UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

Technical and Statistical Report

The United Nations Set of Principles and Rules on Competition: implementation after 40 years

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The United Nations Set of Principles and Rules on Competition: implementation after 40 years

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Introduction by UNCTAD secretariat

This publication commemorates UNCTAD's 60th anniversary in 2024, and 44 years after the adoption of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (Set), reflecting on its influence in the implementation of competition law and policy by developing countries across the globe.

International cooperation in competition law and policy is crucial due to the global nature of markets, as it enables effective enforcement of competition rules against anti-competitive practices that can span multiple jurisdictions, such as cartels and mergers. By sharing information, resources, and best practices, countries can overcome limitations in enforcement capabilities, especially in cases involving complex international economic activities. Furthermore, international cooperation helps harmonize regulations, reducing the risk of conflicting laws and providing a fair and predictable legal environment for businesses operating internationally, thereby promoting fair competition and economic efficiency on a global scale.

To address this complex issue, over four decades ago, the United Nations General Assembly adopted the Set through its resolution 35/63 of 5 December 1980.[1] The Set was the first, and remains the only, internationally agreed instrument on competition law and policy.

Serving as a beacon of international cooperation at the global level, the Set promotes rules to curb anti-competitive business practices, integrates the development aspect of competition law and policy, and provides a platform for international collaboration and the exchange of best practices. Particularly, the Set devotes Section F to "international measures", including provisions for consultations between member States (Section F.4), elaboration of a model law (Section F.5), and technical assistance and capacity building to enhance the application of competition law for developmental goals (Section F.6).

The Set, in its Section G., also establishes an international institutional machinery at UNCTAD to oversee the implementation of the Set, firstly named as Intergovernmental group of experts (IGE) on Restrictive Business Practices and later renamed as IGE on competition law and policy.[2] This IGE reports to the United Nations Conference to Review All Aspects of the Set (Review Conference), which is held every five years.[3]

As a result, UNCTAD became the custodian of the Set and the focal point for competition law and policy within the United Nations system. Since its inception, the Set has significantly influenced competition policies across the world and its recommendations either on the objectives of Competition law or on the main categories of anticompetitive restrictions, remain relevant today. Before 1980, approximately 20 mostly developed countries had competition laws. The late 1980s and early 1990s saw a substantial increase in the adoption of these laws, and currently over 140 countries, including those from the developing and least-developed categories, have established competition laws and relevant enforcement bodies. Additionally, several regional organizations, particularly in developing regions, have implemented competition regulations and formed regional competition authorities.[4]

1 A/RES/35/63.
2 A/RE/52/182 of December 1997.
3 Section G of the Set. Also see https://unctad.org/topic/competition-and-consumer-protection/the-united-nations-set-of-principles-on-competition.
4 https://unctad.org/system/files/official-document/tdrbpconf9d3_en.pdf. As an example, the design and consolidation of the community Competition rules of the Economic and Monetary Community of Central

In this regard, as provided in the Section F.5 of the Set, UNCTAD has engaged in broad technical cooperation activities for those countries and regional organizations across various regions, including Africa, Central and South America, Asia, Eastern Europe, Western Asia, and the Middle East, and has played a pivotal role in the formulation, revision, and implementation of their competition laws and policies, ensuring alignment with the United Nations Sustainable Development Goals and international best practices.

Alongside the formulation and implementation of the Set, the UNCTAD Model Law on Competition (Model Law)[5] has been developed by member States representatives gathered in UNCTAD intergovernmental meetings. The Set provides the basis of the Model Law in its Section F. 5: "[c]ontinued work within UNCTAD on the elaboration of a model law or laws on restrictive business practices in order to assist developing countries in devising appropriate legislation", and member States "should provide necessary information and experience to UNCTAD in this connection". The Model Law supplements the Set by offering detailed, actionable elements for national competition legislation, which is regularly updated to reflect legislative developments and feedback from member States.

The recent development of the Section F of the Set to bolster international cooperation took place in the 2020 Review Conference[6], adopting the "Guiding Policies and Procedures under Section F of the Set" (GPP).[7] The discussion on the GPP started from the need to develop clearer guidance on the collaboration between competition authorities, namely requested by less experienced authorities to advanced ones, under the Set and clarify UNCTAD's supporting role in this regard, and to remove remaining obstacles in terms of cooperation in specific cases. Therefore, this document provides practical step-by-step guidance for nascent competition authorities and facilitates the exchange of information and collaboration particularly among established and emerging authorities. Section II. of the GPP provides available tools for cooperation at each step of case investigations such as initial contacts, exchange of information and discussions on substance and case resolution. Also, Section III. of the GPP clarifies UNCTAD's role to assist competition authorities in requesting other authorities for their cooperation.

An informal UNCTAD working group on cross-border cartels, established in 2021, further supports efforts on fostering international cooperation by encouraging discussion and enhancing understanding among competition authorities.

Another important development towards implementing technical cooperation on competition law and policy is the voluntary peer review exercise that UNCTAD has facilitated since 2005, when the Fifth Review Conference Resolution confirmed UNCTAD's mandate on the voluntary peer review on competition law and policy.[8]

Africa (CEMAC), Economic Community of West African States (ECOWAS) and West African Economic and Monetary Union (WAEMU) were conducted by UNCTAD under the guidance of the Set. The Set also inspired the contribution of UNCTAD to the discussions and drafting of the African Continental Free Trade Area Competition protocol.

5 The idea of a Model Law on Competition has been developed since the 1970s by member States' representatives gathered in UNCTAD intergovernmental meetings to provide guidance on competition legislations, particularly for developing countries that are not familiar with this field. UNCTAD recently compiled a publication on "The UNCTAD Model Law on Competition after 30 years: Some reflections" (UNCTAD/DITC/CLP/2023/6, 8 February 2024). Available at: https://unctad.org/publication/unctad-model-law-competition-after-30-years.

6 https://unctad.org/system/files/official-document/tdrbpconf9d9_en.pdf.

7 https://unctad.org/system/files/official-document/ditccplpmisc2021d2_en.pdf.

8 Paragraph 7. Available at: https://unctad.org/system/files/official-document/tdrbpconf6d15_en.pdf.

UNCTAD has been conducting voluntary peer reviews of competition laws and policies,[9] of 29 countries and one regional organization by 2024.[10] This initiative allows developing countries to benchmark their legislative framework against international best practices. It provides an opportunity for reviewed countries to self-evaluate their enforcement performance. The reviews are conducted using an interactive peer review method that promotes knowledge-sharing and mutual understanding between competition authorities and consumer protection agencies at the regional and international levels through formal relations and informal networks and encourages both North–South and South–South cooperation.

The present publication was prepared to commemorate UNCTAD's 60th anniversary in 2024, 44 years after the establishment of the Set, providing for a reflection on its influence in the adoption and implementation of competition law and policy by developing countries across the globe. It compiles contributions from interneational competition scholars and experts, including civil society representatives. It also highlights UNCTAD's unique role as the voice of developing countries and the focal point for competition law and policy within the United Nations system. This publication also identifies areas for improvement in order to ensure that Set remains valid in the 21st century given the current and evolving global challenges in view of the upcoming Ninth Review Conference in 2025.

[9] UNCTAD Toolbox. Available at: https://unctad.org/system/files/official-document/tc2015d1rev2_S03_P01.pdf.

[10] Jamaica, Kenya, Tunisia, West African Economic and Monetary Union (WAEMU), Benin and Senegal, Costa Rica, Indonesia, Armenia, Serbia, Mongolia, United Republic of Tanzania, Zambia and Zimbabwe (tripartite), Nicaragua, Pakistan, Ukraine, Philippines, Namibia, Seychelles, Albania, Fiji and Papua New Guinea (bipartite), Uruguay, Argentina, Botswana, WAEMU (second review), Malawi, Bangladesh, Paraguay, and Egypt.

History and prospects: the United Nations Set of Principles and Rules on Competition and international cooperation on competition law and policy

The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (Set) has fostered mutual trust between developed and developing nations, driving the growth of national competition frameworks and international agreements that protect consumers, enhance market fairness, and support global economic growth.

Following several key developments, international cooperation on competition has become crucial. First, there has been an increase in the number of countries that have adopted competition laws, rising from around 40 in the 1980s to about 140 today. Second, until up to 2008, there was sustained movement toward trade and investment liberalization, which increased the risk of transnational anticompetitive practices. Third, we have seen the rapid development of the digital sector where very large platforms operate not on a multiplicity of national markets but on a global market. National competition authorities must cooperate to benefit from shared experiences and best practices, economize resources and minimize potential inconsistencies in dealing with practices from global players, which affect multiple jurisdictions in similar ways.

Cooperation requires shared objectives, mutual understanding and trust.

In this context, the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (Set), elaborated and adopted by the United Nations General Assembly resolution in 1980, has played a major role.

The adoption of the Set contributed to establishing a consistent perspective on a range of competition issues and inspired several countries, which hitherto did not have a competition law, to adopt one. In addition, the Set strongly contributed to linking microeconomic governance of markets and economic development. This linking was particularly supported by the significant technical assistance on competition law matters provided by the UNCTAD secretariat to developing countries after the adoption of the Set, as well as the debates held in the United Nations Conferences to Review All Aspects of the Set (Review Conferences). Many developing countries have used the Set as a starting point for defining the scope and the goals of their domestic competition law. The peer review mechanism operated by the UNCTAD secretariat, with the support of experienced competition experts, created an emulation among countries which had adopted a competition regime. Finally, the Set has promoted the idea that international cooperation on competition could contribute to economic development by stating that "collaboration at the international level should aim at eliminating or effectively dealing with restrictive business practices".

Accordingly, it is difficult to overstate the importance of the Set as the foundation upon which mutual trust between developed and developing countries allowed further developments of competition laws. This has occurred at national levels, particularly in developing countries, and has led to increased international cooperation at bilateral, regional or multilateral levels. The Set continues to be a powerful symbol of the importance of competition issues by United Nations member States.

The fact that a framework for such a complex and divisive topic had been achieved in the context of the United Nations, has inspired other attempts to promote competition at the multilateral level and also inspired the creation of the World Trade Organisation (WTO) Working Group on the Interaction between Trade and Competition. This group's mandate was to explore whether a consensus could be achieved to complement multilateral trade agreements with a binding agreement for

cooperation on competition in the context of the Doha round of trade negotiations.

The attempt to promote the adoption of a binding agreement for cooperation on competition in the WTO was opposed by a number of developing countries which were wary of the real intentions of the promoters of such an adoption and also felt less comfortable in the straightjacket of a multilateral trade negotiation than they had felt in the context of the voluntary framework which had been adopted in the context of UNCTAD. They considered UNCTAD to be an organization clearly focused on the promotion of the economic development of developing countries.

The work of the WTO Working Group on Trade and Competition complemented the Set because it focused on concrete examples of transnational anticompetitive practices detrimental to the interest of developing countries and tried to assess the cost of these practices to them. As a result, provisions on competition have become much more frequent in the context of bilateral or regional trade agreements.

International trade or competition experts actively engaged over the last thirty or forty years to raise the consciousness of policymakers with respect to the issue of international competition and development. They are deeply appreciative of the groundbreaking adoption of the Set in the context of UNCTAD, and the work of the UNCTAD secretariat on competition and development.

Without these crucial contributions to public policy, the economic world would be more protectionist, markets would be characterized to a larger extent by the raw exercise of market power by large national or multinational firms, consumers' choices and purchasing power would be diminished and international trade and competition would not have participated in the important achievement of lifting hundreds of millions of people out of poverty.

The United Nations Set of Principles and Rules on Competition - its value for international cooperation

The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (Set) provides a basis for UNCTAD member States to undertake appropriate action in a mutually reinforcing manner at the national, regional, and multilateral levels to eliminate or effectively deal with restrictive business practices. It encouraged convergence and collaboration among national competition regimes and mutual understanding and cooperation.

I. Introduction

UNCTAD's 60th anniversary constitutes a timely moment to reflect upon an important instrument upon which UNCTAD initiated work in its infancy. The Set is the sole multilateral instrument of a universal character dealing with competition law and policy. While it constitutes a major outcome of long-standing multilateral efforts to ensure that restrictive business practices (RBPs) by enterprises do not impede trade liberalization, it also strongly focuses upon development needs. Its implementation under UNCTAD's aegis has contributed to, and fed into, the strong global trend towards the adoption and implementation of competition law and policy.

UNCTAD's work upon competition law and policy started off through a voted resolution by UNCTAD II. UNCTAD III launched the process leading to the Set's adoption, calling by consensus for attention to the possibility of drawing up guidelines for the consideration of developed and developing countries regarding RBPs adversely affecting developing countries (UNCTAD, 1972). Eight years later, agreement was reached upon the Set.

At that time, Group B spokesman acknowledged what this achievement represented; "[t]his Set of Principles and Rules […] marks the conscious restatement of the necessity of competition in international transactions as a guarantee of fairness and equity for all parties […] will also be a significant step in the evolution and development of mutually satisfactory economic relations in the North-South dialogues [...] clear evidence of the possibility of conducting a mutually beneficial dialogue between States at differing levels of economic development, but nevertheless sharing a common concern about transnational corporations in international trade […] also represents a significant achievement towards the attainment of UNCTAD goals, in particular in improving the international trading climate" (UNCTAD, 1980). The United Nations General Assembly (UNGA) proceeded to adopt a consensus resolution incorporating the Set (UNGA,1980).

Part I of this article sketches the context within which the idea of such an instrument came about and how it was pursued, explaining the motivations of different regional groups. Part II analyses and comments upon the Set's text. Part III proceeds to discuss and analyze its effects and influence, as well as its implementation with respect to international cooperation in particular, mainly focusing upon recent initiatives.

II. Background and content

A. Origins, objectives and process

The Set falls within the continuum of efforts by the international community to address anticompetitive practices and their effects upon international trade, starting with Chapter V entitled "Restrictive Business Practices of the abortive Havana Charter" (Havana Charter 1948), followed by further fruitless efforts by the United Nations Economic and Social Council

(United Nations, 1953), and then by the General Agreement on Tariffs and Trade (GATT), with some limited results (GATT 1960). However, the rejuvenation of United Nations activity in this field was impelled by the specific concerns and objectives of developing countries, which wished to minimize the effects upon their trade and development of RBPs emanating from the territory of developed countries and, also, in the adversarial climate of the 1970s, to establish an international code of conduct to control transnational corporations (TNCs). Developing countries considered that international action in this area would provide market opportunities for developing country enterprises perceived to be vulnerable to RBPs of TNCs, making it easier to obtain developed countries' cooperation in controlling TNCs and political and legal acceptance of developing countries' own controls upon TNCs, and strengthening developing countries' bargaining power in negotiations with TNCs - developing countries indeed saw the Set as one element towards the establishment of a New International Economic Order (NIEO) (UNCTAD, 1979a; Greenhill, 1978; Oesterle, 1981; Davidow, 1981a; Brewer, 1982).

Group B's contrasting approach is explained in an article by the United States Department of Justice's representative in the negotiations: "Experts of western and other developed nations have believed […] that a gradual exchange of information and experience, comparison of legislation and enforcement, and development of common norms based on majority approaches will, over time, serve an educational role, develop personal contacts between antitrust experts in different countries, facilitate bilateral cooperation and consultation, and create bases for further work, particularly at the regional level." (Davidow, 1979, 603). Group B opposed the Set's being made legally binding (as demanded by developing countries), arguing that this was precluded by the variances in countries' development approaches to RBPs, as well as enforcement divergences and difficulties, whereas voluntary principles could help to shape international opinion about RBPs, shape the general behaviour of most enterprises, and facilitate international cooperation (UNCTAD, 1976; UNCTAD, 1979b).

The negotiations were also characterized by divisions of opinion regarding such other issues as: the ultimate result to be achieved by controlling RBPs; the Set's scope and effects; the identification of RBPs; exceptions for enterprises, special treatment for developing country enterprises, and applicability to intra-enterprise transactions; and UNCTAD's role (UNCTAD, 1976; UNCTAD, 1979b; Davidow, 1977; Davidow, 1979; Griffin, 1981; Verma, 1988). Yet there was enough convergence and complementarity among the different negotiating objectives to enable the Set to be adopted as a non-binding instrument using "soft" language to find compromises acceptable to all parties. The Set's elaboration was thus relatively rapid as such multilateral negotiations went, involving different sessions of three expert groups and just two sessions of the United Nations Conference on Restrictive Business Practices, whose deliberations were propelled by successive UNCTAD Conferences and the seminal UNGA resolutions mentioned in the Preamble to the Set (Greenhill, 1978; Oesterle, 1981; Brusick, 1983).

B. Balance

The compromises made during the negotiations are reflected in the interrelated balance among and within the Set's provisions between:

(1) pure competition policy criteria, and trade, investment and development concerns;

(2) the universal applicability of competition principles, and exceptions to this;

(3) developing countries' "self-help" action and international cooperation among states, particularly cooperation for development; and

(4) the respective "rights" and "obligations" of states and enterprises, qualified by saving clauses.

This can be seen, for example, in: the inclusion of "equitable" in the Set's title and throughout its provisions, referring to preferential treatment for developing countries in the light of differences in market power; the linkages made in the Preamble among the establishment of the NIEO, the elimination of RBPs adversely affecting international trade, and the development and improvement of international economic relations on a just and equitable basis; the mention in just the Preamble that all countries should "encourage" their enterprises to follow the Set in all respects; the heterogeneous list of the Set's objectives in section A, with the reference to efficiency in paragraph A.2 qualified by "in accordance with national aims of economic and social development and existing economic structures"; the establishment as a general principle in paragraph C.1 (repeating the Preamble) of appropriate action in a mutually reinforcing manner at the national, regional and international levels to eliminate or effectively deal with RBPs, including those of TNCs, adversely affecting international trade, particularly that of developing countries, and the economic development of these countries; and the ambiguities in the definition of RBPs in paragraph B.(i), repeated in paragraphs B.(ii)4, D.3, D.4, and E.2 (qualified by the term "primarily") (Davidow, 1981a; Verma, 1988).

In circumscribing the Set's universal applicability by excluding intergovernmental agreements and RBPs directly caused by such agreements, paragraph B.(ii) aimed to exempt both voluntary export restraints imposed by developed countries, and the activities of the Organization of the Petroleum Exporting Countries (OPEC) and other commodity agreements among producing countries - however, it is unclear whether the United States courts would necessarily exempt OPEC (United Nations, 2004).

Potential exemptions from universality are also envisaged in paragraph C.(ii)6 (subject to a proviso regarding "the need to ensure the comprehensive application of the Set") and paragraph C.(iii)7. These potential exemptions are relevant to export cartels, the Act of State and sovereign compulsion doctrines, exemptions provided under competition law and policy, industrial or infant industry policies, and trading arrangements among developing countries. It was suggested shortly after the Set has adopted that paragraph C.(iii)7 "provides at least a starting point for bilateral discussions when the implementation of the competition law of one country affects the development interests of a developing country" (Arioli and Baldi, 1980, 30), and was compatible with the principle of comity in international antitrust enforcement as approved by the United States courts (Davidow, 1981a), although it was also emphasised that neither of paragraphs C.(ii)6 and C.(iii)7 "overrides the ultimate prosecutorial discretion of each nation in enforcing its antitrust laws" (Davidow, 1981b, 574). The *Hartford Fire* case subsequently clarified that comity would lead to abstention of the United States's exercise of jurisdiction only where there is a true conflict between its law and foreign law.

C. Norms for enterprises and for States

Section D's specification of rules and principles for enterprises, including transnational corporations, also aims at providing a framework for behaviour by governments, potentially facilitating intervention by home countries of TNCs in respect of actions by host Governments allegedly failing to meet these standards (Nguyen, 1992). Paragraph D.1 could have a bearing upon the scope of the economic unity or single economic entity doctrines

(under which distinct corporate legal persons are considered to form a single economic enterprise), affecting the evaluation of not only TNCs' intra-firm practices, but also their affiliates' liability for each other's actions. Paragraph D.2 is relevant to home countries' legal or public policy restrictions blocking their enterprises from providing information located in these home countries to foreign countries.

Developed countries wished to provide multilateral "legitimization" to only those national controls on RBPs which were similar to those under their own laws (while insisting on the proviso in paragraph C.(i) to prevent the Set from justifying other unlawful conduct). This accounts for: the detail with which the criteria for identifying RBPs by enterprises are set out in paragraphs D.3 and D.4; the exclusion of most parent-subsidiary transactions (which developing countries had wished to cover); the "softening" of the prohibitions in paragraph D.4 by pre-conditions, qualifications, or exceptions requiring a rule of reason or economic analysis; and the inclusion among the factors to be taken into account in determining abuse, in the footnote to paragraph D.4, of whether such acts or behaviour are usually treated as acceptable under pertinent national or regional RBP control legislation. Given the differences among national laws relating to the treatment of abuse of dominance/ monopolization, this would still leave open which behaviour should be considered abusive in individual cases. In any event, the list of practices provided in paragraph D.4 is illustrative rather than exhaustive.

Paragraph E.3's provisions are substantially reflected in the Preamble, underlining the importance developed countries attached to safeguards in the treatment of their enterprises. Group B had wished to include the term "non-discriminatory", which the G77 rejected, and agreement was reached upon the compromise formulation "on the same basis to all enterprises" (Verma, 1988) - it is uncertain how different this is.

It is also uncertain what "appropriate" remedial or preventive measures to prevent and/or control the use of RBPs "within their competence" member States should "seek" under paragraph E.4. At the first Review Conference on the Set, developing countries called for developed countries to implement this paragraph by taking measures to reduce RBPs affecting developing countries' trade (UNCTAD, 1985). Developed country competition authorities maintained their already stated position that extraterritorial regulation of corporations was not within their competence as competition authorities (Greenhill, 1978; Oesterle, 1981). However, it has been suggested that this paragraph refers to member States' international competence rather than to competition authorities' competence under their national competition laws (Oesterle, 1981), and that international law recognizes that a member State can regulate the conduct of its nationals wherever they may be or do business, while this may involve significant practical difficulties (Davidow and Chiles, 1978; Oesterle, 1981). The *Empagran* ruling clarifies that United States law debars antitrust claims arising solely out of a foreign injury that is independent of the domestic effects of the challenged anti-competitive conduct.

It is noteworthy that, under paragraph E.9, member States should take the initiative when the need comes to their attention to supply to other member States, particularly developing countries, publicly available information and, to the extent consistent with their laws and established public policy, other information necessary for effective control of RBPs at their own initiative, even if no request has been made.

D. International measures and international institutional machinery

It is also noteworthy that most of the international measures provided for under section F concern international work on national measures, and that the sole provision dealing with international measures, paragraph F.4, is less detailed than the consultations provisions in the relevant GATT Decision (GATT 1960) or the 1979 Organisation for Economic Co-operation and Development (OECD) recommendation (OECD, 1979). Subsequently, however, incorporating language from a later OECD Recommendation (OECD, 1986), the Second Review Conference did resolve that, following a request for consultations, the member State addressed should take whatever remedial action it considered appropriate, including action under its RBP legislation, on a voluntary basis and considering its legitimate interests (UNCTAD, 1990).

In contrast with the private bilateral character of these paragraph F.4 consultations, the Intergovernmental Group of Experts on Restrictive Business Practices (IGERBP) set up by section G provides a forum for multilateral consultations and discussions on matters related to the Set. The IGERBP's title would later be changed by the UNGA (UNGA, 1997) to the Intergovernmental Group of Experts on Competition Law and Policy (IGECLP), the only change to the Set since its adoption, made because it was considered to be in line with the nature of the work and changes in the real world (UNCTAD, 1995). Paragraph G.6 provides for a Review Conference 5 years after the Set's adoption, and the UNGA has regularly authorized further Review Conferences every 5 years. The machinery to oversee the Set's implementation established by section G thus operates through review mechanisms and lateral pressures, relying upon the cooperation of the Set's addressees, rather than through vertical institutional subordination and sanction.

III. Influence, UNCTAD implementation, and international cooperation

A. Influence and implementation by UNCTAD

The Set is not legally binding upon United Nations member States, and there is no indication either that any of its provisions reflected, or have since come to reflect, customary international law (Dhanjee, 2001; Ioannis, 2007). In its earlier days, some argued that the non-binding nature of the Set limited its impact, often downplaying its significance (Verma, 1988; ABA, 1991, 281; Steiner, 1997; Waller, 1997; Correa, 1999; Melamed, 2000). However, these critiques overlooked the Set's enduring and subtle political and educational influence. If there had been a continued push to make the Set legally binding, it either would not have been adopted or, if adopted, would have faced significant limitations, becoming vague and weakened by challenges related to treaty reservations, ratifications and enforcement (Davidow 1981; Wood 1995). Moreover, a treaty could not have directly established norms for enterprises in the way non-binding norms could, since enterprises are not subjects of international law (except in limited circumstances not applicable here).

The history of multilateral negotiations on RBP control from the Havana Charter onwards is indeed instructive regarding the difficulties of agreement upon binding multilateral rules in this area. During the negotiations of the WTO Working Group on the Interaction between Trade and Competition Policy, one delegation, referring to the Set, proposed that WTO work "could in many ways take this initiative further […] by the conferral of binding elements […]

and by the consideration of new issues such as international cooperation" (WTO, 1997, 2). However, another delegation considered that "the international instruments like the UN Set […] are non-binding […] the extent to which the elements identified in such instruments could be replicated in WTO may be limited" (WTO, 2000, 3).

The Set does have the legitimacy and political effects of an unanimously adopted UNGA resolution - as was recognized soon after it was adopted, "it imposes at least a political and moral obligation […] There is an expectation of, and reliance on, compliance by the parties […] because even a nonbinding code demonstrates the legitimacy of certain principles" (Miller and Davidow, 1982). This has provided a mandate, framework and instrument of inclusive dialogue, persuasion and pedagogy to UNCTAD, powering its long-term influence upon the adoption and implementation by developing countries of competition legislation broadly following similar patterns as those of developed countries, and upon international cooperation to support this process (Dhanjee, 2001).

A recent authoritative recognition of the value of the Set's and UNCTAD's intertwined influence in this area was accordingly provided by UNCTAD member States in paragraph 15 of the Guiding Policies and Procedures under section F of the Set (GPP, UNCTAD, 2020c): "The Set plays an important role in encouraging the adoption and strengthening of laws and policies in this area at the national and regional levels. UNCTAD assists developing countries and countries with economies in transition in adopting or revising competition legislation and policies, to align them with international best practices, as well as regional frameworks, in these areas."

As appears from the 5-yearly UNCTAD secretariat reports to Review Conferences (the latest being UNCTAD, 2020a), UNCTAD has, over the years, implemented the Set through reports, the elaboration of a Model Law, voluntary peer reviews, technical assistance, and a Research Partnership Platform, as well as intergovernmental meetings to exchange views, hold paragraph G.3 consultations, and make recommendations. This has significantly contributed to greater convergence among national competition regimes, enhanced transparency and mutual understanding and confidence, and thus facilitated international cooperation (Brusick, 2001). The subject of international cooperation is indeed routinely discussed in IGECLP sessions and Review Conferences, which have for many years adopted recommendations urging that such cooperation be strengthened.

B. Strengthening of international cooperation

However, there was, until recent years, only one instance of recourse to paragraph F.4 consultations, which were held in the mid-1980s between a developing and a developed home country with respect to restraints by a pharmaceuticals TNC upon exports of pharmaceuticals manufactured by licence in that developing country to a neighbouring developing country (UNCTAD, 2006). This was referred by the developed country authorities concerned to this TNC, which explained the restraints, and the matter was informally brought to the IGERBP's attention, with no record being kept.

Implicitly acknowledging the need for further efforts to realize the Set's potential for strengthening international cooperation, the Eighth Review Conference adopted the GPP to flesh out paragraph F.4 (UNCTAD, 2020b). While it is non-binding and contains few norms, the GPP establishes principles, a toolkit, and a pedagogical guide for enforcement cooperation between competition authorities, encourages positive responses to cooperation requests, and strengthens and details the Set's consultations mechanism and the supporting role of UNCTAD and its

secretariat, providing a multilateral locus for publicity, dialogue, and persuasion (Dhanjee, 2021). It could facilitate cooperation, particularly between competition authorities not having regular contacts which have not yet established a relationship of trust, by clarifying possible approaches and providing a framework and protocol for their interactions, gradually fostering mutual trust and accumulating cooperation experience which may lead to the conclusion of memoranda of understanding or other cooperation agreements (UNCTAD, 2023a).

So far, the UNCTAD secretariat has only received two requests from competition authorities for support for facilitating cooperation under section F and the GPP (UNCTAD, 2022). One request concerned a developing country's competition authority's difficulties in obtaining information from both a TNC subsidiary and its parent company being investigated for abuse of dominance, and from the competition authority of the TNC's home country, in the absence of a cooperation agreement. The second request concerned difficulties faced by a regional competition authority in obtaining information for investigating abuse of dominance and anti-competitive agreements by a TNC in cross-border markets for mobile application store services and advertising services, given the lack of cooperation agreements with the competition authorities of two countries where the company was registered or operated. Publicly available information was eventually obtained from one of these competition authorities by the UNCTAD Secretariat.

Three other competition authorities have referred to the GPP's guidance in undertaking requests for informal cooperation and exchanges of non-confidential information and experience with other competition authorities, on possible cooperation at each stage of investigation, and on obtaining confidentiality waivers from leniency applicants and companies involved (UNCTAD, 2023b). However, most competition authorities out of 36 surveyed by the UNCTAD secretariat had either not consulted the GPP (preferring to use more proximate, long-standing, and familiar instruments), had not had cross-border cases, had not needed cooperation to proceed with cases, or were unaware of the GPP.

It was suggested, shortly after the Set was adopted, that consultations are seldom used to address RBPs because the adversely affected State is not totally dependent upon aid from TNCs' home States; most RBPs are discovered after they end, or cease upon being discovered (when consultations are not particularly helpful); and many States do not accept that they are responsible for the behaviour of "their" enterprises abroad, or are reluctant to seek to restrain conduct outside their territory, probably not violative of their laws, or as to which facts are unknown or in dispute (Davidow, 1981a). It is uncertain to what extent such issues continue to be relevant nowadays with respect to consultations in this area.

It has further been suggested that consultations and cooperation outcomes under the GPP framework may depend upon whether controversial issues, possibly relevant to paragraphs B(ii), C.(ii)6, C.(iii)7, D.2, D.4, E.3, E.4, E.5, or E.9 of the Set, arise regarding the appropriateness of competition policy action or inaction by States; but that, even where there's no immediate tangible outcome, consultations under the GPP's umbrella may ventilate issues, positions and interests, facilitating mutual understanding and enhancing future chances of successful outcomes - particularly if reports on the consultations and their results are prepared, as envisaged by paragraph F.4, or there are at least summary records incorporated within IGECLP or Review Conference reports (Dhanjee, 2021). In considering whether or how the GPP might be enhanced, it may be appropriate to take into account consultations provisions in relevant OECD recommendations, as well as the Second Review Conference's approach in this regard.

In parallel with the GPP's adoption, the Eighth Review Conference called upon member States to facilitate cooperation in order to strengthen enforcement against cross-border anti-competitive business practices (with a focus on cross-border cartels), in accordance with section F, and established a Working Group on cross-border cartels - whose mandate, renewed by the twenty-first IGECLP session, is to highlight best practices and facilitate information exchange, consultations and international cooperation, discuss tools and procedures and undertake other projects as agreed in the future (UNCTAD, 2020b; UNCTAD, 2023a). While some delegations have called for the drafting of uniform guidelines for conducting cross-border cartel investigations and joint analysis on mergers and acquisitions in the digital market, others have opposed this. There have been exchanges of experience among countries in dealing with cartels and bid-rigging, procedural problems that can arise have been highlighted, and interest has been shown in sharing cartel detection and investigation methods developed by each competition authority (UNCTAD, 2024b).

The last 22nd IGECLP session in 2024 requested UNCTAD to continue to promote international and regional cooperation; recognized the importance of continuously developing international cooperation among competition authorities, to respond to the mergers of global companies; underlined the importance of international cooperation as recognized in section F of the Set, including informal collaboration among competition authorities, calling upon UNCTAD to promote and support cooperation between Governments and competition authorities, as directed by the Bridgetown Covenant adopted by UNCTAD XV (UNCTAD, 2021), the Eighth Review Conference, and the GPP; welcomed and endorsed updating revisions made to the GPP appendix, which compiles guiding documents and other background information which facilitate cooperation, requesting that it be reported to the Ninth Review Conference next year; requested the UNCTAD secretariat to continue the GPP's dissemination and to encourage its use by member States; emphasized the importance of regional cooperation in the enforcement of competition law and policy and the significance of initiatives launched by regional competition organizations and frameworks, and invited competition authorities to strengthen their regional and bilateral cooperation; welcomed the information exchanges and discussions on best practices to promote cooperation between competition authorities in dealing with cross-border cartel cases and common issues in the fight against bid rigging; and decided to renew the mandate of the informal working group on cross- border cartels, which is to report to the Ninth Review Conference next year (UNCTAD, 2024a).

C. Concluding remarks

The Set provides a basis for UNCTAD member States to undertake appropriate action in a mutually reinforcing manner at the national, regional and multilateral levels to eliminate or effectively deal with RBP, in line with its paragraph C.1. The nature and extent of such action within the UNCTAD framework will continue to depend upon the interactions among member States' interests and strategies in competition law and policy, and in international cooperation for development, and how far shared perceptions of common interest and mutual benefit are built up among UNCTAD member States, in the light of the changing context in which competition law and policy operate.

The key drivers for increasing and improving international enforcement cooperation for at least the last three decades have been: the increase in the number of competition authorities and the maturing and expansion of all authorities' competencies; the continued growth in international economic interconnectedness and interdependence; and developments in the international digital economy. These key drivers will mean that authorities are more likely to be considering

the same or similar issues concurrently within their jurisdictions, investigating the same cross-border enforcement matters, and considering how their current tools, resources and laws are equipped to deal with these global developments (OECD/ICN, 2021). Such drivers are reinforced by more recent trends such as more interventionist economic and industrial policies; more flexibility by competition authorities regarding consideration of broader public policy objectives going beyond consumer welfare and efficiency criteria; and the embrace of extraterritoriality by a large number of developing countries, despite the difficulties (UNCTAD, 2021).

Such drivers will persist in the foreseeable future, so it is safe to assume that there will continue to be progress - with whatever direction or speed - in strengthening international cooperation on competition law and policy, including within the Set's framework.

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A new life for the United Nations Set of Principles and Rules on Competition? Retrospective and prospective

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To maintain its relevance, the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (Set) needs to evolve, addressing the shift from multinational corporations to global value chains and ecosystems, the challenges posed by the market power of digital platforms, and the integration of the United Nations Sustainable Development Goals (SDGs) into competition policy frameworks.

I. Introduction

The Set[11] is the outcome of developing countries' efforts during the 1960s and 1970s to question the foundations of the international trade system and develop a "New International Economic Order (NIEO).[12] The provisions of the Set are therefore inspired by the aim of economic development of the less developed countries, an objective that consequently affects the substantive provisions of the Set and explains the specificities of its approach. In this brief article, I will comment first on the principles that led to the adoption of the Set, and in particular the link between the Set and the NIEO project. I will then explore the future of the Set, in particular following the disintegration of the NIEO project in the 1980s and 1990s, and reflect on the possible emergence of a new agenda that would eventually provide new life to this important and unique so far effort of constituting a truly international competition law.

II. The Set and the NIEO Project

The NIEO was first introduced in Resolutions 3201 (S-VI) (The Declaration on the Establishment of a New International Economic Order (the Declaration)) and 3202 (S-VI) (Programme of Action on the Establishment of a New International Economic Order (the Programme)) of 1 May 1974, during the sixth special session of the United Nations General Assembly.[13] It held that the NIEO should be "based on equity, sovereign equality, interdependence, common interest and cooperation among all States, irrespective of their economic and social systems which shall correct inequalities and redress existing injustices, make it possible to eliminate the widening gap between the developed and developing countries and ensure steadily accelerating economic and social development and peace and justice for present and future generations". The NIEO was thus founded on certain principles, notably the preferential and non-reciprocal treatment for developing countries and the supervision of the activities

[11] The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Conference on Restrictive Business Practices, U.N. Doc. TD/RBP/Conf/10/Rev.2 (Apr. 22, 1980).

[12] See, among others, M. Bedjaiou, Towards a New International Economic Order 133- 34, 143 (1979); T. M. Franck & M. M. Munansangu, The New International Economic Order: International Law in the making? (1982); J. Makarczyk, Principles of New International Economic Order: A Study of International Law in the Making (1988); N. Horn, Normative Problems of a New International Economic Order, 16 J. World Trade L. 338 (1982); K. P. Sauvant, Toward the New International Economic Order, in The New International Economic Order - Confrontation or Cooperation Between North and South? 3 (Karl P. Sauvant & Hajo Hasenpflug eds., 1977); and R. C.A. White, A New International Economic Order, 24 Int'l & Comp. L.Q. 542 (1975).

[13] Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), pmbl., U.N. GAOR, 6th Spec. Sess., Supp. No. 1, U.N. Doc. A/9556 (May 1, 1974). The Declaration was approved without voting. The Programme was also adopted the same day. G.A. Res. 3202 (S-VI) 2, U.N. GAOR 6th Spec. Sess., Supp. No. 1, U.N. Doc. A/9556 (May 1, 1974); see also Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), arts. 2.2(b), 14-18, U.N. GAOR 29th Sess., Supp. No. 31, U.N. Doc. A/3281 (XXIX) (Dec. 12, 1974). This resolution was adopted by 120 countries, with 6 against and 10 abstentions (all developed countries).

of transnational corporations by taking measures in the interest of the national economies of the countries where such transnational corporations operate. The new economic order would insist on a more equitable division of wealth between nations and would consider the special circumstances of developing countries.

The Set completed one of UNCTAD's most important missions during the 1970s, the regulation and control over activities of transnational corporations that, according to developing countries, diminished their sovereignty by interfering in their internal affairs. The goal of regulating transnational corporations was pursued by the adoption of different international codes of conduct. These were addressed not only to States but also to transnational corporations aimed, for example, at ending restrictive business practices, increasing developing countries' access to technology, or changing significantly the working arrangements of shipping conferences in order to enable developing countries to participate fully in maritime trade.[14] The model of competition law promoted by the Set was therefore inspired by an interventionist approach to the market. The Set's use of the word "equitable" expresses the importance accorded to the development dimension of competition policies and the need to establish preferential treatment for developing countries.

The Set reflected two different approaches to international competition rules. On one hand, enhancing economic development, and provide member States (particularly developing countries) capacity to regulate the conduct of transnational corporations. On the other hand, the Set was also perceived as a means of maintaining and promoting market-oriented reforms and competition to the benefit of consumers.

To this purpose, section B. provides that the Set applies to the restrictive business practices of *all* enterprises, "including those of transnational corporations […] irrespective of whether such practices involve enterprises in one or more countries," and to "all countries and enterprises regardless of the parties involved in the transactions, acts or behaviour.

Nevertheless, the Set also established a certain degree of preferential treatment for developing countries. Paragraph C.(ii)(6) provides that "[i]n order to ensure the fair and equitable application of the Set of Principles and Rules," application of the Set should take into account "the extent to which the conduct of enterprises, whether or not created or controlled by States, is accepted under applicable legislation or regulations". Furthermore, countries according to paragraph C.(iii)(7) developed countries should take into account in their control of restrictive business practices the development, financial and trade needs of developing countries, in particular of the least developed countries" by "[p]romoting the establishment or development of domestic industries," and by "[e]ncouraging their economic development through regional or global arrangements among developing countries. The code embraces the principle of non-discrimination and provides that foreign-owned companies and local firms are to be treated similarly.

The Set also anticipates measures for international implementation. These included collaboration, mutual assistance, exchange of information on the restrictive practices of firms, and the application of national laws on an international, regional, and/or sub-regional level. Paragraph G.(i)2 provides that "[s]tates which have accepted the Set of Principles and Rules *should* take appropriate steps at the national or regional levels

[14] See Programme, ibid., V(6), Regulation and Control over the Activities of Transnational Corporations ("[A]ll efforts should be made to formulate, adopt and implement an international code of conduct for transnational corporations […] [t]o regulate their activities in host countries, to eliminate restrictive business practices and to conform to the national development plans and objectives of developing countries, and in this context facilitate, as necessary, the review and revision of previously concluded arrangements.").

to meet their commitment to the Set of Principles and Rules".

Of particular interest here is to mention that the Set was adopted by a General Assembly resolution (Resolution 35/63 of 5 December 1980),[15] it has been in operation since and the Eighth United Nations Conference to Review All Aspects of the Set (Review Conference) in October 2020 reaffirmed its validity.[16] The legal nature of the Set appears thus distinguishable from other codes of conduct adopted by UNCTAD, which were not endorsed by the General Assembly. In other words, because of its adoption by the General Assembly, the Set may demand a higher degree of obligation than other UNCTAD codes. However, it is highly unlikely that the Set can produce any intrinsic legal effects as a resolution of the General Assembly, but as I have argued elsewhere the continuous reaffirmation of the Set's validity since its adoption in 1980 may contribute to the formation of a customary international obligation to prohibit restrictive business practices affecting international trade,[17] to the extent that the continual process of reviewing and reaffirming the validity of the Set, with the participation of countries belonging to various representative groups, may constitute state practice and act as "evidence" of customary law. However, the fact that there is a state practice compatible with the principles of the Set does not necessarily mean that this state practice implemented all the principles of the Set or that the states considered these principles legally binding. The Set does not also provide for bright-line rules that could produce some legal obligation, for example, a *per se* prohibition of certain restrictive practices, but institutes instead a rule-of-reason approach, reflected by the use of the word "unduly" in defining restrictions of competition and employs the highly indeterminate term of "market access."[18] It seems difficult to determine, *in abstracto*, if a practice will have the effect of restricting market access unduly, which leads to the conclusion that states can justify this restriction by a legitimate public purpose. In other words, the Set establishes more of a standard than a rule.

Even if, however, the Set does not appear to have any legally binding effect and does not, by itself, constitute conclusive evidence of the existence of a customary international rule on restrictive business practices, it may still contribute to the formation of a customary international rule in the future and prove, along with some other patterns of conduct, the emergence of *opinio juris* and the existence of state practice in favour of action against certain restrictive business practices. To the extent that more than 140 jurisdictions around the world have adopted competition statutes, sometimes inspired by similar principles, this may be considered as an indication of the emergence of *opinio juris*, at least for some types of harmful conduct to competition (e.g. agreements fixing prices, and collusive tendering).

III. Prospects for the Set: towards a new NIEO agenda?

Although the Set has been the product of its time - the NIEO with its emphasis on differential treatment for developing countries (paragraph C.(iii)7 of the Set) and its focus on harnessing the power of multinational corporations, the continuous process of reaffirmation of the validity of the Set and the revisions of the various Chapters of the UNCTAD Model Law on Competition

[15] G.A. Res. 35/63, pmbl., U.N. Doc. A/RES/35/63 (Dec. 5, 1980).
[16] See https://unctad.org/system/files/information-document/tdrbpconf9_d34_draft_final_resolution_en.pdf.
[17] For a discussion, see I. Lianos, The Contribution of the United Nations to the Emergence of Global Antitrust Law, 2007, 15 Tulane Journal of International and Comparative Law 415.
[18] See paragraphs B.(i)1 and D.3 of the Set.

(Model Law) the last forty years,[19] the launch of new initiatives relating to non-confidential information exchange between competition authorities (section F),[20] the establishment of UNCTAD's Research Partnership Platform on Competition and Consumer Protection, as well as of a Working Group on Cross-Border Cartels, have kept the Set's and UNCTAD's relevance for the development of global competition law as the only successful so far truly international initiative in the field of international competition law. UNCTAD's important role in capacity building in developing and emergent economies has also been recognized by all other international *fora* and organizations that were established to "manage" global competition and to promote international cooperation in the field of competition law and policy, notably the Organisation for Economic Co-operation and Development (OECD) and the International Competition Network (ICN). However, more than issues relating to the validity of the Set, and the prescriptive or programmatic nature of its content, this chapter aims to explore the Set's relevance from a policy perspective, to the extent that the conditions of the global economy and the political landscape have changed considerably during the last four decades.

A. The Set and institutional change

Writing about institutional change, Paul Bush notes that "(t)he institutional structure of any society incorporates two systems of value: the ceremonial and the instrumental, each of which has its own logic and method of validation";[21] ceremonial values are largely based on tradition and accepted as such as authority,[22] while instrumental values involve the application of evidentially warranted knowledge to the problem-solving process in question."[23] Ceremonial encapsulation may lead in some instances to "ceremonial dominance", that is a situation in which ritualistic language will block any evolution of the institution towards a logic that would be more compatible to its instrumental values, and which would thus be correlated to a specific problem-solving process which the institution was expected at first place to manage, with the result that the system in question will be locked into an institution for longer than instrumentally justified (or efficient). Ceremonial dominance poses an obstacle to the absorption and diffusion of new ways of thinking, and which would have integrated the instrumental values of the specific community as these evolve.[24] Progressive institutional change brings an "increased reliance on instrumental values […] lowering the index of ceremonial dominance" and enables the continuous incorporation of new knowledge in the problem-solving processes in question, while regressive institutional change leads to the "displacement of instrumentally warranted patterns of behaviour of the specific institution by ceremonially warranted patterns that block the evolution of an institution to solve new problems to which is confronted the specific community.[25]

Transposing Bush's theoretical framework to the discussion about the future of the UNCTAD's Set, one may note the important work done to preserve the "moment" of the Set by organizing Review Conferences every five years and putting in place intergovernmental group(s) of experts to examine the existence of "common ground".

[19] Since the Eighth Review Conference, Chapters II, II, IV, V, VI, VII, IX and X of part 2 of the UNCTAD Model Law on Competition have been revised.
[20] For a discussion, see UNCTAD Secretariat, International cooperation under section F of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices: Adoption of the guiding policies and procedures, TD/RBP/CONF.9/5 (July 2020).
[21] P.D. Bush, The Theory of Institutional Change, (1987) 21(3) Journal of Economic issues 1075, 1085-1086.
[22] Ibid., 1079.
[23] Ibid., 1080.
[24] Ibid., 1093.
[25] Ibid., 1100.

Note that, during the same period, the policy diffusion of competition law has been a great success. While at the end of the 1970s, only a dozen jurisdictions had a competition laws, and only six of them had a competition authority in place, in 2022 more than 140 jurisdictions around the world have adopted and effectively implemented competition law.[26] To these, a number of regional or sub-regional competition law authorities or cooperation projects have also emerged in the last three decades, also increasingly involving South-South regional (e.g. in the African continents, African Continental Free Trade Area (AfCFTA), Common Market for Eastern and Southern Africa (COMESA), Economic Community of West African States (ECOWAS), Southern African Development Community (SADC)) or international (e.g. BRICS) cooperation. As mentioned, international cooperation in competition law is also pursued in the context of the ICN, although this does not include important jurisdictions such as China and is for this reason "less" international than the UNCTAD's Set. However, at the same time, we have witnessed a process of policy convergence towards a "more economics" *aka* Neoclassical Price Theory inspired model of competition law, which does not fit well with the principles and premises on which the NIEO project has been conceived, that of development economics, and in particular the dependency theory of development, although the Set also incorporates some principles of the "new economic approach" (e.g. the interest of consumers).[27]

The Set should be capable of serving the instrumental values of the global competition law community and the reaffirmation of its validity every five years should not become an example of ceremonial encapsulation essentially motivated by the need to keep alive an old tradition.

B. Towards a new global competition agenda?

Fifty years since the publication of the Set, there is need to re-think the continuous relevance of the NIEO project and to explore how it could possibly be "updated" so that it responds better to the new realities of the global economy. Three relatively recent developments need to be considered: First, the transition from a global economic system in which Multi-National Enterprises (MNEs), often taking the form of the M-form (multidivisional form) corporation or global conglomerates, had structural power to a world economic system structured by global value chains (GVCs) and inter-business co-opetition within global business ecosystems. This change raises new issues of economic and technological dependence and introduces competition between developing and emergent countries, so as to enable their businesses to participate more actively to these GVCs and "upgrade" to higher added value activities within the GVCs. Second, the rise of the level of global economic concentration or stealth-concentration (due to the role of institutional investors and financialisation[28]), in conjunction with the emergence of large global digital platforms, which establish new

[26] See e.g. The UNCTAD Model Law on Competition after 30 years: Some reflections (UNCTAD/DITC/CLP/2023/6), available at: https://unctad.org/publication/unctad-model-law-competition-after-30-years.

[27] For a discussion, see O. Braun, The New International Economic Order and the Theory of Dependency, (1976) 1(1) Africa Development/ Afrique et Développement 12-21. For a discussion on the relations between theories of development and competition law and policy, see I. Lianos, A. Mateus & A. Raslan, Is there a tension between Development Economics and Competition?, in D. Sokol, T. Cheng, I. Lianos (eds.), Competition Law and Development (Stanford University Press, 2013), 35. Note that the Set does not use the term consumer welfare but refers to "social welfare" and continues "in particular the interests of consumers in both developed and developing countries".

[28] See I. Lianos & A. McLean, Competition Law, Big Tech, and Financialisation: The Dark Side of the Moon. In M. Corradi, & J. Nowag (Eds.), Intersections between Corporate and Antitrust Law. (Cambridge University Press, 2023); and I. Lianos, Velias, A., Katalevsky, D., & Ovchinnikov, G., Financialization of the food value chain, common ownership and competition law, (2020) 16(1) European Competition Journal 149-220.

sources of global market power that may be added to the usual concerns expressed by NIEO and the Set about international cartels. Third, the importance of the SDGs and the challenges set by the green transition to emergent and developing countries, which calls for more extensive public-private cooperation. It is argued that as this new agenda for the NIEO of the 21st century emerges, it might be necessary to rethink the content of the Set and to put more emphasis on a polycentric vision of competition law that may be more compatible both with the aspirations of developing countries and the challenges faced by the competition authorities of developed countries in the era of polycrisis.

1. From the structural power of multi-national MNEs to the structuring power of GVCs

During the time of the constitution of the NIEO and the adoption of the Set, conglomerates dominated large chunks of global commerce. They took the form of multinational corporations organised as an M-form business organisation that expanded their reach in different parts of the globe with the view to developing "synergies". Conglomeration and the concept of synergies were however increasingly subject to extensive criticism in business literature in the 1980s.[29] These conglomerates also relied on the central role of the acquisitive conglomerate model with a succession of M&As in the 1960s and early 1970s.[30] Notably, conglomerates pioneered the strategy of corporate growth through capitalizing on financial markets.[31] Conglomeration enabled cross-subsidization between different divisions within the same diversified company[32], however, as external capital markets developed, this eventually bypassed the need for internal capital markets for investment purposes.[33]

At the time of the adoption of the Set, conglomerates were still vital institutions in the global economy, however, the structural crisis of the 1970s eroded the prevalence of this model. The development of technology enabling, first, external (to the firm) capital markets to work around the clock and provide immense amounts of information and data for analysis, and, second, increased modularity in production, reduced the importance of the information advantages of internal capital markets and of concentrating decisions at the centre.[34] This led to the transformation of the economic model with the emergence of hybrid organizations of the global production network, situated between the market and the (multinational) firm (hierarchy), in particular GVCs and business ecosystems.

Writing in 2014, Kevin Sobel-Read noted that "[t]he paradigm of the world political economy has shifted dramatically over the past twenty years. Legal scholarship, however, lags significantly behind. Existing legal scholarship is calibrated to an outdated model that suggests that multinational corporations - either individually or through one-to-one supplier relationships - create, manufacture, and sell a given product. But in today's world, in what has been termed

[29] See M. Porter, From Competitive Advantage to Corporate Strategy, (May 1987) Harvard Business Review. Available at: https://hbr.org/1987/05/from-competitive-advantage-to-corporate-strategy.

[30] A. Schleifer, R. Vishny, Takeovers in the '60s and the '80s: Evidence and Implications, (1991) 12 Strategic Management Journal; and 51; Timothy M. Hurley, The Urge To Merge: Contemporary Theories on The Rise of Conglomerate Mergers in the 1960s, (2006) 1 J. Bus. & Tech. L. 185.

[31] N. Fligstein, The Transformation of Corporate Control (Harvard University Press 1990); and N. Fligstein, 'The Theory of Fields and Its Application to Corporate Governance' (2016) 39(2) Seattle University Law Review 237.

[32] See R. Glenn Hubbard & Darius Palia, A Reexamination of the Conglomerate Merger Wave in the 1960s: An Internal Capital Markets View, (1999) 54(3) The Journal of Finance 1131.

[33] Ibid., 1150.

[34] S. Sassen, The locational and institutional embeddedness of electronic markets: the case of the global capital markets in Mark Bevir and Frank Trentmann (eds), *Markets in Historical Contexts* (Cambridge University Press 2004).

"global value chains," the research, design, production, and retail of most products take place through coordinated chain components that stretch systemically across multiple - from a few to a few thousand - firms"[35]. As a joint OECD, World Trade Organization (WTO) and World Bank report indicates, "[b]etween 30% and 60% of G20 countries' exports consist of intermediate inputs traded within GVCs."[36]

The study of GVCs stems from "world systems theory", which draws on a spatial distinction between core and periphery to explain hierarchies and power differentials in world trade. GVCs rely on various systems of transnational governance and different sorts of linkages, some traditional such as contract law, others novel and relying on corporate law, property law, or even technology.

GVC's "holistic view" of global industries centres on the governance of the value chain, that is, how some actors can shape the distribution of profits and risks in the chain.[37] Taking a political economy perspective, the GVC approach explores the way economic actors may maintain or improve ("upgrade") their position in the GVCs, "economic upgrading" being defined as "the process by which economic actors - firms and workers - move from low-value to relatively high-value activities in GVCs".[38] Concerns over global competitiveness, employment, investment in quality competition and long-term consumer interest may weigh in the decision of competition authorities to explore the dynamics of GVCs and the way issues of distribution may be included in competition law assessment.[39]

The role data plays in economic production in the digital economy and the central architectural position of digital platforms in harvesting this data and providing the "glue" for the coordination of economic activity has also led to the development of "business ecosystems". These are structures of the meso-economy (situated between the firms and the industry) and involve systems in which mutually enhancing products or services come together to create an attractive solution to users.[40] In many fields/ sectors of the global economy "keystone" platforms power ecosystems to which thousands of firms (complementors) align their vision in order to offer a focal value proposition to consumers.[41]

Competition authorities are starting to engage with the important implications of these new complex economic structures,

[35] K. B.Sobel-Read, Global value Chains: A Framework for Analysis, (2014) Transnational Legal Theory, 5(3), pp. 364-407, 364.

[36] OECD, WTO and World Bank group, Global Value Chains; Challenges, Opportunities and Implications for Policy (2014), p.13. Available at: https://www.oecd.org/tad/gvc_report_g20_july_2014.pdf. See also UNCTAD, World Investment Report 2013. Available at: https://unctad.org/system/files/official-document/wir2013_en.pdf.

[37] On the GVC framework and its predecessor Global Commodity Chains, see G. Gereffi& M. Korzienewicz (eds.), Commodity Chains and Global Capitalism (Westport: Praeger, 1994); and R. Kalpinsky & M. Morris, A Handbook for Value Chain Research, available at: https://www.fao.org/fileadmin/user_upload/fisheries/docs/Value_Chain_Handbool.pdf.

[38] G. Gereffi, The global economy: organization, governance, and development", in N.J. Smelser and R. Swedberg (eds.), The Handbook of Economic Sociology, 2nd ed. (Princeton University Press and Russell Sage Foundation, 2005), 171; G. Gereffi, J. Humphrey, T. Sturgeon, The governance of global value chains, (2005) 12(1) Rev. Int. Polit. Econ. 78.

[39] For a discussion of the role of Global Value Chains in Competition Law, see I. Lianos, A. Ivanov & D. Davis, Global Food Value Chains and Competition Law (CUP, 2022).

[40] M. Jacobides, C. Cennano and A. Gawer, "Towards a Theory of Ecosystems", (2018) 39 Strategic Management Journal, 2255; and M. Jacobides & I. Lianos, Ecosystems and competition law in theory and practice, (2021) 30(5) Industrial and Corporate Change, 1199.

[41] M. Iansiti & R. Levien, The Keystone Advantage - What the New Dynamics of Business Ecosystems Mean for Strategy, Innovation, and Sustainability (Harvard Business School press, 2004).

such as ecosystems and GVCs, for competition law enforcement.[42] The Set and current discussions on NIEO may provide the opportunity to also consider these new developments, to the extent that competition law may enable access and active participation in such GVCs and ecosystems.[43] A more concrete proposal may be to add in paragraph B.(i)2 a new definition of what may constitute "market power" or "dominant position", and to complete the reference to the relevant market with a reference to the concept of "ecosystem", in which some of the most significant for the global economy competitive interactions are taking place.

2. Rising levels of global economic concentration and the global role of digital platforms

Important developments in the global economy have shifted the structure of various industries towards rising levels of concentration. Many reasons may be advanced for this phenomenon: large waves of mergers, acquisitions and take-overs, following the liberalization of markets and the retreat of State intervention in various economic sectors, the growing importance of financial capital with the prevalence of a few global equity companies and institutional investors, the global expansion of intellectual property rights and the need for extensive levels of cooperation between global competitors through cross-licensing arrangements or patent pools, the rise of the intangible economy, the development of the Internet, and consequently the importance of network effects and platform competition.

As a result of these and other developments, we have witnessed unprecedented levels of corporate consolidation and markups at a global scale.[44] Increasing levels of market concentration have become the rule, rather than the exception in various sectors of American and European industry, in crucial, from a social welfare perspective, sectors such as agriculture, retailing, automobiles, banking and a number of manufacturing industries. In parallel, the share of wages (or labour) has been steadeily declining in recent years, the main cause for this being the reduction of competition and higher economic concentration (for instance, through intense merger activity and/or the emergence of monopsonies in labour markets).[45] We have witnessed the rise of "superstar firms" or "superforecasters" that are able to take advantage of technology, including Big Data and artificial intelligence, and better understand than "standard" firms the competitive game, as they also harvest data from their business partners and users in the context of the digital ecosystems they control. Big Tech digital platforms, most of them being geographically concentrated in the United States and Asia (mostly China), dominate the world economy and structure ecosystems of thousands of firms in various jurisdictions, including developing and emergent economies.[46]

Although there have been efforts to rain in anti-competitive abuses of the power of digital platforms, with a number of antitrust cases initiated in both developed and large developing/emergent economies, as well as *ex-ante* regulatory tools such as the Digital Markets Act in Europe, there is a significant asymmetry between the

[42] See, for instance, European Commission Notice on the definition of the relevant market for the purposes of Union competition law, C (2023) 6789 final.

[43] See, for instance, H. Bezuidenhout & E. Kleynhans, Implications of foreign direct investment for national sovereignty: The Wal-Mart/Massmart merger as an illustration (2015) 22(1), South African Journal of International Affairs, 93.

[44] J. de Loecker & J. Eeckhout, Global Market Power (June 2018), NBER. Available at: https://www.nber.org/papers/w24768.

[45] See, for instance, D. Autor et al., Concentrating on the Fall of the Labor Share, 107 Am. Econ. Rev. 180 (2017); J. Azar et al., Labor Market Concentration (NBER Working Paper No. 24147, 2017); and D. Card et al., Firms and Labor Market Inequality: Evidence and Some Theory, 36 J. Lab. Econ. S13-70 (2018).

[46] Big tech platforms such as Apple, Microsoft, Alphabet, Amazon, Meta, Tencent have market capitalizations that surpass even the GDP of G20 countries.

resources and capabilities of even a medium sized developing or emergent economy and each of these Big Tech platforms, with the result that it might be quite difficult for smaller competition authorities to open and conclude investigations against anticompetitive conduct adopted by Big Tech platforms. Similarly, there might not always exist an effective regional competition law system with the powers and the institutional capabilities to take action in such cases. This "gap" in global competition law enforcement may only partly be filled by the competition enforcement efforts of large jurisdictions, such as the European Union, the United States, the BRICS countries, and some G20 members. These jurisdictions also focus, as expected, only on the anticompetitive effects on their own consumers, and any remedies they may impose will be implemented only to operations/business activities taking place in or producing effects on their own territory. Big Tech platforms have also the option of menacing jurisdictions with an active competition law and digital regulation agenda to stop providing access to their services in their territory, something which will significantly affect their economy, in view of the central positioning of Big Tech digital platforms and the thousands of firms that depend on them.[47] Digital platforms may also differentiate their business and technology models from jurisdiction to jurisdiction, thus benefitting from the fact that there is little likelihood they would be held accountable for their actions in jurisdictions which do not dispose of the appropriate institutional capabilities.

This is not a new phenomenon and to a certain extent this was also the case in the 1970s, with regard to the asymmetry existing between the power of MNEs and that of developing/emergent economies. This asymmetry was also reinforced by the fact that few jurisdictions had at the time competition laws and institutions/ competition authorities ready to implement them. However, due to the size of digital platforms and the sheer importance of their ecosystems for the global digital economy, this problem is now accentuated. In the absence of a competition law enforcement or the existence of a regulatory "umbrella" that could cover these smaller and/or medium jurisdictions in particular if these is no regional competition law system, it becomes essential to develop global minimum standards and proceed to a more extensive international cooperation/ exchange of information with the aim to limit this enforcement gap. This new emphasis on filling the enforcement gap in some medium-sized and smaller jurisdictions vis-à-vis digital platforms, could be a fruitful addition to the discussions about a revised NIEO in search for a new role for the Set, and could help with the continuous adaptation of the Model (Competition) Law. The Set could be revised to include, under section D.4., further types of abuse of economic power and examples of abusive business conduct in the digital economy (e.g. lack to provide interoperability, self-preferencing etc.).

3. Integrating the SDGs in competition law

If the Set in the 1970s was part of a broader discussion at the United Nations system about the role of MNEs in the global economy, it is to be expected that the current discussions over the implementation of the SDGs in various policy fields will also influence global competition law and provide future directions for the Set.[48] First, these SDGs are truly global goals, to the extent that, although not binding for countries, these are worldwide commitments of all

[47] See, for instance, the standoff between Australia and Facebook and Google with regard to the adoption of regulation (news media bargaining code) regarding the asymmetries of power between Big Tech platforms and Media companies: M. Meaker, Australia's Standoff Against Google and Facebook Worked - Sort Of, Wired (February 25, 2022). Available at: https://www.wired.com/story/australia-media-code-facebook-google/.

[48] United Nations, "Sustainable Development Goals" (2015). Available at: https://sdgs.un.org/goals.

countries in the United Nations system, but also of businesses through the operation of ESG strategies, to create positive global change by the year 2030.[49] The essence of the concept of sustainable development is that it entails a balance of the needs of current generations with those of future generations, taking into account environmental, societal and economic limitations.[50] As argued elsewhere, the integration of sustainable development goals in competition law enforcement may generate tensions with the dominant rhetoric of "consumer welfare" or "consumer well-being" in competition law, principally for the following two reasons: it will require the consideration of sustainability benefits as efficiencies, and competition decision-makers (competition authorities and courts) would need to adequately tackle the possibility of a sustainability-based trade-off between harm to competition and benefits to sustainable development.[51]

The focus on SDGs also introduces a more dynamic perspective for the social economy of production and consumption. An SDGs-inspired competition law will aim to provide the vast majority of people and firms around the globe access to the most advanced (and sustainability friendly) practices of production, and will enable greater investment and influx of capital to the economic and social periphery, as advantage and opportunity become more largely distributed. With the aim to align the 2030 United Nations vision of sustainable development with the Set, a reference to SDGs may be added in section A relating to the objectives pursued by the Set and a special effort be made to integrating SDGs objectives in the definition of "social welfare", as this is referred to in paragraph A.3.

IV. Conclusion

The development of the Set and its linkage to the NIEO programme (and a particular view of development economics) in the 1970s was examined. Although the principles of the Set have been periodically reaffirmed in successive United Nations Conferences "to Review all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices" or on "Competition and Consumer Protection,"[52] its legal effect is not binding. In recent years, some of its intellectual foundations in the 1970s NIEO programme lost their prior significance and competition policy relevance. Furthermore, the Set has not been updated to take into account the significant economic, political and technological changes that have taken place during the last 40 years. In order for the Set to retain its policy significance, there should be some effort made to reconnect with the current discussions relating, first, to the transition from a global economy dominated by multinational enterprises/ transnational corporations to one in which most of the economic activity is structured within global value chains and global business ecosystems, second, to the increase of global economic concentration and the complexity and inherent difficulty of enforcing competition law vis-à-vis the Big Tech Platforms, and third, to the importance of SDGs in guiding various fields of public policy, including competition law enforcement.

[49] The General Assembly of the United Nations adopted, in September 20151, broader development targets for both developed and developing countries, encompassing all sustainability dimensions (economic, financial, institutional, social and environmental).

[50] The report entitled "Our common future" came to be known as the "Brundtland Report" after the Commission's chairwoman, Gro Harlem Brundtland, 20 March 1987.

[51] See, for a discussion, I. Lianos, Re-orienting Competition Law, (2022) 10(1) Journal of Antitrust Enforcement, 1.

[52] Although the first seven conferences to review the Set made reference to the full name of the Set, as adopted in 1980, the Eighth Review Conference did not refer to the full name of the Set but to the "Conference on Competition and Consumer Protection".

Amplifying the voice of development - UNCTAD and the future of abuse of dominance

Under the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (Set), UNCTAD is well placed to facilitate consensus on international rules and principles, fit for the modern economy, with a view towards protecting developing countries from global private power and encouraging them towards efficiency, innovation, and participation.

I. Introduction

In 1980, the trading nations of the world adopted the Set. From the point of view of developing countries, the purpose of the Set was to control the conduct of multinational corporations, which were handicapping developing country firms by conduct that raised their costs and limited their markets, thereby stifling growth and development and suppressing their competitiveness. The Set focused on acts called Restrictive Business Practices that "limit access to markets or otherwise unduly restrain competition, adversely affecting […] trade or economic development."

The substantive provisions of the Set are specified in two sections, one against restrictive arrangements and one against abuse of dominance. This article is about abuse of dominance, which is the provision controlling unilateral conduct. The burden of this article is: Abuse of dominance is an *abuse* concept, as distinct from a classical microeconomic efficiency concept, and is a particularly salient offense for developing countries. It was highlighted as such by the Set. Abuse of dominance so conceived is an outsider or underdog issue. Neoclassical/neoliberal ideology defines efficiency in the context of well-functioning markets, proclaims efficiency as the only valid antitrust goal, and has no quarter for equity and distributional issues. But the values of equity and distribution cannot be forgotten. They continually reappear on the antitrust landscape, as demonstrated by the birth and traction of the neo-Brandeis school in the United States in the last decade.[53]

The Set is a reminder of this provenance of abuse of dominance. It is a reminder that firms with global power, whatever their benefits, continually seek ways to exercise that power. The Set was a harbinger of Big Tech power in a world that we could not have foreseen in 1980, and it should stand as an inspiration for a (notional) code of conduct to control the abusive behaviours that we observe today across a spectrum of trade, competition and development.

This chapter provides context to the abuse-of-dominance provisions in the Set. It describes how a trade-and-development initiative (the Set) was transformed into a competition law initiative and a Model Law of Competition. Finally, it suggests how both the words and the spirit of the Set inspire a project to articulate a developing-country perspective fit for the twenty-first century on control of global private power.

II. Background

In 1980, nations struck a most important agreement to control restrictive business practices in international commerce. The agreement was the result of a three-way bargain: the developing countries (Group of 77), the developed countries (Group B), and the socialist countries (Group D). The negotiations were triggered in the 1970s by the developing countries, which observed the rise of powerful multinational firms that used unfair practices to take over the markets of developing countries. In particular, the Multi-National Enterprises (MNEs) were faulted for selling intermediate

[53] See https://unctad.org/system/files/non-official-document/ccpb_RPP_presentation_Fox_en.pdf.

goods at high prices to local firms while making low-price transfers to their own subsidiaries, pricing low to squeeze out local firms, and joint venturing with local firms only on condition that they not export to the MNEs' markets.[54] For their part, developed countries saw an opportunity to bring state-owned firms within the coverage of competition law, as well as to establish a rule against cartels, and they welcomed a framework for complaint and cooperation on trade. The parties agreed: State enterprises would be covered by the rules. Transnational enterprises would not be singled out as the only offenders. Exemption would be available for conduct consistent with the objectives of the Set; i.e. to control acts that "limit access to markets or otherwise unduly restrain competition, adversely affecting domestic or international trade or economic development." A modality was established for cooperation to control conflict. The agreement would be voluntary; not binding.

The Set established substantive standards. Paragraph 4 of section D of the Set prohibits abuse of a dominant position. Paragraph 4 would become Chapter IV in UNCTAD's Model Law on Competition (Model Law), which presents the language of the Set as the agreed standard, follows the rules with a contextual annotation, and follows the annotation with contributions from various competition authorities describing their experiences in applying their laws. In the course of the conference to review the Set in 2000, UNCTAD officially retitled the Set: "The United Nations Set of Principles and Rules on Competition" - thus deleting from the lead title the language of equity and restrictive business practices and presenting the Set as competition law rather than as trade and development law. The original name - The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices - now appears as a subtitle.[55]

This article observes, firstly, that the character of the harms foreseen by the Set under the banner of abuse of dominance - exploitation and exclusion by global dominant firms - find their equivalents in abusive conduct by global dominant firms today, even though we are now experiencing new sources of power and new forms of abuse. Markets have changed, exponentially enabling seamless global commerce. Digital commerce, extreme network effects, huge accumulations of data, and newly devised artificial intelligence characterize a large percentage of commerce today and are key to communication and personal and economic wellbeing. Multinational and transnational enterprises have power across markets on a scale never imagined in the 1970s. Secondly, it argues that the specific prohibitory language of paragraph 4 of section F of the Set is not the language that nations tend to adopt today to specify the abuse of dominance offense in their competition laws. The Model Law based on the Set recognizes this disjuncture and accounts for it by a high level of generalization of the offense of abuse of dominance and by comment and annotations reflecting modern articulations. The Model Law does not acknowledge developing countries' unique needs and does not give guidance on how developing country law may differ from that of countries whose markets work well. Lastly, this article argues that this anniversary moment of review of the Set presents an opportunity. The developing world is in need of cultivating a common voice on meaningfully-stated principles on abuse of unilateral market power. The need is highlighted by abuses of market power by large digital platforms and the array of approaches taken by different jurisdictions to control them. Modernizing the abuse violation from the perspective of developing countries is a fitting project for UNCTAD. Indeed, modernization is

[54] See Joel Davidow, The UNCTAD Restrictive Business Practice Code, 13 INT'L L. 587 (1979); and Timothy Atkeson and David Gill, The UNCTAD Restrictive Business Practices Code: A Step in the North-South Dialogue, 15 INT'L L. 1 (1981).

[55] TD/RBP/CONF/10/Rev.2.

anticipated by the very language of the Set.[56] If developing countries were to reach a common understanding on their perspective for control of unilateral market power, the principles could appear as an annotation in a future edition of the Model Law. Articulating the abuse-of-dominance offense through the eyes of development is a project on which UNCTAD can take leadership.

III. The Set, paragraph 4 of section D

A. What the Set provides

In paragraph 4 of section D, the Set prohibits abuse of a dominant position of market power. A dominant position entails: "being in a position to control a relevant market for a particular good or service, or groups of goods and services." An abuse occurs: "[w]here the acts or behaviour of a dominant enterprise limit access to a relevant market or otherwise unduly restrain competition, having or being likely to have adverse effects on trade or economic development."

The provision identifies four sets of conduct as abusive in themselves,[57] and adds a fifth category for conduct more likely to be justifiable. The four absolute prohibitions are:

"(a) Predatory behaviour towards competitors, such as using below cost pricing to eliminate competitors;

(b) Discriminatory (i.e. unjustifiably differentiated) pricing or terms or conditions in the supply or purchase of goods or services, including by means of [transfer pricing within subsidiaries] […];

(c) Fixing the prices at which goods sold can be resold, including those imported and exported;

(d) Restrictions on the importation of [grey goods, which were] legitimately marked abroad with a trademark … of the same origin, … to maintain artificially high prices […]".

The fifth-category prohibition ((e)) applies to restrictive conduct undertaken "not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or service." The specified conduct in this category is: refusals to deal on customary terms, conditioning supply on not dealing with competitors, restricting where or to whom goods may be resold or exported, and tying.

Authorization or exemption may be granted for acts and transactions not absolutely prohibited (i.e. acts within category (e)) if consistent with the objectives of the law.

B. Remarks on the Set regarding abuse of dominance

Reflection on the objectives and examples of the Set indicates as follows: the Set's principles on abuse of dominance were designed to prohibit unfair restrictions on trade and competitiveness. The language overlaps with customary language of competition law against abuse of dominance but has a stronger fit with the law of unfair trade practices. In areas of significant overlap, the corresponding modern competition law principles are more nuanced. For example, modern law would not absolutely prohibit the conduct described in the categories (a) through (c).

Subsection (d) is a trade and trademark principle, not a competition issue. Some of the conduct identified in (e) is as serious

[56] See below, paragraphs F.1 and F.5 of the Set.

[57] The original Set specified five categories, one of which (then subsection (c)) was mergers that harm development. This has been separated out into a merger control section of the Model Law on Competition and is not treated herein.

or more serious than conduct identified in (a) through (d), although it is treated more leniently.[58] Other conduct specified in (e) may not be anticompetitive at all and should not need to pass through a screen of good business purpose. Further, the Set allows for exemption of anticompetitive conduct without sufficient attention to the wisdom of this choice or the conditions that should support it.

Drafting this type of provision is not easy. The text of the European Union's Article 102 of TFEU (Treaty on the Functioning of the European Union) illustrates this. A difference is that the European Union Treaty language, with its specified examples of abuse of dominance, has become a standard model or standard basis for further embellishments by jurisdictions across the world, and a large body of caselaw developed over the years clarifies its applications. The language of the Set does not share this advantage.

In sum, the abuse-of-dominance language of the Set is not the optimal model language to meet the aspiration of the Set "to assist developing countries in devising appropriate legislation."[59] After 40 years, the Set should be modernized.

IV. Modernizing the Set; the basis for modernization within the Set

The Set itself anticipates modernization of competition law principles, both domestically and internationally.

Paragraph F.5 contemplates "Continued work within UNCTAD on the elaboration of a model law or laws on restrictive business practices in order to assist developing countries in devising appropriate legislation."

Paragraph F.1 contemplates collaboration at the international level to deal effectively "with restrictive business practices, including those of transnational corporations, through strengthening controls over restrictive business practices affecting international trade, particularly that of developing countries, and the economic development of those countries." It further states:

"[A]ction should include:

1. Work aimed at achieving common approaches in national policies relating to restrictive business practices compatible with the Set of Principles and Rules." (F.1)[60]

Guided by paragraphs F.1 and F.5, we turn to possible modalities for modernizing the Set, both (1) to address domestic and international abuses of power that especially harm developing countries, and (2) to suggest principles that should be brought to international attention to uniquely reflect the voice of developing countries so that they are no longer only rule-takers but can come to the table as rule-makers in a world where one size does not fit all.

In this way, the developing countries' voice should be located and amplified.

V. What developing countries need; identifying principles and values

Compared with developed countries, developing countries have special needs that should be addressed by the unilateral conduct violation. This is especially true if the developed country comparator is the United

[58] For example, tying, and supplying goods on condition of not dealing with competitors, may be more harmful to the market than price discrimination.
[59] Quoting from F5 of The Set, infra.
[60] https://unctad.org/system/files/official-document/tdrbpconf10r2.en.pdf.

States law but applies also if the baseline is the European Union or other law.

First, let us look at the United States law, where the imperfect fit of developing country needs with developed country law is most pronounced. The United States unilateral conduct offense is "monopolization." The monopolization violation is very hard to prove. The United States law, which is informed by neoliberal premises, assumes that markets work well and that action taken unilaterally and not by collaboration with rivals is likely to be pro-competitive and efficient, and that general freedom from antitrust intervention is most likely to incentivize innovation. The United States antitrust law has a strong principle of no duty to deal and classifies many exclusionary acts as "mere" refusals to deal on complainant's preferred terms. As a practical matter, the United States antitrust law has no essential facility doctrine, and it certainly has no akin-to-essential facility doctrine. It has no leveraging violation as such; plaintiff must prove that the conduct will probably increase market power. Price discrimination is regarded as pro-competitive. The law does not prohibit excessive pricing or other exploitation; very high prices are not only legal but are considered an important force to trigger entry and competition. Distributive, fairness, and justice values are not admissible, on the theory that law that incorporated them will protect inefficient firms and shrink the economic pie. Moreover, it is difficult to prove, in the first place, that a firm has the necessary power (monopoly), which is the first screen that must be satisfied before unilateral conduct can even be scrutinized for possible condemnation.[61]

The European Union law on abuse of dominance is considerably more plaintiff-friendly. For the first-screen inquiry - sufficient power - the firm need only be dominant. Dominant firms have a special responsibility not to obstruct (small) firms' competition on the merits. Both exploitative and leveraging conduct are violations, and proof does not depend on plaintiffs' showing that the conduct increases market power. Price discrimination is not itself illegal; the violation requires proof of anticompetitive effects in the market. The law in general does not take account of distributive values, justice, or fairness, except as integral to making the market work.[62]

Why are these models not fully transplantable to developing country soil? In general, the functioning of developing country markets needs to be more effective. The markets are closed by many barriers including those created by state-owned or recently privatized firms, and vested interests. They lack essential infrastructure and integration with neighbouring markets, inflating the cost of food and other necessities.[63] The economies have yet to be modernized. Significant proportions of populations live in poverty, and a large portion of would-be entrepreneurs have been effectively excluded from participation in formal markets. The people of developing counties are particularly vulnerable to exploitative strategies. Moreover, while

[61] See Verizon Communications v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004); Pacific Bell Telephone Co. v. linkLine Communications, Inc., 555 U.S. 438 (2009); New York v. Meta Platforms, Inc. (D.C. Cir. April 27, 2023); Epic Games, Inc. v. Apple, Inc., 559 F. Supp. 3d 898 (N.D. Cal. 2001), aff'd in relevant part, 67 F.4th 969 (9th Cir., 2023). For secondary authorities, see generally William Kovacic, Root and Branch Reconstruction: The Modern Transformation of U.S. Antitrust Law and Policy?, 35 Antitrust Magazine, Summer 2021, p. 46; Carl Shapiro, What Went Wrong and How to Fix It, 35 Antitrust Magazine, Summer 2021, p. 33; Eleanor Fox, The Decline, Fall, and Renewal of U.S. Leadership in Antitrust Law and Policy, Competition Policy International (CPI) Antitrust Chronicle, April 2022. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4097141; and Jonathan Jacobson and Ada Wang, Competition or Competitors? The Case of Self-Preferencing, 38 Antitrust Magazine, Fall 2023, p. 13.

[62] See T-612/17 - Google and Alphabet v. Commission (Google Shopping), ECLI:EU:T:2021:763, appeal pending; C-209/10 - Post Danmark I, ECLI:EU:C:2012:17; and C-23/14 - Post Danmark II, ECLI:EU:C:2015:651.

[63] See World Bank, Africa's Pulse: An Analysis of Issues Shaping Africa's Economic Future, vol. 29, April 2024.

the United States may thrive on pursuit of allocative efficiency goals (proxied in the consumer welfare standard), developing countries need development, and they need inclusive development.[64]

These characteristics would naturally lead developing countries to take a distinctive perspective on unilateral conduct principles. The following list of ten principles or observations characterizes the perspective of developing countries:

(1) Inclusiveness is a foundational value.

(2) Openness of markets and ease of entry are important even if a handful of oligopolists arguably compete effectively against one another in the same market.

(3) Access, and fair access, are foundational values - particularly so in this age of Big Tech, AI, extreme network effects, and dependence on data.

(4) Predatory pricing and loyalty rebates that systematically deter entrants are problems whether or not the entrants are as cost-efficient as the dominant firms. A dominant firm's selective, sharp-shooting pricing below entrants' costs, even if not below the dominant firm's costs, may be an offense.

(5) Tying and bundling by firms with market power are suspect because of their exclusionary effects, whether or not the conduct raises prices.

(6) Exploitative behaviour is problematic and can be an offense. This may be so whether the behaviour is by a dominant firm or a firm of superior bargaining position where the exploited firm is in a position of dependency.

(7) Market power is so widespread and persistent that robust proof of defendant's sufficient market power may be dispensed with. Proxies such as market share may be accepted as sufficient or presumptively so.

(8) Public interest considerations, including effect of conduct or enforcement on workers and small business entities, are commonly recognized as relevant factors.

(9) Western competition law normally deals in aggregates, such as aggregate consumer welfare, and applies the Kaldor Hicks principle - if rich consumers win more than poor consumers lose, the conduct is efficient and good.[65] Developing countries normally care about who wins and who loses as a result of both market strategies and antitrust enforcement. It is not irrelevant that developing countries have been systematically on the losing end.

(10) "Efficiency" is not self-defining and the neoclassical conception is not fitting for developing countries. A developing country's economy is not likely to reach its efficiency potential without nurturing a competition system - along with parallel policies - that empower left-out majorities. Dominant firms' cost savings that will not be passed on to developing country consumers may not offset developing country harms. If a merger, agreement, or dominant firm conduct will chill developing country entrepreneurs' incentives to innovate, this harm is weightier than claims that the dominant firm would be more inventive if it enjoyed a larger flow of revenues.[66]

[64] See E. Fox and M. Bakhoum, Making Markets Work for Africa (Oxford 2018), pp. 179 et seq. To be sustainable, growth must be inclusive. See Michael Spence, The distributional challenge, Mint, Dec. 30, 2013. Available at: https://www.livemint.com/Opinion/tZYhuRzuFnbp46vfZgcA1N/The-distributional-challenge--Michael-Spence.html.

[65] Trickle down is assumed, but without proof. See Jennifer Rubin, "Trickle-down economics" is a scam that ignores decades of evidence, Washington Post, March 12, 2024.

[66] See Andrew P. McLean, Innovation against Change, Journal of Antitrust Enforcement, 2024, p.1.

The disjuncture between developing countries' interests and a Western appreciation of power and abuse can be seen by examining the recommended practices of the International Competition Network on unilateral conduct. There are two such recommended practices, one on the definition of market power and one on predatory pricing. Both specify requirements unfriendly to developing countries' needs.[67]

These observations suggest that developing countries should try to establish a common position expressing agreement on general principles. Occasional, piecemeal objection to the developed world's "international standards" is a weak alternative.[68]

The Set anticipated a common understanding of developing countries. As quoted above, it provides that UNCTAD shall be a forum for the development of policies controlling restrictive business practices that especially harm developing countries. Building the common voice for developing countries is a high, fitting, and anticipated function for UNCTAD.

VI. Conclusion

The discussion above largely concerns how developing countries might formulate law to control unilateral conduct. A separate issue is how to impact the international regime. There is no international competition law. The closest regime we have is the voluntary Set, and while UNCTAD should be proud of the Set, its language defining the abuse of dominance offense is not modern or sufficient. Especially in this day of some corporations larger than many nations, we need articulations of best rules from a developing country perspective so that unlawful conduct at global level is clear.

Even though agreement on global rules may be difficult to achieve, there is a rising consensus among nations. The world condemns hardcore cartels. Nations appear to be nearing consensus on specific abuses of dominance by the Big Tech platforms; for example, that it is wrong for Gatekeepers to obstruct interoperability, to obstruct data portability, to appropriate rivals' data to compete against them, to squash rivals on their platforms when the rivals get too good and block third-party marketplaces and payment systems from access to the Gatekeepers' platforms.[69]

[67] See ICN recommended practices. Available at: https://www.internationalcompetitionnetwork.org/portfolio/dominance-substantial-market-power-analysis-pursuant-to-unilateral-conduct-laws/; and https://www.internationalcompetitionnetwork.org/portfolio/predatory-pricing-analysis-uc-laws/. The recommended practice on market power presents the inquiry into market power as very complex and identifies market shares as only one element and not a sufficient basis for inference. It says: "A firm should not be found to possess dominance/substantial market power without a comprehensive consideration of factors affecting competitive conditions in the market under investigation" (I.2.). The recommended practice on predatory pricing emphasizes the importance of freedom of low pricing and warms that competition law should not protect competitors, and it suggests that, if the low pricing is not rational profit-maximizing behaviour, it probably is not predatory. The recommendation says: "Agencies can determine, using an appropriate price-cost test, whether the alleged predator is making a sacrifice by incurring avoidable losses or whether its pricing is capable of excluding equally efficient competitors", and "[a]pplying price-cost tests is a complex and resource-intensive exercise. Thus, before moving to an assessment of the alleged predator's prices and costs, the agency should make an early determination of whether the alleged predator's prices are likely to cause competitive harm" (Framework 4 and 5).

[68] The new African Continental Competition Protocol specifies "inclusive growth" as an objective, in Article 2. Available at: https://www.bilaterals.org/IMG/pdf/en_-_draft_afcfta_protocol_on_competition_policy.pdf. South African competition law most extensively incorporates inclusiveness, especially as reflected in its 2018-19 amendments to its competition law (available at: https://www.gov.za/sites/default/files/gcis_document/201902/competitionamendment-act18of2018.pdf) and in Constitutional Court caselaw: Competition Commission of South Africa v. Mediclinic Southern Africa (Pty) Ltd (CCT 31/20) (2021) ZACC 35 (15 October 2021). See also Competition, Competitiveness And Development: Lessons From Developing Countries (UNCTAD 2004), featuring articles by Philippe Brusick, George Lipimile, and others.

[69] See the European Union Digital Markets Act. Available at: https://commission.europa.eu/strategy-and-

UNCTAD, through the competencies spelt out in the Set, is well placed to facilitate the formation of consensus on international rules and principles, fit for the modern economy, with a view towards protecting developing countries from global private power and thus freeing up their capacities for efficiency, innovation, and participation. UNCTAD is well placed to articulate and amplify the common vision and cultivate it as an accepted alternative in the world.

policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en; the United Kingdom Digital Markets, Competition and Consumers Bill. Available at: https://www.csis.org/analysis/uk-digital-markets-competition-and-consumers-bill-extraterritorial-regulation-affecting; Australia Digital Markets Inquiry, interim reports. Available at: https://digitalpolicyalert.org/event/15771-adopted-7th-interim-report-of-the-accc-digital-platform-services-inquiry; Charles McConnell, JFTC bullish ahead of digital markets reforms, Global Competition Review, March 14, 2024; and African Continental Competition Protocol, Article 11. Available at: e. See also Eleanor Fox, Simple Rules for Antitrust, in Antitrust and the Digital Economy: Legal Standards, Presumptions, and Key Challenges, Yannis Katsoulacos ed. (Concurrences/CRESSE 2023). Developing countries put an extra stress on access for technologically challenged users of digital platforms. See also Thembalethu Buthelezi and James Hodge, Competition Policy in the Digital Economy: A Developing Country Perspective, 15 Competition L. Int'l 201 (2019).

The United Nations Set of Principles and Rules on Competition and its influence on the development of competition law in Sub-Saharan Africa

The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (Set) has been instrumental in fostering the development of competition law frameworks in Sub-Saharan Africa. UNCTAD has played a pivotal role in this process, offering technical assistance, capacity building, and a Model Law that provides guidance while allowing flexibility to accommodate local socio-economic contexts.

I. Introduction

The Set was adopted at a time when two major developments had taken place worldwide. There was a growing awareness of the need to have a multilateral framework that promotes and protects competition in line with the progressive opening up of markets to international trade. The need to deal with restrictions of competition originating from international corporations was a global preoccupation that has triggered early initiatives to regulate competition internationally. The Havana Charter is a prime example of the early efforts to create and international framework.[70] This contextual element is reflected in one of the key objectives of the Set.[71] The adoption of the Set coincides, on the other hand, with the progressive liberalization of the economies of developing countries and the adoption of markets principles which culminated with the fall of the Berlin Wall.

The adoption of market principles triggered the adoption of competition law worldwide and especially in the framework of developing countries. The move from socialist oriented and planned economies to markets principles triggered legal and legislative changes with a legislative move from fewer price regulations to the adoption of more market friendly competition frameworks. In the 1980s and 1990s in Sub-Saharan African, a progressive change of institutional dynamics took place in many former colonies that moved from less State interference in the economy towards the prevalence of the private initiatives in line with market principles. These changes in the approach of the economy have been supported by institutional changes with the revisions of prices regulations inherited from the independence period and the adoption of new, "modern", and market friendly competition laws. Since the 1990's there have been tremendous developments in Sub-Saharan Africa towards the adoption of more market friendly competition laws. These developments have taken place both at the national and regional levels in the framework of regional integration groups that have common markets or free trade zone. The Common Market for Eastern and Southern Africa (COMESA), the West African Economic and Monetary Union (WAEMU), the Economic Community of West African States (ECOWAS) and the South African Development Community (SADC) regional competition frameworks confirm this dynamic. With the entry into force of the Africa Continental Free Trade Area (AfCFTA) in 2018[72] and the adoption of the protocol on competition protocol in 2023, the integration of African economies has moved from a regional approach to an integrated continental approach.

The Set clearly recognizes the need to build strong competition systems in complement to the opening of developing countries markets to international trade. In this regard, the Set recognizes and reaffirms "*the need to ensure that restrictive business practices do not impede or negate the realization of benefits that should arise*

[70] David Gerber, Global Competition: Law, markets and Globalization, OUP, 2012.
[71] See the Objectives of the Set.
[72] See https://au-afcfta.org/.

from the liberalization of tariff and non-tariff barriers affecting international trade, particularly those affecting the trade and development of developing countries".[73] The pre-requisite for achieving this objective of protecting the newly open markets is the creation and protection of competition. This complementary objective is outlined in the Set which is:

"To attain greater efficiency in international trade and development, particularly that of developing countries, in accordance with national aims of economic and social development and existing economic structures, such as through:

(a) The creation, *encouragement and protection of competition*;

(b) *Control of the concentration* of capital and/or economic power;

(c) Encouragement of *innovation*"[74].

These developments at the international level and the adoption of the Set have influenced the progressive transformation of the African economies towards more markets and the creation of institutions in support of competition. The development competition law and policy in the African continent have been strongly influenced and pushed by the UNCTAD and its work in implementing the Set. The Set objective of building the capacities and accompanying developing countries in their endeavours to build competitive markets and to have functioning competition laws is a key element of the Set that has helped foster the capacities of the African States. In the process, and in line with the objectives of the Set, the specific context of the African Countries has been taken into account when designing the substantive rules, but also when developing the enforcement capacities of the competition authorities.

This chapter is organized as follows: Section II provides a short overview of the development of competition law and policy in Sub-Saharan Africa and the crucial role that UNCTAD has played in the process. Section III wrestles with the main areas of influence of the Set with a focus on the UNCTAD Model Law on Competition (Model Law), the voluntary peer review mechanism and the capacity building dimension. Section IV provides an outlook.

II. UNCTAD and the development of competition law and policy in Sub-Saharan Africa

Competition laws and policies have developed consistently in the African continent since their independence in the 1960's. In the 1990's, thanks to the economic reforms towards markets, a number of country's price regulations that were adopted after the independence were progressively replaced with "modern" competition laws. Countries without legislation have since adopted new competition laws. At the regional level, regional competition frameworks started to emerge in line with the creation of free trade zones and the adoption of common markets. With different institutional designs and enforcement approaches, regional competition authorities started to build capacities and enforce their laws.[75] WAEMU started enforcement in the 2000's. COMESA has recently celebrated its 10th years anniversary and ECOWAS has created its regional competition authority in 2019.[76]

This general trend in the implementation of competition law frameworks in the African

[73] See the preamble of the Set.
[74] See the Objectives of the Set.
[75] Voir, Josef Drexl, Mor Bakhoum, Eleanor M. Fox, Michal S. Gal, David J. Gerber (Eds.), Competition Policy and Regional Integration in Developing Countries", Edward Elgar, 2012.
[76] The ECOWAS Regional Competition Authority is in charge of applying the law. See https://erca-arcc.org/.

continent took places in different socio-economic, political and legal environments. The diversified socio-economic characteristics, historical and political contexts have strongly influenced the receptiveness of States to market principles and competition laws principles. West African States, which are former French colonies and members of either WAEMU or ECOWAS, had a history of controlled and planned economies characterised by strong state involvement and price regulations.[77] In contrast, the Eastern and Southern parts of Africa which are former British colonies inherited from a socio-economic context that is more receptive to market and the adoption of competition law. A number of Eastern and Southern Africa States have well-functioning national competition law systems, for example Kenya, Zambia, Namibia. South Africa is by far the most sophisticated competition system.[78] From a policy perspective, cooperation is taking place between competition authorities in capacity building, technical assistance and information sharing for more efficient enforcement. In this regard, the African Competition Forum (ACF) which is a network of competition authorities has developed since its creation. The ACF plays a crucial role in the development of national and regional competition laws. The ACF provides a platform for cooperation for enforcement and influences the voice of African countries in the international arena.

How have the Set and its implementation principles influenced these developments in Sub-Saharan Africa?

UNCTAD is a privileged partner of African competition authorities. In its approach to implementing the Set, UNCTAD has implemented different actions including: the Intergovernmental Group of Experts (IGE) on Competition Law and Policy and the United Nations Conference to Review All Aspects of the Set, the provision of technical assistance to support developing countries to develop and implement competition law and policy the facilitation regional and international cooperation.[79] Capacity building and technical assistance at national, regional and sub-regional levels include: Assisting in drafting competition law, reviewing competition legislation, and providing training for competition officials. In the process of developing their competition law and policy, African countries have benefited a great deal from the work of UNCTAD in implementing the Set. The UNCTAD's Competition Programme for Africa (AFRICOMP)[80] technical assistance program, which expanded from 5 to 15 countries including regional groupings of WAEMU, SACU and CEMAC, highlights the crucial role that UNCTAD has played in the development of competition laws frameworks in Sub-Saharan Africa.

III. The influence of the Set in the orientation and design of competition regimes in Sub-Saharan Africa

The Set has influenced the creation of many competition institutions in developing countries. This influence is reflected in three aspects: the Model Law, the peer review mechanism and the capacity building component.

[77] See on those aspects, Eleanor Fox and Mor Bakhoum, "Making Markets Work for Africa: Markets, Development and Competition Law in Sub-Saharan Africa", Oxford University Press (OUP), 2019.
[78] Ibid.
[79] See UNCTAD, Implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. Available at: https://unctad.org/system/files/official-document/tdrbpconf9d3_en.pdf.
[80] See https://unctad.org/system/files/official-document/uxiiicn2012d25_en.pdf.

A. The Model Law and the development of competition law and policies in Sub-Saharan Africa

The Set directs UNCTAD to elaborate "a model law or laws on restrictive business practices in order to assist developing countries to design appropriate legislation".[81] The adoption of the Model Law as part of the implementation of the Set aims to help countries design appropriate substantive rules dealing main anticompetitive practices such as cartels, abuse of dominance, mergers, and also to establish functioning competition authorities with sufficient decision making powers.

The adoption of the Model Law is of paramount importance as a legislative reference guide, for drafting and revising competition regimes. The Model Law provides a useful template for countries adopting and revising their competition regimes with the core orientation of principles and practices that need to be regulated and key principles of enforcement. The Chapter of the Model Law dealing with substantive areas aspects of competition law covers the main and common prohibitions such as anti-competitive agreements, abuse of dominant position, and anti-competitive mergers and acquisitions. Principles related to competition investigations and remedies have also been developed in the Model Law. These core aspects of the Model Law do not prevent States from including variations in their legislations that take account of their socio-economic context. In line with the Set to consider the socio-economic context of developing jurisdictions when drafting their competition laws, the Model Law provides enough flexibility and policy space to States to take into account their socio-economic context. The creation of policy space within the Model Law and its approach as a guidance document which is not mandatory is respectful of the specific socio-economic context and policy objectives of implementing States. In addition to efficiency and consumer welfare, non-economic and equity objectives have progressively needed to be included in a number of Sub-Saharan Africa competition frameworks. The soft influence of the Model Law has preserved the policy space and flexibilities of the African State to include equity related objectives and public interest goals in their competition laws.[82] South Africa is a prime example with the integration of public interest in its competition law.

In Sub-Saharan Africa in particular one can notice that the Model Law has influenced, directly or indirectly, the approach of their competition laws. Keys orientations of the Model Law in its objectives, its main prohibitions on cartels (with the exception), abuse of dominant position, merger and enforcement have been taken into account in most of the competition laws.[83]

WAEMU competition law is an example. The Model Law has influenced a number of basic orientations of WAEMU competition law and policy. The objectives of WAEMU competition law to deal with main anticompetitive practices that restrain competition and affect domestic and international trade and economic development are in line with the Model Law. However, some variations and specificities should be noted with the regulation of mergers in the framework of abuse of dominance and its specific centralized enforcement design. The centralized enforcement design of WAEMU limits the effectiveness of the regional law and the development of the institutional framework

[81] Section F. of the Set.
[82] See Eleanor Fox, Mor Bakhoum, "Making Markets Work for Africa: Markets, Development and Competition Law in Sub-Saharan Africa", Oxford University Press (OUP), 2019.
[83] Ibid.

as well as the competition culture at the national level.[84]

The collaboration with UNCTAD in order to correct the design issues resulting from the centralization of the decision-making power in the WAEMU reflects also this influence. The design incoherencies and issues of WAEMU have been highlighted in the 2007 peer review of the competition policy of WAEMU conducted in collaboration with UNCTAD.[85] Following the conclusions of the peer review, with the technical assistance of UNCTAD, a group of experts had worked on proposing new regulations that materialize the orientation of the decentralization the decision-making power. However, those efforts have had limited impact since the WAEMU Court of Justice indicated that the Treaty has to be changed in order to decentralize the enforcement approach. With the support of UNCTAD, the WAEMU Commission is working on implementing the necessary changes in the substantive law and the design of the enforcement framework in order to better involve the national enforcement authorities in the application of the regional and national competition laws. Not only has the Model law influenced the approach of the substantive rules, the UNCTAD, in the framework of its mandate of building the capacities of States without strong competition law institutions has been very instrumental in directing the necessary changes in WAEMU regional legislation in order to ensure its effectiveness.

The influence of the Model Law on the orientation of the revised and newly adopted competition law in Sub-Saharan Africa is noticeable. Zimbabwe is another example of a country that has benefited from the Model Law. In the absence of clarity of the legislation on the issue of monopolization (abuse of dominance), international standards and the Model Law were used as guidelines.[86] This was especially the case on the issue of dominance. It was said in this regard that: "the Model Law was extensively used in deciphering the best practice intentions of the Zimbabwean competition legislation in the determination of dominance and its abuse."[87] In addition to dominance, the Model Law was also used as a reference point for the definition of mergers and acquisitions. The shortcomings of the Competition Act of 1996 were corrected in line with the orientations of the Model Law. Hence, the amendments of the Act were conducted in reference with the Model Law. It has been said in this regard that: "[t]he shortcomings of the Competition Act of 1996 prompted the ITCC [Industry and Trade Competition Commission] to seek amendments to the Act, and the Model Law was extensively used in the drafting of the amendments. The first major amendments to the Act came into effect in 2001 through the Competition Amendment Act, 2001 (No. 29 of 2001). The definition of the term "merger" was amended to cover all possible combinations. New merger notification provisions, covering pre-merger notification, were introduced in line with international best practice, as well as provisions on factors considered in assessing the determination of the merger control substantive test of substantial prevention or lessening of competition."[88]

[84] See "The UNCTAD Model Law on Competition: View from WAEMU competition authority" in The UNCTAD Model Law on Competition after 30 years. Available at: https://unctad.org/system/files/official-document/ditcclp2023d6_en.pdf.
[85] See https://unctad.org/system/files/official-document/ditcclp20071_en.pdf, pages 159-161.
[86] Ibid.
[87] Ibid.
[88] Ibid.

B. The voluntary peer review mechanism

The UNCTAD voluntary peer review of competition law and policy[89] mechanism is an important tool for the implementation of the Set. A number of developing countries including Sub-Saharan Africa countries have benefited from it. The approach of the peer review is very dynamic and involves a number of actions and steps that facilitate a detailed and critical review of a given competition law and policy. The involvement of competition law experts from developed and developing countries provides a broad and comparative overview taking into account also international standards. The scope of the review is quite broad. It involves all the components of the competition law and policy of the reviewed jurisdiction including the substantive law and the enforcement mechanisms and records. The different stages involved in the peer review process also demonstrate the usefulness of the mechanism. Different interactions with the stakeholders including the UNCTAD secretariat and the countries that attend the IGE help correct the shortcomings and a comparative view of the reviewed jurisdiction.

Another important element of the peer review mechanism is its link with the capacity building element. A special session is held in the framework of the peer review process. As pointed out: "[a] session is held to look into the needs of the peer reviewed competition agency in terms of capacity-building and the ways in which UNCTAD can provide assistance to meet these needs."[90]

The peer review process has an important development perspective. The Model Law, which influences the peer review process, provides enough flexibility to take account of the development dimension and the specific socio-economic characteristics of the reviewed country. UNCTAD's focus on the development dimension of competition and policy is a crucial policy element of the review process. Taking international standards is important in a context of globalization of market and the need of legal certainty for businesses. However, it is equally important to respect the policy space of the reviewed country. The progressive inclusion of non-economic objectives in a number of African competition law underscores this aspect.

A number of Sub-Saharan Africa countries have already benefited from the UNCTAD peer review mechanism.[91] For example, the peer review process has helped WAEMU identify the shortcomings in the design of its enforcement institutions and take the steps to correct them. Zimbabwe has benefited from the peer review process that helped it align its competition law and policy with guidelines of the Model Law.[92] Malawi's competition law and policy have also been peer reviewed.[93]

An emerging group of experts specialized in competition law and policy with a focus on competition issues in Sub-Saharan Africa is emerging. The ACF also plays an important role in the development of competition law and policy in the African continent. In the process of the peer reviewing the competition law of Sub-Saharan African countries, the ACF and the accumulated

89 See https://unctad.org/topic/competition-and-consumer-protection/voluntary-peer-review-of-competition-law-and-policy.

90 Ibid.

91 Kenya, WAEMU, Benin and Senegal, the United Republic of Tanzania, Zambia and Zimbabwe (tripartite review), Namibia, Seychelles, Botswana and Malawi.

92 See https://unctad.org/system/files/official-document/ditcclp2012_Zimbabwe_en.pdf.

93 See https://unctad.org/system/files/official-document/ditcclp2021d1_en.pdf. Among the recommendations, the placement of competition and regulatory authorities under one central ministry was suggested to avoid competing and conflicting policy objectives, and disconnections with the Competition Commission of COMESA, and the modernization of the competition regime in a comprehensive scope, based on assessment of the requirements in the contemporary social, economic and political contexts in Malawi.

experiences of jurisdictions in Sub-Saharan Africa such as South Africa should be taken into account.

C. The capacity building dimension

Building the capacities of competition authorities and stakeholders involved in the markets and the application of competition law is an integral part of the objectives of the Set. The opening of markets of developing countries from protectionism and socialists-oriented principles, with a strong involvement of the States, to market principles go hand in hand with a capacity-building component. Building the capacities of the stakeholders involved in the process of implementing a regulation creates the conditions of the acceptance and effectiveness of the newly adopted competition laws. For the newly created competition authorities, the process of setting functioning enforcement institutions needs to be fostered. The capacity building component when implementing the Set is clearly stated: "Implementation within or facilitation by UNCTAD, and other relevant organizations of the United Nations system in conjunction with UNCTAD, of technical assistance, advisory and training programmes on restrictive business practices, particularly for developing countries":[94] Sub-Saharan Africa countries have tremendously benefited from the technical assistance of UNCTAD in the processes of adopting, implementing, revising and enforcing their competition laws. Through various projects, UNCTAD has contributed to the development of competition regulations in West Africa. WAEMU, for instance, has benefited from the assistance of UNCTAD through training activities, reviews of its regional law, drafting of new regulations and studies. The WAEMU Commission regularly takes part to the activities of the IGE.

On a broader perspective, UNCTAD assists also in capacity building at the national, regional and continental levels. The recently adopted competition protocol in the framework of the AfCFTA has benefited from the assistance of UNCTAD,[95] which is involved in the process of drafting and dissemination.

IV. Outlook: looking forward

As markets, competition law and policy should be dynamic and agile. The law and enforcement mechanisms should align with the changes in the markets, the emergence of new markets and the diversification of the types of anticompetitive practices. Markets are becoming increasingly digital. Competition in the digital market is significant and relevant in developing countries' markets. Building the capacities of Sub-Saharan Africa competition authorities in order to help them overcome those changes in markets should be an important element of UNCTAD's capacity building initiatives in the African continent.

[94] See the Set.

[95] See UNCTAD AfCFTA support Program. More information is available at: https://unctad.org/topic/africa/support-to-african-continental-free-trade-area.

The United Nations Set of Principles and Rules on Competition as UNCTAD turns 60


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trade
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Forward
together
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UNCTAD

As UNCTAD celebrates 60 years of existence, the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (Set) will continue to be the hallmark of shaping global competition law especially in developing countries, through the new and amended laws.

I. Why the Set has been very important for developing countries

A. Reference for the promulgation of new laws and harmonisation

While competition law and policy are a relatively new occurrence in developing countries, it is not the same in a number of developed countries. Competition law, or anti-trust law as it is known in North America, was first introduced in Canada in 1889 and later in the United States of America in 1890. It was followed by Japan, which established its competition law in 1945. Competition laws were introduced in Europe in the 1950s with Germany being among the first western countries to adopt competition laws and therefore exerting a lot of influence in the promulgation of European competition law.[96] In the aftermath of the Second World War, prior to their withdrawal from Germany, the United States of America initiated the introduction of a competition law.[97] The orthodox view is that the law that was eventually passed was heavily influenced by American antitrust law[98] and that in turn, the German law was a key influence in the drafting and interpretation of the European Community competition provision in the Treaty establishing the European Economic Community signed in 1957. Therefore, in Europe and particularly in Germany, the promulgation of competition laws was not just a function of market efficiency but also a political matter. In Australia, the first competition law was introduced in 1974.

In contrast, in most developing countries, competition laws were only introduced in the 90s, about a century after they were introduced in North America. This was largely propagated by the fall of the Berlin Wall in 1989 and the transition of Eastern European countries to market economies that followed. The expansion of international trade liberalization in the early 90s and the establishment of the World Trade Organization drew attention to the complementarity between trade and competition[99] and several developing countries started adopting competition laws. Due to their lack of experience of promulgating and administering competition laws, reference was made to the Set, recalling it was basically adopted to address the unique situations of developing countries and help them to fit into global trade and economic order. Developing countries did not have to go through several years of drafting and testing the laws but could simply adopt the principles that had already been tested in the Set.

Today, there are about 140 countries with competition laws from only a handful before 1990. The dramatic increase in interest regarding antitrust matters across such a wide range of cultures and

[96] Michael Wise, "Competition Law and Policy in Germany", OECD Journal of Competition Law and Policy, Vol.7, No. 2 (2005).

[97] D.J. Gerber, "Law and Competition in Twentieth Century Europe: Protecting Promethus" (1998), 270.

[98] The Law against Restraints on Competition 1958. See W. Moschel, "Competition Policy from an Ordo Point of View" in A. Peacock and H. Willgerodt (eds), German Neo-liberals and the Social Market Economy (1989) 145. An earlier competition law had been introduced by the Allies in 1947; Ibid., 268-70.

[99] https://www.wto.org/english/tratop_e/comp_e/comp_e.htm; and https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm#investment.

legal traditions raises the concern that, assuming substantially similar market facts, commercial practices or transactions that are considered lawful under the competition laws in one jurisdiction could be treated as unlawful in another.[100] This concern is a reasonable one. After all, it is accepted that that (i) competition law is predicated on the belief that the free interplay of market forces is the best way to organize productive activity so as to maximize social welfare, and (ii) the economic principles that govern this free interplay of market forces, i.e., the laws of supply and demand, are universal, then it seems reasonable to expect that the principles that govern the maintenance of this free interplay should also be universal and thus yield the same results in similar conditions.[101] However, stark differences in the implementation of competition laws by different countries may result in sub-optimal outcomes with the consequence of distorting international trade, the very same effects that competition laws are intended to combat. These concerns are compounded by the fact that there is no formal international body for harmonization of competition laws nor is there a supra-national enforcement institution and system. Despite attempts to have such a system at international level under the umbrella of the World Trade Organisation (WTO), it is evident this has not come to pass.[102]

The Set therefore provides this platform of achieving uniformity and harmonization, especially with regard to the broad competition law principles. An important feature of the Set is that it lays down the generally accepted principles of competition law and policy.

Further, that these principles were universally[103] adopted makes them acceptable in many countries including the developing countries.[104] The desirable outcome of this is that it leads to a harmonized set of competition laws in those countries where the promulgation of these laws was based on the Set or at least reference was made to the Set.

Notably, the harmonization of competition laws is central for effective implementation at the international level and benefits both the regulators and those who are subject to these laws. For the regulators, it helps them to learn from others on the basis of the application of uniform principles of competition laws. Uniform or largely consistent jurisprudence is developed as a result. For firms and undertakings involved in transnational transactions, it brings a sense of certainty and predictability that their conduct may not be considered lawful in one country and outlawed in another. Most of the firms involved in cross-border or transnational trade are multi-national corporations incorporated in developed countries and are already familiar with competition law principles in their countries. Therefore, having similar principles of competition laws in the developing countries is important for these firms to be incentivized to invest there. This ultimately

[100] Michael G. Egge, "The Harmonization of Competition Laws Worldwide", 2 Rich. J. Global L. & Bus. 93 (2001). Available at: https://scholarship.richmond.edu/global/vol2/iss1/6.

[101] Richmond Journal of Global Law and Business Volume 2/Issue 1, 2001: The Harmonization of Competition Law Worldwide.

[102] WTO, "The 'July decision'" (2004). Available at: https://www.wto.org/english/tratop_e/comp_e/history_e.htm#julydec.

[103] The word "universal" has been used because the United Nations represents 193 countries.

[104] It should be noted that the paper is not advocating for similar competition law legislation in developed and developing countries for this is impractical due to differences in the levels of economic development. For example, competition laws in developing countries may address public interest concerns different from those in the developed countries and therefore, it is important to recognize these differences. In fact, the Set itself recognises this in paragraph 5 of section C. when it states that the provisions of the Set should not be construed as justifying conduct by enterprises which is unlawful under applicable national or regional legislation. The paper however advocates that this notwithstanding, harmonization on the broad principles should be universally accepted.

raises confidence in the international trading system.

B. Forum for mutual enforcement of laws, exchange of knowledge and review of legislation in developing countries

The careful design of a competition law and policy should accommodate changes in the political and economic landscape of an individual country but also the global economic order and in contemporary times, more focus on the digital economy and sustainability has been witnessed. The effective and efficient implementation of the law that follows is the precursor to the contribution of competition laws to economic development and growth in developing countries. The Set provides a framework through which legal and policy reform may be influenced to respond to these changes. Section C of the Set is instructive on this, referring to the importance of eliminating anticompetitive practices, including of multinational companies, that affect negatively international trade in particular that of developing countries and its economic development (subsection 1).[105]

This provision is very important. While the Set is not *stricto sensu* binding on countries, it enjoins all countries to effectively implement competition laws not only in the interest of their countries but also in the interest of other countries especially developing countries whose economic situations are peculiar and who are likely to suffer more from anti-competitive conduct. It has been observed how developed countries have addressed competition concerns by imposing remedies without taking into account the effects of these remedies in developing countries. In most cases, developing countries have not been offered a seat at the table where such remedies are discussed. These views are supported by Professor Eleanor Fox[106] who has openly observed that in the global merger involving *Bayer and Monsanto*, some advanced competition authorities designed effective remedies to address concerns in their countries without taking time to appreciate the effects these remedies would have in developing countries. Similar observations can be made with regard to competition law enforcement against digital platforms in the United States of America and Europe. In these cases, there may not have been an opportunity for developing countries' competition authorities to make their concerns known and have the developed countries take those concerns into account when designing appropriate remedies. Advocating for a strict compliance to paragraph C.(i)1 of the Set would largely address this concern.

The Set also provides the machinery through which governments, competition law enforcement agencies and other competition law experts meet to discuss matters of common interest. For example, in paragraph C.(i)2, the Set provides that collaboration between Governments at bilateral and multilateral levels should be established and, where such collaboration has been established, it should be improved to facilitate the control of restrictive business practices. Paragraph C.(i)3 continues that appropriate mechanisms should be devised at the international level and/or the use of existing international machinery improved to facilitate exchange and dissemination of information among Governments with respect to restrictive business practices. Paragraph C.(i)4 urges that appropriate means should be devised to facilitate the holding of multilateral consultations with regard to policy issues relating to the control of restrictive business practices.

[105] https://unctad.org/system/files/official-document/tdrbpconf10r2.en.pdf.

[106] Eleanor M. Fox is an emeritus professor of law at the University of New York. Her areas of specialization among others are antitrust, economic development, globalization, international trade law, and the European Union.

In compliance with the foregoing instructions from the Set stated in the immediately preceding paragraph, UNCTAD convenes annual meetings of the Intergovernmental Group of Experts (IGE) on competition where matters of mutual interest are discussed and where the respective governments of developed and developing countries meet to discuss how collaboration and cooperation among themselves may be enhanced. It is under this framework that the Common Market for Eastern and Southern Africa (COMESA) Competition Commission (CCC) and the Eurasian Economic Community entered into a cooperation mechanism on 21 July 2021.[107] This framework of IGE meetings allows developed countries to share their expertise and experiences in the enforcement of competition laws acquired from many years of enforcement, while developing countries on their part present the peculiar nature of their economies and how competition laws should be designed to address their concerns.

Exchange of information is facilitated at the IGE which in some cases has resulted in the change of laws and policies at national and regional level. For example, because of discussions on climate change and sustainability issues at the IGE, the CCC has proposed extensive amendments to the COMESA Competition Regulations to include sustainability and environmental consideration in the implementation of the COMESA Competition Regulations.[108] The peer reviews of competition laws in developing countries are another celebrated initiative by UNCTAD which is a product of the implementation of section C of the Set. The peer review identifies areas that need improvement in a particular competition law of a developing country and proposes amendments. This results in the improved, effective, and efficient implementation of competition laws in developing countries. As a result of the peer review, countries like Zambia have amended their laws, while Botswana, Malawi, and Zimbabwe among others are at an advanced stage of amending their laws. A number of developing countries in Asia and South America have undertaken similar processes under the auspices of UNCTAD.

II. Conclusion

As UNCTAD celebrates 60 years of existence, the Set will continue to be the hallmark of shaping global competition law enforcement especially in developing countries through the enactment of laws in countries where they are absent and amendment of laws where they exist. The goal should be to have all developing countries to adopt effective competition laws and ensure harmonization for the benefit of both regulators and those subject to these laws. The Set should continue to be relevant as it should be a model for continued improvement of the international competition law and policy framework.

[107] A copy of the Memorandum of Understanding (MOU) signed with the Eurasian Economic Commission is available at: https://www.comesacompetition.org/wp-content/uploads/2022/08/EURASIA-MOU-ENGLISH.pdf. The signing of the MOU is also reported: https://eec.eaeunion.org/en/news/eek-i-komesa-podpisali-memorandum-o-vzaimoponimanii-v-oblasti-konkurentnoy-politiki-i-pravoprimeneni/.

[108] The COMESA Competition and Consumer Regulations are available at: https://comesacompetition.org/resources/regulations/comesa-competition-regulations-english/. The draft new regulations are not yet adopted.

The United Nations Set of Principles and Rules on Competition: synergies and complementarities with other formative work on competition issues at the multilateral level


1 NO POVERTY
2 ZERO HUNGER
3 GOOD HEALTH AND WELL BEING
4 QUALITY EDUCATION
5 GENDER EQUALITY
6 CLEAN WATER AND SANITATION
7 AFFORDABLE AND CLEAN ENERGY
8 DECENT WORK AND ECONOMIC GROWTH
9 INDUSTRY, INNOVATION AND INFRASTRUCTURE
10 REDUCED INEQUALITIES
11 SUSTAINABLE CITIES AND COMMUNITIES
12 RESPONSIBLE CONSUMPTION AND PRODUCTION
13 CLIMATE ACTION
14 LIFE BELOW WATER
15 LIFE ON LAND
16 PEACE, JUSTICE AND STRONG INSTITUTIONS
17 PARTNERSHIPS FOR THE GOALS
SUSTAINABLE DEVELOPMENT GOALS

The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (Set) and related work are of direct, continuing relevance to the realization of the the United Nations Sustainable Development Goals (SDGs), inspiring the elaboration of national competition policies and possible future developments at the multilateral level.

I. Introduction

The Set[109] underpins an extensive body of related work by the UNCTAD Secretariat, comprising: (1) ongoing work on the elaboration of a model law or laws on restrictive business practices in order to assist developing countries in devising appropriate legislation;[110] (2) vital technical assistance and capacity-building for interested United Nations member States to equip them to adapt and refine their national competition policies to promote development and economic welfare; and (3) extensive exchange of information, peer reviews, roundtables and related dialogues on related issues of interest, including through regular meetings of the Intergovernmental Group of Experts (IGE) on Competition Law and Policy.[111]

This chapter focuses on the Set's synergies and complementarities with other work on competition-related issues at the multilateral level, both past and ongoing. To begin with, the wording of the Set echoes and recalls for readers themes set out initially in Chapter V of the Havana Charter for an International Trade Organization (ITO), an early cooperative effort to articulate essential foundations for global trade and development in the aftermath of World War II.[112] This is of interest in that it manifests the enduring nature of the concerns underlying the Set.

More recently, the Set was an important source of inspiration for the World Trade Organization (WTO)'s seminal work on competition policy and its relationship with international trade policy in the period 1997-2003.[113] In key respects, the Set prefigured

[109] Formally, "The United Nations Set of Principles and Rules on Competition - The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices", developed by the United Nations Conference on Trade and Development and adopted by the General Assembly on 5 December 1980. See United Nations Conference on Trade and Development (UNCTAD), "The United Nations Set of Principles and Rules on Competition", TD/RBP/CONF/10/Rev.2 (United Nations: 2000). Available at: https://unctad.org/system/files/official-document/tdrbpconf10r2.en.pdf. See, for additional background, "The United Nations Set of Principles on Competition (The UN Set)", available at https://unctad.org/topic/competition-and-consumer-protection/the-united-nations-set-of-principles-on-competition.

[110] See "The UNCTAD Model Law on Competition after 30 years" Available at: https://unctad.org/publication/unctad-model-law-competition-after-30-years.

[111] See "Intergovernmental Group of Experts on Competition Law and Policy" Available at: https://unctad.org/topic/competition-and-consumer-protection/intergovernmental-group-of-experts-on-competition-law-and-policy.

[112] See United Nations Conference on Trade and Employment, Havana Charter for an International Trade Organization, U.N. Doc. E/Conf.2/78, (Mar. 24, 1948) (Havana Charter). Available at https://treaties.un.org/doc/source/docs/E_CONF.2_78-E.pdf; and, for pertinent background, Douglas A. Irwin, Petros C. Mavroidis and Alan O. Sykes, The Genesis of the GATT (Cambridge University Press, 2009).

[113] See, for a review and assessment of the continuing relevance of the work of the WTO Working Group, Robert D. Anderson, William E. Kovacic, Anna Caroline Mueller, Antonella Salgueiro and Nadezhda Sporysheva, "Competition Policy and the Global Economy: Current Developments and Issues for Reflection" (2020) 88(6) The George Washington Law Review 1421; see also Robert D. Anderson and Frédéric Jenny, "Competition Policy, Economic Development and the Role of a Possible Multilateral Framework on Competition Policy: Insights from the WTO Working Group on Trade and Competition Policy" in Erlinda Medalla (ed), Competition Policy in East Asia (Routledge 2005), chapter 4; and Robert D. Anderson, "Realising the Potential Synergies Between International Trade and Competition Policy: Carrying Forward the Vision of Frédéric Jenny", in Nicholas Charbit and Thomas Moretto (eds.), Frédéric Jenny Liber Amicorum: Standing Up for Convergence and Relevance in Antitrust - Vol II (Concurrences, 2021), chapter 1.

issues that were addressed in that work. As also described herein, in the current era, the Set and related work in the United Nations are of direct, continuing relevance to the realization of the United Nations Sustainable Development Goals (SDGs). The Set also remains a source of inspiration for both the elaboration of national competition policies and possible future action on competition policy at the multilateral level whether in the United Nations, the International Competition Network (ICN), the Organisation for Economic Co-operation and Development (OECD), the WTO or other *fora*.

The foregoing is *not* to suggest that the Set and the work of the WTO Working Group (or relevant elements of the long-ago Havana Charter or other efforts to promote international cooperation in competition law and policy) are congruent in all respects, or that one replaces the need for the other(s).[114] Rather, it is simply to recognize the remarkable complementarity and continuity of interests and concerns underlying the respective instruments.

This article highlights these continuities and congruences regarding developing countries. The remainder of the chapter is organized as follows. Part II explores and brings to light interesting parallels between the wording of the Set and themes set out initially in Chapter V of the Havana Charter. Part III examines the relationship of the Set to the original mandate for the work of the WTO Working Group, as set out in the Singapore Ministerial Declaration, and to related aspects of that work. Part IV highlights the continuing relevance of the concerns underlying the Set for global prosperity and development, as illuminated (for example) in related elements of the SDGs. Part V provides concluding remarks.

II. The Set and Chapter V of the Havana Charter: historic parallels of continuing relevance to the global economy

As long ago as 1948, Chapter V of the Havana Charter for the ITO[115] set out a surprisingly comprehensive and, in some respects, prescient framework for international cooperation in regard to anti-competitive business practices impacting on global trade and development.[116] The Charter, including Chapter V, grew directly out of the pressing need, in the aftermath of World War II, to establish conditions for the peaceful development of global commerce. The founders of the post-war global trading system were acutely aware of the interrelationships between international trade policy, development, and competition in markets. Cordell Hull, the United States Secretary of State from 1933 -1944 and an intellectual pioneer of multilateralism, advocated tariff cuts in part to assist in the fight against the industrial trusts, cartels, and monopolies of the time. The United States President Franklin Delano Roosevelt himself wrote to Secretary Hull on this point, observing that “cartel practices which

[114] As just one example of a dissimilarity of approach, the Set embraces a language of “equity” and “equitable principles” that the WTO’s work and the Havana Charter largely abjure. For example, the second recital of the Set’s Preamble affirms that: “a set of multilaterally agreed equitable principles and rules for the control of restrictive business practices can contribute to attaining the objective in the establishment of a new international economic order to eliminate restrictive business practices adversely affecting international trade and thereby contribute to development and improvement of international economic relations on a just and equitable basis […]”. The same emphasis on equity is, for the most part, not found in either the work of the WTO Working Group or the Havana Charter (see below).

[115] See Havana Charter, supra note 112.

[116] See Robert D. Anderson and Peter Holmes, “Competition Policy and the Future of the Multilateral Trading System” (2002) 5(2) Journal of International Economic Law 531.

restrict the free flow of goods in foreign commerce will have to be curbed".[117]

To tackle this problem, Article 46, Paragraph 1, of Chapter V of the Havana Charter, on "Restrictive Business Practices", provided as follows:

"Each Member shall take appropriate measures and shall co-operate with the Organization to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives set forth in Article 1 [...]"

The above language resonates today as a remarkable expression of the collective interest of nations to deter and eradicate business practices that undermine trade, development, and global prosperity. It also prefigures relevant language of the Set. In particular, the Set begins, in the first recital of its Preamble, by recognizing that:

"restrictive business practices can adversely affect international trade, particularly that of developing countries, and the economic development of [those countries] [...]"

The congruency of underlying concerns between Chapter V of the Havana Charter and the Set becomes even more evident in the third recital of the Set's Preamble, which highlights the need:

"to ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting international trade, particularly those affecting the trade and development of developing countries [...]"

Chapter V of the Havana Charter was also noteworthy for the relatively comprehensive approach that it sought to bring to the control of anti-competitive practices. According to Article 46, paragraph 3 of the Charter, relevant practices were to include:

(1) fixing prices, terms, or conditions to be observed in dealing with others in the purchase, sale, or lease of any product:

(2) excluding enterprises from, or allocating or dividing, any territorial market or field of business activity, or allocating customers, or fixing sales quotas or purchase quotas;

(3) discriminating against particular enterprises;

(4) limiting production or fixing production quotas;

(5) preventing by agreement the development or application of technology or invention whether patented or unpatented;

(6) extending the use of rights under patents, trademarks or copyrights granted by any Member to matters which, according to its laws and regulations, are not within the scope of such grants, or to products or conditions of production, use or sale which are likewise not the subject of such grants;

(7) any similar practices which the Organization may declare, by a majority of two-thirds of the Members present and voting, to be restrictive business practices.[118]

Again, the foregoing prefigures the broad approach to anti-competitive practices that is taken in the Set.[119] Chapter V of the Havana Charter also incorporated significant related procedural provisions, including a

[117] Letter from President Franklin D. Roosevelt to Cordell Hull on the elimination of cartels (6 September 1944), available at https://www.presidency.ucsb.edu/documents/letter-the-elimination-cartels.
[118] See Havana Charter, Article 46, paragraph 3, supra note 112.
[119] Section D, supra note 109.

special procedure with respect to services that could have harmful effects similar to those indicated in the above-mentioned paragraph 1 of Article 46.[120]

It is important to be clear that Chapter V of the Havana Charter, for better or worse, was ultimately left aside by the international community in the light of opposition in the United States Congress, when the proposal for the ITO was abandoned and the (more limited) General Agreement on Tariffs and Trade (GATT) was adopted in its place. In this sense, the Charter today is predominantly of historical interest. Nonetheless, as we have seen, the core concerns underlying Chapter V were eventually reflected in the Set. In this sense, it can be said that the Set helped to fill the void left by the non-adoption, when the GATT was founded, of Chapter V. Moreover, the underlying concerns remain relevant today.[121]

III. Relationship of the Set to the mandate and work of the WTO Working Group on the Interaction Between Trade and Competition Policy (Working Group)

The WTO Working Group was established at the first WTO Ministerial Conference (Singapore Ministerial Conference), in 1996, to study relevant aspects of the interaction between trade and competition policy. The Singapore Ministerial Declaration (paragraph 20), i.e. the original authorization for the Working Group's work, established a working group to examine the relationship between trade and investment; and a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework.[122]

Thus, paragraph 20 both looked back at pre-existing elements of competition policy already built into existing provisions of the WTO Agreements and anticipated possible further action to further develop the role of competition policy in the WTO system. It derived from the same underlying concern as both the Havana Charter and the Set - namely, that if left unchecked, anti-competitive practices of enterprises hold the potential to undermine the intended benefits of trade liberalization. Consistent with this thrust, the Singapore Ministerial Declaration also encouraged the Working Group to undertake its work in cooperation with UNCTAD and other appropriate intergovernmental *fora*, to make the best use of available resources and to ensure that the development dimension was fully taken into account in the work.

From 1997 through 2003, the WTO Working Group engaged in a wide-ranging study of possible such practices, and of measures that could be considered to address their impact. In broad terms, in the first two years of this work, the WTO Working Group was guided by terms of reference set out in a "Chairman's Checklist of Issues". Under that direction, the work focused, inter alia, on the impact of anti-competitive practices of enterprises and associations on international trade, and specifically on:

[120] See Havana Charter, Article 53, supra note 112.

[121] Consider, for example, the extent of shared concern in the world today regarding perceived anti-competitive practices of the part of digital platforms. Consider also the relevance of the Set and of competition law and policy generally to the relevant elements of the United Nations Sustainable Development Goals (see Part IV, below).

[122] See the Singapore Ministerial Declaration, para. 20. Available at: https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm#investment_competition.

(1) the impact of state monopolies, exclusive rights and regulatory policies on competition and international trade;

(2) the relationship between the trade-related aspects of IPRs and competition policy;

(3) the relationship between investment and competition policy;

(4) and the impact of trade policy on competition.[123]

Subsequently, from 1999 to 2001, the WTO Working Group pursued a refocused mandate emphasizing (1) the relevance of fundamental WTO principles of national treatment, transparency, and most-favoured-nation treatment to competition policy and vice versa; (2) approaches to promoting cooperation and communication among Members, including in the field of technical cooperation; and (3) the contribution of competition policy to achieving the objectives of the WTO, including the promotion of international trade. In late 2001, pursuant to the Doha Ministerial Declaration, the work of the Working Group was further refocused to emphasize specific elements of a possible "multilateral framework on competition policy" as proposed by the proponents of such a framework, particularly the European Union. These comprised core principles, including transparency, non-discrimination, and procedural fairness; provisions on "hard-core cartels"; modalities for voluntary cooperation (between competition authorities); and support for progressive reinforcement of competition institutions in developing countries through capacity building.[124] Without exaggerating the extent of overlap with the Set, clearly, the work drew upon common insights and understandings.[125]

As is well known, the foregoing work of the WTO Working Group did not yield formal results in the sense of new negotiated rules in the WTO. The work was, in fact, officially placed on hold in August 2004, in the aftermath of the WTO's Cancún Ministerial Conference of 2003, at which no consensus could be found on "modalities" to initiate negotiations on this topic. It is not clear if or when the Working Group's work will be resumed, though an eventual resumption is certainly not precluded by the terms of the WTO General Council's decision on the matter.[126]

Nonetheless, it could be said that the discussions in the WTO Working Group, at a minimum, amply justified and documented the above-outlined concerns underlying both the establishment of the WTO Working Group and the articulation of the Set. Furthermore, they were non-controversial for competition enforcers and advocates, in many respects. For example, the Working Group's work extensively and vividly illustrated such themes as:

(1) The ability of both anti-competitive practices and state measures to limit competition and thereby harm consumers and (potentially) impede development;

(2) The particular harm caused by cartels in addition to abuses of a dominant position and anti-competitive mergers, and the cross-border effects that such practices can have;

(3) The usefulness of competition advocacy, particularly in relation to regulatory barriers to competition;

(4) The importance of a case-by-case approach to competition issues involving IP rights and

[123] WTO, Report (1997) to the General Council, WT/WGTCP/1. Available at: https://docsonline.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/WGTCP/1.pdf&Open=True.
[124] Doha WTO Ministerial 2001, Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, paragraph 25.
[125] See also Anderson et al, supra note 116.
[126] Ibid.

(5) The over-arching importance of capacity-building and the value of both formal and informal inter-agency cooperation mechanisms.[127]

Furthermore, clear lines can be drawn from debates and proposals put forward in the WTO Working Group in the years 1997 - 2003 to the chapters on competition policy that are increasingly included in regional trade agreements;[128] to subsequent discussions and developments in the ICN and other relevant bodies (including, very much, UNCTAD); and to work and discussions in the WTO itself and in other international organisations that continue to this day.[129] In this sense, the work of the WTO Working Group on the Interaction of Trade and Competition Policy was far from being unproductive; rather, in our submission, it carried forward effectively the concerns underlying both the Set and the earlier Havana Charter (Chapter V), and helped set the stage for subsequent developments that have reinforced the importance of competition policy as a bulwark of the global economy.

IV. Continuing relevance of the concerns underlying the Set

The concerns underlying the Set - notably the potential adverse impacts of anti-competitive practices for development and the need for international cooperation to address these concerns have, if anything, taken on more salience in today's global economy. As one manifestation of this phenomenon, subsection A. of this section outlines the importance of competition law and policy for addressing relevant elements of the SDGs. As a second illustration, subsection B. highlights the importance of international cooperation in addressing relevant practices - a dimension that is integral to the Set and figured equally importantly in the work of the WTO Working Group.

A. Competition law and policy and development - relevant elements of the SDGs

The United Nations member States, leading efforts to foster sustainable development, adopted in 2015 the SDGs as a universal call to action to end poverty, protect the planet and ensure that all people enjoy peace and prosperity by 2030.[130] In this sense, both governments and the private sector are called to strengthen their commitment to achieve the SDGs, which include supporting affordable and sustainable energy, promoting sustainable industrialization, and ensuring responsible consumption and production, as well as combatting climate change.

Competition law and policy can play a key role in supporting sustainability initiatives, as they address market failures and help provide a level playing field in which businesses and consumers can make the best choices. At the same time, the Set also provides a framework for promoting and implementing effective competition policies globally. These principles are closely aligned with the SDGs and can significantly contribute to achieving them by fostering a competitive market environment that promotes economic growth, innovation, reduced inequalities, responsible

[127] See, for supporting details and references, Anderson et al, supra note 116.
[128] See Anderson et al, supra note 116 and, for additional background, François-Charles Laprévote, Sven Frisch, and Burcu Can, "Competition Policy within the Context of Free Trade Agreements" (2015) E15 initiative on Strengthening the Global Trade and Investment System for Sustainable Development.
[129] For example, competition policy remains an important element of the WTO's work in the areas of Trade Policy Reviews and WTO accessions, in addition to the WTO Secretariat's technical assistance programmes.
[130] UNCTAD, Competition and Consumer Protection Policies for Sustainability (2023), UNCTAD/DITC/CLP/2023/1, Available at: https://unctad.org/system/files/official-document/ditcclp2023d1_en.pdf.

consumption and production, and global partnerships, as detailed below:

(1) Goal 8: Decent Work and Economic Growth

Competition law contributes to Goal 8 by promoting fair market conditions that encourage entrepreneurship, investment, and job creation. The Set promotes competition policies that support market access for all businesses, including small and medium enterprises, fostering economic growth and job creation. By preventing anti-competitive practices such as monopolies or cartels, competition authorities ensure a level playing field for businesses of all sizes. This fosters productive capacity, enhances market efficiency, and ultimately leads to the creation of decent jobs and sustainable economic growth.

(2) Goal 9: Industry, Innovation, and Infrastructure

Competition law and policy support Goal 9 by fostering a competitive environment that encourages industries to innovate, invest in infrastructure, and adopt sustainable practices. By promoting competition in key sectors such as technology, energy, and transportation, competition authorities stimulate innovation, improve infrastructure quality, and drive economic transformation. This integrated approach is essential for tackling vulnerabilities, building resilience, and achieving sustainable industrial development.

(3) Goal 10: Reduced Inequalities

Competition law contributes to Goal 10 by advocating for fair competition and addressing market distortions that contribute to income inequalities. The Set emphasizes the importance of competition policies that promote equal opportunities, thereby reducing inequalities in access to markets and economic resources. Through effective enforcement and regulation, competition authorities promote fair pricing, enhance consumer welfare, and prevent market abuses that disproportionately impact vulnerable populations. Moreover, international cooperation and harmonization of competition policies strengthen economic governance, reduce trade barriers, and promote inclusive growth, thereby contributing to reduced inequalities.

(4) Goal 12: Responsible Consumption and Production

Competition law and policy play a critical role in promoting responsible consumption and production patterns. SDG 12 includes targets applicable to various stakeholders, including Governments, businesses, and consumers. In particular SDG 12.6 encourage companies, especially large and transnational companies, to adopt sustainable business practices and to integrate sustainability information into their reporting cycle, and 12.7 refers to integrating sustainability in public procurement practices (SDG 12.7). In both instances, competition enforcement is very relevant to ensure that certain restrictive business practices are not conducted under the false pretence of benefiting certain environmental scheme.

(5) Goal 17: Partnerships for the Goals

The Set recognizes the importance of international cooperation and capacity building in implementing effective competition policies globally, fostering partnerships among competition authorities, governments, and stakeholders. Through international collaboration, sharing best practices, and capacity building, competition authorities strengthen competition regimes globally, promote cross-border trade, and facilitate knowledge transfer. This enhanced global partnership fosters innovation, promotes sustainable development, and accelerates progress towards achieving the SDGs collectively.

Overall, it should be nevertheless noted that as sustainability becomes a priority

policy objective for policymakers worldwide, markets will increasingly be expected to deliver sustainable results. Though competition law and policy can be aligned with sustainability objectives, there may be circumstances in which competition and sustainability initiatives are in conflict and clear guidance is required on what is admissible in terms of competition to avoid "greenwashing" anti-competitive activities. In fact, there are no grounds to believe that competition restrictions will incentivize firms to take more sustainable approaches. Therefore, such guidance should be complemented by a variety of advocacy tools and collaboration between authorities and sectoral regulators.[131]

B. International cooperation in the implementation of competition law and policy

For the past four decades, UNCTAD has been the focal point in the United Nations for all matters related to competition policy.[132] It fulfils its mandate by "providing a forum for intergovernmental deliberations", "undertaking research, policy analysis and data collection", and "providing technical assistance to developing countries" on matters pertaining to competition law and policy.[133] In particular, its Intergovernmental Group of Experts meets annually with the goal of strengthening global cooperation on competition policy implementation and fostering greater convergence through dialogue.[134] Additionally, the IGE conducts its work through voluntary competition law and policy peer review and by organizing topical round tables on specialized competition issues.[135]

Principles on international cooperation, a foundational element of the Set, also underlie the work of other relevant organizations, namely the OECD and the International Competition Network (ICN). First, the OECD provides a platform for competition officials from developed and emerging economies to discuss both traditional as well as cutting-edge competition issues, fostering market-oriented reform throughout the world.[136] Its efforts are widely respected in the competition community and have contributed importantly to consensus building in many areas of competition law enforcement.[137]

Since its establishment in 2001, and building on the work of UNCTAD, the OECD and other *fora*, the ICN has become the leading global force in promoting international cooperation in competition law enforcement and in shaping widely accepted international competition policy norms.[138] The organization's achievements cover such areas as anticartel enforcement, merger review, abuse of dominance, competition advocacy, and competition policy implementation.[139] Overall, significant progress towards the ICN's main objective, greater convergence of competition

[131] Ibid.
[132] Hugh M. Hollman and William E. Kovacic, The International Competition Network: Its Past, Current and Future Role (2011) *20 Minn. J. Int'l L.* 274, 295-96.
[133] UNCTAD, Competition and consumer protection, Mandate and key functions. Available at: https://unctad.org/Topic/Competition-and-Consumer-Protection.
[134] See UNCTAD, Intergovernmental Group of Experts on Competition Law and Policy. Available at: https://unctad.org/en/Pages/DITC/CompetitionLaw/Intergovernmental-Group-of-Experts-on-Competition-Law-and-Policy.aspx.
[135] Ibid.
[136] OECD, "International Co-operation in Competition". Available at: http://www.oecd.org/competition/internationalco-operationandcompetition.htm.
[137] Ibid.
[138] See Hollman and Kovacic, supra note 132, 274-75, 286. The membership of the ICN comprises 140 competition agencies from 130 jurisdictions. ICN, Members. Available at: https://www.internationalcompetitionnetwork.org/members/.
[139] ICN Factsheet and Key Messages (2009). Available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/Factsheet2009.pdf.

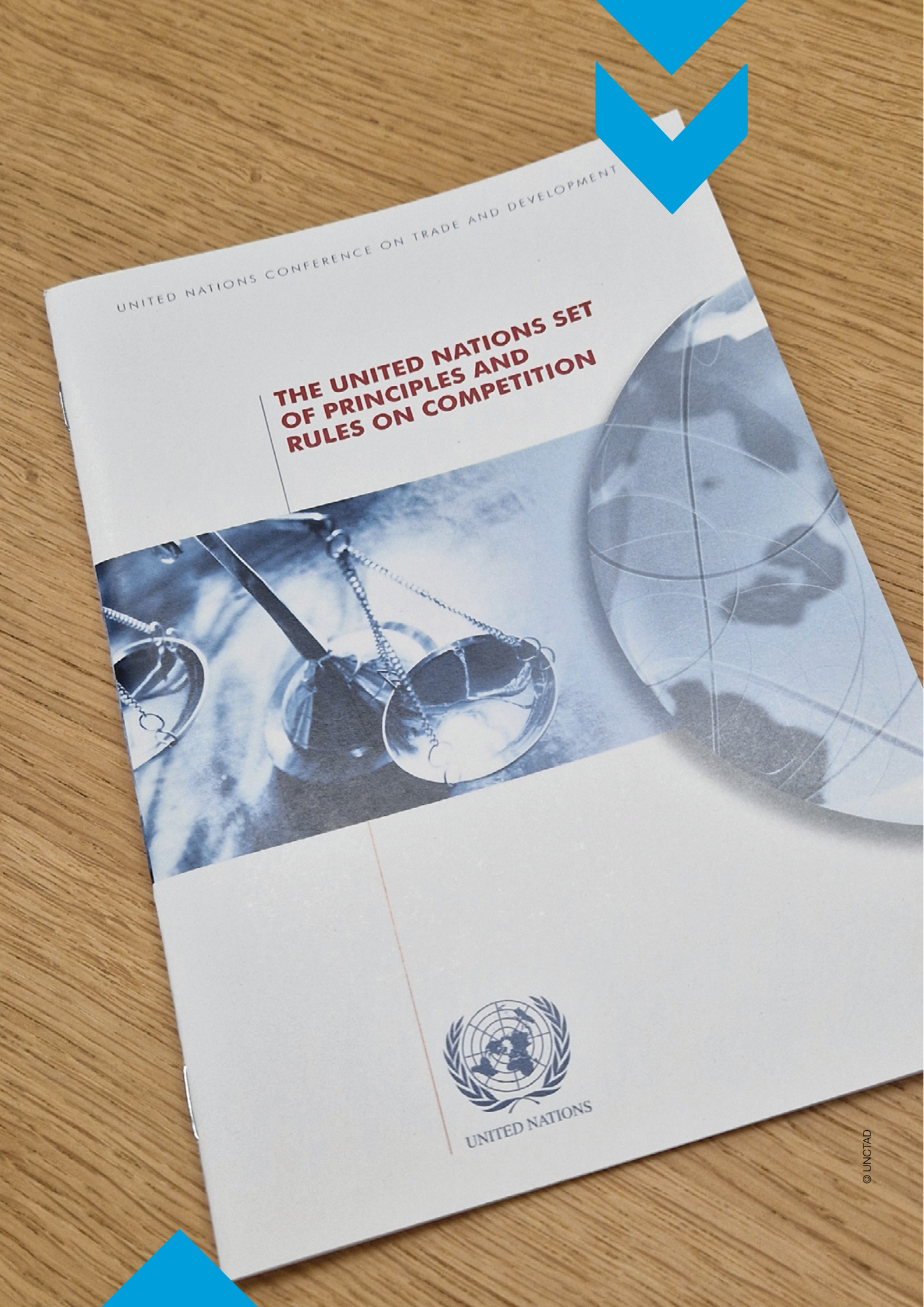
laws, has been achieved.[140] ICN's efforts to promote convergence in substantive approaches have helped foster a more coherent international policy environment than would have otherwise prevailed.

V. Concluding remarks

As outlined in this and other chapters to the present volume, the Set has played a vital role in the elaboration of competition policy at the national and international levels. In part, it has done this through its extensive synergies and complementarities with related work on competition issues in other international *fora*. For example, and as we have seen, the Set's wording echoes and recalls for readers themes set out initially in Chapter V of the Havana Charter for the ITO, a seminal international effort to articulate guiding principles for global trade and development in the aftermath of World War II. Equally, the Set was an important source of inspiration for the WTO's seminal work on competition policy and its relationship with international trade policy in the period 1997-2003. In today's world, the Set and related work at UNCTAD are of direct, continuing relevance to realization of the SDGs. As such, the Set remains a source of inspiration for both the elaboration of national competition policies and possible future action on competition policy at the multilateral level whether in the United Nations, the ICN, the OECD or other *fora*.

[140] See ICN, The Future of the ICN in its Second Decade 42-43 (2016). Available at: https://internationalcompetitionnetwork.org/wp-content/uploads/2018/09/ICN2dDecade2016.pdf; Hollman and Kovacic, supra note 132, 278.

Impressions of the United Nations Set of Principles and Rules on Competition


UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT
THE UNITED NATIONS SET OF PRINCIPLES AND RULES ON COMPETITION
UNITED NATIONS

The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (Set) provides a common framework for cooperation and dialogue among competition authorities, recognizing the special needs and challenges of developing countries and offering flexibility for them to pursue development goals.

I. Context

The Set has its roots in post-World War II concerns about the rapid and uncontrolled growth of transnational corporations (TNCs), restrictive trade practices and market power abuse. It is crucial to contextualize this within the broader efforts of consumer advocacy groups, such as Consumers International (then known as the International Organization of Consumer Unions - IOCU[141]), which sought to embed these principles not only in the United Nations framework but also in the emerging international trade architecture.

The period following World War II witnessed the efforts of the fifty-three[142] countries who signed up to The Final Act and Related Documents of the Interim Commission for the International Trade Organization (better known as the Havana Charter)[143] to establish the ITO. Chapter V of the Havana Charter dealt with control of anti-competitive business practices.

Chapter V of the Havana Charter provides an extensive treatment of obligations on member States to act against business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control. A complaint handling mechanism was proposed and an extensive list of practices to be contained. Investigation procedures and provisions for studies relating to restrictive business practices are also provided for as are obligations of members and a requirement for cooperative remedial arrangements. The objective and the details outlined for promoting competition in development countries was ambitious but extraordinary and still has relevance today.

Despite broad acceptance of the need for a body such as the ITO and a general acceptance of its goals, only some elements of the ITO survived and formed the underpinning for the General Agreement on Tariffs and Trade in 1947.[144]

A. Rebirth of the push for control of restrictive business practices by TNCs - a New International Economic Order (NIEO)

Despite the rejection of previous proposals to deal with pernicious and consumer welfare destroying business practices, 27 years later, in 1974 the United Nations General Assembly and (separately) the Department of Economic and Social Affairs breathed new life into the idea of international rules on restrictive business practices.

In the spirit which inspired United Nations member States to propose the establishment of the ITO, on Mayday

[141] For the benefit of comprehension, the essay will refer to IOCU by the name Consumers International (CI), which it adopted in 1979. CI was founded in 1960 and has a global membership of more than 250 consumer groups from around the world.

[142] Some sources claim there were 56 signatories to the Havana Charter- several being non-state actors.

[143] United Nations Conference on Trade and Employment held at Havana, Cuba from November 21, 1947, To March 24, 1948. Available at: https://www.wto.org/english/docs_e/legal_e/havana_e.pdf.

[144] https://www.wto.org/english/thewto_e/minist_e/min96_e/comppol.htm; and https://www.wto.org/english/tratop_e/comp_e/comp_e.htm. See also Hoekman, Bernard & Mavroidis, Petros C (1994) "Competition, Competition Policy and the GATT," CEPR Discussion Papers 876, C.E.P.R. Discussion Papers.

1974, the General Assembly adopted the Declaration and the Programme of Action on the Establishment of a NIEO.[145] Included within the programme of action is Section V. Regulation and Control Over the Activities of Transnational Corporations which, amongst other provisions, calls for the formulation, adoption, and implementation of an international code of conduct for transnational corporations to regulate their activities in host countries and to eliminate restrictive business practices.

B. Draft United Nations Code of Conduct on Transnational Corporations (Code of Conduct)

Also in 1974, the Department of Economic and Social Affairs, published the report of the Group of Eminent Persons to Study the Impact of Multinational Corporations on Development and on International Relations.[146]

Two prominent leaders of the global consumer movement contributed to the report. Ralph Nader, who over the course of seven decades has been corporate America's fiercest critic and described by Supreme Court Justice William Powell as the single most effective antagonist of American business[147] gave evidence to the United Nations panel. Also giving evidence to the United Nations panel, was Peter Goldman, then Director of Consumers International and a former chief executive of the Consumers Association, publisher of "Which?" Magazine in the United Kingdom.

The preparation of the Code of Conduct was a task assigned to a special United Nations Commission on Transnational Corporations in 1975. Over the next decade, the Commission met frequently (on 20 occasions between 1975 and 1994) attempting to develop an instrument which might address and check the economic power, political influence, and corrupt actions of TNCs.

In 1978, the United Nations Conference on Restrictive Business Practices met to begin work on what became the Set and in December 1980, the United Nations General Assembly adopted the Set and established the Intergovernmental Group of Experts on Restrictive Business Practices to undertake reviews every five years.[148]

In 1983, the Commission on Transnational Corporations (established by the United Nations Economic and Social Council) released a new version of the Code of Conduct. The subject matter of the draft Code of Conduct dealt with matters such as respect of national sovereignty and observance of domestic laws, regulations and administrative practices, adherence to economic goals and development objectives, policies and priorities, and adherence to social cultural objectives and values and respect for human rights and fundamental freedoms.[149]

Work on the Code of Conduct was just one of many initiatives seeking multilateral controls on the activities of TNCs, as other international instruments such as

[145] General Assembly 3201(S-VI) and 3202 (S-VI) of 1 May 1974, containing the Declaration and the Programme of Action on the Establishment of a New International Economic Order, 3281 (XXIX) of 12 December 1974, containing the Charter of Economic Rights and Duties of States, and 3362 (S-VII) of 16 September 1975 on development and international economic-operation.

[146] United Nations New York E/5500/Rev.1, ST/ESA/6.

[147] See https://nader.org/ for a comprehensive account of 70 years of activists campaigning by this living legend of the consumer movement.

[148] The text of the resolution can be found at Resolution 35/63, adopted by the United Nations General Assembly at its thirty-fifth session, on 5 December 1980. Available at: https://unctad.org/system/files/official-document/tdrbpconf10r2.en.pdf.

[149] Paragraph 35 of the 1983 draft relates to competition and restrictive business practices and provided: "To this Code of Conduct, the relevant provisions of the Set, adopted by the United Nations General Assembly in its resolution 35/63 of 5 December 1980, shall/should also apply in the field of restrictive business practices".

the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, agreed upon in the International Labour Organization (ILO)[150]; and the Declaration on International Investment and Multinational Enterprises, agreed upon in the Organisation for Economic Co-operation and Development (OECD)[151] were adopted during this period of time.

Throughout the negotiations for the Code of Conduct, unions and consumer organisations were frequent interlocutors.

By 1991, it appeared that there was a consensus around the adoption of the Code of Conduct, albeit as a voluntary instrument. here remained wide support for the development of an international instrument to deal with the overseas activities on TNCs.

II. Competition policy and the WTO built-in agenda

The Uruguay round of trade talks which led to the establishment of the WTO in January 1995, provided the next opportunity for the development and implementation of international competition mechanisms (as opposed to the more policy-oriented status of the Set). As economies implemented trade reforms by reducing tariffs and trade-damaging subsidies, it became apparent that national and international anti-competitive agreements were retarding international development by frustrating international trade and forcing higher prices and lower levels of quality and performance on consumers. This particularly affected consumers in developing economies.

Written into the operating mandate of the WTO was a commitment to examine competition policy at the 1996 ministerial meeting to be held in Singapore.[152]

Scheduled for discussion at the 1996 Singapore Ministerial Conference, a working group was established to consider how the WTO might proceed in this area.[153] In the period up to the 2004 Ministerial Conference, the working group focused on clarifying: i) core principles including transparency, non-discrimination and procedural fairness, and provisions on "hardcore" cartels (i.e. cartels that are formally set up); ii) ways of handling voluntary cooperation on competition policy among WTO member governments; and iii) support for progressive reinforcement of competition institutions in developing countries through capacity building.

The declaration stated the work must take full account of developmental needs. It includes technical cooperation and capacity building, on such topics as policy analysis and development, so that developing countries are better placed to evaluate the implications of closer multilateral cooperation for various developmental objectives. Cooperation with other organizations such as UNCTAD was also included. The next Ministerial Conference was scheduled for Doha, Qatar, where in November 2001 WTO agreed to launch new negotiations and to

[150] https://www.ilo.org/publications/tripartite-declaration-principles-concerning-multinational-enterprises-and-3.
[151] https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0144.
[152] In 1990, CI (then known as the International Organization of Consumers Unions), led by the United Kingdom Consumers Association, advocated for the inclusion of competition or antitrust provisions in the WTO framework to ensure that the benefits of international trade were not undermined by anti-competitive practices, promoting fair competition, and protecting consumer interests. The IOCU paper titled "Lost Thread" highlighting the interconnectedness of trade, competition policy, and consumer welfare, underscored the idea that competition should be an invisible thread weaving through the fabric of international trade, influencing market dynamics, and shaping economic outcomes, was an important contribution to the debate. See LOST THREAD - Consumers and Competition in International Trade. A discussion paper from the International Organization of Consumers Unions, July 1991, available at: https://fairerfuture.au/wp-content/uploads/2024/02/1991-Lost-Thread.pdf.
[153] https://www.wto.org/english/tratop_e/comp_e/comp_e.htm.

work on other issues, including competition policy.[154]

The declaration in August 2004 from the General Council of the WTO (Cancun Ministerial meeting), in relation to interaction between trade and competition stated that this will not form any part of the future agenda. And therefore, no work towards negotiations on any of these issues will take place within the WTO.

Incorporating competition principles into the WTO system would create a more comprehensive and cohesive international economic framework. The inclusion of competition policy provisions would contribute to preventing anti-competitive practices that could distort global markets. It would foster fair competition, provide a mechanism to address monopolistic behaviour, and ultimately promote a more equitable distribution of the benefits of international trade. And the WTO could contribute to a global economy where consumers are better served, businesses can thrive through fair competition, and developing nations can participate on a more level playing field.

As the international community continues to grapple with evolving challenges in the world of trade, these principles remain an integral part of the ongoing discourse surrounding the future of global economic governance. Furthermore, incorporation of rules to reduce or eliminate restrictive business practices, based on provisions of The Set provides the best near-term opportunity for stepping up the implementation of the Set.

III. Conclusion - the benefits of the Set for developing countries

After four decades of the Set's implementation, a few conclusions can be drawn.

The Set provides a common framework and language for cooperation and dialogue among competition authorities, especially in cross-border cases that affect developing countries' markets. It recognizes the special needs and challenges of developing countries in implementing and enforcing competition law and policy and provides flexibility and policy space for them to pursue their development objectives. It facilitates the exchange of information, experiences, and best practices among competition authorities, as well as the provision of technical assistance and capacity-building by UNCTAD and other international organizations. It promotes the harmonization and convergence of competition laws and policies, as well as the development of regional and bilateral cooperation agreements, among developing countries and between developing and developed countries. And it contributes to the promotion of consumer welfare, economic efficiency, innovation, and development in developing countries by addressing the harmful effects of anti-competitive practices on their markets and consumers.

The Set has also influenced the adoption and implementation of competition laws and policies by developing countries in various ways, encouraging the establishment and

[154] Doha Development Agenda declaration paragraphs 23 to 25. Paragraph 23 states " Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations".

strengthening of competition authorities and institutions in developing countries, as well as the development of human and institutional capacities for effective enforcement and advocacy of competition law and policy. It has fostered the participation and involvement of developing countries in the global dialogue and cooperation on competition issues, as well as the integration of competition policy into the broader development agenda and the multilateral trading system.

In conclusion, the Set has played a significant role in the development and evolution of competition law and policy in developing countries over the past four decades. It has provided a common framework and a set of principles and rules that have guided and supported the efforts of developing countries to adopt and implement competition law and policy in accordance with their specific needs and circumstances.

Assessing the global influence of the United Nations Set of Principles and Rules on Competition


BHOUTAN
COORDONNATEUR PMA
HONDURAS
LUXEMBOURG
NAMIBIE
CHINE
PEROU

The United Nations' efforts contributed to shaping a landscape where fair competition not only stimulates economic growth but also aligns with broader goals of sustainability and inclusivity for a more equitable and competitive global marketplace, emphasising the importance of collaborative international efforts.

I. Introduction to the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (Set)

In 1980, the United Nations Conference on Restrictive Business Practices formally endorsed the Set as a resolution, thereby establishing United Nations principles in this regard.[155]

But, over a period of time, it was observed that development priorities among developing countries started differing. This change of priorities also made some countries shift from inward-looking growth strategies to outward ones.

This paradigm shift had a natural impact on their relationship with transnational companies and the governments of their home countries. Furthermore, it also impacted their outlook towards competition concerns. Some of these countries in fact relegated competition principles to the background with the aim of building globally competitive industries. For example, even in countries where there is a strong competition regime, export cartels are exempted from the jurisdiction of their competition laws.[156]

These changes in the perception of countries affected the pace and quality of negotiations vis-à-vis the Set. Though not legally binding, the Set stands as the sole multilateral agreement addressing competition issues to date. It lists restrictive business practices that need to be prohibited, recommends a framework for developing countries to adopt; and gives a call for technical cooperation in the area of development of instruments to foster competition.

The Set is timely and periodically reviewed by the United Nations Conference to Review All Aspects of the Set (Review Conference) every five years since 1980. Following its adoption in 1980, the United Nations has organised four Review Conferences under UNCTAD's auspices in 1985, 1990, 1995, and 2000.[157] The Fourth Review Conference in September 2000 reaffirmed the Set's validity, recommended referring to it as the "UN Set of Principles and Rules on Competition," and urged member States to implement its provisions. This iterative review process underscores the ongoing commitment to promoting equitable principles and rules in controlling restrictive business practices on a global scale.

Eight such review conferences have been held since 1980, with the latest in 2020, focusing on the principles of the Set. These principles aim to ensure that obstructive business practices do not hinder the benefits of liberalising global trade, particularly affecting developing nations. The objectives include enhancing efficiency in

[155] "The United Nations Set Of Principles And Rules On Competition". Available at: https://unctad.org/system/files/official-document/tdrbpconf10r2.en.pdf.
[156] CUTS Centre for International Trade, Economics & Environment (1999) Analyses of the Interaction Between Trade and Competition Policy.
[157] Supra note 155.

international trade and development, aligning with national goals, promoting competition, regulating economic power concentration, fostering innovation, safeguarding social welfare and consumer interests, eliminating trade disadvantages from transnational corporations, and providing internationally agreed-upon rules to regulate business practices, facilitating the adoption of laws at national and regional levels.[158]

Certain specific segments of the principles warrant special attention, as they foster international collaboration concerning competition law and policy matters. Additionally, the document outlines an international institutional framework designed to support the implementation of the specified principles. These have been broadly covered in the sections F and G of the Set.[159]

Sections F and G of the Set focus on international collaboration in competition law and policy. Section F emphasises global cooperation, urging the adoption of national policies aligning with Set principles and promoting increased consultations among member States. It underscores UNCTAD's role as a facilitator, refining model laws related to RBPs and offering support to developing nations in creating appropriate legal frameworks. UNCTAD provides crucial assistance through technical support, advisory services, and training programmes in the field of RBPs.[160]

Section G establishes the institutional framework for implementing the Set through the Intergovernmental Group of Experts (IGE) on Competition Law and Policy within UNCTAD. The IGE serves as a forum for consultations among competition policy experts, lacking judicial powers. It holds review conferences every five years to assess the principles' validity. Section C.(iii) addresses preferential treatment for developing countries, suggesting tailored national and regional competition rules to accommodate diverse levels of development among countries and regional groups.[161]

II. Scenario across the world

The global landscape has witnessed an increasing emphasis on promoting competition as a driving force for economic development, with countries worldwide adopting trade and economic liberalisation policies. Australia, for instance, has implemented a National Competition Policy to address anti-competitive outcomes and enhance resource utilisation. Various motives drive countries to adopt competition policies, such as countering high concentration levels in the production or trade sector. The United States, Canada, India, and Pakistan, for instance, introduced competition laws to address this issue.[162]

In the process of privatisation, competition authorities play a crucial role in preventing monopolistic situations. However, not all countries have systematically integrated competition and regulatory frameworks before liberalisation. For instance, India implemented regulatory reforms after opening up its economy, resulting in delayed modernisation of competition laws. Commitments under free trade agreements have also prompted countries like Guatemala and Singapore to adopt competition laws.

While some countries, like the Netherlands, have granted independence to their competition authorities much after their introduction, others, including developing nations, often house them within government ministries. For example, Kenya's

158 Ibid.
159 Ibid.
160 Ibid.
161 Ibid.
162 Ibid.

first competition authority, the Monopolies Prices Commission was housed within the Finance Ministry. However, once a new competition law was adopted in 2010, it was housed in an independent agency: the Competition Authority of Kenya.

There are many such countries that moved from an old control regime to a regulatory regime when adopting new laws. However, implementation challenges persist, particularly in developing countries, due to political economy issues, corruption, and business opposition. Graduated implementation, as seen in the United Kingdom, India, Kenya, Singapore, and Taiwan Province of China involves a phased approach, addressing societal awareness, anti-competitive practices, and structural issues over successive years. Understanding the evolutionary stages of competition law implementation provides a basis for cross-country comparisons.[163]

III. Challenges in the implementation of the Set

UNCTAD, as part of its work on trade and development, has guided competition policy to member States. It emphasises the importance of effective competition policy in fostering economic development, ensuring consumer welfare, and promoting fair and open markets. The level of global adoption and acceptance of UNCTAD's recommendations on competition policy may vary among countries. Many developed and developing nations have embraced principles of competition to varying degrees in their legal and regulatory frameworks. Some of the challenges faced by developing countries in implementing the Set include the following:

(1) Limited Institutional Capacity: Many developing countries may lack the necessary institutions and expertise to effectively implement and enforce competition laws. Establishing and strengthening competition authorities requires skilled personnel, technical resources, and financial support.[164]

(2) Legal and Regulatory Frameworks: Developing countries may need to update or create legal frameworks that align with international competition standards. This includes defining and addressing anticompetitive practices, mergers and acquisitions, and other aspects of competition policy.

(3) Resource Constraints: Limited financial resources can impede the effective implementation of competition policies. This includes funding for training, investigations, and legal proceedings. Competition authorities may struggle to compete for resources with other government priorities.[165]

(4) Lack of Awareness and Education: Stakeholders, including businesses, consumers, and policymakers, may lack awareness and understanding of the benefits of competition and the importance of competition policies. Education and awareness campaigns are crucial to garner support and compliance.

(5) Political Will and Governance: The political will to enforce competition policies and withstand pressure from powerful interest groups can be challenging. In some cases, there may be resistance to implementing policies that could disrupt existing economic structures.

[163] Ibid.
[164] The United Nations set of principles on competition (The Set). Available at: https://unctad.org/topic/competition-and-consumer-protection/the-united-nations-set-of-principles-on-competition.
[165] Ibid.

(6) Coordination Challenges: Coordinating efforts among various government agencies, such as those responsible for trade, finance, and industry, can be challenging. Effective competition policy often requires collaboration across different sectors.[166]

(7) Economic Informality: In many developing economies, a significant portion of economic activities occurs in the informal sector. Informal markets and businesses may operate outside the reach of formal competition regulations, making enforcement difficult.

(8) Globalisation and International Trade: Developing countries engaged in international trade may face challenges in dealing with anti-competitive practices that extend beyond their borders. Coordinating efforts with other countries and international bodies becomes crucial.

(9) Technical Assistance Needs: Developing countries may require technical assistance and capacity-building support to design, implement, and enforce effective competition policies. Assistance from international organisations and more developed countries can be instrumental in this regard.

(10) Adaptation to Local Contexts: While international principles provide a foundation, it is essential for developing countries to adapt these principles to their specific economic, social, and cultural contexts. A one-size-fits-all approach may not be effective.

Addressing these challenges often involves a combination of domestic reforms, international cooperation, and targeted assistance. The United Nations, UNCTAD and other international organisations, as well as civil society organisations like Consumer Unity & Trust Society (CUTS) International, play a role in providing technical assistance and guidance to support developing countries in overcoming these challenges.

IV. Role of stakeholders

Governments play a pivotal role in advancing and upholding United Nations principles on competition within their national boundaries. These principles are designed to cultivate fair and open markets, prevent anti-competitive practices, and stimulate economic development. Governments employ various strategies to champion the Set's principles on competition, encompassing legislation, institutional frameworks, public awareness initiatives, policy coordination, enforcement mechanisms, international cooperation, periodic review processes, and support for small and medium-sized enterprises (SMEs).

(1) Legislation and Regulation: Governments must establish comprehensive competition laws that align with international best practices and the Set's principles. This involves the development and implementation of regulatory frameworks addressing key aspects of competition policy, such as antitrust regulations, rules governing mergers and acquisitions, and measures ensuring consumer protection.

(2) Institutional Framework: Creating independent and effective competition authorities is crucial for enforcing competition laws. Governments need to invest in building the institutional capacity of these authorities through training initiatives, recruiting skilled personnel, and providing the necessary resources to carry out their mandates effectively.

(3) Public Awareness and Education: To ensure widespread compliance and understanding, governments engage in public awareness campaigns aimed at educating businesses, consumers, and other stakeholders about the significance of competition and the

[166] Ibid.

advantages of fair market practices. Training programmes targeting government officials, businesses, and legal professionals enhance comprehension of competition laws and regulations.[167]

(4) Policy Coordination: Encouraging inter-agency cooperation among different government entities involved in economic policy, trade, industry, and finance is vital. This coordination ensures a coherent and unified approach to competition issues. Furthermore, integrating competition principles into broader economic policies contributes to the creation of a business environment that fosters healthy competition.

(5) Enforcement and Compliance: Governments play a critical role in enforcing competition laws through investigations and, when necessary, imposing sanctions on entities engaging in anti-competitive practices. Encouraging businesses to adopt compliance programmes further ensures adherence to competition laws and ethical business practices.[168]

(6) International Cooperation: Engaging in bilateral and multilateral agreements facilitates international cooperation in addressing cross-border competition issues. Actively participating in international forums and organisations, such as the International Competition Network (ICN) and UNCTAD, allows governments to share experiences and best practices in the field of competition policy.

(7) Support for SMEs: Developing inclusive policies that consider the needs of small businesses and promote fair competition is crucial. Ensuring that SMEs have access to information and resources to navigate the regulatory landscape and comply with competition laws contributes to a level playing field for businesses of all sizes.

Non-governmental organisations (NGOs) can also play a pivotal role in promoting competition. NGOs can provide analysis, and expertise, and serve as early warning mechanisms to help monitor and implement international agreements.[169] NGOs can also foster treaties and promote the exchange of best practices.[170]

UNCTAD works closely with non-governmental organisations to promote globalisation that fosters development and facilitates the effective integration of developing nations into the global economy and thus promotes competition. It collaborates with partners from non-governmental organisations, academia, trade unions, parliamentary groups, and business associations.

Civil society organisations are integral, as they regularly contribute their expertise at UNCTAD events and briefings, and serve as observers at intergovernmental meetings and quadrennial UNCTAD conferences.

Commemorating the approval of the Set, CUTS International has launched the 5th of December as World Competition Day. This day was chosen because it was on this day in 1980 when the Set was adopted by the United Nations General Assembly. Several developing countries are now using the Day to create awareness about competition in their countries. Following this, the Philippines has declared 5th December as National Competition Day.[171]

[167] The UN Guiding Principles on Business And Human Rights. Available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf.
[168] Ibid.
[169] The Effectiveness of Non-Governmental Organisations (NGOs) within Civil Society. Available at: https://fisherpub.sjf.edu/cgi/viewcontent.cgi?article=1074&context=intlstudies_masters.
[170] Nongovernmental Organisations and International Law. Available at: https://www.jstor.org/stable/3651151.
[171] International Network of Civil Society Organisation on Competition. See https://incsoc.net/.

V. Future implications and recommendations

The Review Conference serves as the highest-level gathering on global competition and consumer protection, welcoming participation from developed and developing nations, including least developed countries. The 2020 conference focused on critical issues such as implementing the Set, reinforcing consumer protection in the digital economy, international cooperation in competition enforcement, and the voluntary peer review of the West African Economic and Monetary Union. It traditionally offers guidance to UNCTAD on future work programmes, emphasising technical assistance and capacity-building for developing and transitional economies.[172]

To strengthen and expand the impact of the Set, the following suggestions can be considered:

(1) Increase awareness and outreach: Promote the Set to a wider audience, including policymakers, competition authorities, and the general public. This can be achieved through workshops, seminars, and online resources. Furthermore, to get the UNGA to adopt 5th December as the World Competition Day as a recognised international day in the calendar of days.

(2) Enhance international cooperation: Encourage more countries to adopt and implement the Set. This can be facilitated through capacity-building and technical assistance programmes, as well as the exchange of best practices among member States. Furthermore, to be able to engage on cross border abuses by firms through active cooperation among competition authorities. Developing countries do suffer from international cartels and other anticompetitive practices, especially from the Global North.

(3) Focus on specific sectors: Identify sectors where competition issues are particularly prevalent or where the impact of competition policy is most significant. Develop targeted initiatives and guidelines to address these issues and promote competition in these sectors.[173]

(4) Monitor and evaluate progress: Regularly review and assess the implementation of the Set. This can help identify areas for improvement and ensure that the principles remain relevant and effective in addressing competition issues.

(5) Promote research and innovation: Encourage research on competition issues and the development of innovative solutions. This can be facilitated through partnerships with academic institutions, think tanks, and other relevant organisations.[174]

In conclusion, the impact of the Set is undeniably significant, reflecting a global commitment to fostering fair and competitive market environments. These principles serve as a guiding force, influencing the formulation and revision of competition laws across nations. As we navigate an increasingly interconnected world, the United Nation's efforts contribute to shaping a landscape where fair competition not only stimulates economic growth but also aligns with broader goals of sustainability and inclusivity. The shared commitment to these principles paves the way for a more equitable and competitive global marketplace, emphasising the importance of collaborative international efforts in shaping the future of competition regulation.

[172] Eighth United Nations Conference on Competition and Consumer Protection. Available at: https://unctad.org/meeting/eighth-united-nations-conference-competition-and-consumer-protection.
[173] United Nations guidelines for consumer protection. Available at: https://unctad.org/topic/competition-and-consumer-protection/un-guidelines-for-consumer-protection.
[174] Ibid.

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