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**The Role of GAL Standards in Juris-generative  
Interactions between Global Antitrust Institutions in  
the light of the *Mexico – Telecoms case***

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# **The Role of GAL Standards in Juris-generative Interactions between Global Antitrust Institutions in the light of the *Mexico – Telecoms* case**

*Amedeo Arena*<sup>1</sup>

## **Abstract**

Against the background of the asymmetric mandates of Global Antitrust Institutions (GAIs), this paper explores the potential for juris-generative interactions in the form of legal transplants of antitrust rules and principles from the OECD, the UNCTAD, and the ICN to the WTO through the gateway of dispute settlement. Relying on the WTO panel report in *Mexico – Telecoms* as a case-study, this work highlights the uneven level of compliance with GAL due process and institutional performance standards by the donors and the recipient of such legal transplants and investigates the optimal conditions for juris-generative interactions between GAIs.

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

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## 1. Introduction

As noted by Benedict Kingsbury, Nico Krisch, and Dick Stewart, interactions between international institutions account for a substantial part of the rules generated by those institutions<sup>2</sup> and those rules, in turn, often have a significant impact on domestic administrative practices.<sup>3</sup> Drawing upon Benedict Kingsbury and Lorenzo Casini's intuition that relations between global actors can be usefully analyzed in terms of inter-public law,<sup>4</sup> this paper seeks to examine the role of certain GAL norms and standards in shaping the juris-generative interactions between four Global Antitrust Institutions (GAIs): the WTO, the OECD, the UNCTAD, and the ICN.<sup>5</sup>

To this end, this paper will first examine those GAIs and their individual mandate in the antitrust domain. Second, this paper will explore the potential for juris-generative interactions between those GAIs in the light of the *Mexico – Telecoms* case,<sup>6</sup> where a WTO panel relied on OECD and UN soft-law documents to flesh out the prohibition on “anticompetitive practices” set out in Mexico's schedule of commitments under the GATS. This work will then turn to the role that GAL standards may play in legal transplants of that sort.<sup>7</sup> In particular, regard

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<sup>2</sup> See B. Kingsbury, N. Krisch and R.B. Stewart, *The Emergence of Global Administrative Law* (2005), available at <[www.iilj.org/global\\_adlaw](http://www.iilj.org/global_adlaw)>, 25-26. On the subject of inter-institutional relations, see also the papers discussed at the 9th Viterbo GAL Seminar “Inter-institutional relations in Global Law and Governance”, available at <[www.irpa.eu/ix-viterbo-gal-seminar-2013-papers/](http://www.irpa.eu/ix-viterbo-gal-seminar-2013-papers/)>. For earlier treatments of the so-called horizontal dimension of GAL, see, e.g., Georgios Dimitropoulos, “Holding National Administrations Accountable through Peer Review: The FATF Case”, in S. Cassese, B. Carotti, L. Casni, M. Macchia, E. MacDonald, M. Savino (eds), *Global Administrative Law: Cases, Materials, Issues* (3rd ed., 2012); Id. *Collegial Rule-Implementation: Peer Reviews in Global Administrative Law*, available at <[ssrn.com/abstract=2169983](http://ssrn.com/abstract=2169983)>; Id., *Global Administrative Law as “Enabling Law”: How to Monitor and Evaluate Indicator-Based Performance of Global Actors*, IRPA Working Paper – GAL Series No. 7/2012.

<sup>3</sup> See G. Tesaurò, “Riforma della regolazione e concorrenza: esiste un consenso politico?”, 37 *Rassegna Forense* (2004) p. 39 (discussing pro-competitive policy reform and the elimination of regulatory barriers to competition in the light of OECD studies).

<sup>4</sup> See B. Kingsbury and L. Casini, *Global Administrative Law Dimensions of International Organizations Law*, IILJ Working Paper 2009/9, pp. 20-24.

<sup>5</sup> See, generally, D. Sokol, “International Antitrust Institutions” in A.T. Guzman (ed), *Cooperation, Comity and Competition Policy* (Oxford University Press, Oxford, 2011) p. 187. For a global overview and analysis of international and transnational competition networks, see I. Maher and A. Papadopoulos, “Competition agency networks around the world”, in Ezrachi (ed), *International Research Handbook on Competition Law* (Edward Elgar, Cheltenham, 2012), p. 60.

<sup>6</sup> Panel Report, *Mexico – Measures Affecting Telecommunications Services*, T/DS204/R, adopted 1 June 2004 (hereafter: “Panel Report, *Mexico – Telecoms*”). Mexico did not appeal. See WT/DS204/9/Add.8, acknowledged 19 August 2005.

<sup>7</sup> For the purpose of this paper, the GAL standards surveyed are essentially those analysed in E.M. Fox and M.J. Trebilcock, “Introduction: the GAL Competition Project: the Global Convergence of Process Norms”, in E.M. Fox and M. J. Trebilcock, *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford University Press, 2013), pp. 7-9.

will be had to compliance with GAL norms by the potential donors (the OECD, the UNCTAND, and the ICN) and recipient (the WTO) of antitrust rules and principles. Finally, this paper will investigate the optimal conditions for juris-generative interactions between GAIs.

Before engaging in the analysis outlined above, a definitional note is in order: the “GAL standards” or “GAL norms” surveyed in this paper are essentially those employed in the NYU-University of Toronto “GAL Competition Project”, to wit due process (*e.g.*, opportunity to be heard, full notice of allegations, independence of decision-makers, right to appeal, rules of evidence, etc.) and institutional performance norms (timeliness of dispositions, expertise of decision-makers, effectiveness of sanctions, predictability in the application of the law, transparency, accountability, etc.).<sup>8</sup> Those principles have been extensively studied in GAL literature. Benedict Kingsbury, Nico Krisch, and Dick Stewart referred to some of them as “emerging principles” of GAL.<sup>9</sup> Daniel Etsy included a number of those standards in his “Global Administrative Law Toolbox”.<sup>10</sup> Benedict Kingsbury and Lorenzo Casini employed some of those principles in their study on GAL and international organizations.<sup>11</sup>

## 2. GAIs and their Antitrust Mandate

### 2.1. *The WTO*

The WTO is the only GAI having case-by-case decision-making and enforcement powers. The WTO does not rely on an antitrust agency or authority for the exercise of those powers, but rather on a private enforcement model. It is for each WTO member to monitor compliance by other members with WTO rules and, upon detection of a violation that harms that member’s commercial interests, to invoke the dispute resolution mechanism governed by the Dispute Settlement Understanding (DSU).<sup>12</sup> If a report establishes that a member has infringed a provision of a WTO agreement, it is for the winning WTO member to activate the

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<sup>8</sup> E.M. Fox and M.J. Trebilcock, “Introduction: the GAL Competition Project: the Global Convergence of Process Norms”, in E.M. Fox and M.J. Trebilcock, *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford University Press, 2013), pp. 7-9 (discussing due process and institutional performance norms in the context of antitrust enforcement), pp. 47-48 (setting out a template of the norms analyzed in the study).

<sup>9</sup> B. Kingsbury, N. Krisch and R.B. Stewart, “The Emergence of Global Administrative Law”, 68 *Law & Contemporary Problems* (2005) p. 15, pp. 37-39.

<sup>10</sup> D. Etsy, “Good Governance at the Supranational Scale: Globalizing Administrative Law”, 115 *Yale Law Journal* (2006) p. 1490, pp. 1523-1542.

<sup>11</sup> B. Kingsbury and L. Casini, *Global Administrative Law Dimensions of International Organizations Law*, IILJ Working Paper 2009/9.

<sup>12</sup> For reasons of space, this paper will not address non-violation complaints and situation complaints, although they did contribute to the development of WTO’s antitrust jurisprudence. See C.-D. Ehlermann and L. Ehrling, “WTO Dispute Settlement and Competition Law: views from the Perspective of the Appellate Body’s Experience”, 26 *Fordham International Law Journal*, (2003), p. 1505, pp. 1554-1560.

enforcement procedures set out in the DSU to ensure that the offending member ultimately brings its conduct into line with WTO law.

The WTO has no general antitrust competence, as that organization's main focus is to lower trade barriers erected by states, rather than by companies. However, several provisions in the WTO agreements deal directly or indirectly with private anticompetitive conduct. Those provisions can be divided into three groups:<sup>13</sup> i) *negative provisions*, which require WTO members to prevent firms from engaging in specific anticompetitive conducts; ii) *positive provisions*, which require WTO members to ensure that companies carry out specific pro-competitive behaviour; iii) *enabling provisions*, which highlight certain potentially anti-competitive practices and allow WTO members to adopt measures to address them.

### 2.1.1. Negative provisions

According to Article XI GATT, WTO members must not institute or maintain import and export cartels.<sup>14</sup> In *China - Exportation of Raw Materials*, the panel ruled that under that provision WTO members are also prohibited from imposing export cartels under the guise of a "system of self-discipline" based on "informal statements and oral agreements between traders and export regulators".<sup>15</sup> The prohibition set out in Article XI:1 GATT, possibly, also implies that state-owned or controlled firms may not be party to import or export cartels.<sup>16</sup>

Article VIII GATS requires each WTO member to ensure that its monopoly or exclusive service suppliers do not act in a manner inconsistent with that member's

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<sup>13</sup> Cf. A. Alvarez-Jiménez, "Merging WTO Competition Jurisprudence and its Possibilities for Future Development", 24 *Northwestern Journal of International Law & Business* (2004) p. 441, pp. 488-492 (suggesting a tripartite classification of WTO antitrust provisions encompassing (i) pro-competition provisions, (ii) mandatory anti-restrictive business practices precepts, and (iii) exhortatory anti-restrictive business practices norms).

<sup>14</sup> See Article XI GATT ("No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product on the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party") (Emphasis added).

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

<sup>16</sup> See GATT Annex I, *Ad Articles XI, XII, XIII, XIV and XVIII* ("Throughout Articles XI, XII, XIII, XIV, and XVIII, the terms "import restrictions" or "export restrictions" include restrictions made effective through state-trading operations.")

specific commitments and MFN obligations both inside the scope of their monopoly rights, and, through abuse of their monopoly position, outside that ambit. Section 1(1) of the Telecommunications Reference Paper requires the scheduling WTO member to prevent its major suppliers from engaging in “anticompetitive practices” such as those listed in paragraph 2 thereof.<sup>17</sup> As it will be discussed in further detail below, the panel in *Mexico–Telecoms* clarified that the list is not exclusive<sup>18</sup> and also that anticompetitive horizontal agreements fall within the ban.<sup>19</sup>

Article 8.1, second sentence, of the TBT Agreement prohibits WTO members from taking measures that require or encourage non-governmental bodies operating conformity assessment procedures to act in a manner inconsistent with the principle of national treatment *vis-à-vis* foreign products, the obligation that technical regulations must not be more trade restrictive than necessary, and the aim to promote mutual recognition of technical regulations.<sup>20</sup> The assumption underlying that provision is that associations involving traders of a certain country may have incentives to discriminate against imported products.<sup>21</sup>

Article 11.1(b) of the Agreement on Safeguards stipulates: “a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side.”<sup>22</sup> The direct ban on anticompetitive governmental action laid down in Article 11.1(b) of the Agreement on Safeguards is backed by an anti-circumvention provision, set out in Article 11.3, requiring WTO Members not to “encourage or support the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to” the ones above. The purpose of those provisions of the Agreement on Safeguards is to prohibit agreements between an exporting country and an importing one to restrict cross-border trade of a given product (voluntary export restraints).

### 2.1.2. Positive provisions

Article XVII:1 GATT requires WTO members to ensure that their State Trading Enterprises (STEs), in their purchases or sales involving either imports or exports,

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<sup>17</sup> See Section 1(2) of the Reference Paper (referring to anticompetitive cross-subsidization, use of information obtained from competitors with anticompetitive results, and not making available to other services suppliers technical information about essential facilities and commercially relevant information which are necessary for them to provide services).

<sup>18</sup> See Panel Report, *Mexico–Telecoms*, para. 7.232 (noting that the list in Section 1(2) of the Reference Paper only includes the most relevant unilateral practices to the telecommunications sector).

<sup>19</sup> *Ibid.*, para. 7.234

<sup>20</sup> See M. Matsushita, T.J. Schoenbaum and P.C. Mavroidis, *The World Trade Organization: law, practice, and policy* (Oxford University Press, Oxford, 2006), p. 546.

<sup>21</sup> See, e.g., *National Macaroni Manufacturers Ass’n v. FTC*, 345 F.2d 421 (7th Cir. 1965); *United States v. Automobile Mfrs. Ass’n, Inc.*, 307 F. Supp. 617, 1969 Trade Cas. (CCH) para. 721, 907 (C.D. Cal. 1969).

<sup>22</sup> Footnote 4 to that provision provides examples of similar measures: “export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection.”

act in a manner consistent with the general principles of non-discriminatory treatment and, in particular, that STEs make such purchases or sales “solely in accordance with commercial considerations”. The Appellate Body in *Canada – Wheat* clarified that that provision seeks to prevent certain types of discriminatory behaviour, not to impose “comprehensive competition-law-type obligations on STEs”.<sup>23</sup>

Section 5(a) of the GATS Annex on Telecommunications provides that each member must ensure that any telecom service supplier of any other member is accorded “access to and use” of public telecommunications transport networks and services on “reasonable”<sup>24</sup> and “non-discriminatory”<sup>25</sup> terms and conditions for the supply of a service included in that member’s schedule of commitment. Section 2(2) of the Telecoms Reference Paper requires each scheduling WTO member to ensure that its major suppliers enable interconnection under non-discriminatory terms, in a timely fashion at cost-oriented rates<sup>26</sup> (having regard to economic feasibility),<sup>27</sup> and upon request, at points in addition to the network termination points offered to the majority of users.

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

### 2.1.3. Enabling provisions

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

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<sup>23</sup> See Appellate Body Report, *Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/Appellate Body/R, adopted 30 August 2004, para. 145

<sup>24</sup> See Panel Report, *Mexico-Telecoms*, para. 7.334.

<sup>25</sup> “Non-discriminatory” is defined in footnote 15 of the Annex on Telecommunications.

<sup>26</sup> See Panel Report, *Mexico-Telecoms*, para. 7.177 (employing incremental cost methodologies to assess the “cost-oriented” requirement).

<sup>27</sup> *Ibid.*, para. 7.183 (interpreting “having regard to economic feasibility” as allowing the major supplier to derive a ‘reasonable rate of return’ from interconnection fees)

“other information available.”<sup>28</sup> The goal of this consultation process is to facilitate the provision of the necessary information to the investigating authorities or antitrust agencies of WTO Members in cross-border licensing cases involving anticompetitive restrictions. This consultation mechanism is “without prejudice to any action under the law and to the full freedom of an ultimate decision of either Member.” Article 40.4 complements the “offensive” consultation mechanism laid down in Article 40.3 with a “defensive” one, extending the right to request consultations to the WTO member where the respondent IPR holder resides.

Article 9 TRIMs sets out a negotiation mandate for the Council for Trade in Goods, which, within five years from the entry into force of the WTO Agreement, must review the operation of the TRIMs Agreement and may propose amendments to the Ministerial Conference amendments. In particular, the Council for Trade in Goods must “consider whether the Agreement should be complemented with provisions on investment policy and competition policy.” Pursuant to Article 9 TRIMs, the Council for Trade in Goods launched the review of the operation of the TRIMs Agreement in 1999.<sup>29</sup> Even though the review process has not yet resulted in the incorporation of competition policy provisions in the TRIMs Agreement, Article 9 is commonly regarded as evidence of the awareness by the framers of the close link existing between competition policy and the matters governed by the TRIMs Agreement.<sup>30</sup>

The WTO Agreement on Government Procurement does not contain provision addressing competition matters directly, but sets out a comprehensive set of rules on several aspects of tendering procedures. Those rules may contribute to prevent anticompetitive practices such as collusive tendering or bid-rigging,<sup>31</sup> which tend to occur more frequently in settings where competitive and transparent bidding procedures are not in place.<sup>32</sup>

## 2.2. *The OECD*

Established in 1961, the OECD is an intergovernmental organization based in Paris composed mainly of developed countries.<sup>33</sup> The OECD provides a forum for governments to compare policy experiences, seek solutions to common problems, devise good practice and coordinate their internal and external policies. The OECD has a Council comprised of a representative for each member nation and

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<sup>28</sup> See Article 40.3 TRIPS.

<sup>29</sup> Council for Trade in Goods, Minutes of the Meeting held in the Centre William Rappard on 15 October 1999, G/C/M/41, p. 10-11.

<sup>30</sup> See M. Matsushita, T.J. Schoenbaum and P.C. Mavroidis, *The World Trade Organization: law, practice, and policy* (Oxford University Press, Oxford, 2006), p. 550.

<sup>31</sup> See M. Trebilcock and R. Howse, *The Regulation of International Trade* (Routledge, London, 2005), p. 594.

<sup>32</sup> See B. Hoekman and P.C. Mavroidis, “Economic Development, Competition Policy and the World Trade Organization”, 37 *Journal of World Trade*, p. 1, pp. 16-17 (2003).

<sup>33</sup> See, generally, R.T. Kudrle, “Governing Economic Globalization: The Pioneering Experience of the OECD”, 46 *Journal of World Trade* (2012) p. 695.

the European Union. The OECD operates through Committees, which collect data, organize discussions, write research reports, conduct peer reviews, and issue publications that may culminate in agreements, standards and recommendations.

The OECD Competition Law and Policy Committee is the chief international forum on competition policy issues.<sup>34</sup> It brings together the top officials of the competition agencies and certain other policymakers, and observers from non-OECD countries. The Competition Committee prepares analytical papers, sector studies and policy recommendations, and provides support to governments seeking to improve their antitrust laws. The Competition Committee has achieved international credibility through the quality of its analysis and the balanced approach of its recommendations,<sup>35</sup> yet its limited membership has reduced scope for dissemination.<sup>36</sup>

The Committee has issued soft-law documents and submitted recommendations for adoption by the OECD Council on a broad range of antitrust and antitrust-related topics.<sup>37</sup> OECD instruments paved the way to international cooperation in the field of antitrust enforcement:<sup>38</sup> the 1995 Recommendation concerning cooperation between member countries on anticompetitive practices affecting international trade, for instance, has for a long time constituted the only basis for international enforcement cooperation. In a similar vein, the 1998 Recommendation concerning effective action against hard-core cartels urged competition authorities to review existing exemptions from the ban on cartels and called for transparency of any new exemptions.<sup>39</sup> The OECD anti-cartel initiative was complemented by the publication of Best practices for the formal exchange of information between competition authorities in hard-core cartel investigations.<sup>40</sup>

Having regard to the distinctive features of economic sectors subject to government regulation, the OECD issued a Recommendation on Competition Policy and Exempted or Regulated Sectors,<sup>41</sup> a Recommendation concerning Structural Separation in Regulated Industries,<sup>42</sup> and Guiding principles for regulatory quality and performance,<sup>43</sup> and a Recommendation on Regulatory Policy and Governance.<sup>44</sup> The OECD also adopted a recommendation and other

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<sup>34</sup> See J. Malinauskaite, "Harmonisation in Competition Law in the Context of Globalisation", 21 *European Business Law Review* (2010) p. 369, p. 383.

<sup>35</sup> See D. Sokol, "International Antitrust Institutions", in A.T. Guzman (ed), *Cooperation, Comity and Competition Policy* (Oxford University Press, Oxford, 2011) p. 198.

<sup>36</sup> See H.M. Hollman and W.E. Kovacic, "The ICN: Its Past, Current and Future Role", in P. Lugard, *The International Competition Network at Ten* (Intersentia, Cambridge, 2011) p. 63.

<sup>37</sup> See D.K. Tarullo, "Norms and Institutions in Global Competition Policy" 94 *American Journal of International Law* (2000), p. 478, p. 495.

<sup>38</sup> See P. Marsden, *A Competition Policy for the WTO* (Cameron May, 2003) pp. 51-52.

<sup>39</sup> See <[www.oecd.org/daf/competition/cartels/2350130.pdf](http://www.oecd.org/daf/competition/cartels/2350130.pdf)> See also OECD, *Hard Core Cartels: Third Report on the Implementation of the 1998 Council Recommendation* (2005), available at <[www.oecd.org/daf/competition/cartels/35863307.pdf](http://www.oecd.org/daf/competition/cartels/35863307.pdf)>

<sup>40</sup> See <[www.oecd.org/dataoecd/1/33/35590548.pdf](http://www.oecd.org/dataoecd/1/33/35590548.pdf)>

<sup>41</sup> See <[acts.oecd.org/Public/Info.aspx?lang=en&infoRef=C\(79\)155/FINAL](http://acts.oecd.org/Public/Info.aspx?lang=en&infoRef=C(79)155/FINAL)>

<sup>42</sup> See <[www.oecd.org/daf/competition/50119298.pdf](http://www.oecd.org/daf/competition/50119298.pdf)>

<sup>43</sup> See <[www.oecd.org/dataoecd/24/6/34976533.pdf](http://www.oecd.org/dataoecd/24/6/34976533.pdf)>

<sup>44</sup> See <[www.oecd.org/gov/regulatory-policy/49990817.pdf](http://www.oecd.org/gov/regulatory-policy/49990817.pdf)>

instruments to fight bid rigging.<sup>45</sup> In view of the paramount role of sound economic analysis for effective antitrust enforcement, moreover, the OECD adopted a Recommendation on competition assessment.<sup>46</sup>

### 2.3. *The UNCTAD*

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

UNCTAD is the depository of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices,<sup>47</sup> approved by the UN Conference on Restrictive Business Practices<sup>48</sup> and adopted by the United Nations General Assembly in 1980,<sup>49</sup> also known as the “UN Set of Principles and Rules on Competition”.<sup>50</sup>

The UN Set still constitutes the only multilaterally agreed set of principles governing competition matters.<sup>51</sup> It lays down equitable rules for the control of anti-competitive practices, recognizes the development dimension of competition law and policy, and provides a framework for international operation and exchange of best practices.<sup>52</sup> The UN Set covers horizontal restraints and suggests that vertical restraints be prohibited only when conducted by a dominant firm. As to abuse of a dominant position by a firm, the UN Set recommends a case-by-case

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<sup>45</sup> See OECD Recommendation on Fighting Bid Rigging in Public Procurement, 17 July 2012 - C(2012)115/CORR1; OECD Guidelines for combating bid rigging in public procurement <[www.oecd.org/daf/competition/cartels/42851044.pdf](http://www.oecd.org/daf/competition/cartels/42851044.pdf)>

<sup>46</sup> Recommendation of 22 October 2009 - C(2009)130. See also the OECD Competition Assessment Toolkit, available at <[www.oecd.org/daf/competition/assessment-toolkit.htm](http://www.oecd.org/daf/competition/assessment-toolkit.htm)>

<sup>47</sup> See UNCTAD, document TD/RBP/CONF/10/Rev.2, available at: <[www.unctad.org/en/docs/tdrbpconf10r2.en.pdf](http://www.unctad.org/en/docs/tdrbpconf10r2.en.pdf)>

<sup>48</sup> UN Conference on Restrictive Business Practices, Resolution of 22 April 1980.

<sup>49</sup> UN General Assembly, resolution no. 35/63 of 5 December 1980.

<sup>50</sup> See UNCTAD, Resolution of 4 October 2000, Review of all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (TD/RBP/CONF.5/15) (recommending the adopting of the above denomination).

<sup>51</sup> See <<http://r0.unctad.org/en/subsites/cpolicy/english/aboutus.htm>>

<sup>52</sup> See E.M. Fox and A. Arena, “The International Institutions of Competition Law”, in E.M. Fox and M.J. Trebilcock (eds) *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford University Press, Oxford, 2013), p. 480.

assessment in accordance with a “purpose and effects” test.<sup>53</sup> Each year, the Intergovernmental Group of Experts on Competition Law and Policy meets to monitor the application and implementation of the UN set.<sup>54</sup> The Sixth Review Conference, held in November 2010, marked the 30th anniversary of the adoption of the Set, and reaffirmed it.<sup>55</sup>

Furthermore, UNCTAD is the depository of the Model Law on Competition, which builds upon the UN Set and seeks to provide guidance to developing countries in drafting and improving their antitrust laws.<sup>56</sup> The Model Law consists of two parts: the first part, composed of thirteen chapters, lays down substantive possible elements for a competition law; the second part gathers commentaries on the chapters of the model law and discusses alternative approaches in existing legislation.<sup>57</sup>

#### 2.4. *The ICN*

The International Competition Network was founded in 2001. Unlike OECD, UNCTAD, and WTO, ICN is not an intergovernmental organization, but rather an informal venue where more than a hundred competition authorities can maintain regular contacts and address practical competition concerns, so as to build consensus and convergence towards sound competition policy principles across the global antitrust community.<sup>58</sup>

ICN is a virtual network with no secretariat, no premises, and no formal legal basis. Agenda setting is entrusted to the Steering Group, which currently comprises 15 members and three *ex officio* members. The *ex officio* members represent ICN members designated to host the ICN annual conference. Elected Steering Group members serve renewable two-year terms and are selected by consensus by the ICN membership.

ICN operates through a number of working groups, where volunteers – including non-governmental advisors – work together by Internet, telephone,

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<sup>53</sup> See I. Maher and A. Papadopoulos, “Competition agency networks around the world”, in Ezrachi (ed), *International Research Handbook on Competition Law* (Edward Elgar, Cheltenham, 2012), p. 70, footnote 28.

<sup>54</sup> See <[unctad.org/en/Pages/DITC/CompetitionLaw/Intergovernmental-Group-of-Experts-on-Competition-Law-and-Policy.aspx](http://unctad.org/en/Pages/DITC/CompetitionLaw/Intergovernmental-Group-of-Experts-on-Competition-Law-and-Policy.aspx)>

<sup>55</sup> See UNCTAD, Resolution “Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices”, TD/RBP/CONF.7/L.16 (2011). See also UNCTAD, Report of the Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, TD/RBP/CONF.7/11 (2011).

<sup>56</sup> See UNCTAD, Model Law on Competition, TD/RBP/CONF.7/8, available at <[unctad.org/en/Docs/tdrbpconf7d8\\_en.pdf](http://unctad.org/en/Docs/tdrbpconf7d8_en.pdf)>

<sup>57</sup> See, generally, C. Lee, “Model competition laws”, in P. Cook, R. Fabella and C. Lee, *Competitive Advantage and Competition Policy in Developing Countries* (Edward Elgar, Cheltenham, 2007) 29-53.

<sup>58</sup> See <[www.internationalcompetitionnetwork.org/about.aspx](http://www.internationalcompetitionnetwork.org/about.aspx)>

teleseminars and webinars to address practical competition concerns.<sup>59</sup> The Cartels Working group, for instance, has drafted a compilation of good practices for cartel enforcement<sup>60</sup> and several anti-cartel enforcement manuals.<sup>61</sup> The Merger Working group, in turn, has issued guiding principles for merger notification and review,<sup>62</sup> as well as recommended practices for merger analysis.<sup>63</sup>

The ICN does not seek to achieve any “top-down” harmonisation of competition law and does not adopt binding rules.<sup>64</sup> Where the ICN reaches consensus on recommendations or best practices, individual competition authorities decide whether and how to implement them through unilateral, bilateral, or multilateral arrangements. This flexibility has allowed ICN to significantly advance global convergence in antitrust matters. This success is also attributable to the fact that ICN is comprised of the competition law community, not the trade community to the non-binding character of its documents, which thus require no governmental oversight or authorisation.<sup>65</sup> Agreed standards, however, constitute soft international law and may thus influence the development of hard international law in competition matters.<sup>66</sup>

### **3. The Mexico – Telecoms case and Juris-generative Interactions between GAIs**

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

With the ongoing deadlock in WTO trade negotiations, juris-generative interactions between GAIs constitute, along with bilateral agreements,<sup>67</sup> the most likely scenario in the development international binding antitrust rules.<sup>68</sup> In

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<sup>59</sup> See C. Damro, “The New Trade Politics and EU Competition Policy: Shopping for Convergence and Co-operation” 13 *Journal of European Public Policy* (2006) p. 867, p. 879.

<sup>60</sup> See <[www.internationalcompetitionnetwork.org/uploads/library/doc756.pdf](http://www.internationalcompetitionnetwork.org/uploads/library/doc756.pdf)>

<sup>61</sup> See <[www.internationalcompetitionnetwork.org/uploads/library/doc835.pdf](http://www.internationalcompetitionnetwork.org/uploads/library/doc835.pdf)>

<sup>62</sup> See <[www.internationalcompetitionnetwork.org/uploads/library/doc591.pdf](http://www.internationalcompetitionnetwork.org/uploads/library/doc591.pdf)>

<sup>63</sup> See <[www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf](http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf)>

<sup>64</sup> See J. Malinauskaite, “Harmonisation in Competition Law in the Context of Globalisation”, 21 *European Business Law Review* (2010) p. 369, p. 382.

<sup>65</sup> See E.M. Fox and A. Arena, “The International Institutions of Competition Law”, in E.M. Fox and M.J. Trebilcock (eds) *The Design of Competition Law Institutions: Global Norms, Local Choices* (OXFORD University Press, Oxford, 2013), pp. 482-483.

<sup>66</sup> But see P. Marsden, “‘Jaw-jaw’ not ‘law law’: from treaties to meetings: the increasing informality and effectiveness of international antitrust cooperation”, in Ezrachi (ed), *International Research Handbook on Competition Law* (Edward Elgar, Cheltenham, 2012), pp. 133-134 (arguing that any effort to make ICN best practices binding would make them less effective).

<sup>67</sup> See, generally, O. Petrovsky, “International Antitrust Agreement: Premature Proposal and Practical Solutions”, 22 *New York International Law Review* (2009) p. 131.

<sup>68</sup> But see P. Marsden, “‘Jaw-jaw’ not ‘law law’: from treaties to meetings: the increasing informality and effectiveness of international antitrust cooperation”, in Ezrachi (ed), *International*

particular, antitrust rules and principles set out in OECD, UNCTAD, and ICN documents may be relied upon by the WTO judiciary to flesh out the substantive antitrust provisions in WTO agreements in the context of a dispute.<sup>69</sup> As Philip Marsden put it, it is “an ineluctable fact that new WTO competition rules are going to be [...] ‘created’ through interpretation in dispute settlement proceedings”.<sup>70</sup> Indeed, since domestic competition laws of WTO members are remarkably diverse, rules and principles acknowledged at the global level by GAIs constitute the most suitable material for filling the gap in WTO antitrust provisions.

So far, the most significant interaction of this sort has taken place in the context of the WTO panel report in *Mexico – Telecoms*. The present section, accordingly, analyses the panel’s findings and its reception in academic circles.

### 3.1. *The Panel report in Mexico - Telecoms*

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

Mexico had undertaken several pro-competitive commitments in the telecommunications sector by incorporating the provisions of the so-called “Reference Paper” into its GATS schedule of commitments. In their request for establishment of a panel, the US claimed *inter alia* that the rates charged by Telmex for interconnection on calls from the United States to Mexico were not “cost-oriented”<sup>71</sup> and that Mexico had failed to honour its commitment to prevent “anti-competitive practices” by major suppliers,<sup>72</sup> insofar as the interconnection rates were the result of price-fixing among suppliers authorized by Mexican regulation.

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*Research Handbook on Competition Law* (Edward Elgar, Cheltenham, 2012), pp. 110-135 (arguing that in the development of international antitrust, informal gathering among antitrust agencies are more beneficial than binding international law commitments).

<sup>69</sup> See R.B. Stewart and M. Ratton Sanchez Badin, *The World Trade Organization and Global Administrative Law*, Public Law & Legal Theory Research Paper Series Working Paper No. 09-71, p. 11.

<sup>70</sup> P. Marsden, *A Competition Policy for the WTO* (Cameron May, 2003) p. 253. See also K.Y Lee, *The WTO dispute settlement and anti-competitive practices: lessons learnt from trade disputes*, Oxford Centre for competition Law and Policy Working Paper 10/05, p. 44.

<sup>71</sup> Cf. Article 2.2(b) of the Reference Paper (“Interconnection with a major supplier will be ensured at any technically feasible point in the network. Such interconnection is provided [...] [at] cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided.”).

<sup>72</sup> Cf. Article 1.1 of the Reference Paper (“Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices”).

At the time, however, the scope of the expression “anti-competitive practices” was unclear. Although at the WTO level there had been discussions on “restrictive business practices”, a dispute involving allegations of exclusive distribution channels, and negotiations on the interaction of trade and competition policy, no binding WTO legal instrument defined what practices must be deemed “anti-competitive” within the meaning of the Reference Paper.<sup>73</sup> The only relevant context was the non-exhaustive list of anti-competitive practices set out in Section 1.2 of Mexico’s Reference Paper, which, however, only referred to unilateral practices.<sup>74</sup>

The panel followed a meandering path to construe the term “anti-competitive practices”. First, relying upon dictionary definitions, the panel observed that that expression comprised a broad range of actions “that lessen rivalry or competition in the market.”<sup>75</sup> The panel then noted that the examples of anti-competitive practices provided in Section 1.2 indicated that “pricing actions” could be relevant<sup>76</sup> and that the reference to a major supplier acting “alone or together” suggested that also “horizontal coordination” of suppliers with the purpose of fixing prices could be caught by the ban.<sup>77</sup>

The panel found support for its finding in the laws of several WTO members, which prohibited “cartels or collusive horizontal agreements between firms, such as agreements to fix prices or share markets”,<sup>78</sup> as well as in three “international instruments that address competition policy” prepared by other GAIs: i) Article 46 of the Havana Charter, ii) the UN Set, iii) the OECD 1998 recommendation on hardcore cartels.<sup>79</sup>

Based on the above analysis, the panel considered that the term “anti-competitive practices” in Section 1 of Mexico's Reference Paper included “horizontal practices related to price-fixing and market-sharing agreements.”<sup>80</sup> Finally, the Panel found that “anti-competitive practices” were not exempt from the Reference Paper commitments even though they were required by Mexico regulation,<sup>81</sup> thus espousing a narrow view of the so-called state action doctrine embraced by several antitrust jurisdictions, including the US.

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<sup>73</sup> See Commentary to the Panel Report *Mexico – Measures Affecting Telecommunications Services*, available at <[www.worldtradelaw.net](http://www.worldtradelaw.net)>, p. 24.

<sup>74</sup> See Section 1.2 of the Reference Paper (“The anti-competitive practices referred to above shall include in particular: (a) engaging in anti-competitive cross-subsidization; (b) using information obtained from competitors with anti-competitive results; and (c) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services”).

<sup>75</sup> Panel report, *Mexico – Telecoms*, para 7.230 (citing both *The Shorter Oxford English Dictionary* and the *Merriam Webster Dictionary*).

<sup>76</sup> *Ibid.*, paras 7.231-7.232.

<sup>77</sup> *Ibid.*, para 7.234.

<sup>78</sup> *Ibid.*, para 7.235.

<sup>79</sup> *Ibid.*, para 7.236.

<sup>80</sup> *Ibid.*, para 7.238.

<sup>81</sup> *Ibid.*, para 7.245.

### 3.2. Assessment by scholarly commentators

The panel report in *Mexico – Telecoms* stirred significant controversy in academic circles. Eleanor Fox saluted the report as a “sleeping victory” for trade and competition in that it heralded the development of multilateral rules to address the so-called hybrid restraints – i.e. anti-competitive conduct by private parties authorised or required by governmental actors – which often escape scrutiny both under national antitrust laws and international trade laws.<sup>82</sup>

Marco Bronckers and Pierre Larouche, instead, identified a number of flaws and misunderstandings in the panel’s broad interpretation of the Reference Paper antitrust clause,<sup>83</sup> but noted that the panel report could nonetheless “help to break the ice by opening this controversial subject [a competition competence in the WTO] to multilateral negotiations”.<sup>84</sup> In turn, Gregory Sidak and Hal Singer claimed that the panel espoused the US government’s policy preferences rather than the informed judgments of Mexico’s independent regulatory authority and favoured the private interests of US companies while depriving US consumers of a more ubiquitous telecommunications network.<sup>85</sup>

In an often-quoted note, Philip Marsden argued that the *Mexico – Telecoms* panel disregarded both the ordinary meaning and the preparatory work of the Reference Paper, none of which pointed to a ban on horizontal agreements.<sup>86</sup> Marsden also took issue with the international instruments cited by the panel – and in particular with the unratified Havana Charter – as they were neither made “in connexion with” nor concerned the interpretation of the Reference Paper as required by the Vienna Convention of the Law of Treaties.<sup>87</sup> Likewise, Damien Neven and Petros Mavroidis noted that the legal value of the Havana Charter was “highly symbolic”, that the OECD documents were not binding, and that the absence of a clear reference to cartels in the Reference Paper reflected the Treaty Masters’ will not to involve WTO in the enforcement of those anticompetitive practices.<sup>88</sup> By the same token, Kathy Lee lamented that the panel failed to provide a satisfactory basis for employing the above international instruments to succour its interpretation of the Reference Paper<sup>89</sup> and that the panel’s report

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<sup>82</sup> See E.M. Fox, *The WTO’s First Antitrust Case – Mexican Telecom: A Sleeping Victory for Trade and Competition*, 9 *Journal of International Economic Law* 271 (2006).

<sup>83</sup> See M. Bronckers and P. Larouche, “Telecommunications Services”, in P. Macrory, A. Appleton and M. Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Dordrecht: Springer, 2005) p. 989, pp. 999-1013.

<sup>84</sup> *Ibid.*, p. 1012.

<sup>85</sup> See J.G. Sidak and H.J. Singer, “Überregulation Without Economics: The World Trade Organization’s Decision in the U.S.-Mexico Arbitration on Telecommunications Services”, 57 *Federal Communications Law Journal* (2004) p. 1.

<sup>86</sup> See P. Marsden, *Trade and Competition: WTO Decides First Competition Case – With Disappointing Results*, *Competition Law Insight* 3 (May 2004).

<sup>87</sup> *Ibid.*, p. 8.

<sup>88</sup> See D.J. Neven and P.C. Mavroidis, “El mess in TELMEX: a comment on Mexico-measures affecting telecommunications services”, 5 *World Trade Review* (2006) p. 271, pp. 290-292.

<sup>89</sup> See K.Y. Lee, *The WTO dispute settlement and anti-competitive practices: lessons learnt from trade disputes*, Oxford Centre for competition Law and Policy Working Paper 10/05.

showed “disconcerting gaps between its reasoning and conclusion” leading to a “tautological expansion” of the scope of the Reference Paper<sup>90</sup> that ran the risk of “undermining the legitimacy and integrity of the WTO”,<sup>91</sup> a concern also shared by Sonali Singh.<sup>92</sup>

### 3.3. *The role of GAL standards in juris-generative interactions between GAIs*

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

By the same token, most comments to the *Mexico – Telecoms* report devoted limited attention to the institutional setting where exogenous international antitrust instruments were implanted, i.e. the WTO. Does the WTO dispute resolution system provide sufficient procedural safeguards to enforce antitrust provisions? Are the members of the WTO judiciary sufficiently independent? Can WTO rules of evidence accommodate the fact-intense assessments required to adjudicate antitrust cases? How does the WTO judiciary handle economic analysis? Is dispute resolution transparent and predictable? Are reports adopted in a timely fashion? Are sanctions sufficient to ensure compliance with WTO rulings?

In view of the strong potential for further juris-generative interactions *à la Mexico – Telecoms*, those questions cannot be left unanswered. It is thus to compliance with GAL norms by the four GAIs that this paper now turns.

## 4. Assessing Compliance with GAL Standards by GAIs

This section will assess compliance with GAL due process and institutional performance norms by the GAIs involved in the *Mexico – Telecoms* juris-generative interaction and by GAIs that may be involved in similar interactions in the future. This section will not cover the International Trade Organization because the Havana Charter, which would have established that organization, never entered into force due to the US Congress’ failure to ratify it. Moreover, in the case of the UNCTAD and the OECD, the lack of decision-making and enforcement powers precludes any assessment of compliance by those GAIs with GAL due process norms. Although no ICN materials were cited in *Mexico –*

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<sup>90</sup> *Ibid.*, p. 34.

<sup>91</sup> *Ibid.*, p. 44.

<sup>92</sup> See S. Snigh, *The Telmex Dispute at the WTO: Competition Makes a Backdoor Entry*, CUTS Briefing Paper no. 1/2006, p. 4.

*Telecoms*, ICN's extensive contribution to the development of guidelines and best practices in the field of antitrust makes it a likely donor for future legal transplants, thus calling for its assessment under the lens of GAL. The bulk of this section will be devoted to the WTO, i.e. the potential recipient of legal transplants, whose enforcement powers in individual cases require a careful scrutiny under both institutional performance and due process norms as articulated in GAL literature.

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

##### 4.1.1. The OECD

Access by OECD members to the Competition Committee is generally satisfactory.<sup>93</sup> Members are routinely invited to participate to Committee's works and their contributions are duly taken into account. All members are entitled to nominate the chair of the OECD Competition Committee and the members of the Committee Bureau. Non-members can participate in the Competition Committee as observers, provided that they adhere to certain recommendations, disseminate them to other authorities, accept to undergo peer review, and actively participate in the Committee's roundtables and outreach events.<sup>94</sup>

The Competition Committee's activities are transparent. Communications and documents by the Competition Committee are circulated to all OECD members. Submissions for some sessions, such as policy roundtables, are made public on the OECD website. OECD also publishes its own competition law periodical: the OECD Journal of Competition Law and Policy, whose contents are freely accessible online.<sup>95</sup>

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

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<sup>93</sup> See E.M. Fox and A. Arena, "The International Institutions of Competition Law", in E.M. Fox and M. J. Trebilcock (eds) *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford University Press, Oxford, 2013), p. 479.

<sup>94</sup> See Letter of F. Jenny, Chairman of the Competition Committee to (former) Secretary General Johnston, 14 June 2005, DAF/COMP (2005) 26.

<sup>95</sup> See <[www.oecd-ilibrary.org/governance/oecd-journal-competition-law-and-policy\\_16097521](http://www.oecd-ilibrary.org/governance/oecd-journal-competition-law-and-policy_16097521)>

#### 4.1.2. The UNCTAD

As far as access is concerned, it must be noted that although UNCTAD members may suggest agenda items, the work is largely steered by the Secretariat.<sup>96</sup> The studies and reports drafted by the CCPB are transparent and usually available on UNCTAD's website. UNCTAD's agenda is generally responsive to the needs of developing countries. A program of capacity building in Latin America (COMPAL) has been designed and implemented with high expertise and sensitivity to context.<sup>97</sup> Currently involving twelve countries, the project's aim is to develop competition law and policy in these countries in a way that leads to lower prices, better quality and wider variety of products.<sup>98</sup> UNCTAD also launched the Africa Competition Programme (AFRICOMP), seeking to develop appropriate administrative, institutional and legal structures for effective enforcement of competition and consumer laws and policies in African countries, both on a national and a regional level.<sup>99</sup>

#### 4.1.3. The ICN

Access to the ICN is extremely satisfactory. Members of member authorities have broad access to ICN activities. Since some authorities have limited resources, the ICN seeks to maximize their participation by providing funding assistance according to its Travel Funding Guidelines.<sup>100</sup> Non-governmental advisors (NGAs), such as lawyers, businessmen, academic, and think tanks, massively participate in ICN activities. NGA participation is especially sought in the working groups – from which all recommendations, guidelines and other work product originate.

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

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<sup>96</sup> See E.M. Fox and A. Arena, "The International Institutions of Competition Law", in E.M. Fox and M.J. Trebilcock (eds) *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford University Press, 2013), p. 481.

<sup>97</sup> See <[www.unctadxi.org/templates/Startpage\\_\\_\\_1529.aspx](http://www.unctadxi.org/templates/Startpage___1529.aspx)>

<sup>98</sup> See I. Maher and A. Papadopoulos, "Competition agency networks around the world", in Ezrachi (ed), *International Research Handbook on Competition Law* (Edward Elgar, Cheltenham, 2012), p. 71.

<sup>99</sup> See UNCTAD, The Africa Competition Programme (AFRICOMP) (May 2009 Briefing), available at <[www.unctad.org/sections/ditc\\_ccpb/docs/dite\\_ccpb0027\\_en.pdf](http://www.unctad.org/sections/ditc_ccpb/docs/dite_ccpb0027_en.pdf)>

<sup>100</sup> See <[www.internationalcompetitionnetwork.org/uploads/library/doc785.pdf](http://www.internationalcompetitionnetwork.org/uploads/library/doc785.pdf)>

The ICN is accountable to its members (i.e. competition authorities), which unlike the OECD or UNCTAD members (i.e. national governments) are usually unelected. Accordingly, concerns have been voiced that the ICN might divert power from “elected officials” to “unelected technocrats”.<sup>101</sup> ICN members, however, are accountable at the domestic level<sup>102</sup> and only adopt non-binding instruments,<sup>103</sup> whereas national executives retain full control over binding international cooperation initiatives.<sup>104</sup> Besides, it has been argued that national representatives to international institutions are even less accountable and, usually, do not have hands-on antitrust enforcement experience.<sup>105</sup>

Recently, the ICN steering group surveyed and personally interviewed all members and NGAs. The results of these surveys and interviews are posted on the ICN website.<sup>106</sup> The feedback from the members indicates satisfaction with the original mission statement and support for continuing on the course. Most NGAs agreed that the ICN is sufficiently transparent, that there are adequate opportunities for NGAs to contribute to the ICN, and that there is sufficient diversity of NGA’s professional background. Some NGAs, however, replied that that there was an insufficient geographical distribution of NGAs.<sup>107</sup>

#### 4.2. *The recipient: the WTO*

As the potential recipient of the transplants of antitrust rules and principles from other GAIs and the only GAI currently endowed with case-by-case enforcement powers, the WTO deserves a careful examination under the lens of GAL due process and institutional performance norms.

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<sup>101</sup> See A.-M. Slaughter and T. Hale, “Transgovernmental Networks and Multilevel Governance”, in D. Hand and T. Hale (eds), *Handbook of Transnational Governance* (Polity Press, 2011), footnote 54.

<sup>102</sup> See J. Fingleton, *Competition Agencies and Global Markets: The Challenges Ahead* (2009), available at <[www.oft.gov.uk/shared\\_of/speeches/2009/spe0909paper.pdf](http://www.oft.gov.uk/shared_of/speeches/2009/spe0909paper.pdf)>, p. 21 (“agencies participating in [the ICN] are ultimately domestically accountable, which avoids the democratic deficit problem”).

<sup>103</sup> See M. Coppola, “One Network’s Effect: The Rise and Future of the ICN”, 3 *Concurrences* (2011) p. 227 (“since ICN best practice is non-binding, unaccountable rule-making seems a misplaced smear”).

<sup>104</sup> K. Raustiala, ‘The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law’ 43 *Virginia Journal of International Law* (2002) p. 24.

<sup>105</sup> See P. Marsden, “‘Jaw-jaw’ not ‘law-law’: from treaties to meetings: the increasing informality and effectiveness of international antitrust cooperation”, in Ezrachi (ed), *International Research Handbook on Competition Law* (Edward Elgar, Cheltenham, 2012), pp. 126-127.

<sup>106</sup> The results of the interviews with members are summarized in the Note from the Chair, 2 September 2010, available at <[www.internationalcompetitionnetwork.org/uploads/2010-2011/chairnote8.9.10.pdf](http://www.internationalcompetitionnetwork.org/uploads/2010-2011/chairnote8.9.10.pdf)>. The responses to the August 2010 NGA Survey are available at <[www.internationalcompetitionnetwork.org/uploads/2010-2011/responses%20nga%20survey%208.10.pdf](http://www.internationalcompetitionnetwork.org/uploads/2010-2011/responses%20nga%20survey%208.10.pdf)>

<sup>107</sup> *Ibid.*, pp. 5-6.

The WTO dispute resolution system complies with several GAL due process norms.<sup>108</sup> Parties and Third Parties to WTO disputes have ample opportunity to be heard at the consultation, panel, interim review and appellate review stage. The DSU sets out several procedural arrangements to ensure that the respondent party in a WTO dispute settlement procedure is informed in detail of the complainant's claim. The principle that parties must be afforded sufficient time to prepare is expressly recognized in the DSU.<sup>109</sup> The WTO dispute resolution system fully recognizes the parties' right to appeal from panel reports and provides for an institutional structure that enables a comprehensive and expeditious appellate review.

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

#### 4.2.1. Independence

The importance of independent decision-makers, especially in the context of judicial proceedings, is well established in GAL literature.<sup>110</sup> The WTO dispute resolution acknowledges the importance of ensuring the independence of panel and Appellate Body members and their impartiality *vis-à-vis* the parties to a dispute. Apart from a number of statements of principle,<sup>111</sup> those goals are achieved essentially by granting the parties significant powers in the appointment of panel members and in reporting evidence of possible conflicts of interest on the part of Appellate Body members. The Secretariat usually proposes nominations to the parties, drawing from an indicative list of people that meet certain expertise and independence requirements. Although parties should only oppose nominations for compelling reasons,<sup>112</sup> in fact they often object to nominations

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<sup>108</sup> See E.M. Fox and A. Arena, "The International Institutions of Competition Law", in E.M. Fox and M.J. Trebilcock (eds) *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford University Press, Oxford, 2013), pp. 460-464.

<sup>109</sup> See Article 12.4 DSU.

<sup>110</sup> See R.B. Stewart and M. Ratton Sanchez Badin, *The World Trade Organization and Global Administrative Law*, Public Law & Legal Theory Research Paper Series Working Paper No. 09-71, p. 10 (acknowledging the "greater independence and authority" of the WTO dispute settlement process), 24 (arguing that "if WTO administrative bodies obtain more authority and independence, they need to be disciplined by GAL accountability mechanisms for the benefit both of members and non-member interests"); S. Cassese, "Administrative Law Without the State? The Challenge of Global Regulation", 37 *New York University Journal of International Law and Politics* (2005) p. 663, p. 692 (noting that "global administrative courts [...] decide disputes through adversarial procedures and are required to be independent"); D.C. Esty, "Good Governance at the Supranational Scale: Globalizing Administrative Law", 115 *Yale Law Journal* (2006) p. 1490, pp. 1524-1526 (referring to controls on special interest influence and conflict of interest rules as part of the Global Administrative Law Toolbox, i.e. "[a] number of administrative law strategies, approaches, and tools may prove to be useful to advance good supranational governance").

<sup>111</sup> See Article 8.2, 8.3 and 8.9 DSU with reference to panel members and Article 17.3 DSU and Rule 2 of the Appellate Body Working Procedures with respect to Appellate Body members.

<sup>112</sup> See Article 8.6 DSU.

providing reasons that are not subject to review. When this occurs, the Secretariat draws other names from the list. Furthermore, upon the filing of a Notice of Appeal, each Appellate Body member (as well as the professional staff of the Appellate Body Secretariat) must complete a form whereby he or she undertakes to disclose any information likely to affect his or her independence or impartiality or which could give rise to justifiable doubts as to the integrity and impartiality of the dispute settlement mechanism.<sup>113</sup>

However, it has been argued that the concentration of those powers in the parties' hands and the self-disclosure procedure for Appellate Body members are not necessarily conducive to the independence of panel and Appellate Body members from external influences and special interests, which may be unbeknown to or tolerated by the parties.<sup>114</sup> This, nonetheless, is a reflection of the intergovernmental character of the WTO dispute settlement system, which relies extensively on WTO members as qualified – yet potentially imperfect – representatives of the interests of their nationals and of stakeholders at large.

#### 4.2.2. Rules of evidence

As competition-related cases are notoriously fact-intensive,<sup>115</sup> the necessity of a clear and coherent body of rules of evidence cannot be overstated.<sup>116</sup> Yet, the DSU does not include any express rule concerning the burden of proof in panel proceedings. The Appellate Body has attempted to remedy that shortcoming by ruling that the concept of a burden of proof is implicit in the WTO dispute settlement system. In *US – Wool Shirts and Blouses* the Appellate Body endorsed the traditional maxim *onus probandi incumbit ei qui dicit*, according to which it is for the party who asserts a fact, whether complainant or respondent, to provide proof thereof.<sup>117</sup> Accordingly, the complainant must state and provide evidence that the respondent has infringed a given provision of a WTO agreement,<sup>118</sup> while the respondent bears the burden of proving that the requirements set out in an exception or affirmative defence have been met. A review of the precedents on the

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<sup>113</sup> See Section VI of Annex II attached to the Working Procedures for Appellate Review.

<sup>114</sup> See E.M. Fox and A. Arena, “The International Institutions of Competition Law”, in E.M. Fox and M.J. Trebilcock (eds) *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford University Press, Oxford, 2013), p. 466.

<sup>115</sup> See C.-D.Ehlermann and L. Ehring, “WTO Dispute Settlement and Competition Law: views from the Perspective of the Appellate Body’s Experience”, 26 *Fordham International Law Journal* (2003) p. 1505, p. 1506.

<sup>116</sup> See D.C. Esty, “Good Governance at the Supranational Scale: Globalizing Administrative Law”, 115 *Yale Law Journal* (2006) p. 1490, p. 1546 (noting that the WTO Appellate Body has adopted specific methods of submitting timely evidence).

<sup>117</sup> See Appellate Body Report, *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/Appellate Body/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323.

<sup>118</sup> See, e.g., Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/Appellate Body/R, WT/DS48/Appellate Body/R, adopted 13 February 1998, DSR 1998:I, 135, para. 104.

burden of proof issue seems to reveal that the Appellate Body has consistently followed the rule established by *US – Wool Shirts and Blouses*.<sup>119</sup>

Furthermore, the required standard of proof is unclear. The Appellate Body has affirmed that if the party bearing the burden of proof is able to put forward evidence sufficient to make a *prima facie* case (a presumption), the *onus* shifts to the other party, who will fail unless it submits sufficient evidence to disprove the claim (thus rebutting the presumption). Precisely how much and what kind of evidence will establish a *prima facie* case varies from measure to measure, provision to provision, and case to case. The standard of review that panels must employ in respect of WTO members' competition laws and individual decisions in the field of competition law is set out in Article 11 of the DSU. This standard excludes *de novo* review, but does specify relatively strict requirements.<sup>120</sup>

#### 4.2.3. Expertise

Apart from being fact-intensive, antitrust cases often hinge upon economic analysis. This calls for decision-makers having the necessary expertise.<sup>121</sup> Still, the WTO judiciary's epistemic legitimacy in the handling of economic evidence has been seriously questioned.<sup>122</sup> Although most WTO rules are based on economic concepts or involve economic evaluations, panels and the Appellate Body have been generally unwilling to engage rigorously with economic evidence

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<sup>119</sup> M. Matsushita, T.J. Schoenbaum and P.C. Mavroidis, *The World Trade Organization: law, practice, and policy* (Oxford University Press, Oxford, 2006), p. 39. See also Michelle Grando, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement* (Oxford University Press, Oxford, 2009).

<sup>120</sup> See C.-D. Ehlermann and L. Ehrling, "WTO Dispute Settlement and Competition Law: views from the Perspective of the Appellate Body's Experience", 26 *Fordham International Law Journal* (2003) p. 1505, pp. 1532-1540 (opining that the current standard of review is appropriate for competition cases). But see J.G. Sidak and H.J. Singer, "Überregulation Without Economics: The World Trade Organization's Decision in the U.S.-Mexico Arbitration on Telecommunications Services", 57 *Federal Communications Law Journal* (2004) p. 1 (criticising the *Telmex* panel's willingness to second-guess the assessment made by the Mexican authorities).

<sup>121</sup> See E.M. Fox and M.J. Trebilcock, "Introduction: the GAL Competition Project: the Global Convergence of Process Norms", in E.M. Fox and M.J. Trebilcock, *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford University Press, Oxford, 2013), p. 9 (noting that "lack of legal and economic expertise is a recurrent problem" in the global enforcement of competition law). On the expertise of decision-makers in GAL literature, see also R.B. Stewart and M. Rattón Sánchez Badin, *The World Trade Organization and Global Administrative Law*, Public Law & Legal Theory Research Paper Series Working Paper No. 09-71, 19 (arguing that borrowing regulatory standards adopted by other global bodies would enable the WTO to take advantage of those bodies' "expertise and decisional capacity [...] in specialized areas of regulation"); D.C. Esty, "Good Governance at the Supranational Scale: Globalizing Administrative Law", 115 *Yale Law Journal* (2006) p. 1490, p. 1527 (including expertise and sound rulemaking in the Global Administrative Law Toolbox), p. 1545 (noting that the WTO's "Weberian legitimacy, derived from its recognized expertise and the technical nature of the work undertaken, has come under attack").

<sup>122</sup> See C.A. Thomas, "Of Facts and Phantoms: Economics, Epistemic Legitimacy, and WTO Dispute Settlement", 14 *Journal of International Economic Law* (2011) pp. 295–328.

and argument and have often refused to turn to experts for assistance.<sup>123</sup> For instance, Henrik Horn and Petros Mavroidis criticized the panel and Appellate Body reports in *US – Offset Act (Byrd Amendment)*<sup>124</sup> for ruling on the effects on competition of the challenged US legislation without performing a sound economic analysis based on empirical verification.<sup>125</sup> Similarly, in their detailed commentary to the *Mexico – Telecommunications* report, Gregory Sidak and Hal Singer claimed that the panel had revealed a “startlingly low level of economic sophistication” in handling economic questions by favouring dictionary definitions over antitrust economics in its construction of key concepts such as “cost” and “market power”.<sup>126</sup> In *US – Upland Cotton 21.5*, the Appellate Body itself vehemently condemned the panel’s carelessness in evaluating the economic theories presented by the parties.<sup>127</sup>

#### 4.2.4. Transparency

Transparency is a prominent feature in GAL literature.<sup>128</sup> Yet, the WTO dispute settlement system, albeit more open and accessible than its GATT predecessor,

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<sup>123</sup> *Ibid.*, pp. 305-312.

<sup>124</sup> See Panel Report, *US – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS234/R, adopted 27 January 2003; Appellate Body Report, *US – Continued Dumping and Subsidy Offset Act of 2000 (US – Offset Act (Byrd Amendment))*, WT/DS234/Appellate Body/R, adopted 27 January 2003.

<sup>125</sup> See H. Horn and P.C Mavroidis, United States – Continued Dumping and Subsidy Offset Act of 2000, in H. Horn and P.C Mavroidis (eds), *The American Law Institute Reporters’ Studies on WTO Case Law: Legal and Economic Analysis* (Cambridge University Press, Cambridge, 2007) pp. 622–656, p. 629, p. 633.

<sup>126</sup> See J.G. Sidak and H.J. Singer, “Überregulation Without Economics: The World Trade Organization’s Decision in the U.S.-Mexico Arbitration on Telecommunications Services”, 57 *Federal Communications Law Journal* (2004) p. 1, p. 7.

<sup>127</sup> See Appellate Body Report, *US – Subsidies on Upland Cotton – Recourse to Article 21.5 by Brazil (US – Upland Cotton 21.5)*, WT/DS267/Appellate Body/RW, adopted 20 June 2008, paras 357-358 (“The relative complexity of a model and its parameters is not a reason for a panel to remain agnostic about them [...] the Panel could have gone further in its evaluation and comparative analysis of the economic simulations and the particular parameters used.”).

<sup>128</sup> See, e.g., D.C. Esty, “Good Governance at the Supranational Scale: Globalizing Administrative Law”, 115 *Yale Law Journal* (2006) p. 1490, pp. 1530-1534 (including transparency in the Global Administrative Law Toolbox); S. Battini, *International Organizations and Private Subjects: A Move Toward a Global Administrative Law?*, IILJ Working Paper 2005/03, p. 22 (defining transparency as “[t]he first guiding principle”); N. Krisch and B. Kingsbury, “Introduction: Global Governance and Global Administrative Law in the International Legal Order”, 17 *European Journal of International Law* (2006) p. 1, p. 12 (regarding transparency as an instance of rules of global administrative law flowing from sources not usually recognised as sources of international law); S. Cassese, “Administrative Law Without the State? The Challenge of Global Regulation”, 37 *New York University Journal of International Law and Politics* (2005) p. 663, p. 691 (considering transparency a global principle rooted in traditional administrative law rights); B. Kingsbury, N. Krisch and R. B. Stewart, “The Emergence of Global Administrative Law”, 68 *Law & Contemporary Problems* (2005) p. 15, p. 37 (mentioning “Procedural Participation and Transparency” among the emerging principles of Global Administrative Law).

still favours confidentiality over transparency. Consultations are confidential,<sup>129</sup> as are panel deliberations,<sup>130</sup> and proceedings of the Appellate Body.<sup>131</sup> Documents submitted to panels and to the Appellate Body are confidential, although parties are entitled to disclose statements of their own position; parties are requested to submit, along with their confidential submissions, a non-confidential summary that can be disclosed to the public.<sup>132</sup>

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

#### 4.2.5. Predictability

According to GAL literature, predictability is a major source of legitimacy for decision-making and rule making by unelected authorities.<sup>133</sup> Although “providing security and predictability to the multilateral trading system” is one of the goals of the WTO dispute settlement system,<sup>134</sup> the latter's predictability is undermined by the absence of a formal *stare decisis* doctrine. Panel and Appellate Body reports do not formally constitute binding precedents for other disputes, whether between the same parties on different matters or different parties on the same or other matters.<sup>135</sup>

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

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<sup>129</sup> See Article 4.6 DSU.

<sup>130</sup> See Article 14.1 DSU.

<sup>131</sup> See Article 17.10 DSU.

<sup>132</sup> See Article 18.2 DSU and paragraph 3 of the Working Procedures in Appendix 3 to the DSU.

<sup>133</sup> D.C. Esty, “Good Governance at the Supranational Scale: Globalizing Administrative Law”, 115 *Yale Law Journal* (2006) p. 1490, p. 1518 (discussing predictability as a feature of order-based legitimacy), 1529 (“By building understanding, published decisions also advance predictability and reduce future governance costs, thereby promoting clarity, stability, and compliance”).

<sup>134</sup> See Article 3.2 DSU.

<sup>135</sup> See D. Palmeter and P.C. Mavroidis, “The WTO Legal System: Sources of Law”, 92 *American Journal of International Law* (1998) p. 398, p. 404.

relevant to any dispute.”<sup>136</sup> This also holds true for Appellate Body reports, as clarified in *US – Shrimp*.<sup>137</sup> In *US – Oil* the Appellate Body went so far as to state that “following the Appellate Body’s conclusion in earlier disputes is not only appropriate, but is what would be expected from panels, especially where issues are the same.”<sup>138</sup>

#### 4.2.6. Timeliness

Timeliness is a key institutional performance indicator.<sup>139</sup> The timeliness of WTO dispute settlement procedures, however, is a source of increasing concern.<sup>140</sup> During the last five years, significant delays have occurred at the panel stage.<sup>141</sup> While the DSU provides that the panel must conduct its examination in six months,<sup>142</sup> which can be extended to nine months following a reasoned notice to the DSB, the annual median time for panel proceedings since 2005 has ranged from 11 to 15 months,<sup>143</sup> with five disputes taking more than two years.<sup>144</sup> One reason is that most panels liberally grant parties’ requests for additional time for submissions, even in cases where no provision for extension of time is made in the DSB.<sup>145</sup> Other major causes of delay in panel proceedings are the scope or complexity of the issues raised in each dispute and the length of panel reports.

In contrast, the Appellate Body generally complies with the (extended) 90-day time frame laid down in Article 17.5 DSU. So far, only about one tenth of

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<sup>136</sup> See Appellate Body Report, *Japan – Alcoholic Beverages*, II DSR 1996:I, 97 at p.107-108.

<sup>137</sup> See Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 109.

<sup>138</sup> See Appellate Body Report, *United States—Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/Appellate Body/R, 17 December 2004, para. 188.

<sup>139</sup> E.M. Fox and M.J. Trebilcock, “Introduction: the GAL Competition Project: the Global Convergence of Process Norms”, in E.M. Fox and M.J. Trebilcock, *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford University Press, Oxford, 2013), p. 9.

<sup>140</sup> See, e.g., W. Davey, “Expediting the Panel Process in WTO Dispute Settlement”, in M. Janow *et al.* (eds), *The WTO: Governance, Dispute Settlement and Developing Countries* (New York: Juris Publishing 2008), pp. 409-440, p. 440; P. Clark, “Airbus Fears WTO Delay on Boeing Report Could Hurt Contract Hopes”, *Financial Times*, December 20, 2009.

<sup>141</sup> Also the implementation stage has recently given rise to timeliness concerns. For an exhaustive analysis of the possible abuses arising in the determination of the “reasonable period of time” accorded by Article 21:3 DSU to the losing party to comply with DSB rulings and recommendations, see MA Qian, “‘Reasonable Period Of Time’ in the WTO Dispute Settlement System”, 15 *Journal of International Economic Law* (2012) p. 257, pp. 264-274.

<sup>142</sup> See Articles 12.8 and 12.9 DSU.

<sup>143</sup> See M. Kennedy, “Why are WTO panels taking longer? And what can be done about it?”, 45 *Journal of World Trade* (2011) p. 221, p. 223.

<sup>144</sup> *Id.*, 221, footnote 3 (referring to the following disputes: *EC – Biotech (GMOs)*, WT/DS291, DS292, DS293; *US/Canada – Continued Suspension of Obligations in the EC-Harmony Dispute*, WT /DS320, DS321; *EC and certain Member States – Large Civil Aircraft*, WT/DS316; *US – Large Civil Aircraft (2nd complaint)*, WT/DS353; *Australia – Apples*, WT/DS367).

<sup>145</sup> See M. Kennedy, “Why are WTO panels taking longer? And what can be done about it?”, 45 *Journal of World Trade* (2011) p. 231.

Appellate Body reports have exceeded that deadline.<sup>146</sup> Of course, the Appellate Body's task in each dispute is more limited than that of the panel, as the Appellate Body only reviews the issues of law raised by the parties on appeal. Moreover, Appellate Body reports, unlike panel reports, are not subject to review by a higher-ranking body.

#### 4.2.7. Effectiveness and Sanctions

The nexus between sanctions and the effectiveness of antitrust enforcement is well established in academic literature.<sup>147</sup> Do sanctions in the WTO system yield sufficient deterrence? While the record by WTO members in complying with adverse panel and Appellate Body rulings is generally positive,<sup>148</sup> sanctions in the WTO dispute settlement system confront two major issues: the ambiguity of the procedural arrangements and the uneven bargaining power of WTO members.

As to the first issue, if the losing party fails to comply with DSB rulings and recommendations, the winning party may either request the establishment of a compliance panel under Article 21.5 DSU or request authorization from the DSB to retaliate by suspending trade concessions, a matter which may be referred to arbitration under Article 22.6 DSU. However, nothing in the DSU prevents the compliance procedure under Article 21.5 and arbitration under Article 22.6 from running in parallel, possibly with conflicting outcomes. This is known as the "sequencing problem."<sup>149</sup>

If DSB rulings and recommendations are not complied with, the DSU envisages two types of sanctions: compensation and retaliation. The coercion and deterrence effects of those sanctions can vary significantly depending on the bargaining

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<sup>146</sup> *Ibid.*, 228, footnote 40 (referring to the following disputes: *EC – Hormones*, WT/DS26 and WT/DS48 (114 days); *Thailand – H-Beams*, WT/DS122 (140 days); *EC Asbestos*, WT/DS135 (140 days); *US – Lead and Bismuth II*, WT/DS138 (104 days); *EC – Sugar*, WT/DS265 (105days); *US – Upland Cotton*, WT/DS 267 (136 days); *Mexico – Antidumping Measures on Rice*, WT/DS295 (132 days); *US – Upland Cotton (Article 21.5)*, WT/ DS267 (111 days); *US/Canada – Continued Suspension of Obligations in the EC-Harmony Dispute*, WT/DS320 and WT/DS321 (140 days).

<sup>147</sup> See J.M. Connor, and R.H. Lande, "Cartels as Rational Business Strategy: Crime Pays", 34 *Cardozo Law Review* 427 (arguing that the combined level of U.S. cartel sanctions has been only 9% to 21% as large as it should be to protect potential victims of cartelization); W.M. Landes, "Optimal Sanctions for Antitrust Violations", 50 *University of Chicago Law Review* 652 (1983); P. Buccirossi & G. Spagnolo, *Optimal Fines in the Era of Whistleblowers: Should Price Fixers Still Go to Prison?*, in Vivek Ghosal & Johan Stennek (eds), *The Political Economy Of Antitrust*, 2007, 81; A. Arena, "Game Theory as a Yardstick for Antitrust Leniency Policy: the US, EU, and Italian Experiences in a Comparative Perspective", 11 *Global Jurist*, article no. 5 (2011).

<sup>148</sup> See B. Wilson, "Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date", 10 *Journal of International Economic Law* (2007) p. 397 (noting that in virtually all cases of adverse rulings the WTO member concerned indicated its intention to bring itself into compliance and that in most cases it had already done so).

<sup>149</sup> See C.M. Valles and B.P. McGivern, "The right to retaliate under the WTO Agreement: the 'Sequencing' Problem", 34 *Journal of World Trade* (2000) p. 63.

power of the parties concerned.<sup>150</sup> Retaliatory measures, which usually take the form of additional customs duties on the goods originating in the territory of the losing WTO member, can prove ineffective if they are put into place by a weak bargaining party against a stronger one. Besides, not all WTO members have the same practical ability to resort to the suspension of obligations, as nationals of the winning member will have to bear additional import duties and may have to switch to suboptimal supply sources.<sup>151</sup> Moreover, a strong bargaining party may offer a wide range of trade concessions to persuade a weaker party to allow the former party to maintain measures at variance with WTO agreements.

## 5. Conclusion: the Optimal Conditions for Juris-Generative Interactions between GAIs

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

This paper, however, showed an uneven level of compliance with GAL due process and institutional performance norms by the four GAIs. More to the point, while the three potential donors of antitrust rules and principles – i.e. the OECD, the UNCTAD, and the ICN – have, by and large, a positive compliance record with GAL standards in terms of access, transparency and accountability, non-negligible problems inhere in the potential recipient, *viz.* the WTO. The absence of clear rules of evidence and the lack of epistemic rigour in handling economic data are serious systemic issues, considering that antitrust cases are normally fact-intensive and often hinge upon economic analysis. Transparency is often sacrificed in the name of confidentiality. Broader NGO participation in dispute settlement could promote transparency, but the Appellate Body has placed significant restraints on *amici curiae* submissions. The predictability of the WTO dispute settlement system is affected by the absence of a formal *stare decisis* doctrine, although in fact panels consistently follow Appellate Body reports. The lack of timeliness of WTO dispute settlement procedures has become a source of

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<sup>150</sup> See B.L. Brimeyer, “Bananas, Beef, and Compliance in the World Trade Organization: The Inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower Nations”, 10 *Minnesota Journal of Global Trade* (2001) p. 133. *But see* Chad P. Bown, B.M. Hoekman, “Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement is Not Enough”, 42 *Journal of World Trade* (2008) p. 177 (noting that developing countries are rarely challenged in formal trade disputes for failing to live up to commitments, reducing the benefits of their participation in international trade agreements).

<sup>151</sup> See R. Malacrida, “Towards Sounder and Fairer WTO Retaliation: Suggestions for Possible Additional Procedural Rules Governing Members’ Preparation and Adoption of Retaliatory Measures”, 42 *Journal of World Trade* (2008) p. 3, pp. 11-12.

concern, especially at the panel stage. The effectiveness of WTO dispute settlement system is undermined by the lack of clarity in the regulation of implementation and remedies and its disregard of the inequality of WTO members' bargaining power.

In view of such shortcomings, one may legitimately wonder whether the expansion of WTO's antitrust mandate as a result of juris-generative interactions with other GAIs is actually desirable. Is it sensible to entrust the WTO dispute settlement system with the task of applying detailed antitrust provisions if that system is unprepared to do so? Answering that question lies beyond the scope of this work. Nonetheless, that question does hint at the optimal conditions for legal transplants between GAIs, to wit, a donor and a recipient in good standing *vis-à-vis* GAL standards.

The first requirement, i.e. ensuring the donor's compliance with GAL standards, has already been conceptualised in GAL literature. Dick Stewart and Michelle Ratton Sanchez Badin averred that "[i]f the WTO, though its [...] dispute settlement bodies, were to condition recognition of other global bodies' regulatory standards upon their observance of GAL norms of transparency, participation, and reason giving, that would help to ensure that the standards to be accorded recognition are well informed and reflect a fair consideration of the interests at stake".<sup>152</sup> Eager to bolster the legitimacy of its gap-filling function in the sensitive area of global antitrust law, the WTO judiciary might readily embrace compliance with GAL due process and institutional performance standards as a precondition for the importation of antitrust rules from other GAIs.

Operationalizing the second requirement – i.e. that also the recipient be in good standing *vis-à-vis* GAL norms – instead, might prove more problematic. What party to a WTO dispute would argue that the panel should not refer to a given non-WTO antitrust instrument because that panel lacks, say, the necessary expertise to handle the economic concepts employed therein? While some national courts have shown a remarkable degree of self-restraint in imposing antitrust remedies,<sup>153</sup> there is no guarantee that also the WTO judiciary will go down that road.

Legal transplants carried out under suboptimal conditions may undermine the coherence and legitimacy of WTO dispute resolution system. However, they might also bring to the fore the most problematic aspects of that system allowing the WTO judiciary to set them right. Just as the Appellate Body has remedied the lack of a formal *stare decisis* rule by admonishing panels that failed to follow previous reports addressing similar issues, it may induce panels to take fact-finding and economic assessment in antitrust cases more seriously and to consult experts when necessary. In conclusion, transplants of exogenous antitrust tissue

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<sup>152</sup> R.B. Stewart and M. Ratton Sanchez Badin, *The World Trade Organization and Global Administrative Law*, Public Law & Legal Theory Research Paper Series Working Paper No. 09-71, p. 25.

<sup>153</sup> See *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) ("We think that Professor Areeda got it exactly right: 'No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise' [...] An antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations").

into a body with a suboptimal GAL record may initially harm the patient (*aegrescit medendo*), but might ultimately lead to full recovery (πάθει μάθος).