined in footnote 15 of the Annex on Telecommunications.

²³ See Panel Report, *Mexico-Telecoms*, para. 7.177 (employing incremental cost methodologies to assess the “cost-oriented” requirement).

²⁴ *Ibid.*, para. 7.183 (interpreting “having regard to economic feasibility” as allowing the major supplier to derive a ‘reasonable rate of return’ from interconnection fees)

²⁵ See Article 40.3 TRIPS.

“without prejudice to any action under the law and to the full freedom of an ultimate decision of either Member.” Article 40.4 complements the “offensive” consultation mechanism laid down in Article 40.3 with a “defensive” one, extending the right to request consultations to the WTO member where the respondent IPR holder resides.

Article 9 TRIMs sets out a negotiation mandate for the Council for Trade in Goods, which, within five years from the entry into force of the WTO Agreement, must review the operation of the TRIMs Agreement and may propose amendments to the Ministerial Conference amendments. In particular, the Council for Trade in Goods must “consider whether the Agreement should be complemented with provisions on investment policy and competition policy.” Pursuant to Article 9 TRIMs, the Council for Trade in Goods launched the review of the operation of the TRIMs Agreement in 1999.²⁶ Even though the review process has not yet resulted in the incorporation of competition policy provisions in the TRIMs Agreement, Article 9 is commonly regarded as evidence of the awareness by the framers of the close link existing between competition policy and the matters governed by the TRIMs Agreement.²⁷

The WTO Agreement on Government Procurement does not contain provision addressing competition matters directly, but sets out a comprehensive set of rules on several aspects of tendering procedures. Those rules may contribute to prevent anticompetitive practices such as collusive tendering or bid-rigging,²⁸ which tend to occur more frequently in settings where competitive and transparent bidding procedures are not in place.²⁹

2.2. The OECD

Established in 1961, the OECD is an intergovernmental organization based in Paris composed mainly of developed countries.³⁰ The OECD provides a forum for governments to compare policy experiences, seek solutions to common problems, devise good practice and coordinate their internal and external policies. The OECD has a Council comprised of a representative for each member nation and the European Union. The OECD operates through Committees, which collect data, organize discussions, write research reports, conduct peer

²⁶ Council for Trade in Goods, Minutes of the Meeting held in the Centre William Rappard on 15 October 1999, G/C/M/41, p. 10-11.

²⁷ See Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organization: law, practice, and policy* (Oxford; Oxford University Press, 2006), 550.

²⁸ See Michael Trebilcock and Robert Howse, *The Regulation of International Trade* (London; Routledge 2005), 594.

²⁹ See Bernard Hoekman and Petros C. Mavroidis, Economic Development, Competition Policy and the World Trade Organization, 37 *Journal of World Trade* 1, 16-17 (2003).

³⁰ See, generally, Robert T. Kudrle, Governing Economic Globalization: The Pioneering Experience of the OECD, 46 *Journal of World Trade* 695 (2012).

reviews, and issue publications that may culminate in agreements, standards and recommendations.

The OECD Competition Law and Policy Committee is the chief international forum on competition policy issues.³¹ It brings together the top officials of the competition agencies and certain other policymakers, and observers from non-OECD countries. The Competition Committee prepares analytical papers, sector studies and policy recommendations, and provides support to governments seeking to improve their antitrust laws. The Competition Committee has achieved international credibility through the quality of its analysis and the balanced approach of its recommendations,³² yet its limited membership has reduced scope for dissemination.³³

The Committee has issued soft-law documents and submitted recommendations for adoption by the OECD Council on a broad range of antitrust and antitrust-related topics.³⁴ OECD instruments paved the way to international cooperation in the field of antitrust enforcement:³⁵ the 1995 Recommendation concerning cooperation between member countries on anticompetitive practices affecting international trade, for instance, has for a long time constituted the only basis for international enforcement cooperation. In a similar vein, the 1998 Recommendation concerning effective action against hard core cartels urged competition authorities to review existing exemptions from the ban on cartels and called for transparency of any new exemptions.³⁶ The OECD anti-cartel initiative was complemented by the publication of Best practices for the formal exchange of information between competition authorities in hard core cartel investigations.³⁷

Having regard to the distinctive features of economic sectors subject to government regulation, the OECD issued a Recommendation on Competition Policy and Exempted or Regulated Sectors,³⁸ a Recommendation concerning Structural Separation in Regulated

³¹ See Jurgita Malinauskaite, *Harmonisation in Competition Law in the Context of Globalisation*, 21 *European Business Law Review* 369, 383 (2010).

³² See Daniel Sokol, *International Antitrust Institutions*, in Andrew T. Guzman (ed), *Cooperation, Comity and Competition Policy* (Oxford University Press 2011) 198.

³³ See Hugh M. Hollman and William E. Kovacic, *The ICN: Its Past, Current and Future Role*, in Paul Lugard, *The International Competition Network at Ten* (Intersentia 2011) 63.

³⁴ See Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy* 94 *American Journal of International Law* 478, 495 (2000).

³⁵ See Philip Marsden, *A Competition Policy for the WTO* (Cameron May, 2003) 51-52.

³⁶ See www.oecd.org/daf/competition/cartels/2350130.pdf. See also OECD, *Hard Core Cartels: Third Report on the Implementation of the 1998 Council Recommendation* (2005), available at: www.oecd.org/daf/competition/cartels/35863307.pdf.

³⁷ See www.oecd.org/dataoecd/1/33/35590548.pdf.

³⁸ See [http://acts.oecd.org/Public/Info.aspx?lang=en&infoRef=C\(79\)155/FINAL](http://acts.oecd.org/Public/Info.aspx?lang=en&infoRef=C(79)155/FINAL)

Industries,³⁹ and Guiding principles for regulatory quality and performance,⁴⁰ and a Recommendation on Regulatory Policy and Governance.⁴¹ The OECD also adopted a recommendation and other instruments to fight bid rigging.⁴² In view of the paramount role of sound economic analysis for effective antitrust enforcement, moreover, the OECD adopted a Recommendation on competition assessment.⁴³

2.3. The UNCTAD

Established in 1964 as the main articulation of the United Nations General Assembly dealing with issues of trade, investment and development, the United Nations Conference on Trade and Development (UNCTAD) is a Geneva-based intergovernmental body consisting of 194 countries from both the developed and developing world. Its aim is to improve trade, investment and development opportunities of developing countries. Apart from being a major forum for intergovernmental consensus-building, UNCTAD also undertakes policy analysis and research and provides technical assistance to the governments of developing countries. Antitrust matters are mainly addressed by the UNCTAD Competition and Consumer Policies Branch (CCPB) and the Intergovernmental Group of Experts on Competition Law and Policy, established in 1980.

The UNCTAD is the depository of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices,⁴⁴ approved by the UN Conference on Restrictive Business Practices⁴⁵ and adopted by the United Nations General Assembly in 1980,⁴⁶ also known as the “UN Set of Principles and Rules on Competition”.⁴⁷

The UN Set still constitutes the only multilaterally agreed set of principles governing competition matters.⁴⁸ It lays down equitable rules for the control of anti-competitive practices, recognizes the development dimension of competition law and policy, and provides

³⁹ See www.oecd.org/daf/competition/50119298.pdf

⁴⁰ See www.oecd.org/dataoecd/24/6/34976533.pdf

⁴¹ See www.oecd.org/gov/regulatory-policy/49990817.pdf

⁴² See OECD Recommendation on Fighting Bid Rigging in Public Procurement, 17 July 2012 - C(2012)115/CORR1; OECD Guidelines for combating bid rigging in public procurement www.oecd.org/daf/competition/cartels/42851044.pdf.

⁴³ Recommendation of 22 October 2009 - C(2009)130. See also the OECD Competition Assessment Toolkit, available at: www.oecd.org/daf/competition/assessment-toolkit.htm.

⁴⁴ See UNCTAD, document TD/RBP/CONF/10/Rev.2, available at: www.unctad.org/en/docs/tdrbpconf10r2.en.pdf.

⁴⁵ UN Conference on Restrictive Business Practices, Resolution of 22 April 1980.

⁴⁶ UN General Assembly, resolution no. 35/63 of 5 December 1980.

⁴⁷ See UNCTAD, Resolution of 4 October 2000, Review of all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (TD/ RBP/CONF.5/15) (recommending the adopting of the above denomination).

⁴⁸ See <http://r0.unctad.org/en/subsites/cpolicy/english/aboutus.htm>.

a framework for international operation and exchange of best practices.⁴⁹ The UN Set covers horizontal restraints and suggests that vertical restraints be prohibited only when conducted by a dominant firm. As to abuse of a dominant position by a firm, the UN Set recommends a case-by-case assessment in accordance with a “purpose and effects” test.⁵⁰ Each year, the Intergovernmental Group of Experts on Competition Law and Policy meets to monitor the application and implementation of the UN set.⁵¹ The Sixth Review Conference, held in November 2010, marked the 30th anniversary of the adoption of the Set, and reaffirmed it.⁵² Furthermore, UNCTAD is the depository of the Model Law on Competition, which builds upon the UN Set and seeks to provide guidance to developing countries in drafting and improving their antitrust laws.⁵³ The Model Law consists of two parts: the first part, composed of thirteen chapters, lays down substantive possible elements for a competition law; the second part gathers commentaries on the chapters of the model law and discusses alternative approaches in existing legislation.⁵⁴

2.4. The ICN

The International Competition Network (ICN) was founded in 2001. Unlike the OECD, the UNCTAD, and the WTO, the ICN is *not* an intergovernmental organization, but rather an informal venue where more than a hundred competition authorities can maintain regular contacts and address practical competition concerns, so as to build consensus and convergence towards sound competition policy principles across the global antitrust community.⁵⁵

The ICN is a virtual network with no secretariat, no premises, and no formal legal basis. Agenda-setting is entrusted to the Steering Group, which currently comprises 15 members and three *ex officio* members. The *ex officio* members represent ICN members

⁴⁹ See Eleanor M. Fox and Amedeo Arena, The International Institutions of Competition Law, in Eleanor M. Fox and Michael J. Trebilcock (eds) *The Design of Competition Law Institutions: Global Norms, Local Choices* (OUP, 2013), 480.

⁵⁰ See Imelda Maher and Anestis Papadopoulos, Competition agency networks around the world, in Ezrachi (ed), *International Research Handbook on Competition Law* (Elgar, 2012), 70, footnote 28.

⁵¹ See <http://unctad.org/en/Pages/DITC/CompetitionLaw/Intergovernmental-Group-of-Experts-on-Competition-Law-and-Policy.aspx>

⁵² See UNCTAD, Resolution “Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices”, TD/RBP/CONF.7/L.16 (2011). See also UNCTAD, Report of the Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, TD/RBP/CONF.7/11 (2011).

⁵³ See UNCTAD, Model Law on Competition, TD/RBP/CONF.7/8, available at: http://unctad.org/en/Docs/trbpconf7d8_en.pdf

⁵⁴ See, generally, Cassey Lee, Model competition laws, in Paul Cook, Raul Fbella and Cassey Lee, *Competitive Advantage and Competition Policy in Developing Countries* (Edward Elgar, 2007) 29-53.

⁵⁵ See <http://www.internationalcompetitionnetwork.org/about.aspx>

designated to host the ICN annual conference. Elected Steering Group members serve renewable two-year terms and are selected by consensus by the ICN membership.

The ICN operates through a number of working groups, where volunteers – including non-governmental advisors – work together by Internet, telephone, teleseminars and webinars to address practical competition concerns.⁵⁶ The Cartels Working group, for instance, has drafted a compilation of good practices for cartel enforcement⁵⁷ and several anti-cartel enforcement manuals.⁵⁸ The Merger Working group, in turn, has issued guiding principles for merger notification and review,⁵⁹ as well as recommended practices for merger analysis.⁶⁰

The ICN does not seek to achieve any “top-down” harmonisation of competition law and does not adopt binding rules.⁶¹ Where the ICN reaches consensus on recommendations or best practices, individual competition authorities decide whether and how to implement them through unilateral, bilateral, or multilateral arrangements. This flexibility has allowed ICN to significantly advance global convergence in antitrust matters. This success is also attributable to the fact that ICN is comprised of the competition law community, not the trade community to the non-binding character of its documents, which thus require no governmental oversight or authorisation.⁶² Agreed standards, however, constitute soft international law and may thus influence the development of hard international law in competition matters.⁶³

3. Cross-fertilization between IARs: the *Mexico – Telecoms* case

The above survey of the four IARs revealed an uneven distribution of powers in the field of antitrust. While the WTO holds case-by-case decision-making and enforcement powers but has an underdeveloped substantive antitrust framework, the OECD, the ICN and the UNCTAD have issued a panoply of guidelines, recommendations, best practices, and other soft-law documents on antitrust matters, but they lack the power to enforce them in specific cases.

⁵⁶ See Chad Damro, *The New Trade Politics and EU Competition Policy: Shopping for Convergence and Cooperation* 13 *Journal of European Public Policy* 867, 879 (2006).

⁵⁷ See www.internationalcompetitionnetwork.org/uploads/library/doc756.pdf.

⁵⁸ See www.internationalcompetitionnetwork.org/uploads/library/doc835.pdf.

⁵⁹ See www.internationalcompetitionnetwork.org/uploads/library/doc591.pdf.

⁶⁰ See www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf.

⁶¹ See Jurgita Malinauskaite, *Harmonisation in Competition Law in the Context of Globalisation*, 21 *European Business Law Review* 369, 382 (2010).

⁶² See Eleanor M. Fox and Amedeo Arena, *The International Institutions of Competition Law*, in Eleanor M. Fox and Michael J. Trebilcock (eds) *The Design of Competition Law Institutions: Global Norms, Local Choices* (OUP, 2013), 482-483.

⁶³ *But see* Philip Marsden, *Jaw-jaw not law-law: from treaties to meetings: the increasing informality and effectiveness of international antitrust cooperation*, in Ezrachi (ed), *International Research Handbook on Competition Law* (Elgar, 2012), 133-134 (arguing that any effort to make ICN best practices binding would make them less effective).

It is thus possible that antitrust rules or principles set out in OECD, UNCTAD, and ICN documents may be relied upon by the WTO judiciary to flesh out the substantive antitrust provisions in WTO agreements in the context of a dispute.⁶⁴ Indeed, since domestic competitions laws of WTO members are still divergent in some respects, rules and principles acknowledged at the international level by IARs constitute the most suitable source of guidance for the WTO judiciary to fill the gaps in WTO agreements.

So far, the most significant instance of interaction of this sort has been the WTO panel report in *Mexico – Telecoms*, which will be the subject of the present section.

3.1. The Panel report in *Mexico – Telecoms*

The *Mexico – Telecoms* case originates from the US concern that its telecommunications companies were being charged unfairly high rates to interconnect US networks with Mexican networks for US to Mexico telephone calls. Under Mexico's "International Long Distance" rules, the dominant firm (Telmex) was responsible for the setting those rates and all other carriers were required to charge the same price.

Mexico had undertaken a number pro-competitive commitments in the telecommunications sector by incorporating the provisions of the so-called "Reference Paper" into its GATS schedule of commitments. In their request for establishment of a panel, the US claimed *inter alia* that the rates charged by Telmex for interconnection on calls from the United States to Mexico were not "cost-oriented"⁶⁵ and that Mexico had failed to honour its commitment to prevent "anti-competitive practices" by major suppliers,⁶⁶ insofar as the interconnection rates were the result of price-fixing among suppliers authorized by Mexican regulation.

At the time, however, the scope of the expression "anti-competitive practices" was still unclear. Although at the WTO level there had been discussions on "restrictive business practices", a dispute involving allegations of exclusive distribution channels, and negotiations on the interaction of trade and competition policy, no binding WTO legal instrument defined what practices had to be regarded as "anti-competitive" within the meaning of the Reference

⁶⁴ See Richard B. Stewart and Michelle Raton Sanchez Badin, *The World Trade Organization and Global Administrative Law*, Public Law & Legal Theory Research Paper Series Working Paper No. 09-71, 11.

⁶⁵ Cf. Article 2.2(b) of the Reference Paper ("Interconnection with a major supplier will be ensured at any technically feasible point in the network. Such interconnection is provided [...] [at] cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided.")

⁶⁶ Cf. Article 1.1 of the Reference Paper ("Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.")

Paper.⁶⁷ The only relevant context was the non-exhaustive list of anti-competitive practices set out in Section 1.2 of Mexico's Reference Paper, which, however, only concerned unilateral practices.⁶⁸

The panel followed a meandering path to construe the term "anti-competitive practices". First, relying upon dictionary definitions, the panel observed that that expression comprised a broad range of actions "that lessen rivalry or competition in the market."⁶⁹ The panel then noted that the examples of anti-competitive practices provided in Section 1.2 indicated that "pricing actions" could be relevant⁷⁰ and that the reference to a major supplier acting "alone or together" suggested that also "horizontal coordination" of suppliers with the purpose of fixing prices could be caught by the ban.⁷¹

The panel found support for its finding in the laws of several WTO members, which prohibited "cartels or collusive horizontal agreements between firms, such as agreements to fix prices or share markets",⁷² as well as in three "international instruments that address competition policy" prepared by other IARs: i) Article 46 of the Havana Charter, ii) the UN Set, iii) the OECD 1998 Recommendation on hardcore cartels.⁷³

Accordingly, the panel considered that the term "anti-competitive practices" in Section 1 of Mexico's Reference Paper included "horizontal practices related to price-fixing and market-sharing agreements."⁷⁴ Finally, the Panel found that "anti-competitive practices" were not exempt from the Reference Paper commitments even though they were required by Mexico regulation,⁷⁵ thus espousing a narrow view of the so-called state action doctrine, which is recognised in several jurisdictions, including the US.

3.2. Assessment by scholarly commentators

The panel report in *Mexico – Telecoms* stirred significant controversy in academic circles. Eleanor Fox saluted the report as a "sleeping victory" for trade and competition in that it may highlight the need to address the challenges posed by the so-called hybrid restraints –

⁶⁷ See Commentary to the Panel Report *Mexico - Measures Affecting Telecommunications Services*, available at www.worldtradelaw.net, 24.

⁶⁸ See Section 1.2 of the Reference Paper ("The anti-competitive practices referred to above shall include in particular: (a) engaging in anti-competitive cross-subsidization; (b) using information obtained from competitors with anti-competitive results; and (c) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.")

⁶⁹ Panel report, *Mexico – Telecoms*, para 7.230 (citing both *The Shorter Oxford English Dictionary* and the *Merriam Webster Dictionary*).

⁷⁰ *Ibid.*, paras 7.231-7.232.

⁷¹ *Ibid.*, para 7.234.

⁷² *Ibid.*, para 7.235.

⁷³ *Ibid.*, para 7.236.

⁷⁴ *Ibid.*, para 7.238.

⁷⁵ *Ibid.*, para 7.245.

i.e. anti-competitive conduct by private parties authorised or required by governmental actors, which often escape scrutiny both under national antitrust laws and international trade laws.⁷⁶

Marco Bronckers and Pierre Larouche, instead, identified a number of flaws and misunderstandings in the panel's broad interpretation of the Reference Paper antitrust clause,⁷⁷ but noted that the panel report could nonetheless "help to break the ice by opening this controversial subject [a competition competence in the WTO] to multilateral negotiations".⁷⁸ In turn, Gregory Sidak and Hal Singer claimed that the panel espoused the US government's policy preferences rather than the informed judgments of Mexico's independent regulatory authority and favoured the private interests of US companies while depriving US consumers of a more ubiquitous telecommunications network.⁷⁹

In an often-quoted note, Philip Marsden argued that the *Mexico – Telecoms* panel disregarded both the ordinary meaning and the preparatory work of the Reference Paper, none of which pointed to a ban on horizontal agreements.⁸⁰ Marsden also took issue with the international instruments cited by the panel – and in particular with the unratified Havana Charter – as they were neither made "in connexion with" nor concerned the interpretation of the Reference Paper as required by the Vienna Convention of the Law of Treaties.⁸¹ Likewise, Damien Neven and Petros Mavroidis noted that the legal value of the Havana Charter was "highly symbolic", that the OECD documents were not binding, and that the absence of a clear reference to cartels in the Reference Paper reflected the Treaty Masters' will not to involve WTO in the enforcement of those anticompetitive practices.⁸² By the same token, Kathy Lee lamented that the panel had failed to provide a satisfactory basis for employing the above international instruments to succour its interpretation of the Reference Paper⁸³ and that the panel's report showed "disconcerting gaps between its reasoning and conclusion" leading

⁷⁶ See Eleanor M. Fox, *The WTO's First Antitrust Case – Mexican Telecom: A Sleeping Victory for Trade and Competition*, 9 *Journal of International Economic Law* 271 (2006).

⁷⁷ See Marco Bronckers and Pierre Larouche, *Telecommunications Services*, in Patrick Macrory, Arthur Appleton and Michael Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Dordrecht: Springer, 2005) 989, 999–1013.

⁷⁸ *Ibid.*, 1012.

⁷⁹ See J. Gregory Sidak and Hal J. Singer, 'Überregulation Without Economics: The World Trade Organization's Decision in the U.S.-Mexico Arbitration on Telecommunications Services', 57 *Federal Communications Law Journal* 1 (2004).

⁸⁰ See Philip Marsden, *Trade and Competition: WTO Decides First Competition Case – With Disappointing Results*, *Competition Law Insight* 3 (May 2004).

⁸¹ *Ibid.*, p. 8.

⁸² See Damien J. Neven and Petros C. Mavroidis, *El mess in TELMEX: a comment on Mexico-measures affecting telecommunications services*, 5 *World Trade Review* 271 (2006) at 290-292.

⁸³ See Kathy Y Lee, *The WTO dispute settlement and anti-competitive practices: lessons learnt from trade disputes*, Oxford Centre for competition Law and Policy Working Paper 10/05.

to a “tautological expansion” of the scope of the Reference Paper⁸⁴ that ran the risk of “undermining the legitimacy and integrity of the WTO”⁸⁵ – a concern also shared by Sonali Singh.⁸⁶

3.3. The role of procedural fairness standards

Although scholarly commentators have carefully analysed the scope and implications of the interaction between legal regimes occurred in the *Mexico – Telecoms* case, the actors of that interaction have remained somewhat in the background. Who prepared the international instruments employed by the panel to flesh out the competition provisions laid down in Mexico’s Reference Paper? Were transparency and access guaranteed throughout the process that resulted in the adoption of those instruments? Are those global actors sufficiently accountable?

Moreover, most comments to the *Mexico – Telecoms* report devoted limited attention to the procedural features of the institutional setting where exogenous international antitrust instruments were implanted, to wit the WTO. Does the WTO dispute resolution system provide sufficient procedural safeguards to enforce antitrust provisions? Are the members of the WTO judiciary independent and impartial? Can WTO rules of evidence accommodate the fact-intensive assessments required to adjudicate antitrust cases? How does the WTO judiciary handle economic analysis? Is dispute resolution transparent and predictable? Are reports adopted in a timely fashion? How are they implemented? In view of the potential for further legal transplants *à la Mexico – Telecoms*, those questions cannot be left unanswered.

4. Assessing compliance by IARs with procedural fairness standards

This section will assess compliance with procedural fairness standards by the IARs involved in the *Mexico – Telecoms* case and by IARs that may be plausibly involved in cross-fertilisation in the future. This section, however, will not cover the International Trade Organization insofar as the Havana Charter, which would have established it, never entered into force due to the US Congress’ failure to ratify it. Moreover, in the case of UNCTAD and OECD, the lack of decision-making and enforcement powers precludes the assessment of compliance with due process standards. Although no ICN materials were cited in *Mexico – Telecoms*, ICN’s extensive contribution to the development of guidelines and best practices in the field of antitrust makes it a likely donor for future legal transplants, thus calling for its

⁸⁴ *Ibid.*, 34.

⁸⁵ *Ibid.*, 44.

⁸⁶ See Sonali Snigh, *The Telmex Dispute at the WTO: Competition Makes a Backdoor Entry*, CUTS Briefing Paper no. 1/2006, 4.

assessment under the lens of procedural fairness. The bulk of this section will be devoted to the WTO, i.e. the potential recipient of legal transplants, whose enforcement powers in individual cases require a careful scrutiny under both institutional performance and due process norms.

4.1. The donors: the OECD, the UNCTAD, and the ICN

4.1.1. The OECD

Access by OECD members to the Competition Committee is generally satisfactory,⁸⁷ as Members are routinely invited to participate to Committee's works and their contributions are duly taken into account. All members are entitled to nominate the chair of OECD Competition Committee and the members of the Committee Bureau. Non-members can participate in the Competition Committee as observers, provided that they adhere to certain recommendations, disseminate them to other authorities, accept to undergo peer review, and actively participate in the Committee's roundtables and outreach events.⁸⁸

The Competition Committee's activities are transparent. Communications and documents by the Competition Committee are circulated to all OECD members. Submissions for some sessions, such as policy roundtables, are made public on the OECD website. OECD also publishes its own competition law periodical: the OECD Journal of Competition Law and Policy, whose contents are freely accessible online.⁸⁹

OECD Competition Committee's accountability to its members does not give rise to concerns. Committee members evaluate the Committee's work on a biennial basis. The OECD Council allocates financial resources to the Competition Committee for each succeeding bi-annual budget period in accordance based on how the evaluation of the performance of the Competition Committee compares with the evaluations of the other committees, thus assuring accountability not only to participants in the committee meetings and projects but also to the OECD member governments.

4.1.2. The UNCTAD

As far as access is concerned, it must be noted that although UNCTAD members may suggest agenda items, the work is largely steered by the Secretariat.⁹⁰ The studies and reports

⁸⁷ See Eleanor M. Fox and Amedeo Arena, *The International Institutions of Competition Law*, in Eleanor M. Fox and Michael J. Trebilcock (eds) *The Design of Competition Law Institutions: Global Norms, Local Choices* (OUP, 2013), 479.

⁸⁸ See Letter of Frederic Jenny, Chairman of the Competition Committee to (former) Secretary General Johnston, 14 June 2005, DAF/COMP (2005) 26.

⁸⁹ See www.oecd-ilibrary.org/governance/oecd-journal-competition-law-and-policy_16097521

⁹⁰ See Eleanor M. Fox and Amedeo Arena, *The International Institutions of Competition Law*, in Eleanor M. Fox and Michael J. Trebilcock (eds) *The Design of Competition Law Institutions: Global Norms, Local Choices* (OUP, 2013), 481.

drafted by the CCPB are transparent and usually available on UNCTAD's website. UNCTAD's agenda is generally responsive to the needs of developing countries. A program of capacity building in Latin America (COMPAL) has been designed and implemented with high expertise and sensitivity to context.⁹¹ Currently involving twelve countries, the project's aim is to develop competition law and policy in these countries in a way that leads to lower prices, better quality and wider variety of products.⁹² UNCTAD also launched the Africa Competition Programme (AFRICOMP), seeking to develop appropriate administrative, institutional and legal structures for effective enforcement of competition and consumer laws and policies in African countries, both on a national and a regional level.⁹³

4.1.3. The ICN

Access to ICN is extremely satisfactory. Members of member authorities have broad access to ICN activities. Since some authorities have limited resources, ICN seeks to maximize their participation by providing funding assistance according to its Travel Funding Guidelines.⁹⁴ Non-governmental advisors (NGAs), such as lawyers, businessmen, academic, and think tanks, massively participate in ICN activities. NGA participation is especially sought in the working groups – from which all recommendations, guidelines and other work product originate.

ICN activities are also extremely transparent. All competition authorities and NGAs involved in any particular project are invited to be part of the working communications, usually done by telephone calls and supporting e-mail. Work product is adopted at annual conferences. Comments are invited in advance and discussion is invited from the floor. Adoption is by consensus. ICN documents, including NGA submissions and conference materials, are constantly uploaded on the publicly accessible ICN website.

The ICN is accountable to its members (i.e. competition authorities), which unlike the OECD or UNCTAD members (i.e. national governments) are usually unelected. Accordingly, concerns have been voiced that ICN might divert power from “elected officials” to “unelected technocrats”.⁹⁵ ICN members, however, are accountable at the domestic level⁹⁶ and only

⁹¹ See www.unctadxi.org/templates/Startpage_1529.aspx

⁹² See Imelda Maher and Anestis Papadopoulos, Competition agency networks around the world, in Ezrachi (ed), International Research Handbook on Competition Law (Elgar, 2012), 71.

⁹³ See UNCTAD, The Africa Competition Programme (AFRICOMP) (May 2009 Briefing), available at www.unctad.org/sections/ditc_ccpb/docs/dite_ccpb0027_en.pdf

⁹⁴ See www.internationalcompetitionnetwork.org/uploads/library/doc785.pdf

⁹⁵ See Anne-Marie Slaughter and Thomas Hale, Transgovernmental Networks and Multilevel Governance, in David Hand and Thomas Hale (eds), Handbook of Transnational Governance (Polity Press 2011), footnote 54.

⁹⁶ See John Fingleton, ‘Competition Agencies and Global Markets: The Challenges Ahead’ (2009), available at: http://www.oft.gov.uk/shared_ofi/speeches/2009/spe0909paper.pdf, 21 (“agencies participating in [the ICN] are ultimately domestically accountable, which avoids the democratic deficit problem”)

adopt non-binding instruments,⁹⁷ whereas national executives retain full control over binding international cooperation initiatives.⁹⁸ Besides, it has been argued that national representatives to international institutions are even less accountable and, usually, do not have hands-on antitrust enforcement experience.⁹⁹

Recently, the ICN steering group surveyed and personally interviewed all members and NGAs. The results of these surveys and interviews are posted on the ICN website.¹⁰⁰ The feedback from the members indicates satisfaction with the original mission statement and support for continuing on the course. Most NGAs agreed that the ICN is sufficiently transparent, that there are adequate opportunities for NGAs to contribute to the ICN, and that there is sufficient diversity of NGA's professional background. Some NGAs, however, replied that there was an insufficient geographical distribution of NGAs.¹⁰¹

4.2. The recipient: the WTO

As the potential recipient of the transplants of antitrust rules and principles from other IARs, the WTO deserves a closer scrutiny under the lens of procedural fairness. The WTO dispute resolution system complies with several due process standards.¹⁰² Parties and Third Parties to WTO disputes have ample opportunity to be heard at the consultation, panel, interim review and appellate review stage. The DSU sets out several procedural arrangements to ensure that the respondent party in a WTO dispute settlement procedure is informed in detail of the complainant's claim. The principle that parties must be afforded sufficient time to prepare is expressly recognized in the DSU.¹⁰³ The WTO dispute resolution system fully recognizes the parties' right to appeal from panel reports and provides for an institutional structure that enables a comprehensive and expeditious appellate review.

⁹⁷ See Maria Coppola, *One Network's Effect: The Rise and Future of the ICN*, *Concurrences* (2011) 3 227 ("since ICN best practice is non-binding, unaccountable rule-making seems a misplaced smear").

⁹⁸ See Kal Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' 43 *Virginia Journal of International Law* 24(2002).

⁹⁹ See Philip Marsden, *Jaw-jaw not law-law: from treaties to meetings: the increasing informality and effectiveness of international antitrust cooperation*, in Ezrachi (ed), *International Research Handbook on Competition Law* (Elgar, 2012), 126-127.

¹⁰⁰ The results of the interviews with members are summarized in the Note from the Chair, 2 September 2010, available at <http://www.internationalcompetitionnetwork.org/uploads/2010-2011/chairnote8.9.10.pdf>. The responses to the August 2010 NGA Survey are available at: www.internationalcompetitionnetwork.org/uploads/2010-2011/responses%20nga%20survey%208.10.pdf.

¹⁰¹ *Ibid.*, at 5-6.

¹⁰² See Eleanor M. Fox and Amedeo Arena, *The International Institutions of Competition Law*, in Eleanor M. Fox and Michael J. Trebilcock (eds) *The Design of Competition Law Institutions: Global Norms, Local Choices* (OUP, 2013), 460-464.

¹⁰³ See Article 12.4 DSU.

In contrast, there are some due process norms and several institutional performance standards with which the WTO dispute resolution system does not fully comply. The next subsections will address those criticalities seriatim.

4.2.1. Independence of decision-makers

The WTO dispute resolution acknowledges the importance of ensuring the independence of panel and Appellate Body members and their impartiality *vis-à-vis* the parties to a dispute. Apart from a number of statements of principle,¹⁰⁴ those goals are achieved essentially by granting the parties significant powers in the appointment of panel members and in reporting evidence of possible conflicts of interest on the part of Appellate Body members. The Secretariat usually proposes nominations to the parties, drawing from an indicative list of people that meet certain expertise and independence requirements. Although parties should only oppose nominations for compelling reasons,¹⁰⁵ in fact they often object to nominations providing reasons that are not subject to review. When this occurs, the Secretariat draws other names from the list.

Furthermore, all persons called upon to serve in a dispute (panellists, members of the Appellate Body, arbitrators, experts, and Members of the WTO Secretariat) are required to disclose information likely to affect their independence or impartiality.¹⁰⁶ Any party to a dispute who comes into possession of evidence of a material violation of the obligations of independence, impartiality, or confidentiality or the avoidance of direct or indirect conflicts of interest that may impair the integrity, impartiality, or confidentiality of the dispute settlement mechanism must submit such evidence to the Chair of the DSB, the Director General, or the Standing Appellate Body.¹⁰⁷

Most recently, the Appellate Body adopted Post-Employment guidelines to facilitate compliance by its former members and staff with their confidentiality and independence obligations.¹⁰⁸ The guidelines articulate limitations on the ability of these individuals to serve as advisers or panelists in disputes in which they were involved or disputes in which the same measures are challenged and the same claims are raised, as well as a cooling-off period during which such individuals cannot attend an oral hearing in any appeal before the Appellate Body as a member of a delegation of a participant or third participant.

¹⁰⁴ See Article 8.2, 8.3 and 8.9 DSU with reference to panel members and Article 17.3 DSU and Rule 2 of the Appellate Body Working Procedures with respect to Appellate Body members.

¹⁰⁵ See Article 8.6 DSU.

¹⁰⁶ See Section VI of the Rules of conduct for the understanding on rules and procedures governing the settlement of disputes, WT/DSB/RC/1.

¹⁰⁷ Ibid., Section VIII.

¹⁰⁸ Communication from the Appellate Body, Post-employment guidelines, WT/AB/22, 16 April 2014.

In sum, several sets of rules are in place to safeguard the independence and impartiality of WTO judiciary. However, the concentration of the power to apply those rules in the hands of the parties may leave panellists and Appellate Body members exposed to the risk of interferences (e.g. by private actors) that may be unbeknown to or tolerated by the parties. This, nonetheless, is a reflection of the intergovernmental character of the WTO dispute settlement system, which relies extensively on WTO members as qualified – yet potentially imperfect – representatives of the interests of their nationals and of stakeholders at large.

4.2.2. Rules of evidence

Competition-related cases are notoriously fact-intensive.¹⁰⁹ Yet, the DSU does not include any express rule concerning the burden of proof in panel proceedings. The Appellate Body has attempted to remedy that shortcoming by ruling that the concept of a burden of proof is implicit in the WTO dispute settlement system. In *US—Wool Shirts and Blouses* the Appellate Body endorsed the traditional maxim *onus probandi incumbit ei qui dicit*, according to which it is for the party who asserts a fact, whether complainant or respondent, to provide proof thereof.¹¹⁰ Accordingly, the complainant must state and provide evidence that the respondent has infringed a given provision of a WTO agreement,¹¹¹ while the respondent bears the burden of proving that the requirements set out in an exception or affirmative defence have been met. A review of the precedents on the burden of proof issue seems to reveal that the Appellate Body has consistently followed the rule established by *US—Wool Shirts and Blouses*.¹¹²

Furthermore, the required standard of proof is unclear. The Appellate Body has affirmed that if the party bearing the burden of proof is able to put forward evidence sufficient to make a *prima facie* case (a presumption), the *onus* shifts to the other party, who will fail unless it submits sufficient evidence to disprove the claim (thus rebutting the presumption). Precisely how much and what kind of evidence will establish a *prima facie* case varies from measure to measure, provision to provision, and case to case. The standard of review that

¹⁰⁹ See Claus-Dieter Ehlermann and Lothar Ehring, WTO Dispute Settlement and Competition Law: views from the Perspective of the Appellate Body's Experience, 26 Fordham International Law Journal 1505, 1506 (2003).

¹¹⁰ See Appellate Body Report, *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/Appellate Body/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323.

¹¹¹ See, e.g., Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/Appellate Body/R, WT/DS48/Appellate Body/R, adopted 13 February 1998, DSR 1998:I, 135, para. 104.

¹¹² Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organization: law, practice, and policy* (Oxford; Oxford University Press, 2006), 39. See also Michelle Grando, Evidence, Proof, and Fact-Finding in WTO Dispute Settlement (Oxford 2009).

panels must employ in respect of WTO members' decisions in the field of competition law is set out in Article 11 of the DSU. This standard excludes *de novo* review, but does specify relatively strict requirements.¹¹³

4.2.3. Economic Analysis

Apart from being fact-intensive, antitrust cases often hinge upon economic analysis. Still, the WTO judiciary's epistemic legitimacy in handling economic data has been seriously questioned.¹¹⁴ Although most WTO rules are based on economic concepts or involve economic evaluations, panels and the Appellate Body have been generally unwilling to engage rigorously with economic evidence and argument and have often refused to turn to experts for assistance.¹¹⁵ For instance, Henrik Horn and Petros Mavroidis criticized the panel and Appellate Body reports in *US – Offset Act (Byrd Amendment)*¹¹⁶ for ruling on the effects on competition of the challenged US legislation without performing a sound economic analysis based on empirical verification.¹¹⁷ Similarly, in their detailed commentary to the *Mexico – Telecommunications* report, Gregory Sidak and Hal Singer claimed that the panel had revealed a “startlingly low level of economic sophistication” in handling economic questions by favouring dictionary definitions over antitrust economics in its construction of key concepts such as “cost” and “market power”.¹¹⁸ In *US – Upland Cotton 21.5*, the Appellate Body itself vehemently condemned the panel's carelessness in evaluating the economic theories presented by the parties.¹¹⁹

¹¹³ See Claus-Dieter Ehlermann and Lothar Ehring, *WTO Dispute Settlement and Competition Law: views from the Perspective of the Appellate Body's Experience*, 26 *Fordham International Law Journal* 1505, 1532-1540 (2003) (opining that the current standard of review is appropriate for competition cases). *But see* J. Gregory Sidak and Hal J. Singer, ‘Überregulation Without Economics: The World Trade Organization's Decision in the U.S.-Mexico Arbitration on Telecommunications Services’, 57 *Federal Communications Law Journal* 1 (2004) (criticising the *Telmex* panel's willingness to second-guess the assessment made by the Mexican authorities).

¹¹⁴ See Chris A. Thomas, *Of Facts and Phantoms: Economics, Epistemic Legitimacy, and WTO Dispute Settlement*, 14 *Journal of International Economic Law* 295–328 (2011).

¹¹⁵ *Ibid.*, 305-312.

¹¹⁶ See Panel Report, *US – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS234/R, adopted 27 January 2003; Appellate Body Report, *US – Continued Dumping and Subsidy Offset Act of 2000 (US – Offset Act (Byrd Amendment))*, WT/DS234/Appellate Body/R, adopted 27 January 2003.

¹¹⁷ See Henrik Horn and Petros C Mavroidis, *United States – Continued Dumping and Subsidy Offset Act of 2000*, in Henrik Horn and Petros C Mavroidis (eds), *The American Law Institute Reporters' Studies on WTO Case Law: Legal and Economic Analysis* (Cambridge: Cambridge University Press, 2007) 622–56, 629, 633.

¹¹⁸ See J. Gregory Sidak and Hal J. Singer, ‘Überregulation Without Economics: The World Trade Organization's Decision in the U.S.-Mexico Arbitration on Telecommunications Services’, 57 *Federal Communications Law Journal* 1, 7 (2004).

¹¹⁹ See Appellate Body Report, *US – Subsidies on Upland Cotton – Recourse to Article 21.5 by Brazil (US – Upland Cotton 21.5)*, WT/DS267/Appellate Body/RW, adopted 20 June 2008, paras 357-358 (“The relative complexity of a model and its parameters is not a reason for a panel to remain agnostic about them. . . . the Panel could have gone further in its evaluation and comparative analysis of the economic simulations and the particular parameters used.”)

4.2.4. Transparency

The WTO dispute settlement system, albeit more open and accessible than its GATT predecessor, still favours confidentiality over transparency. Consultations are confidential,¹²⁰ as are panel deliberations,¹²¹ and proceedings of the Appellate Body.¹²² Documents submitted to panels and to the Appellate Body are confidential, although parties are entitled to disclose statements of their own position; parties are requested to submit, along with their confidential submissions, a non-confidential summary that can be disclosed to the public.¹²³

Moreover, the political dimension of WTO dispute settlement and its the member-driven ethos are still paramount. The DSU favours mutually agreed solutions between WTO members as an alternative to judicially-centred dispute resolution leading to publicly accessible reports. Even so, mutually agreed solutions occur in only approximately 10% of the disputes, and the interim review stage contributes only minimally to the achievement of those informal understandings. The limited participation of non-state actors in panel and Appellate Body proceedings also reflects the state-centred dimension of WTO dispute settlement, insofar as the Appellate Body does not recognize an enforceable right to have one's *amicus curiae* brief considered by a panel or by the Appellate Body unless one of the parties expressly consents to its incorporation in its own submissions.

4.2.5. Predictability

Although “providing security and predictability to the multilateral trading system” is one of the goals of the WTO dispute settlement system,¹²⁴ that system has not yet formally recognised the principle of *stare decisis*. Panel and Appellate Body reports do not constitute legally binding precedents for other disputes, whether between the same parties on different matters or different parties on the same or other matters.¹²⁵

Nonetheless, if the reasoning developed in a given report is particularly compelling it is very likely that the panel or the Appellate Body will follow it in a similar case. The Appellate Body in *Japan—Alcoholic beverages* ruled that adopted GATT and WTO panel reports “create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.”¹²⁶ This also holds true for Appellate

¹²⁰ See Article 4.6 DSU.

¹²¹ See Article 14.1 DSU.

¹²² See Article 17.10 DSU.

¹²³ See Article 18.2 DSU and paragraph 3 of the Working Procedures in Appendix 3 to the DSU.

¹²⁴ See Article 3.2 DSU.

¹²⁵ See David Palmetier and Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 *American Journal of International Law* 398, 404 (1998).

¹²⁶ See Appellate Body Report, *Japan—Alcoholic Beverages*, II DSR 1996:I, 97 at p.107-108.

Body reports, as clarified in *US—Shrimp*.¹²⁷ In *US—Oil* the Appellate Body went so far as to state that “following the Appellate Body’s conclusion in earlier disputes is not only appropriate, but is what would be expected from panels, especially where issues are the same.”¹²⁸

4.2.6. Timeliness

The timeliness of WTO dispute settlement procedures is a source of increasing concern.¹²⁹ During the last few years, significant delays have occurred at the panel stage.¹³⁰ While the DSU provides that the panel must conduct its examination in six months,¹³¹ which can be extended to nine months following a reasoned notice to the DSB, the annual median time for panel proceedings since 2005 has ranged from 11 to 15 months,¹³² with five disputes taking more than two years.¹³³ One reason is that most panels liberally grant parties’ requests for additional time for submissions, even in cases where no provision for extension of time is made in the DSB.¹³⁴ Other major causes of delay in panel proceedings are the scope or complexity of the issues raised in each dispute and the length of panel reports.

In contrast, the Appellate Body generally complies with the extended 90-day time frame laid down in Article 17.5 DSU. So far, only about one tenth of Appellate Body reports have exceeded that deadline.¹³⁵ Of course, the Appellate Body’s task in each dispute is more limited than that of the panel, as the Appellate Body only reviews the issues of law raised by

¹²⁷ See Appellate Body Report, *US—Shrimp (Article 21.5—Malaysia)*, para. 109.

¹²⁸ See Appellate Body Report, *United States—Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/Appellate Body/R, 17 December 2004, para. 188.

¹²⁹ See, e.g., William Davey, *Expediting the Panel Process in WTO Dispute Settlement*, in M. Janow et al., eds., *The WTO: Governance, Dispute Settlement and Developing Countries* (New York: Juris Publishing 2008), 409-40, 440; Pilita Clark, *Airbus Fears WTO Delay on Boeing Report Could Hurt Contract Hopes*, *Financial Times*, December 20, 2009.

¹³⁰ Also the implementation stage has recently given rise to timeliness concerns. For an exhaustive analysis of the possible abuses arising in the determination of the “reasonable period of time” accorded by Article 21:3 DSU to the losing party to comply with DSB rulings and recommendations, see Ma Qian, “Reasonable Period Of Time” in the WTO Dispute Settlement System, 15 *Journal of International Economic Law* 257, 264-274 (2012).

¹³¹ See Articles 12.8 and 12.9 DSU.

¹³² See Matthew Kennedy, *Why are WTO panels taking longer? And what can be done about it?*, 45 *Journal of World Trade* 221, 223 (2011).

¹³³ *Id.*, 221, footnote 3 (referring to the following disputes: *EC—Biotech (GMOs)*, WT/DS291, DS292, DS293; *US/Canada—Continued Suspension of Obligations in the EC-Harmony Dispute*, WT /DS320, DS321; *EC and certain Member States—Large Civil Aircraft*, WT/DS316; *US—Large Civil Aircraft (2nd complaint)*, WT/DS353; *Australia—Apples*, WT/DS367).

¹³⁴ See Matthew Kennedy, *Why are WTO panels taking longer? And what can be done about it?*, 45 *Journal of World Trade* 231 (2011).

¹³⁵ *Ibid.*, 228, footnote 40 (referring to the following disputes: *EC—Hormones*, WT/DS26 and WT/DS48 (114 days); *Thailand—H-Beams*, WT/DS122 (140 days); *EC Asbestos*, WT/DS135 (140 days); *US—Lead and Bismuth II*, WT/DS138 (104 days); *EC—Sugar*, WT/DS265 (105days); *US—Upland Cotton*, WT/DS 267 (136 days); *Mexico—Antidumping Measures on Rice*, WT/DS295 (132 days); *US—Upland Cotton (Article 21.5)*, WT/ DS267 (111 days); *US/Canada—Continued Suspension of Obligations in the EC-Harwony Dispute*, WT/DS320 and WT/DS321 (140 days)).

the parties on appeal. Moreover, Appellate Body reports, unlike panel reports, are not subject to review by a higher-ranking body.

4.2.7. Implementation and remedies

While the record by WTO members in complying with adverse panel and Appellate Body rulings is generally positive,¹³⁶ implementation and remedies in the WTO dispute settlement system confront two major issues: the ambiguity of certain procedural rules and the uneven bargaining power of WTO members.

As to the first issue, if the losing party fails to comply with DSB rulings and recommendations, the winning party may either request the establishment of a compliance panel under Article 21.5 DSU or request authorization from the DSB to retaliate by suspending trade concessions, a matter which may be referred to arbitration under Article 22.6 DSU. However, nothing in the DSU prevents the compliance procedure under Article 21.5 and arbitration under Article 22.6 from running in parallel, possibly with conflicting outcomes. This is known as the “sequencing problem.”¹³⁷

If DSB rulings and recommendations are not complied with, the DSU envisages two types of sanctions: compensation and retaliation. The coercion and deterrence effects of those sanctions, however, hinge upon the bargaining power of the parties concerned.¹³⁸ Retaliatory measures, which usually take the form of additional customs duties on the goods originating in the territory of the losing WTO member, can prove ineffective if they are put into place by a weak bargaining party against a stronger one. Besides, not all WTO members have the same practical ability to resort to the suspension of obligations, as constituents of the winning member will have to bear additional import duties and may have to switch to suboptimal supply sources.¹³⁹ Moreover, a strong bargaining party may offer a wide range of trade

¹³⁶ See Bruce Wilson, Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date, 10 *Journal of International Economic Law*, 397 (2007) (noting that in virtually all cases of adverse rulings the WTO member concerned indicated its intention to bring itself into compliance and that in most cases it had already done so).

¹³⁷ See Cherise M. Valles and Brendan P. McGivern, The right to retaliate under the WTO Agreement: the “Sequencing” Problem, 34 *Journal of World Trade* 63 (2000).

¹³⁸ See Benjamin L. Brimeyer, Bananas, Beef, and Compliance in the World Trade Organization: The Inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower Nations, 10 *Minnesota Journal of Global Trade* 133 (2001). *But see* Chad P. Bown, Bernard M. Hoekman, Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement is Not Enough, 42 *Journal of World Trade* 177 (2008) (noting that developing countries are rarely challenged in formal trade disputes for failing to live up to commitments, reducing the benefits of their participation in international trade agreements). *See also* Dukgeun Ahn, Jihong Lee, and Jee-Hyeong Park: ‘Understanding Non-litigated Disputes In the WTO Dispute Settlement System’, *Journal of World Trade* 47, no. 5 (2013), pp. 985–1012.

¹³⁹ See Reto Malacrada, Towards Sounder and Fairer WTO Retaliation: Suggestions for Possible Additional Procedural Rules Governing Members’ Preparation and Adoption of Retaliatory Measures, 42 *Journal of World Trade* 3, 11-12 (2008).

concessions to persuade a weaker party to tolerate measures at variance with WTO agreements.

4. Conclusion: procedural fairness as a necessary precondition for cross-fertilisation between IARs

The analysis of the antitrust mandates of the four IARs surveyed in this paper revealed a potential for legal transplants from the ICN, the OECD, or the UNCTAD to the WTO through the conduit of dispute settlement. Instances of cross-fertilisation *à la Mexico – Telecoms* may occur again in the future, as WTO panels and the Appellate Body may turn to globally-accepted antitrust rules and principles, such as those developed by IARs, to flesh out the generic wording of the WTO provisions dealing with antitrust matters.

This paper, however, showed an uneven level of compliance with procedural fairness standards by the four IARs surveyed. More to the point, while the three potential donors of antitrust rules and principles – i.e. the OECD, the UNCTAD, and the ICN – have, by and large, a positive compliance record with procedural fairness standards in terms of access, transparency and accountability, non-negligible problems inhere in the potential recipient, *viz.* the WTO. Parties to a dispute may not be in the best position to ensure the impartiality and independence of the WTO judiciary at all times. The absence of clear rules of evidence and the lack of epistemic rigour in handling economic data are serious systemic issues, considering that antitrust cases are normally fact-intensive and often hinge upon economic analysis. Transparency is often sacrificed in the name of confidentiality. Broader NGO participation in dispute settlement could promote transparency, but the Appellate Body has placed significant limits on *amici curiae* submissions. The predictability of the WTO dispute settlement system is affected by the absence of a formal *stare decisis* doctrine, although in fact panels consistently follow Appellate Body reports. The length of WTO dispute settlement procedures has become a source of concern, especially at the panel stage. The implementation of panel and Appellate Body reports is undermined by the sequencing problem and by WTO members' uneven bargaining power.

In view of such shortcomings, one may legitimately wonder whether the expansion of WTO's antitrust mandate as a result cross-fertilisation with other IARs is actually desirable. Is it sensible to entrust the WTO dispute settlement system with the task of applying antitrust provisions if that system is not ready to do so? Answering that question lies beyond the scope of this work. Nonetheless, that question does suggest that compliance with procedural fairness

standards by both the donor and recipient IAR should be regarded a necessary precondition for legal transplants.

Parties to WTO disputes may contribute to ensure the donor's compliance with procedural fairness standards by requesting the WTO judiciary only to refer to antitrust rules and principles articulated by IARs that comply with those standards. Eager to bolster the legitimacy of its gap-filling function in the sensitive area of global antitrust, the WTO dispute resolution system might readily embrace compliance with procedural fairness standards as a precondition for the importation of antitrust rules from other IARs.¹⁴⁰

Operationalizing the requirement that also the recipient IARs be in good standing in respect of procedural fairness norms, instead, might prove more problematic. What party to a dispute before a WTO panel would argue that that panel should not draw inspiration from non-WTO antitrust instruments because it lacks, say, the necessary expertise to apply the relevant economic tests? While some national courts have shown a remarkable self-restraint in imposing antitrust remedies they were unable to handle,¹⁴¹ there is no guarantee that also the WTO judiciary will go down that road.

Finally, it must be observed that, while legal transplants carried out under suboptimal conditions may undermine the coherence and legitimacy of WTO dispute resolution system, they might also contribute to highlight problematic aspects prompting the WTO judiciary to set them right. Just as the Appellate Body has remedied the lack of a formal *stare decisis* rule by rebuking panels that failed to follow previous reports addressing similar issues, it may induce panels to take fact-finding and economic assessment in antitrust cases more seriously and to consult experts when necessary. In sum, transplants of exogenous antitrust tissue into a body with a suboptimal procedural fairness record may initially harm the patient (*aegrescit medendo*), but might ultimately facilitate full recovery (πάθει μάθος).

¹⁴⁰ See Richard B. Stewart and Michelle Ratton Sanchez Badin, *The World Trade Organization and Global Administrative Law*, Public Law & Legal Theory Research Paper Series Working Paper No. 09-71, 25 (“[i]f the WTO, though its [...] dispute settlement bodies, were to condition recognition of other global bodies’ regulatory standards upon their observance of GAL norms of transparency, participation, and reason giving, that would help to ensure that the standards to be accorded recognition are well informed and reflect a fair consideration of the interests at stake”).

¹⁴¹ See *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (“We think that Professor Areeda got it exactly right: ‘No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise’ [...] An antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations”).