



PROUDLY SOUTH AFRICA CAMPAIGN:

**THE INTERPLAY BETWEEN PARTICULAR GLOBAL TRADE POLICIES AND
COMPETITION MECHANISMS WITH SPECIFIC FOCUS ON THE ROLE OF THE WTO IN
DEVELOPING AN INTERNATIONAL COMPETITION POLICY**

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ABSTRACT

This paper centres on a consideration of the 'Proudly South Africa' campaign and whether it is compliant with the general operations of the World Trade Organisation (WTO) and the National Treatment Policy in terms of Article III of the General Agreement on Tariffs and Trade (GATT). By extension, this research questions the relationship between trade and competition in the international context and the shortfall therein. The current method of competition regulation in the form of national competition legislation and policies, and bilateral competition agreements, is proving insubstantial, and susceptible to inconsistency, due to the overlap in regulation. Therefore, a single regulatory body is necessary to ensure uniformity.

The GATT expanded from its formative years of 23 signatories, to its evolution into the WTO, the *de facto* global trade organisation, boasting a membership of 164 countries. This research essentially considers whether the WTO can replicate its success under the GATT and, in turn, act as the pinnacle of a world competition organisation or forum, given the overlap in nature between trade and competition.

By discussing, how developing countries are affected by the lack of uniformity where competition regulation is concerned and whether the WTO's intention to promote international trade and competition has had the converse effect of hindering competition by limiting market access. Further, whether such obligations have proved too restrictive on developing and least developed member states, this research considers the role of the WTO in developing a competition regime, and whether there is potential for such a body to be created in a similar vein to that of the development of the WTO. The proposal of this research is that the involvement of the WTO is integral, both from the perspective of its ability to rally its members, and to ensure there is no conflict between the two prospective international bodies. However, in order to ensure competition remains at the focus of this establishment, and is not overshadowed by trade requirements, and to ensure developing countries' needs are taken into account, the WTO should play more of an advisory role, than act as the dominating body.

LIST OF ABBREVIATIONS

BRICS	-	Brazil, Russia, India, China, South Africa
DTI	-	Department of Trade and Industry
EU	-	European Union
GATS	-	General Agreement of Trade in Service
GATT	-	General Agreement on Tariffs and Trade
ITO	-	International Trade Organisation
OECD	-	Organisation for Economic Co-Operation and Development
SADC	-	Southern African Development Community
TRIPS	-	Trade-Related Aspects of Intellectual Property Rights
UK	-	United Kingdom
UN	-	United Nations
UNCTAD	-	United Nations Conference on Trade and Development
US	-	United States
WTO	-	World Trade Organisation

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CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND:

In broad, this paper considers the practical effect Article III (commonly referred to as the National Treatment Policy) of the General Agreement on Tariffs and Trade GATT)¹, has on the World Trade Organisation's (WTO) Member states. More specifically, this paper questions whether the Article has in actuality encouraged or hindered competitive trade. The 'Proudly South African' campaign will be the starting point of this topic. The key matters for consideration are:

- i) whether such a logo amounts to an infringement of South Africa's obligation to the WTO Agreements² not to offer different treatment of its own products to those like products introduced into its market by other Member states; and
- ii) whether the Article, instead of realising its intended effect of encouraging well-regulated trade, too greatly burdens the development of necessary competitive capacity in lesser developed Members, like South Africa.

Thus, the paper looks at whether the effect of some WTO obligations are too restrictive in the context of a developing member state, relying on the Proudly South African campaign as a specific point of analysis. The relevant Article itself is fairly lengthy, but it surmises that WTO Member states owe other Member states an obligation to treat foreign imported products as they would their own like products once imported into the Member states' market. Further, Paragraph 4 of the Article more specifically addresses treatment that must be 'no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements'.³ Such requirements include marking details, which, other than place of origin markings, such markings cannot result in a differentiation between domestic and imported goods. The basis of Article III is that, other than marking the country of origin on the product, no marking should appear that distinguishes an imported product from a domestic

¹ GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].

² WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter Marrakesh Agreement or WTO Agreement].

³ Article III of the GATT 1994.

product and affords the domestic product an 'unfair' competitive advantage, as this would then amount to an infringement of the Member state's WTO obligation.

According to the WTO itself, 'Its main function is to ensure that trade flows as smoothly, predictably and freely as possible' and 'to open trade to the benefit of all'.⁴ In essence, the purpose of the WTO is to facilitate and promote trade between its Member states. However, one wonders whether such restrictions are not causing an adverse effect instead. To determine this, the point of reference would be understanding what is being intended with the use of the 'Proudly South African' logo. The answer seems fairly obvious- to promote local production and consumption. As stated on the Proudly South African site, the aim is to 'encourage consumers to source local products, which in turn would influence the private sector to source resources locally, including labour and manufacturing'.⁵ Ultimately, the campaign seeks to inspire local job creation, to decrease unemployment and to introduce money back into the South African economy.⁶ For a product to qualify under the campaign, "[...] at least 50% of the cost of production must be incurred in South Africa and there must be "substantial transformation" of any imported materials."⁷

If an economy such as South Africa's stands to benefit from a campaign such as the aforementioned, then surely its implementation should be endorsed. Thus, the consideration is whether such a stringent obligation is not, in fact, having a regressive or stagnant effect on developing the country's economy as it forces compliance with a provision that negates the promotion of local consumption. Note that this research will not be considering restrictive trade or even whether developing countries benefit from the WTO extensively. Rather, it intends to incorporate that consideration without making it the focal point

By considering the logo, this research instead intends developing into discerning legitimate marketing practices and competitive tools in the face of Articles such as the National Treatment Policy. Do these, possibly, qualify as exemptions? The WTO, in its supposed effort to encourage developing countries to partake in international trade and competition, while bearing in mind their impediments resultant of their weaker economies and international influence, allows for certain concessions where developing and least developed countries are

⁴'The WTO... In brief' available at https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm, accessed on 17 June 2019.

⁵ 'About the Campaign – Overview' available at http://members.proudlysa.co.za/section/about.asp?include=../area/about_us/about.html&title=../gfx/pa ges/about.jpg, accessed on 17 June 2019.

⁶ 'Welcome to the home of buy local' <http://www.proudlysa.co.za/consumer-site/consumer.html>, accessed on 17 June 2019. Importantly, in 2018, South Africa unemployment rate was at 27%. www.statssa.gov.za, accessed 10 July 2019.

⁷ 'Logo Identification – Local Content' available at <http://www.proudlysa.co.za/consumer-site/consumer.html>, accessed on 17 June 2019.

concerned. These include provisions found in WTO agreements, such as the GATT and the GATS⁸ whereby the developed Member states are encouraged to treat developing and least developed Member states with leniency.⁹ The section dealing with Trade and Development in the GATT¹⁰ includes provisions on non-reciprocity between developed and developing countries, meaning the trade concessions granted by a developed Member state to a non-developed Member state need not be returned. Non-developed Member states are also granted some general allowances, including more time to incorporate WTO provisions into their existing national legislation, greater market access in certain key trade industries, such as textiles, services etc., and various means of financial and resource support for non-developed Member states to realise their WTO obligations. However, none of these concessions appear to allow any Member state, whether developed or not, to abandon their WTO obligations. Thus, if the National Treatment Policy is deemed a core principle, there is the possibility that, through the Proudly South African campaign, South Africa is, in fact, failing to adhere to the WTO standard, without exemption. If the campaign is potentially WTO non-compliant, another pertinent matter that needs to be addressed is whether it complies with the general standard of international competition practices and the extent to which this can be reconciled with the international trade practices.

It is apparent that an interplay exists between trade and competition as trade encompasses a competitive element. However, this does not mean the two are one and the same. This means that, when interpreting trade or competition legislation, it is likely that it would need to be read with the other. Further, international trade is regulated by the WTO, and the provisions of the GATT, by their nature, promote trade and, with that, competition.¹¹ However, the same cannot be said for international competition.

This research will identify that there is no single body regulating anti-competitive practices internationally. Instead, the method of regulation appears to be co-operation amongst different foreign jurisdictions.¹² This poses an obvious problem of potential overlap or conflicting laws and bears the question of which jurisdiction would take precedence in such instances. However, the rationale behind the slow implementation of an international policy and regulatory body is that the regulation of competition within countries is fairly new, with a surge

⁸ General Agreement on Trade in Services: General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].

⁹ 'Understanding the WTO: Developing countries' available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm, accessed on 17 June 2019.

¹⁰ Part IV 4 of GATT 1947.

¹¹ S Woolcock 'International Competition Policy and the World Trade Organisation' 2010 LSE Business Council Trade Forum in South Africa at 2.

¹² C Oh 'Trade and Competition Policy in the WTO' (2003) 18 *Third World Network (TWN) for Cancun* at 2.

in policies only being enacted within the last 20 years.¹³ However, the idea of a “World Competition Organisation”, so to speak, is not new and a number of authors have made contributions pertaining to the need for a single ordinance and the challenges likely to be faced in efforts to develop an international competition policy. What is most striking is the arguments on the WTO’s role in this development and that will form the particular focus of this research paper.

In summary, this research has, over the course, developed from a consideration of the ‘Proudly South Africa’ campaign and whether it is WTO compliant to whether it is, in fact, compliant with international trade standards. On this basis, the key research questions have developed to encompass the relationship between trade and competition; the shortfall in the regulation of international competition; and how countries, like South Africa, are affected by this.

1.2 OVERVIEW

It is futile to argue that competition is not essential to the operation of trade. In its attempts to encourage international trade and promote free trade areas, the WTO asserts that an increase in global competition will inherently manifest from a boost in trade. The expectation is that this will lead to a surge in exports as countries capitalize on their comparative specialization and lower, alternatively dispense with, tariff barriers.¹⁴ For consumers, the benefits are substantial, as it will ensure market accountability- production costs will be lowered; goods will be produced at a better quality; production will be more efficient and, as a result of exposure to new ideas, manufacturers will become more innovative.¹⁵ Ultimately, competition is necessary to hold suppliers to an elevated standard. Where production increases, naturally job creation manifests as a result. Through competition, global trade can then aid in profitability, particularly for disadvantaged regions. When properly effected, it can be used to boost a country’s economy, which, for developing countries, means less reliance on foreign aid. As such, a

¹³ B Hoekman and PS Holmes ‘Competition, Developing Countries and the WTO’ (1999) 22(6) *The World Economy* at 876.

¹⁴ ‘Investment and Competition: What role for the WTO?’ available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm#investment, accessed on 17 June 2019.

¹⁵ ‘Consumers, Multilateral Competition Policy and the WTO: Technical Report’ 2003 *Consumers International* at 10 available at https://www.wto.org/english/tratop_e/dda_e/symp03_ci_tech_report_e.pdf, accessed on 01 July 2019.

monitored competitive discipline is necessary to keep existing competitors in line and also to facilitate foreign direct investment in emerging markets.¹⁶

This, however, is simply a surface level account of how trade and competition result in improved economies, and those in support of globalization and the purpose of the WTO strongly endorse international competition, regulated through the existing mechanisms of the WTO. However, this is not to say competition is without its pitfalls, and the cocoon of private and state means of protection naturally appears more secure.¹⁷ It is pertinent to bear in mind that the groups encouraging competition policies are those who do not benefit under the present capitalist structure, and, therefore, are anxious that the benefits of globalisation might not be fully shared without some commitment by key stakeholders to prohibit anti-competitive practices. In addition to individual traders' concerns of international regulatory interference are those of developing countries that the regulation of competition is simply a farce and the true agenda of the major international stakeholders is to preserve the *status quo*. This is to retain control of channels of trade and distribution of economic activity. Already developing countries face barriers to entry to trade, which have been institutionalized by the terms of the WTO Agreement.¹⁸

While successful trade is not dependant on competition- as is evidenced by the effectiveness of cartels- competition and trade have fundamental effects on one another.¹⁹ These effects must be mapped out and managed so that the governing instruments do not undermine their objectives and inadvertently nullify the developmental potential of any such framework. Because of this interplay between trade and competition, it logically follows that the WTO would be required to regulate competitive practices on an international level. As mentioned earlier, broadly, the WTO's fundamental principle of non-discrimination evidences the organisation's role in monitoring how Member states treat each other within the competitive arena. There are already elements of competition policy ranging across WTO obligations. The provisions of WTO Agreements such as the Agreement on Trade-Related Aspects of Intellectual Property 1995 (hereafter referred to as TRIPS)²⁰ and GATS²¹ Agreements, enunciate how anti-competitive practices restrict trade and, more pressingly, limit market access. More specifically is the recent development of an International Competition Policy and considerations of the WTO's role in the enforcement of such a policy.²² However, by virtue of

¹⁶ Consumers International (note 15 above; 10).

¹⁷ S Woolcock (note 11 above; 6).

¹⁸ B Hoekman and PS Holmes (note 13 above; 880).

¹⁹ B Sweeney 'International Competition Law and Policy: A Work in Progress' (2009) 10 *Melbourne Journal of International Law* at 1 – 2.

²⁰ Article 3, Article 7, Article 8, Article 27, Article 31 and Article 40 of TRIPS 1995

²¹ Article VIII and Article IX of GATS 1995.

²² B Sweeney (note 19 above; 4 – 6).

the WTO's involvement in the development of a consolidated International Competition Policy, the primary concern is that the International Competition Policy thereby undermining the pro-competitive objectives of the proposed instrument might inherit the inherent disparity of the Member countries within the organisation.²³

Thus, it must first be accepted that there exists a manner in which the current regulation of international competition can be circumvented. Research shows that, whilst international competition was initially included on the WTO's Singapore Round of Negotiations, negotiations stalled because of Member states' inability to agree on a single ordinance of competition regulation.²⁴ The default position then became co-operative governance, where countries informally agreed to respect and promote- and where possible enforce or assist- in the enforcement of the national competition regulation of each other. As idealistic as this scenario would be, it poses a number of problems. The most concerning problem is the overlap and conflict in legislation and policies. Except where jurisdiction is contractually agreed upon, determining the more suitable way to regulate competition, and what the precedence is, can be problematic. What is especially risky is stronger countries strong-arming smaller, less influential countries into accepting the enforcement of their policies, potentially to their detriment. This then feeds into the narrative that trade and competition is geared towards protecting and benefitting developed countries, whilst developing countries are overlooked or overshadowed or, worse still, bullied into remaining complacent.²⁵

If research supports the inference that a deficiency exists with the current international regulation of competition and this deficiency poses risk to the global economic system, it then follows that the deficiency must be addressed and remedied. The obvious solution is developing an international standard of regulation; however, this will not be without its challenges. As the Singapore Negotiations²⁶ prove, reaching consensus will be one of the biggest challenges to overcome.²⁷ Another challenge will be agreeing on a standard that will suit the needs of a range of different countries, each with their own economic methods and areas of focus.²⁸ To address this, the method or solution should be from the basis of best historical model- in other words, looking to national legislation to determine which policy or regulation has proved most successful. However, this could potentially be an enormous exercise, so for the purposes of this research, it might be best to consider an overview of

²³ S Woolcock (note 11; 6).

²⁴ S Woolcock (note 11; 3 – 5).

²⁵ J Tamura 'Trade and Competition at the WTO: Domestic Regulation and Competition Policy for Market Access Development' 2003 *Ford School of Public Policy* at 15 – 16.

²⁶ The First WTO Ministerial Conference, held in Singapore (9 – 13 December 1996).

²⁷ Consumers International (note 15 above; 14).

²⁸ Consumers International (note 15 above; 29).

success in competition law and focus specifically on one area of legislation, to use as a terms of reference.

Another issue to consider is the WTO's role in developing such a policy. On the one hand it must be appreciated that the WTO could be resourceful based on their expertise in international trade and their background knowledge on a number of countries' methods of trade and their national economies and economic needs. However, criticism shows that the three major concerns of WTO involvement are:

- i. Their inability to finalize an international competition policy during the Singapore Round of Negotiations and an unwillingness to persist in the Doha Round of Negotiations²⁹, making their authority and expertise questionable;
- ii. The disparity between developed and developing countries and their trade relations³⁰; and
- iii. Although the WTO is probably competent at understanding competition specifically in relation to trade, it could very well be inept at governing anti-competitive practices³¹, such as collusion, price fixing etc.

Each of these concerns will be addressed in the research, before an overall finding and recommendation is made on the limit of the WTO's involvement. However, to avoid the research digressing from the topic, it will be limited to considering the concerns of the WTO as a key role-player from a developing country perspective, looking through the lens of South African competition law and domestic economic considerations, and focusing specifically on the effect of WTO regulation of competition on the National Treatment Policy.

1.3 KEY RESEARCH QUESTIONS:

The following research questions are pertinent to the study:

- To what extent has the development of the multilateral trade system from GATT to the WTO affected the developments within international competition policies? What is the nature of the relationship between competition and trade, and to what extent does competition affect international trade relations?
- How is competition currently regulated internationally and what are the main concerns about the WTO's involvement in developing an international standard of regulation of

²⁹ B Sweeney (note 19 above; 4).

³⁰ C Oh (note 12 above; 2).

³¹ S Woolcock (note 11 above; 6).

competition and what role should the World Trade Organisation (WTO) play in this development?

- To what extent does the 'Proudly South African' logo and campaign comply with the current principles underlying the WTO and is it in line with the existing international, regional standards?

1.4 METHODOLOGY:

The research will be based on primary and secondary research. The purpose is to consider current legislation and its effects, against the backdrop of existing articles and research.

The sources which will be relied on include:

i. Primary Resources:

- International trade competition legislation, more specifically WTO legislation, including the General Agreement on Tariffs and Trade (GATT); the General Agreement on Trade in Services (GATS); the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); and the Model Provisions on Protection Against Unfair Competition under the World Intellectual Property Organisation (WIPO)
- National competition legislation, including the South African Competition Act and any policies of the South African Competition Commission
- Competition recommendations, including the Organisation for Economic Co-Operation and Development (OECD); the United Nations Charter on Trade and Development (UNCTAD) and the United Nations' Set of Principles and Rules on Competition (the Set)
- Foreign policies on competition and trade, such as the Australian Competition and Consumer Act 2010

ii. Secondary Resources:

Secondary resources include books and textbooks, journal articles, online newspaper articles and web articles.

1.5 LITERATURE REVIEW:

The first key element to decipher in academic text is an understanding of why a single regulatory framework for competition might be required. The first point is that the regulation of

competition has become more prevalent because of internationalized commerce and the interdependent nature of businesses across borders.³² The regulation of competition is essential in order to develop domestic enterprises³³ and a lapse in international competition regulation can result in challenges to gaining market access.³⁴ The fact that an international competition framework does not currently exist naturally makes these risks more prevalent.

Whilst national competition regulation, according to Sweeney, has seen a surge in recent times, the differences and overlaps in the policies beneficial to each nation make a consolidated approach difficult.³⁵ Some authors are of the view that there is little need to regulate competition internationally and, instead, national governments should be tasked with developing legislation to protect themselves from within their borders³⁶. There is the acknowledgment that the power of states to deal with threats domestically is limited, but it is argued that competition practices which are implemented in a regulated manner are market enhancing, and thus are required in order to competently balance the access and allocation of resources for the maximisation of national welfare. Hoekman emphasises that a lack of regulatory oversight runs the risk of hindering access to domestic markets for exporters.³⁷ Michael Porter, in *The Competitive Advantage of Nations*³⁸, affirms this by raising the point that efforts to relax competition laws has the result of undermining competition entirely, and that successful competitive practices require both domestic and international regulation in order to flourish.

Authors tend to have varying views of how to approach this lapse in regulation but, for the most part, there is consensus that the role of the WTO should be limited. One proposed solution is a unilateral approach, wherein countries independently deal with foreign infringement more forcefully. However, the problem with this approach is the risk of defensive retaliation³⁹ and, as such; Hoekman concedes that it is ultimately a soft approach with no real prospects of long-term successful implementation.⁴⁰

A second view is the reliance on regional and bilateral competition agreements. The European Union (EU), the North American Free Trade Area (NAFTA), and the Common Market of Eastern and Southern Africa (COMESA), to provide a few examples, are already applying

³² B Sweeney (note 19 above; 2).

³³ C Oh (note 12 above; 1).

³⁴ J Tamura (note 25 above; 1).

³⁵ B Sweeney (note 19 above; 1 – 2).

³⁶ B Hoekman and PS Holmes (note 13 above; 877).

³⁷ B Hoekman and PS Holmes (note 13 above; 877).

³⁸ M Porter 'The Competitive Advantage of Nations' 1998 *Palgrave Macmillan* at 74.

³⁹ B Sweeney (note 19 above; 4).

⁴⁰ B Hoekman and PS Holmes (note 13 above; 878).

this.⁴¹ However, there is the argument that this will only provide a temporary solution, as bilateral agreements are limited due to the conflict of the differing policies within the agreements themselves and the risk of retaliatory action.⁴² As Viljoen points out in South Africa and Namibia: cooperation on competition law, enforcement and policy⁴³ these provisions already exist, it is enforcing compliance that is problematic. Bilateral agreements, however, are not without purpose as they can be used as precedence for any impending multilateral agreement, bearing in mind that such an agreement would be more complex in nature as it encompasses wider areas of interests for more states.⁴⁴

Finally, there is the argument for the development of a single regulatory authority for international competition, namely an international competition agreement. However, this brings about the question of how such an ambitious agreement would be developed. The various issues with a single agreement include lack of uniformity amongst nations, different policy needs, differences in politics and economies, and administrative and procedural differences.⁴⁵ According to Oh, there are two existing competition models that can be contrasted, namely the European/USA model, where the approach is to primarily focused on curbing anti-competitive practices, versus the Japanese model, where the approach is more flexible, as the overarching objective is to use competitive measures to develop a domestic policy.⁴⁶ It is clear that the former model would be favoured by developed countries, as it is geared towards ensuring market access, whereas developing countries would endorse the latter model, which provides some degree of flexibility.

If the WTO were to play a significant role in the selection of the approach, and even if the Japanese model were chosen, it is still believed that the WTO will prioritize free trade.⁴⁷ Whilst developed countries are driven by market access issues, rather than holding their national firms accountable for improper practices within foreign markets, developing countries are more driven by ensuring welfare inducing outcomes. Thus, the major concern with WTO involvement is the agenda being dominated by market access issues rather than competition issues. Thus, whilst trade and exports is promoted, economic efficiency is neglected.⁴⁸ Another general concern is that the WTO would be out of its depth. According to Woolcock, the WTO, in its effort to remove trade barriers, is focused on the regulation of public practice.

⁴¹ S Woolcock (note 11 above; 18 – 19).

⁴² J Tamura (note 25 above; 9 – 10).

⁴³ W Viljoen 'South Africa and Namibia – co-operation on competition law, enforcement and policy' 2016 *TRALAC* available at <https://www.tralac.org/discussions/article/9077-cooperation-on-competition-and-trade-matters-in-south-africa.html>, accessed on 01 July 2019.

⁴⁴ J Tamura (note 25 above; 10 – 12).

⁴⁵ B Sweeney (note 19 above; 4).

⁴⁶ C Oh (note 12 above; 2).

⁴⁷ C Oh (note 12 above; 4).

⁴⁸ B Hoekman and PS Holmes (note 13 above; 882).

Where private regulation is involved, the WTO is inept.⁴⁹ Should the WTO be responsible for implementing an international policy, the outcome would most likely be the incorporation of the organisation's core principles, namely, transparency, non-discrimination, and the inclusion of substantive and procedural provisions.⁵⁰ The WTO agreements, namely the GATT, GATS and TRIPS, include their own competitive provisions but, whilst these agreements do contain elements of competition law, they largely do not qualify as robust, nor successful, and have, in fact, seldom been relied on. There is no overarching set of principles or interpretation of the WTO rules as they apply to competition.⁵¹ Further, the GATT, GATS and TRIPS provisions apply to Member state obligations, thus dealing primarily with barriers to trade between nations, rather than holding private firms accountable. This will not suffice as Tamura notes, because most anti-competitive behaviour extends from companies themselves. Thus, the authority of any organisation regulating competition must be able to address this directly.⁵² The WTO should then rather focus on developing trade regulations instead of risking being over-burdened with non-trade issues.⁵³

Finally, there is the concern that, by placing the WTO at the forefront of the development of an international competition standard, the needs of developing countries will be overlooked⁵⁴. Developing countries might generally be on a lesser footing as they have less capacity to discipline anti-competitive abuses by foreign multinational firms.⁵⁵ In addition, there is the concern that developing countries will be strong-armed into adopting a multilateral policy that purports to take into account the needs of all participants, but in reality caters to developed countries' trade objectives primarily. For instance, whilst developed countries will benefit from a focus on free trade and like treatment, developing country governments need to prioritize providing advantages to local firms, including opposing the National Treatment Policy⁵⁶, which debate is at the core of this paper.

⁴⁹ S Woolcock (note 11 above; 27).

⁵⁰ S Woolcock (note 11 above; 28).

⁵¹ S Woolcock (note 11 above; 8 – 10).

⁵² J Tamura (note 25 above; 14).

⁵³ S Woolcock (note 11 above; 6).

⁵⁴ S Woolcock (note 11 above; 8).

⁵⁵ B Hoekman and PS Holmes (note 13 above; 885).

⁵⁶ C Oh (note 12 above; 1).

Fowler and Watkins in *Rigged Rules and Double Standards: Trade, Globalisation and the Fight Against Poverty*⁵⁷, Al Jazeera⁵⁸, Jason Hickel for the Guardian⁵⁹ and Stewart Patrick for the Atlantic⁶⁰ have taken far harsher viewpoints in their respective articles. The consensus there is not simply that the WTO is ill-equipped to address international competition regulation, taking into account the needs of developing and least developed countries, but rather that it is a mechanism for developed, powerful nations to advance on the back of its smaller 'allies'. While Al Jazeera⁶¹ points out that the WTO's failure to bring the Doha Development Agenda shows its lack of commitment to its Asian and African members, who rely on agriculture for sustenance, Hickel⁶² points out that, because developing countries rely so heavily on developed countries for funding, this unequal bargaining power means the likelihood of developed countries negotiating in good faith is slim.

However, the role of the WTO in this respect need not be completely non-existent, but should rather be limited. Countries will still benefit from the WTO playing an oversight role in facilitating international development. In other words, by ensuring each country's policy is in line with the WTO agenda and by facilitating the transparency of various business practices of existing WTO Member states.⁶³

Other suggestions by authors include providing an interim measure, whilst the pursuit of consensus amongst countries persists, is making transparent the approach of each country towards competition.⁶⁴ Further, if developing a single agreement proves too burdensome, to consider the option of dissecting the different areas of anti-competitive behaviour and developing international regulation for each, focusing more specifically on the problematic regions. In other words, tackling the task in a piece-meal fashion.⁶⁵ Lastly, there is the view that, whilst the attempts at negotiating a unilateral trade agreement persist, countries should continue to focus on ensuring each country at least has a national competition policy to protect its domestic interests. If WTO developed Member states really are concerned with the success

⁵⁷ P Fowler and K Watkins. 'Rigged Rules and Double Standards: Trade, Globalisation and the Fight Against Poverty' 2002 *Oxfam* 2 at 276.

⁵⁸ Al Jazeera 'Has the World Trade Organisation failed poor countries?' 2015 available at <https://www.aljazeera.com/programmes/countingthecost/2015/12/world-trade-organisation-failed-poor-countries-151219155155237.html>, accessed on 15 July 2019.

⁵⁹ J Hickel 'Aid in reverse: how poor countries develop rich countries' 2017 *The Guardian* available at <https://www.theguardian.com/global-development-professionals-network/2017/jan/14/aid-in-reverse-how-poor-countries-develop-rich-countries>, accessed on 01 July 2019.

⁶⁰ S Patrick 'Why Natural Resources Are a Curse on Developing Countries and How to Fix It' 2012 *The Atlantic* available at <https://www.theatlantic.com/international/archive/2012/04/why-natural-resources-are-a-curse-on-developing-countries-and-how-to-fix-it/256508/>, accessed on 15 July 2019.

⁶¹ Al Jazeera (note 58 above).

⁶² J Hickel (note 59 above)

⁶³ J Tamura (note 25 above; 16 – 17).

⁶⁴ J Tamura (note 25 above; 17).

⁶⁵ B Sweeney (note 19 above; 10).

of non-developed states, as purported, they could facilitate the process by aiding developing and least developed countries that do not have the resources required to implement a competition policy. More specifically, their role can be reduced to bearing the costs associated ensuring transparency and procedural fairness where international competition is concerned.⁶⁶

1.6 STRUCTURE

To proceed, the chapters will be set out as follows:

Chapter One: Introduction

This will include the introduction, research questions and research methodology and a synopsis of the topic.

Chapter Two: Background study of the World Trade Organisation (WTO)

First focusing on an overall history of the existence of the WTO, the chapter then develops to focus specifically on each Round of Negotiations, particularly the Singapore and Doha Development Round Agendas, and considers why negotiations proved unsuccessful; considering literary criticism on why the role of the WTO in respect of competition should be limited, if at all permitted.

Chapter Three: Competition Law, Policy, and the role of the World Trade Organisation (WTO)

Following from the previous chapter, this chapter then discusses how competition is currently regulated on an international sphere, and not merely from the point of view of the WTO's involvement. It considers the existing lapse in the regulation of international competition and analyses the major concerns from various sources, including recommendations from both the Organisation for Economic Co-Operation and Development (OECD) and the United Nations Charter on Trade and Development (UNCTAD) and the United Nations' Set of Principles and Rules on Competition (the Set), regarding the involvement of the WTO in developing a single international competition framework.

Chapter Four: South Africa's perspective on international competition and the 'Proudly South African' campaign

⁶⁶ J Tamura (note 25 above; 15 – 16).

A summary of South Africa's competition regulation, commencing from its WTO involvement and obligations and considering how these operate within the national sphere.

Chapter Five: Conclusion and Recommendations

Finally, the research closes on the note of whether an international competition policy is possible; if so, what model it should follow; and if not, whether any alternatives exist; and what role the WTO should have in this development.

1.7 CONCLUSION

It is apparent that this topic extends far beyond the initial discussion envisaged – is the 'Proudly South African' logo in direct conflict with the country's National Treatment Policy obligations in terms of the WTO and GATT? On the face of it, it appears that the promotion of local trade is not, in fact, a GATT trade concession or exemption. As such, it can only be concluded that such a logo is in conflict with a GATT core principle. However, to leave the topic at this juncture is too simplistic an approach. It does not take into account that one of the WTO's key objectives is to open trade to the benefit of all. Surely, then, this means that GATT and WTO principles should be developed to benefit all its members, including smaller, developing and least developed countries that stand to gain from the promotion of local consumption and trade?

If developing countries cannot find shelter under the auspices of the WTO, then how are they protected under international competition regimes? If such protection is afforded, it would promote legitimate marketing practices, rather than hinder it. However, the current regulation of international competition- or the lack thereof- does not appear to provide much recourse either. The narrative then extends to whether there is a need for competition to be regulated through a unilateral international mechanism- much like trade is through the WTO – and, if so, what should the WTO's involvement be?

By looking at the viewpoints of a number of authors, this research topic delves into whether the WTO is equipped to actively partake in the development of an international competition organisation, and supporting policies, or whether this will be in conflict of its world trade objectives. To do so, the relationship between trade and competition is examined, particularly under the WTO and its supporting agreements.

CHAPTER TWO:

BACKGROUND STUDY OF THE WORLD TRADE ORGANISATION (WTO)

2.1 INTRODUCTION

This chapter considers how the World Trade Organisation (WTO) came into existence by reviewing its history. This includes a brief analysis of how international trade relations were governed prior to the World Wars and how the onset of the Great Depression forced the world's superpowers to accept that opening their markets to the international community was in the best interests of all states. From 1947, negotiations then commenced on establishing what is now known as the General Agreement on Tariffs and Trade (GATT), and each negotiating round conducted for the purpose of this establishment, as well as the later establishment of the WTO, is considered in brief. Particular focus is placed on the later rounds of negotiations, including the Tokyo Round, the Uruguay Round, the Singapore Round, and the Doha Round, and what progress was made during these negotiations that extended beyond reducing trade tariffs, in respect to competition.

This chapter also succinctly looks at the WTO itself, including the core principles of the organisation, what it sets to achieve through its key objectives and how it functions as the world's trade establishment. In this respect, a critical analysis on how successful the WTO's role has been in trade liberalisation and negotiation will be provided. Finally, this chapter serves as a basis for later discussions to be embarked in this paper, namely whether the WTO, as a supposed successful international trade vehicle, is well equipped to lead progress on addressing international competition issues.

2.2 THE HISTORY OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT)

Prior to World War I, there was little need for an international regulation of trade. Trade relations adhered to bilateral trade treaties and countries were generally free to set and amend their tariffs as they saw fit. However, the War brought about higher tariffs, licensing requirements, customs controls etc. and this system became ineffective.⁶⁷ Following the conclusion of the Second World War (WW II), the General Agreement on Tariffs and Trade (GATT) began to form an existence. Countries initially negotiated to reduce the excessive

⁶⁷ D Irwin 'The GATT in Historical Perspective' *The American Economic Review* (1995) 85 at 1 – 2.

trade barriers and tariffs brought about by the Great Depression. For the next few years, the focus remained on tariff reduction⁶⁸. Holistically, though, the intent was to create a forum for negotiation, illumination and litigation. The former of the intents can be described as the GATT's most successful attribute to date, with trade liberalization negotiations continuing for more than 50 years after the conclusion of the Agreement in 1947.⁶⁹ The inspiration for the GATT was the development of an international trade institution, to join the likes of the 'Bretton Woods' institutions, namely the World Bank and the International Monetary Fund.⁷⁰ Whilst more than 50 countries negotiated on the formation of such an institution in Havana, Cuba, the scope of focus was found to be too broad- it covered not only trade related issues, but also included employment rules, international investment, commodity agreements, and causing negotiations to be fruitless.⁷¹

Meanwhile, with the post-war effects of instability still fresh, in 1947 twenty-three countries (referred to as contracting parties) commenced negotiations, with the intent to develop rules regulating international trade, with the initial focus being tariff reductions. Soon ensued other trade liberalization negotiations – as detailed below in each round of negotiations – with more countries signing on to the GATT. In total eight rounds of negotiations have taken place. To date the GATT boasts a membership of 128 countries.⁷²

2.2.1 An outline: from pre-GATT enactment to the formation of the WTO

2.2.1.1 The International Trade Organisation (ITO):

Post WW1, the formation of the United Nations was underway and countries looked to strengthen their international relations to counter against the devastation of the war. The United States of America (USA) was offering assistance to its allies (particularly Britain) to rebuild after the war. During the loan negotiations between the two super powers, the idea of an international trade charter was borne⁷³. In fact, specifically included in the USA-Britain loan agreement was a provision for the parties to agree to eliminate discriminatory behaviour in trade and commerce by reducing tariffs and other trade barriers.⁷⁴ The idea behind including

⁶⁸ C Bown 'Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement' 2009 *Brookings Institution Press* at 10 – 11.

⁶⁹ C Bown (note 68 above; 11 – 12).

⁷⁰ 'Understanding the WTO: Basics. The GATT Years: from Havana to Marrakesh' 1995 available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm, accessed 20 June 2019.

⁷¹ Understanding the WTO: Basics. The GATT Years: from Havana to Marrakesh' 1995 available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm, accessed 20 June 2019.

⁷² C Bown (note 68 above; 12 – 13).

⁷³ W Diebold 'The End of the I.T.O.' *Princeton University (International Finance Section)* 1952 (16) at 3.

⁷⁴ Article VII of the Proposals for the Expansion of World Trade and Employment 1946.

such a provision was the acknowledgment between two of the world's most powerful countries that the war had devastated not only the countries, but the very people who populated the countries. As a result, there was a dire need to provide relief, stabilize economies, provide income, better socio-economic circumstances by improving health support, and in essence any barriers that hindered this must be done away with. Thus, there was very little conflict surrounding the need for an international organisation to govern these trade liberalization efforts. Instead, lack of consensus was resultant of countries refusing to risk their sovereignty by complying with an overarching international standard.⁷⁵

In March 1948, the Draft Charter for an International Trade Organisation was signed at Havana. Prior to the signing of the Charter, the General Agreement on Tariffs and Trade (GATT) had been negotiated in 1947, intended as an interim arrangement whilst the ITO was in the process of being finalized.⁷⁶ Whilst the Draft Charter was signed, due to the tense relations between the superpowers following post-war relations, actually implementing its provisions and finalizing the Charter was not deemed a priority. By 1950, the Great Depression was waging on. The more people suffered as a result of unemployment, the more it was alleged that job security was being threatened by importing. Thus, international trade liberalization lost support and momentum and negotiations on the ITO were abandoned.⁷⁷

2.2.1.2 The General Agreement on Tariffs and Trade (GATT):

Whilst initially intended to serve as an interim measure, following the demise of the ITO, the GATT saw itself flourishing as an agreement in its own right. The history of the ITO is evident in the writing of the GATT, which set out to reduce tariff and other trade barriers, as the ITO had preceded.⁷⁸ Initially the GATT was signed in Geneva in 1947 temporarily, but to prevent all efforts already made in improving international trade relations being fruitless, the application of the GATT was extended for a further three years in 1950 in Torquay.⁷⁹

The reason the GATT succeeded where the ITO had failed was because, initially, the GATT lacked permanency. This put those countries who were sceptical of its effects at ease. The fact that the commitments were less binding than the ITO, it was more easily accepted. Overtime, however, consensus was reached on the fact that, for the negotiations concluded under the GATT to be more effect, the GATT should be awarded a firmer status. This would

⁷⁵ W Diebold (note 73; 4).

⁷⁶ W Diebold (note 73; 5).

⁷⁷ W Diebold (note 73; 5 – 6).

⁷⁸ W Diebold (note 73; 26 – 27).

⁷⁹ W Diebold (note 73; 27).

mean the GATT having its own secretariat, separate personality as a permanent organisation, more binding commitments and legislative inclusion from its signatories.⁸⁰ Below is a summary of how the GATT achieved this and bore the World Trade Organisation as a result, and what was covered during negotiating rounds by the organisation.

2.2.2 The World Trade Organisation's Negotiating Rounds:

i. Geneva Round: April – November 1947.

Whilst the agenda of this Round- like most following it- was primarily tariff focused, what is of most significance is that the culmination of the negotiations led to the original signing of the GATT by twenty-three member states.⁸¹ Commencing from April 1947, negotiations were held on reducing tariffs and completing the charter for the International Trade Organisation (or the "Havana Charter"). In October 1947 in Geneva the GATT was signed and by January 1948 eight of the twenty-three signatories had ratified the Agreement, with the remainder following suite over the next few months.⁸²

The difference between the intended interim GATT and the Havana Charter was that the Havana Charter was intended to be more comprehensive, dealing not only with reducing tariffs, but also: reducing all restrictions to trade; improving labour and employment relations; economic developing; subsidies; antidumping and countervailing duties; developing free trade areas; restrictive business practices *et al.* Thus, the signing of the GATT in 1947 was not intended to be a long-term obligation.⁸³

Before the Kennedy Round in 1964, the Rounds following the formation of the GATT were focused primarily on trade reductions, as initially intended. These include:

ii. Annecy Round: April – August 1949: In the second Round of GATT negotiations tariffs were reduced by a further 5000 concessions;⁸⁴

iii. Torquay Round: September 1950 – May 1951: This Round saw the reduction of the Geneva Round tariffs by a further 25%;⁸⁵

⁸⁰ W Diebold (note 73; 28 – 30).

⁸¹ W Diebold (note 73; 10).

⁸² S Suravonic...et al 'A Three-Year Review of the WTO' *Elliot School of International Affairs, George Washington University* 1998 at 4.

⁸³ S Suravonic (note 82; 4).

⁸⁴ W Diebold (note 73; 12).

⁸⁵ W Diebold (note 73; 12).

iv. **Geneva Round II:** January – June 1956: In the second Round held in Geneva tariffs were further reduced by \$2.5 billion;⁸⁶

v. **Dillon Round:** September 1960 – August 1961: During this round of negotiation tariffs were reduced by \$4.9 billion;⁸⁷

vi. **Kennedy Round:** May 1964 – June 1967: For the first time since the inception of the GATT, the focus of the Rounds shifted to including issues other than tariff concessions. During this Negotiating Round, the contracting parties considered developing anti-dumping policies, the result of which formed the GATT Anti-Dumping Agreement. And thus began the expansion of GATT focus to negotiate more than just tariff concessions;⁸⁸

vii. **Tokyo Round:** September 1973 – November 1979: By now GATT membership had increased to 120 contracting parties. In addition to further tariff reductions, the Round also included talks on non-tariff barriers, providing an agreement on safeguards, subsidies and countervailing measures, to name but a few. The agreements borne of the Tokyo Round include the Agreement on Subsidies and Countervailing Measures; the Technical Barriers to Trade Agreement; the Agreement on Import Licensing Procedures; the WTO Agreement on Customs Valuation; the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (or the Anti-Dumping Agreement); the Plurilateral Agreement on Government Procurement; the International Bovine Meat Agreement and the Agreement on Trade in Civil Aircraft.⁸⁹ However, the Round continued for longer than envisioned, primarily due to lack of consensus on these new issues. Because a number of members refused to subscribe to these new codes, there was little multilateral effect. Only the first five Agreements listed were binding on all members; the remainder were plurilateral agreements.⁹⁰ Another critique was the GATT's refusal to consider agricultural issues, a major area of concern for most developing countries. This highlights the impending difficulty experienced in attempts to broaden the mandate of focus areas;⁹¹ and

viii. **Uruguay Round:** September 1986 – April 1994. This Round saw the most progress, covering almost every aspect of trade- most notably including talks on trade in services and

⁸⁶ W Diebold (note 73; 12 – 13).

⁸⁷ W Diebold (note 73; 13).

⁸⁸ 'Understanding the WTO: Basics. The GATT Years: from Havana to Marrakesh' 1995 available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm, accessed 20 June 2019.

⁸⁹ S Suravonic (note 82; 4).

⁹⁰ S Suravonic (note 82; 4).

⁹¹ 'Understanding the WTO: Basics. The GATT Years: from Havana to Marrakesh' 1995 available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm, accessed 20 June 2019.

intellectual property- and lasting over 7 years. The most successful negotiation, however, was the agreement to form an international trade organisation, namely the World Trade Organisation (WTO), conceded by 123 contracting parties. Whilst the WTO replaced the GATT as an international organisation, the GATT itself remains in existence as the treaty to the WTO. The round itself was tedious, and whilst ultimately successful, led many to believe a Negotiation of this magnitude could never again be successfully achieved.⁹²

2.3 THE DEVELOPMENT OF THE WORLD TRADE ORGANISATION (WTO) AND THE LATER ROUND OF NEGOTIATIONS

Whilst the GATT proved successful in liberalizing international trade, still the calls remained for a stronger multilateral organisation. Thus the WTO was born following the Uruguay Round.⁹³ Prior to the commencement of the Uruguay Round, the GATT 1947 underwent modifications and amendments that brought to fruition what is now referred to as GATT 1994, as well as the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This proved an integral part of the development of the WTO, because after 47 years of work and negotiations, leading to the growth of the GATT signatories and the eventual membership of the WTO, the GATT finally graduated from a provisional agreement to being accepted as a de facto global trade agreement. Thus, through the evolution of the GATT, the way was paved for the official international trade organisation.⁹⁴

2.3.1 The fundamental principles of the GATT and WTO:

Stemming from the GATT before it, the principles of the WTO retained the same intended output but were extended. These inherited principles include:

- i. non-discrimination i.e. through the most-favoured nation and national treatment principles;⁹⁵

⁹² 'Understanding the WTO: Basics. The GATT Years: from Havana to Marrakesh' 1995 available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm, accessed 20 June 2019.

⁹³ K Anderson 'International Trade: the World Trade Organisation (WTO)' 2017 *Encyclopaedia Britannica* at 1.

⁹⁴ K Anderson (note 93 above; 1, 4).

⁹⁵ 'Principles of the Trading System' 1995 available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm, accessed on 15 July 2019.

- ii. reciprocity i.e. enabling mutual exchange of market access between members;⁹⁶
- iii. trade liberalization i.e. continuing with negotiations on reducing tariffs and eliminating other barriers to trade;⁹⁷
- iv. predictability and transparency i.e. having binding commitments not to raise trade barriers without first compensating other member states;⁹⁸
- v. fairness i.e. by discouraging unfair competitive practices, including export subsidies and dumping;⁹⁹ and
- vi. technical aid and development reform i.e. assisting developing and least developed countries to meet their WTO obligations by allowing flexible time adjustments and certain privileges and concessions.¹⁰⁰

In summary, the purpose of these principles are protection against discriminatory practices (through the most-favoured nation and national treatment articles), especially in favour of protection for smaller, less powerful states; to ensure a boost in market access and protect against market access and trade barriers; and ensuring certainty and predictability in economic markets.¹⁰¹

Identified from the above are what are known as the three core principles of international trade-

i. **Reciprocity:**

Reciprocity involves maintaining a balance within the market and ensuring each of the contracting parties are afforded the same benefits within the ambit of the GATT and WTO. In essence, reciprocity works in two ways: 1. when a country raises its import tariff to a higher level than its bound tariff, the contracting parties affected by such a raise can in turn negotiate a reciprocal market access change in another area of interest; and 2. when a country changes its market access and adversely affects other trading partners, those affected can rely on the dispute settlement process to obtain a ruling allowing them to rebalance market access obligations.¹⁰²

⁹⁶ 'Principles of the Trading System' 1995 available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm, accessed on 15 July 2019.

⁹⁷ 'Principles of the Trading System' 1995 available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm, accessed on 15 July 2019.

⁹⁸ 'Principles of the Trading System' 1995 available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm, accessed on 15 July 2019.

⁹⁹ 'Principles of the Trading System' 1995 available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm, accessed on 15 July 2019.

¹⁰⁰ 'Principles of the Trading System' 1995 available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm, accessed on 15 July 2019.

¹⁰¹ K Anderson (note 93 above; 4).

¹⁰² C Bown (note 68 above; 6 – 7).

ii. **Most Favoured Nation (MFN) Treatment:**

Both the MFN treatment and national treatment principle are in effect principles of non-discrimination. Any treatment- including lower tariffs and market access – offered to one GATT member by another, must in turn be offered to every GATT member, unless a deviation from the principle is permitted (i.e. through regional trade agreements or preferential trade agreements).¹⁰³

Prior to the inclusion of the MFN Clause within the GATT, the MFN principle “has long been the cornerstone of all modern commercial treaties and remains at the heart of contemporary commercial trade”.¹⁰⁴ Thus, MFN clauses have historically existed in some form or the other, even prior to being codified within the GATT. However, the historical trend of MFN application was one-sided, as where powerful states sought to secure unilateral pledges from less powerful- and more dependant- states. The overall effect was not reciprocal, which counters the GATT’s motivation. The unilateral form has since fallen out of favour because it is “incompatible with the principle of sovereign equality of states”.¹⁰⁵

Before the adoption of the contemporary MFN as adopted and endorsed within the GATT today was the development of the MFN from lacking reciprocity to a conditional MFN clause. The logic was that a conditional clause, which allowed for certain concessions, would be equivalent to having the effect of no clause at all¹⁰⁶. And whilst the MFN clause today purports to have a single effect, the reality is that countries still differ on their opinion of its interpretation, with countries such as the United Kingdom arguing that the intended effect is broad, and others like the United States of America preferring a restrictive interpretation.¹⁰⁷ The purpose of the MFN clause is to promote “fair and equitable treatment” i.e. to treat all contracting parties without discrimination.

The MFN is deemed so important that is in fact the first article of the GATT. It canvasses 39 pages and four comprehensive sections. The key excerpt of the MFN clause is as follows:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international

¹⁰³ Article I of the GATT 1947.

¹⁰⁴ S Vesel ‘Clearing a Path Through a Tangled Jurisprudence: Most-Favoured Nation Clause and Dispute Settlement Provisions in Bilateral Investment Treaties’ (2007) 32 (1) *Yale Journal of International Law* at 126.

¹⁰⁵ S Vesel (note 104 above; 128 – 129).

¹⁰⁶ S Vesel (note 104 above; 110).

¹⁰⁷ S Vesel (note 104 above; 132).

transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation [...] any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties¹⁰⁸

In *Most-Favoured-Nation Treatment in International Investment Law: Ascertaining the Limits through Interpretative Principles* author PR Thulasidhass contends that whilst the intention of the provision might be to create certainty, uniformity and ensure fair and equitable treatment in trade, the true result is instead fragmented and unrestricted and reduces the policy-making freedom of sovereign states, and contends that the clause should not be applied without limitation or restriction¹⁰⁹. The OECD seems to echo the author and in its report finds that, whilst the treaty purports to create certainty, it in fact lacks certainty due to its relative standard- in other words the treaty does not interpret the treatment of nations within the borders of other member states, but rather the treatment of nations in comparison other like nations. There is no primary standard of treatment- so long as the treatment is no less favourable to that afforded to another nation, the treaty is not contravened. The treaty would thus offer no protection where all nations are treated equally badly¹¹⁰.

iii. **National Treatment:**

Once a GATT member's foreign-produced good enters into the market of another GATT member, the national like-good must be afforded treatment no less favourable than those of foreign competitors. This means the imported good cannot be subject to additional taxes or regulatory barriers that would differentiate it from the nationally produced good.¹¹¹

The criticism surrounding the national treatment policy is that it potentially has the effect of hindering a nation's sovereignty by impacting on its freedom to implement its own domestic policies relating to the taxation of imported goods. Another criticism

¹⁰⁸ Article I of the GATT 1947.

¹⁰⁹ PR Thulasidhass 'Most-Favoured-Nation Treatment in International Investment Law: Ascertaining the Limits through Interpretative Principles' 2015 *Amsterdam Law Forum* at 4.

¹¹⁰ A Faya-Rodriguez and B Joubin-Bret 'Most-Favoured-Nation Treatment – UNCTAD Series on Issues in International Investment Agreements II' 2011 *UNCTAD* at 111 – 112.

¹¹¹ Article III of the GATT 1947.

is that the WTO Panels and Appellate Body¹¹² appear to interpret Article III without consideration of whether the additional taxes or any other perceived barrier prescribed on the imported products would have any bearing on the market. As Henrik Horn and Petros Mavroidis point out, “Article III is there to protect expectations about a behaviour and trade effects are, consequently, irrelevant”.¹¹³ The authors go on to suggest that the incorporation of the national treatment policy into domestic legislation would be better received by government officials if the outcomes of not affording national treatment to like products was considered and steps were only taken for actions that would have the *effect* of undoing trade liberalization steps. Thus, this would give countries the freedom to pursue their own internal policies, as long as the deliverables are in line with trade liberalization efforts. The effect would be appeasing countries that are fearful of the adverse effect on their state sovereignty.¹¹⁴ Other principles of the WTO include the general prohibition of quantitative restrictions (QRS), which, as per Article XI¹¹⁵, and subject to certain exceptions, where a quantity of products has been authorized for importation or exportation, Members cannot then restrict or prohibit this quantity; the observance of binding levels of tariff concessions and specific commitments (i.e. goods and services), where Members commit to minimum market access conditions; and transparency, meaning that Members’ relative trade regulations and policies are kept transparent by informing the WTO and other Members.¹¹⁶

2.3.2 The objectives and benefits of the WTO:

The key objectives of the WTO are found in the Preamble to the Agreement Establishing the WTO¹¹⁷ and are set out as follows:

1. The WTO aims to raise the living standards of its Members’ citizens through trade in both goods and services by providing a growth in employment, and increase in salaries, by optimally using resources sourced both nationally and internationally; and

¹¹² As highlighted in the following cases: Japan- Taxes on Alcoholic Beverages (WTO Doc. WT/DS8 of 4 October 1996); Korea- Taxes on Alcoholic Beverages (WTO Doc. WT/DS 75 of 18 January 1999); and Chile- Taxes on Alcoholic Beverages (WTO Doc. WT/DS87 of 13 December 1999).

¹¹³ H Horn and PC Mavroidis ‘Still Hazy After all These Years: The Interpretation of National Treatment in the GATT/WTO Case-Law on Tax Discrimination’ (2004) 15 (1) *European Journal of International Law (EJIL)* at 50.

¹¹⁴ H Horn and PC Mavroidis (note 113 above; 52 – 53).

¹¹⁵ Article XI of the GATT 1994.

¹¹⁶ ‘Module 1 – Introduction to the World Trade Organisation (WTO)’ 2012 *World Trade Organisation (WTO) E-Campus* at 4.

¹¹⁷ The GATT 1994.

2. Focus especially on the needs of developing countries and least developed countries to ensure they partake in and enjoy the fruits of a well-functioning international system of trade¹¹⁸

In order to fulfil these objectives the WTO has the following functions to fulfil, as set out in Article III¹¹⁹:

1. The administration of trade related agreements between WTO Members, by facilitating the implantation, administration and operation of these Agreements;¹²⁰
2. Multilateral trade negotiation of its Members, concerning both existing topics covered by the GATT and any new topics of interest;¹²¹
3. Constructive dispute handling through its Dispute Settlement Understanding (DSU) whereby the appropriate forum established by the Organisation provides recourse to Members who cannot otherwise negotiate and mutually resolve an issue;¹²²
4. Monitoring Members' national trade policies through the Trade Policy Review Mechanism, which helps facilitate the fundamental principle of transparency;¹²³
5. Co-operation with other Bretton Woods institutions (i.e. the International Monetary Fund and the World Bank), and in terms of the 'coherence mandate'¹²⁴ which requires the WTO to establish "effective cooperation with other intergovernmental organisations that have responsibilities related to those of the WTO" and to consult and cooperate "with non-governmental organisations concerned with matters related to those of the WTO"¹²⁵; and
6. Technical assistance, whereby the WTO supports developing and least-developed countries to transition to the WTO rules, and to implement its obligations and know the mechanisms available to exercise its rights.¹²⁶

¹¹⁸ Preamble to the GATT 1994.

¹¹⁹ Article III of the GATT 1994.

¹²⁰ 'Module 1 – Introduction to the World Trade Organisation (WTO)' 2012 *World Trade Organisation (WTO) E-Campus* at 11.

¹²¹ 'Module 1 – Introduction to the World Trade Organisation (WTO)' 2012 *World Trade Organisation (WTO) E-Campus* at 11.

¹²² 'Module 1 – Introduction to the World Trade Organisation (WTO)' 2012 *World Trade Organisation (WTO) E-Campus* at 11.

¹²³ 'Module 1 – Introduction to the World Trade Organisation (WTO)' 2012 *World Trade Organisation (WTO) E-Campus* at 11 – 12.

¹²⁴ Article V to the GATT 1994.

¹²⁵ 'Module 1 – Introduction to the World Trade Organisation (WTO)' 2012 *World Trade Organisation (WTO) E-Campus* at 12.

¹²⁶ 'Module 1 – Introduction to the World Trade Organisation (WTO)' 2012 *World Trade Organisation (WTO) E-Campus* at 12.

Chad Bown brands the GATT and its successor, the WTO, only 'moderately successful' in achieving its objectives. However, the author appears to accept that the WTO's task of negotiating provisions with a vast number of Member states is far from simple and for that reason, the GATT/WTO has shown its relevance and why it is an essential part of international economic relations¹²⁷. Brigitte Stern states that the WTO's principal purpose, or overarching objective, can be summarised as an attempt "to foster liberalisation in all sectors of economic activity". Thus, when determining the success of the GATT and the WTO the question is whether the organisation has managed to successfully achieve this. The author's final view is that, whilst the WTO can be used as a universal tool to deal with aspects of multilateral trade, it is not effective on its own. This is because the objectives of the WTO are primarily centred on trade liberalisation, in other words increasing globalisation as opposed to bettering the current system in existence, which would require correcting the structural deficiencies of the international trade market.¹²⁸

2.3.3 Further Rounds of Negotiations

What is important to note is that during each of the eight Rounds of Negotiations, and over a period of almost 50 years, the subject of international competition and the regulation thereof never entered into negotiations. After the dismal attitude following the Uruguay Round, the idea of broaching this subject seemed even more far off.

2.3.3.1 Singapore Round: December 1996 – September 2003.

However, during the Singapore Round, this issue was finally addressed. The Round itself focused on issues of investment, competition, government procurement and trade facilitation. The WTO set up three working groups to consider these issues. However, as a result of lack of development in negotiations, it was decided that, following the 2003 Cancun Ministerial Conference, the only Singapore issue to be considered would be trade facilitation, which would be the focus of the Doha Development Round of Negotiations. As a result, competition was deprioritized.¹²⁹

¹²⁷ C Bown (note 68 above; 9).

¹²⁸ B Stern 'Governing Rules and Principles of the WTO: Its scope and future developments in the context of globalisation' 1999 *Law, Democracy and Development* at 11.

¹²⁹ R Sandrey 'WTO and the Singapore Issues' (2006) 18 *TRALAC* at 7 available at <https://www.tralac.org/publications/article/6840-wto-and-the-singapore-issues.html>, accessed on 15 July 2019.

2.3.3.2 Doha Round (or the Doha Development Agenda):

November 2001 – July 2008 (note: whilst negotiations stalled in 2008, there have been several attempts to revive the talks, however, to date there has been little success). Superseding the Uruguay Round as the largest round of trade negotiations, the agenda of the Doha Round focused primarily on reforming the present international trading system. The mandate for the negotiations were provided for in the Doha Ministerial Declaration and included topics such as intellectual property, international services, agriculture, lower trade barriers, and revised trade rules. Development, however, remained at the core of the negotiations, including offering assistance to developing countries in implementing the WTO's mandate.¹³⁰ The Doha Round has established some success. The 'Bali Package', an agreement focusing primarily on trade facilitation, as well as development, which includes food security, provisions on the cotton industry in developing countries, reducing export subsidies in agriculture *et al*, is one such example.¹³¹ The 'Nairobi Package', which contains six Ministerial Decisions on agriculture and the cotton industry, public stockholding for food security, safeguards for developing countries, preferential treatment for least developed countries (LDCs) in services and trade preferences is another.¹³²

2.4 THE WTO AND DEVELOPING COUNTRIES

Whilst the formation of a single forum to negotiate trade relations was a feat many had been sceptical of, the success of the GATT and the subsequent WTO was not without its critics. One of the most prevalent points of criticism was that the WTO focused primarily on the needs of developed, 'superpowers' and the inclusion of developing and least developed countries (or LDCs) in negotiations was merely a farce as the needs of these countries were never prioritized.

The WTO does purport to concentrate on the needs of developing countries and LDCs by way of special and preferential treatment, support, trade opportunities, infrastructure support, encouraging Member aid and support *et al*, with at least 75% of WTO membership being made up of developing countries, critiques argue that the WTO's current contribution to development does not suffice¹³³. Fowler and Watkins describes the WTO as "... a governance system based

¹³⁰ 'The Doha Round' available at https://www.wto.org/english/tratop_e/dda_e/dda_e.htm, accessed on 26 June 2019.

¹³¹ 'Day 3, 4 and 5: Round-the-clock consultations produce 'Bali Package' available at https://www.wto.org/english/news_e/news13_e/mc9sum_07dec13_e.htm, accessed on 26 June 2019.

¹³² 'WTO members secure "historic" Nairobi Package for Africa and the world' available at https://www.wto.org/english/news_e/news15_e/mc10_19dec15_e.htm, accessed on 26 June 2019.

¹³³ 'The WTO can help countries develop' available at https://www.wto.org/english/thewto_e/what_is_e/10thi_e/10thi06_e.htm, accessed on 30 June 2019.

on a dictatorship of wealth”, finding that developed countries have a disproportionate influence over the operation of the organisation.¹³⁴ What appears to be the consensus of a number of writers is that the WTO has failed those who need and rely on it most.

Some critics point to the failure of the developed countries to bring the Doha Development Agenda to finality as the reason why confidence in the WTO wanes. With many African and Asian third world countries relying on agriculture for sustenance and national wealth, the fact that this issue has remained unresolved for 14 years perpetuates the idea that the WTO prioritises the needs of Western superpowers.¹³⁵ Given the history of most developing countries, the culture is to rely on western funding in order to survive. Thus, an unequal bargaining power exists.¹³⁶ Africa itself is an example of this. Referred to as the “resource curse”, African countries are renowned for vast natural resources that could stabilize the economies of most of its countries, yet leaves the citizens poor.¹³⁷ A number of factors result in this, including the fact that, through globalization and open markets, the West has unlimited access to Africa’s resources. While raw materials are an essential contribution to every facet of economic activity, the trend is for the West to export these into African countries at lower prices. As the West has better developed and more advanced industrial resources, as well as stronger economies and access to funds, this allows it to develop the resource further and dump it back into the same countries.¹³⁸ Thus, not only are developing countries, in essence, purchasing their own resources back, they are also missing out on employment opportunities where resources are exported and refined, rather than this taking place within their own territories.¹³⁹

While developing and least developed countries are supposedly protected through, certain trade concessions and development assistance provided for by developed countries, this is not without terms and conditions. The South Africa-USA chicken saga is such an example. In this instance, the South African poultry industry could not compete with the extremely low price of the unwanted USA chicken being dumped. SA attempted to balance the impact of the alleged dumping by increasing tariffs; however, this was met with threats from the USA to exclude SA from AGOA completely, highlighting the unequal bargaining power referred to between developing and developed countries.¹⁴⁰ Concerning international trade relations,

¹³⁴ P Fowler and K Watkins (note 57 above; 276).

¹³⁵ Al Jazeera (note 58 above).

¹³⁶ J Hickel (note 59 above).

¹³⁷ S Patrick (note 60 above).

¹³⁸ S Patrick (note 60 above).

¹³⁹ S Patrick (note 60 above).

¹⁴⁰ ‘Unwanted American chicken dumped in South Africa’ available at <https://www.health24.com/Diet-and-nutrition/Food-safety/unwanted-american-chicken-dumped-in-south-africa-20160324>, accessed on 30 June 2019.

developing countries oftentimes feel as if they are strong-armed into agreements that are not necessarily preferential but, faced with the prospect of being denied access to funding and resources, appear to be the best choice in the circumstances. This attitude will inevitably spill over to competition, should the WTO be tasked with determining a unilateral competition policy.

In terms of application and dispute resolution, in the *Kodak/Fuji Film*¹⁴¹ case, the WTO failed to take into account the accusations of anti-competitive behaviour on the basis that the behaviour itself, while morally questionable, did not in fact amount to a violation of Japan's WTO commitments. While the organisation took a more progressive stance in the *Mexico-Telecoms*¹⁴² case, it can be argued that the anti-competitive behaviour complained of was extreme in nature and also represented a violation of specific WTO commitments.¹⁴³

The problems of the WTO make reaching consensus difficult, as apparent by the Doha Development Round. This can be attributed to bad management on the part of the organisation.¹⁴⁴ Criticism of the WTO ranges from the organisation failing dispute settlement procedure and its lack of authority to enforce DSU decisions to problems with protectionist measures, including anti-dumping measures and retaliatory actions. The overarching result of this criticism is the lack of confidence in the organisation itself. By failing to conclude the Doha Round, this has only served to strengthen the view that, where trade relations are concerned, the WTO may have bitten off more than it can chew. The objectives of that Round are considered crucial to not only development, but also removing trade barriers, allowing for better market access and overall strengthening the multilateral system. Perhaps the WTO's rule of a single undertaking renders consensus an almost impossibility, however, the most attributable factor to the lack of finality is probably that the organisation needs to lower its focus.¹⁴⁵ With this in mind, and the fact that a number of trade issues still remain pending and require address, how can the WTO be the forum to negotiate on international competition?

2.5 CONCLUSION

Following the World Wars and the effect of the Great Depression, the world at large began to see that higher tariffs and restricted market access threatened the globe's economy. Thus,

¹⁴¹ *Japan- Measures Affecting Consumer Photographic Film and Paper* WT/DS44/R at 2 – 3.

¹⁴² *Mexico- Measures Affecting Telecommunications Services* WT/DS204/R at 2.

¹⁴³ AF Abbott and S Shanker 'Competition Policy and International Trade Distortions' 2013 *European Yearbook of International Economic Law* at 31.

¹⁴⁴ EM Dickinson 'The Doha Development Dysfunction: Problems of the WTO Multilateral Trading System' 2013 *The Global Business Law Review* at 234.

¹⁴⁵ EM Dickinson (note 144 above; 234 – 235).

the formation of the GATT and later the WTO was necessitated. The initial International Trade Organisation (later replaced with the WTO) would act as the Bretton Woods institution on international trade, but to reach consensus with dozens of countries on how such an institution should be regulated, and the type of issues it should be concerned with, was not easy. Thus, the WTO as what how it is known today took a number of years and many rounds of negotiations until its formation was effected and it became fully operational. Not all of these rounds were successful and some, like the Uruguay Round, took many years to conclude, whereas the Doha Round was never concluded due to lack of consensus amongst its members.

Whilst the WTO has achieved success in establishing itself as the de facto global trade organisation, it is still criticized, primarily for supposedly prioritizing the needs of developed countries over that of developing countries¹⁴⁶, with criticism ranging from the organisation's failing dispute settlement procedure and its lack of authority to enforce DSU decisions¹⁴⁷ to problems with protectionist measures, including anti-dumping measures¹⁴⁸ and retaliatory actions¹⁴⁹, causing confidence in the organisation to wane.

¹⁴⁶ S Vessel (note 104 above; 128 – 129).

¹⁴⁷ J Hickel (note 59 above).

¹⁴⁸ EM Dickinson (note 144 above; 236).

¹⁴⁹ C Oh (note 12 above; 7).

CHAPTER THREE:

COMPETITION LAW AND POLICY AND THE ROLE OF THE WORLD TRADE ORGANISATION

3.1 INTRODUCTION

International trade results in global competitive markets that requires particular frameworks that encapsulates this complex area. Following from the previous chapter-, which considered competition solely from the perception of its development within the World Trade Organisation (WTO) - this chapter, then discusses how competition is currently regulated on an international sphere, and not merely from the point of view of the WTO's involvement. Thus, it goes beyond merely considering the role of the WTO and as such considers how there presently exists a lapse in the regulation of international competition. An analysis is then made of the major concerns from various authors and sources regarding the WTO's involvement in developing a multilateral competition framework agreement and considering what role the WTO should, in fact, play in regulation. The chapter will engage in a review of the WTO and its ancillary agreements, such as the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).¹⁵⁰ It will also look at the recommendations of both the Organisation for Economic Co-Operation and Development (OECD) and the United Nations Charter on Trade and Development (UNCTAD)¹⁵¹ and the United Nations' Set of Principles and Rules on Competition (the Set), which flows from UNCTAD. The purpose is to ascertain whether there is a lack of established international competition principles. Further, the chapter will reveal that competition is governed unilaterally and through co-operative measures between governments, or through bilateral and regional agreements. The views of a few authors are

¹⁵⁰ According to the website of the Organisation for Economic Co-operation and Development (OECD), the organisation's primary objective is to improve the economic and social status of people globally by providing a forum for governments to share policies and problems so as to bring about social change. The OECD is primarily concerned with global finances and the improvement thereof, paying special attention to any endeavours to promote the financial status of global economies, and forecasting any risks that could pose a negative outcome. This means the organisation has a special interest in how competition policies and anti-competitive behaviours and practices have an adverse effect on the financial wellbeing of the population at large. 'About the OECD' available at <https://www.oecd.org/about/>, accessed on 15 July 2019.

¹⁵¹ Established by the United Nations in 1964, the role of the United Nations Conference on Trade and Development (UNCTAD) is that of an intergovernmental organisation tasked with providing support to developing countries to ensure economic integration into a fast developing global economy. To achieve this, UNCTAD assists with providing funding for development, but also addresses economic and development challenges, including the regulation of competition. 'About UNCTAD' available at <https://unctad.org/en/Pages/aboutus.aspx>, accessed on 15 July 2019.

shared; these views not only reflect the need and plausibility of a multilateral policy, but also consider the role the WTO should play in developing such a policy.

To decipher the above, the chapter first defines international competition policy by giving attention to how it is interpreted by the WTO and other international competition bodies such as the OECD and UNCTAD. Further, the chapter then compares these definitions to assess how these definitions relate to what is understood by national competition policy, meaning the competition regulation generally employed within an individual state, in comparison to multilateral competition regulation.

3.2 THE MEANING OF COMPETITION POLICY WITHIN THE CONTEXT OF INTERNATIONAL LAW

3.2.1 The definition of national competition law and policy

What is key to note is that competition *law* and competition *policy*, whilst referred to interchangeably, in fact bear different meanings. According to Hoekman and Holmes, competition law is:

a set of rules and disciplines maintained by governments relating either to agreements between firms that restrict competition or to the abuse of a dominant position.¹⁵²

Competition policy, on the other hand, is conferred a broader meaning by the authors and is defined as:

[...] the set of measures and instruments used by governments that determine the “conditions of competition” that reign on their markets.¹⁵³

Competition law and competition policy, however, are terms that are not ordinarily defined explicitly, but rather their meaning can be conferred within the context they are used. Thus, to understand what constitutes either, one must first be familiar with what the law or policy would regulate i.e. what is an anti-competitive practice. Other terms for anti-competitive practices, include restrictive business practices, monopolistic practices *et al*, but these terms are generally all conferred the same meaning.¹⁵⁴ Attempts to regulate anti-competitive practices

¹⁵² B Hoekman and PS Holmes (note 13 above; 8).

¹⁵³ B Hoekman and PS Holmes (note 13 above; 9).

¹⁵⁴ OECD Global Forum on Competition ‘Competition Law and Policy in South Africa’ 2003 Organisation for Economic Co-Operation and Development, Competition Division and Centre for Co-Operation with Non-Members at 4.

became prevalent as early as the 1930s, when the International Trade Organisation described it as practices that “[...] have harmful effects of the expansion of production or trade [...]”.¹⁵⁵ The ITO further included examples of such practices:

- a. price fixing agreements on terms and conditions of supply of a product; b. agreements to exclude suppliers or allocating markets between suppliers; c. discrimination against particular enterprises; d. limiting production or fixing production quotas; e. agreements preventing the development of particular technologies; and f. unjustified or unlawful extensions of patent or intellectual property rights.¹⁵⁶

However, these provisions have no real effect as the Charter was never formally adopted due to the United States’ refusal to ratify it.¹⁵⁷ One author defines anti-competitive practices as “[...] business conduct that is deemed to harm the competitive process [...]”, and substantiates this brief definition with examples that includes collusive or exclusionary agreements entered into between competitors, abuse of monopoly power and anti-competitive mergers; and states that competition policy has the effect of promoting welfare, must like trade law and policy.¹⁵⁸ Another does not define what constitutes anti-competitive behaviour, but rather provides examples, which include international trade cartels and monopolistic behaviour amongst international mergers.¹⁵⁹ Interestingly, the Australian Competition and Consumer Commission defines anti-competitive behaviour as “[...] practices that limit or prevent competition [...]”, and expand this definition to include cartels, collective bargaining and boycotts, exclusive dealing, the misuse of market power, the refusal to supply products or services, and the more general anti-competitive conduct and unconscionable conduct (the definition of these examples is further expanded below).¹⁶⁰ Closer to home is the definition contained in the Competition Act 89 of 1998 (hereafter referred to as the Competition Act), which defines restrictive business practices as:

- any practices that “[...] has the effect of substantially preventing, or lessening, competition in a market [...]”¹⁶¹ by “[...] directly or indirectly fixing a purchase or selling price or any other trading condition; dividing markets by allocating customers, suppliers, territories, or specific types of goods or services, or collusive tendering

¹⁵⁵ Chapter V of the Havana Charter for an International Trade Organisation 1948.

¹⁵⁶ Article 46 of the Havana Charter for an International Trade Organisation 1948.

¹⁵⁷ S Bilal and O Marcelo ‘Competition Policy and the WTO: Is there a need for a multilateral agreement’ 1998 (98/W/02) European *Institute of Public Administration* at 6.

¹⁵⁸ AF Abbott and S Shankar (note 144 above; 23).

¹⁵⁹ S Nagaoka ‘International Trade Aspects of Competition Policy’ in University of Chicago Press (ed) *Deregulation and Interdependence in the Asia-Pacific Region* vol 8 (2000) at 56 – 60.

¹⁶⁰ ‘Business – Anti-Competitive’ available at <https://www.accc.gov.au/business/anti-competitive-behaviour>, accessed on 30 June 2019.

¹⁶¹ S 4 (1) (a) 89 of 1998.

[...].¹⁶² This definition includes both horizontal¹⁶³ and vertical practices.¹⁶⁴ Other examples of anti-competitive practices include abuse of a dominant position,¹⁶⁵ price discrimination,¹⁶⁶ and the prohibition of certain mergers that fail to conform to the standards provided for in the Act and by the Competition Commission.¹⁶⁷

To substantiate the definition of certain examples of anti-competitive practices:

- i. *Anti-competitive conduct*: “[...] contracts, arrangements, understandings or concerted practices that have the purpose, effect or likely effect of substantially lessening competition in a market [...]”¹⁶⁸
- ii. *Cartels*: “Businesses that make agreements with their competitors to fix prices, rig bids, share markets or restrict outputs [...]”¹⁶⁹
- iii. *Collective bargaining and boycotts*: “[...] to fix prices, restrict outputs or allocate customers, suppliers or territories [...]”¹⁷⁰
- iv. *Exclusive dealing*: “[...]when one person trading with another imposes some restrictions on the other’s freedom to choose with whom, in what, or where they deal [...]”, with the effect of substantially lessening competition¹⁷¹
- v. *Misuse of market power*: where a business with “substantial degree of power in the market” engages in conduct that “[...] has the purpose, effect or likely effect of substantially lessening competition in a market”¹⁷²
- vi. *Unconscionable conduct*: “[business] conduct which is so harsh that it goes against good conscience”.¹⁷³

In summary, then competition law can be defined as a component of competition policy, which is used to regulate anti-competitive or restrictive or monopolistic practices, which, in brief, can

¹⁶² S 4 (1) (b) (i) – (iii) of 89 of 1998.

¹⁶³ S 4 of 89 of 1998.

¹⁶⁴ S 5 of 89 of 1998.

¹⁶⁵ S 8 of 89 of 1998.

¹⁶⁶ S 9 of 89 of 1998.

¹⁶⁷ S 11 – 18 of 89 of 1998.

¹⁶⁸ S 45 of the Australian Competition and Consumer Act 2010.

¹⁶⁹ ‘Business – Anti-Competitive’ available at <https://www.accc.gov.au/business/anti-competitive-behaviour>, accessed on 30 June 2019.

¹⁷⁰ ‘Business – Anti-Competitive’ available at <https://www.accc.gov.au/business/anti-competitive-behaviour>, accessed on 30 June 2019.

¹⁷¹ ‘Business – Anti-Competitive’ available at <https://www.accc.gov.au/business/anti-competitive-behaviour>, accessed on 30 June 2019.

¹⁷² ‘Business – Anti-Competitive’ available at <https://www.accc.gov.au/business/anti-competitive-behaviour>, accessed on 30 June 2019.

¹⁷³ ‘Business – Anti-Competitive’ available at <https://www.accc.gov.au/business/anti-competitive-behaviour>, accessed on 30 June 2019.

be defined as harmful conduct that has the effect of lessening or restricting competition in business,

3.2.2 The WTO's definition of international competition policy

It should be noted that the definitions ascribed above are applicable to *national* competition law and policy. Within the context of international law, the WTO defines competition policy similarly to the aforementioned authors as:

[...] policy dealing with the behaviour or enterprises, and, specifically, the regulation of anti-competitive practice.¹⁷⁴

However, this definition still pertains to how national governments deal with anti-competitive practices within their national jurisdictions, and not how competition is internationally defined and perceived. Thus, to define competition as it pertains specifically to international trade, reliance was placed on a WTO dispute settlement ruling most closely linked to anti-competitive practices. In the *Mexico – Measures Affecting Telecommunications Services* matter (or the *Mexico-Telecomms case*) the WTO dispute settlement panel decided on a complaint made by the United States that, “[...] Mexico adopted or maintained anti-competitive and discriminatory regulatory measures, tolerated certain privately-established market access barriers [...]”.¹⁷⁵ Whilst the panel does not specifically define international competition- or even competition- within its findings, its interpretation on what constitutes ‘anti-competitive practices’ appears to be measures that limit market access, and/or infringe on the principle of non-discrimination or any other international commitments.¹⁷⁶

Like its predecessor, the ITO, the WTO's definition is primarily trade reflective, as opposed to determining competition as an issue that is related to, but still wholly independent from, trade. This divergence in how the WTO defines competition versus how national competition is understood is probably the primary reason why the WTO's role in developing an international competition standard is widely criticised. Whilst national competition policies ordinarily encompass rules to combat international price fixing cartels and export cartels; the regulation of international mergers; the reduction of policies that discriminate against foreign goods; introducing pro-competitive policy reforms; and also market access related issues, the WTO's stance on competition seems focused only on the latter i.e. how competition affects market access.¹⁷⁷ This conflict in focus will be expanded upon later.

¹⁷⁴ ‘Module 1 – Introduction to the World Trade Organisation (WTO)’ 2012 *World Trade Organisation (WTO) E-Campus* at 2.

¹⁷⁵ *Mexico- Measures Affecting Telecommunications Services* WT/DS204/R.

¹⁷⁶ WT/DS204/R.

¹⁷⁷ B Sweeney (note 19 above; 58 – 59).

3.2.3 The OECD's definition of international competition policy

In contrast to the WTO, the OECD defines competitiveness as “a measure of a country's advantage or disadvantage in selling its products in international markets”¹⁷⁸ and anti-competitive practices as “[...] a wide range of business practices in which a firm or group of firms may engage in order to restrict inter-firm competition to maintain or increase their relative market position and profits without necessarily providing goods and services at a lower cost or of higher quality.”¹⁷⁹ Within the definition are specific examples including cartels, collusion, conspiracy, mergers, price discrimination, price fixing, exclusive dealing, market restrictions, resale price maintenance *et al.*¹⁸⁰ Given the OECD's role in setting international standard on economic issues, it is well-equipped to contribute to the conversation concerning international competition. On this note, it is evident that the OECD's view of anti-competitiveness is wider than that of the WTO in that it is not oriented on market access issues only.

3.2.4 The UNCTAD's definition of international competition policy

UNCTAD describes competition policy broadly as the preservation of the operation of a competitive market mechanism. Like the OECD, UNCTAD includes specific examples of what amounts to anti-competitive practices (or restrictive business practices (RBPs)) such as collusion, cartels, price-fixing, monopolization, unfair or discriminatory market terms, *et al.*¹⁸¹ UNCTAD also recognises the split in anti-competitive practices between businesses (i.e. conduct that restrains competition) and government policies that burden competition.¹⁸²

UNCTAD further distinguishes two root causes of anti-competitive practices, namely business conduct that restrains competition and government policies that burden competition. The

¹⁷⁸ OECD 'Glossary for Statistical Terms' 2014 available at <https://stats.oecd.org/glossary/detail.asp?ID=399>, accessed on 30 June 2019.

¹⁷⁹ OECD 'Glossary for Statistical Terms' 2014 available at <https://stats.oecd.org/glossary/detail.asp?ID=399>, accessed on 30 June 2019.

¹⁸⁰ OECD 'Glossary for Statistical Terms' 2014 available at <https://stats.oecd.org/glossary/detail.asp?ID=399>, accessed on 30 June 2019.

¹⁸¹ UNCTAD 'UNCTAD Series on Issues in International Investment Agreements: Competition' 2004 *United Nations* at 2.

¹⁸² UNCTAD 'Competition Law: Why Competition Matters' available at <http://unctad.org/en/Pages/DITC/CompetitionLaw/why-competition-matters.aspx>, accessed on 30 June 2019.

former includes cartels, price fixing, non-compete agreements *et al*; and the latter examples include restrictive licensing regimes for certain sectors¹⁸³.

The definitions of what constitutes anti-competitive practices within the international arena provided for by the OECD and UNCTAD are aligned with how national anti-competitive behaviour is ordinarily defined (i.e. in view of the definitions provided for by the Australian¹⁸⁴ Competition and Consumer Commission¹⁸⁵ as well as the Australian Competition and Consumer Act 2010¹⁸⁶; and our own Competition Act 89 of 1998¹⁸⁷, as points of reference). The WTO, therefore, remains the anomaly that views international competition only in relation to international trade, rather than as an area of focus of its own.

3.3 HOW INTERNATIONAL COMPETITION IS PRESENTLY REGULATED

3.3.1 The regulation of international competition in the WTO

As detailed in the previous chapter, the WTO initially set about to develop a consolidated international standard on the regulation of anti-competitive practices at the Ministerial Conference in Singapore (1996) by establishing a Working Group on the Interaction between Trade and Competition Policy (WGTCP). However, by the Doha Ministerial Round in 2001 and the Cancun Ministerial Round in 2003, little progress had been made in developing a multilateral framework and no consensus could be reached between members. In August 2004, the General Council elected to focus instead on the 'other issues' covered in the Doha Development Agenda (DDA) and work on an international competition policy was thus abandoned.¹⁸⁸ The WTO recognises the importance of a single standard of competition regulation, especially due to the complementary relationship between trade and competition and the understanding that anti-competitive practices can lead to distorted markets. However, it appears that certain issues, including agricultural subsidies, industrial tariffs and non-tariff

¹⁸³ UNCTAD 'Why Competition Matters' available at <http://unctad.org/en/Pages/DITC/CompetitionLaw/why-competition-matters.aspx>, accessed on 30 June 2019.

¹⁸⁴ Australia, as well as Japan, is one of the few developed countries, outside the Western powers, with a well established competition regime. It would be interesting to contrast this against the approach taken by a developing country, such as South Africa.

¹⁸⁵ 'Business – Anti-Competitive Behaviour' available at <https://www.accc.gov.au/business/anti-competitive-behaviour>, accessed on 30 June 2019.

¹⁸⁶ Australian Competition and Consumer Act 2010.

¹⁸⁷ Act 89 of 1998.

¹⁸⁸ 'Module 1 – Introduction to the World Trade Organisation (WTO)' 2012 *World Trade Organisation (WTO) E-Campus* at 3.

barriers and trade remedies have, by consensus between members, been deemed more of a priority than competition.¹⁸⁹¹⁹⁰

The WTO, however, still governs anti-competitive practices through its subsidiary agreements. These include the GATT, which consist of provisions on monopolies and exclusive service suppliers;¹⁹¹ in GATS, which also includes procedures for cooperation by WTO Members to mitigate against anti-competitive practices and their effect on international trade;¹⁹² with the latter also included in the TRIPS.¹⁹³ However, Woolcock argues that the provisions included in WTO agreements “[...] are weak, have seldom been used and even more seldom used with success [...]”.¹⁹⁴ It is for this reason that an overarching set of principles is required.

3.3.2 The role of the OECD and UNCTAD in the regulation of international competition

3.3.2.1 OECD

The mission of the OECD is described by the organisation as the promotion of policies to improve the economic and social well-being of the international community, through government cooperation and transparency and the recommendation of key policies.¹⁹⁵ The OECD’s work, specifically in relation to cooperation in international competition, includes stabilising inconsistencies in the enforcement of national and bilateral competition laws; assistance with compliance of the competition regimes across jurisdictions; and improving the tools and techniques of competition authorities’ co-operation.¹⁹⁶

As such, the OECD provides its services to its members through its Competition Committee in the form of recommendations, encouraging the application of best practices and policy roundtable discussions¹⁹⁷. The effect of these recommendations, however, are not binding. Because they are not Acts or formal policies, they have not legal implications, and thus, merely

¹⁸⁹ The rationale for prioritizing these issues and delegating a special status appears to be that it would be a more conducive use of time to focus on removing the remaining restraints on trade for better market access, as more headway has already been in the respect of the negotiation of these issues, thus, success is more imminent. In contrast, to embark on negotiations on international competition is thought of as a futile, arduous task. Module 1 – Introduction to the World Trade Organisation (WTO) 2012 *World Trade Organisation (WTO) E-Campus* at 3 – 4.

¹⁹⁰ Module 1 – Introduction to the World Trade Organisation (WTO) 2012 *World Trade Organisation (WTO) E-Campus* at 3 – 4.

¹⁹¹ Article II: 4 of the GATT 1947.

¹⁹² Article IX of the GATS 1995.

¹⁹³ Article 40 of the TRIPS 1995.

¹⁹⁴ S Woolcock (note 11; 16).

¹⁹⁵ OECD ‘About the OECD’ available at <http://www.oecd.org/about/>, accessed on 30 June 2019.

¹⁹⁶ OECD ‘About the OECD’ available at <http://www.oecd.org/about/>, accessed on 30 June 2019.

¹⁹⁷ OECD ‘International Co-Operation in Competition’ available at <http://www.oecd.org/competition/internationalco-operationandcompetition.htm>, accessed on 30 June 2019.

serve as guidelines. However, the OECD itself has more faith in the adoption of these recommendations by its Member states and declares that recommendations “[...] are not legally binding, but practice accords them great moral force as representing the political will of Member countries and there is an expectation that Member countries will do their utmost to fully implement a Recommendation”.¹⁹⁸ Whilst the efforts of the OECD are well received and by all means better than an organisational approach, the reality is that, with a membership of 35 countries globally,¹⁹⁹ it cannot suffice as the primary model of multilateral cooperation within the competition environment.

3.3.2.2 UNCTAD

The general role of UNCTAD is to promote the integration of developing countries into the global economy through a forum for intergovernmental deliberations; research and policy analysis; and providing technical assistance to developing countries.²⁰⁰

Notably, the UNCTAD has developed a Competition and Consumer Policies Programme with the intent to improve competition and consumer protection. The key functions of the Competition and Consumer Policies Programme are:

- enabling government discussions regarding the relationship between competition and development,
- international cooperation in competition law enforcement, and the effectiveness of competition agencies at the annual Intergovernmental Group of Experts on Competition Law and Policy (IGE) meeting;
- undertaking research, policy analysis and data collection on the aforementioned points; and
- assisting developing countries with the implementation of the recommendations and best practice models identified.²⁰¹

UNCTAD rightly points out that one of the key issues with international competition is that “[C]ompanies and supply chains are international, while competition laws and enforcement

¹⁹⁸ OECD ‘Legal Affairs – OECD Legal Instruments’ available at <https://www.oecd.org/legal/legal-instruments.htm> accessed on 30 June 2019.

¹⁹⁹ OECD ‘Members and Partners’ available at <http://www.oecd.org/about/membersandpartners/>, accessed on 30 June 2019.

²⁰⁰ UNCTAD ‘About UNCTAD’ available at <http://unctad.org/en/Pages/aboutus.aspx>, accessed on 30 June 2019.

²⁰¹ UNCTAD ‘International Law and Competition: Mandate and Key Functions’ available at <http://unctad.org/en/Pages/DITC/CompetitionLaw/ccpb-Mandate.aspx>, accessed on 30 June 2019.

agencies are primarily national”.²⁰² The result of this is national competition authorities being fraught with international issues, which they are not adept at handling.²⁰³ Such international issues broadly include the organisations discussed below.

3.3.3 The United Nations Set of Principles and Rules on Competition

Through UNCTAD, the United Nations has adopted a Set of Principles and Rules on Competition (the Set)²⁰⁴. Ioannis Lianos asserts that the Set was established as a result of “[...] developing countries’ efforts [...] to question the foundations of the international trade system and develop a “New International Economic Order””.²⁰⁵ Thus, the Set appears to be substantially concerned with providing economic support and development to less developed countries, as is the objective of UNCTAD to combat poverty by enabling developing countries to access the tools for economic integration.²⁰⁶ From December 1978 to April 1980 the United Nations Conference on Restrictive Business Practices (RBP) - under the auspices of UNCTAD- convened meetings with the intent to adopt a set of multilateral rules governing RBPs. The Set was adopted in 1980 and seven UN Conferences²⁰⁷ have taken place to review and, where necessary update, the content.

The intention behind the set of rules is to eliminate RBPs adversely affecting international trade, and contribute to the economic development of developing countries. The UN also recognized that the best way to target and impede anti-competitive practices is by agreeing

²⁰² UNCTAD ‘Why competition and consumer protection matter’ available at <http://unctad.org/en/Pages/DITC/CompetitionLaw/why-competition-matters.aspx>, accessed on 30 June 2019.

²⁰³ UNCTAD ‘Why competition and consumer protection matter’ available at <http://unctad.org/en/Pages/DITC/CompetitionLaw/why-competition-matters.aspx>, accessed on 30 June 2019.

²⁰⁴ ‘The United Nations’ Set of Principles and Rules on Competition – The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices’ (1980) 10 (2) *UNCTAD* at 7.

²⁰⁵ I Lianos ‘The Contribution of the United Nations to the Emergency of Global Antitrust’ (2007) 15 (2) *Tulane Journal of International & Comparative Law* at 4.

²⁰⁶ UNCTAD ‘About UNCTAD’ available at <http://unctad.org/en/Pages/aboutus.aspx>, accessed on 30 June 2019.

²⁰⁷ The United Nations Conference to Review All Aspects of the Set is a conference that has taken place every five years, since the inception of the United Nations Set of Principles and Rules on Competition in 1980. The seven conferences have, thus, taken place in 1985, 1990, 1995, 2000, 2005, 2010 and 2015. All but one of the conferences were held at the UN Headquarters; the Palais de Nations, in Geneva, Switzerland (the fifth conference was held from 13 – 18 November 2005 in Antalya, Turkey). The ordinary process is for UNCTAD to issue an invitation- which includes an agenda canvassing the key issues- to all its Member states to attend the conference. The conference is ordinarily opened by the President of the Review Conference (as selected for that year) and a number of meetings are convened over the course of the designated days to discuss each issue as recorded in the agenda. Following the conference, a report is compiled and circulated, which contains a Resolution which, in essence, provides for an adoption of processes to further strengthen the United Nations Set of Rules and Principles on Competition. ‘The United Nations’ Set of Principles and Rules on Competition – The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices’ (1980) 10 (2) *UNCTAD* at 7.

upon multilateral equitable principles and rules. The reason for preference of multilateral- as opposed to regional, bilateral or cooperative- principles and rules is the belief that such rules would, in fact, strengthen national laws and policies and regional and bilateral relationships governing RBPs and, “[...] lead to improved conditions and attain greater efficiency and participation in international trade and development [...]”.²⁰⁸ In order to ensure rules are fair and equitable, it needs to be applied on the same basis across nations. There is little way of governing and ensuring this if countries each elect to create and adhere to their own set of rules.²⁰⁹

The principles and rules are split: those applicable to enterprises, including transnational enterprises; those applicable to States at national, regional and sub-regional levels; and those applicable at an international level. Whilst the ambit of the Set purports to address a multilateral form of governance of RBPs, the application of the rules indicates more of a co-operative stance.

In summary, the rules applicable to enterprises are as follows: i. enterprises must conform to the rules of the countries in which they operate; ii. enterprises conduct their operations transparently and disclose any information that concerns any form of RBPs; iii. enterprises must refrain from practice that is deemed a RBP including, but not limited to, price fixing agreements, collusive tendering, market or customer allocation arrangements, refusals to deal, below-cost pricing to eliminate competitors, discriminatory pricing or terms and conditions, trademark infringement *et al.*²¹⁰ Concerning State obligations, governments must commit to advancing national legislation regarding RBPs; treat all enterprises fairly and equitably; encourage the disclosure of certain information by enterprises related to RBPs and also ensure the protection of said confidential information; promote transparency of both *de facto* and *de jure* anti-competitive policies. Internationally states must simply ensure compliance with the Set.²¹¹

²⁰⁸ Preface to the United Nations’ Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices 1980.

²⁰⁹ UNCTAD ‘Why competition and consumer protection matter’ available at <http://unctad.org/en/Pages/DITC/CompetitionLaw/why-competition-matters.aspx>, accessed on 30 June 2019.

²¹⁰ Part D (1 – 4) to the United Nations’ Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices 1980.

²¹¹ Part E (1 – 9) to the United Nations’ Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices 1980.

3.3.4 Bilateral cooperation

The International Competition Network (ICN), whilst not a bilateral cooperation agreement, is used as a model- along with the OECD recommendations and the UN Set- in the development of bilateral agreements. The mission statement of the ICN is:

“[...] to advocate the adoption of superior standards and procedures in competition policy around the world, formulate proposals for procedural and substantive convergence, and seek to facilitate effective international cooperation to the benefit of member agencies, consumers and economies worldwide.”²¹²

Further the ICN is an avenue for competition authorities to address competition issues and communicate anti-competitive policies applied globally.²¹³ The benefits of the ICN have been identified as the following:

- i. pre-investigation – notifications concerning activities of cartels, companies and markets;
- ii. during investigation – the coordination and consolidation of investigation strategies and efforts; and
- iii. post-investigation – the sharing of information relating to prosecution or settlement arrangements.²¹⁴

The ICN, thus, acts as a community for governments to convene and share information in the quest to determine the best practice. The United States (US) is one superpower of the view that international regulation of competition will amount to subordination of national legislation and, as such, prefers unilateral application with co-operative governance, or bilateral application preferable. The US has concluded a total of 16 bilateral anti-trust agreements, including agreements with the EU; Japan; Canada; Brazil; and Australia, to name a few.²¹⁵ These agreements are largely cooperative in nature, and are usually drafted as Memorandums of Understanding (MOU), thus, having very little legally binding effect. Most agreements simply require its signatories to communicate with their respective competition

²¹² International Competition Network ‘Mission Statement’ available at <http://www.internationalcompetitionnetwork.org/>, accessed on 30 June 2019.

²¹³ International Competition Network ‘Mission Statement’ available at <http://www.internationalcompetitionnetwork.org/>, accessed on 30 June 2019.

²¹⁴ N Sekata ‘Are Southern African Competition Law Regimes geared up for effective co-operation in competition law enforcement?’ 2011 *Competition Commission of South Africa* at 3 – 4.

²¹⁵ The United States Department of Justice ‘Anti-Trust Division – Anti-Trust Co-operation Agreements’ available at <https://www.justice.gov/atr/antitrust-co-operation-agreements>, accessed on 30 June 2019.

authorities and undertake to ensure transparency, and cooperate when anti-trust behaviours are investigated. The effect thus, is that effectiveness of these agreements are dependent on the goodwill of its signatories and that a substantial outcome is difficult to achieve where said signatories fail to reach consensus, as the provisions cannot be enforced.²¹⁶

Within Africa the Southern African Customs Union Agreement (2002), COMESA Competition Regulations (2004), and the SADC Declarations on Regional Cooperation in Competition and Consumer Policies (2009) regulates how member states cooperate in the area of competition law enforcement. The need for such agreements stemmed from the acknowledgment that, to tackle cross-border anti-competitive practices, regional cooperation was required.²¹⁷

It appears as though, whilst the OECD and UNCTAD are, to date, the most progressive in dealing with multilateral competition, the reality is with a sparse membership, and without the obligations that arise through WTO membership, these organisations do not have enough clout to compel cooperation. Stephen Woolcock, in *International Competition Policy and the World Trade Organisation*, rightly points out that the OECD rules merely serve as guidelines as opposed to having the effect of enforcement.²¹⁸ As stated by Woolcock, “[T]he OECD rules were not seen as the beginning of a multilateral competition regime, but were explicitly seen as providing the model of bilateral co-operation between OECD members”. Woolcock further contends that the provisions included in the UN Set are limited and not concrete. There is no commitment by governments to any binding provisions, and instead the Set acts as recommendations.²¹⁹

Regional and bilateral cooperative agreements are a good start in the right direction, the issue is that the points of divergence within the various agreements can result in regulatory overlap.²²⁰ It has also been indicated that cooperation does not suffice where there is a serious difference in policy. For example, whilst the EU and the US have concluded a cooperative antitrust agreement, in the *Boeing-McDonnell Douglas (MDD) case*²²¹ concerning a transnational merger, the views of the two differed. The EU sought to protect the interests of Airbus, its EU competitor of Boeing-MDD, against Boeing-MDD enforcing sole-sourcing contracts through its merger. This case illustrates that the interests of different jurisdictions can diverge where antitrust practices are concerned.²²² What is viewed as a RBP by one state

²¹⁶ C James ‘International Anti-Trust in the 21st Century: Co-operation and Convergence’ 2001 *OECD* at 2 – 5.

²¹⁷ N Sekata (note 214 above; 6).

²¹⁸ S Woolcock (note 11 above; 16 – 17).

²¹⁹ S Woolcock (note 11 above; 16 – 17).

²²⁰ B Sweeney (note 19 above; 67).

²²¹ *Boeing v McDonnell Douglas* IV/M.877.

²²² B Hoekman and PS Holmes (note 13 above; 7).

to the agreement can be seen as a legitimate business practice to the other. In this instance, which stance overrides the other? Similarly, in the southern African region the primary challenges identified in enforcing co-operation is that most agencies are new and underdeveloped and thus need to still build capacity; the divergence of rules and approaches makes compatibility of methods difficult; and the difficulty in transparency due to the fear of the disclosure of confidential information through the sharing of information.²²³

3.4 CRITIQUING THE ROLE OF THE WTO IN DEVELOPING A MULTILATERAL COMPETITION POLICY

Whilst views on whether or not a multilateral competition policy is possible and necessary oftentimes diverge, the opinion that the WTO is not the correct forum in which such a policy should be developed appears to be widely shared. According to the WTO itself, efforts on developing an international competition policy have ceased indefinitely.²²⁴ Initially the WTO established the Working Group on the Interaction between Trade and Competition Policy (WGTCPP) to study the issue. The findings of the study were included in the Doha Ministerial Declaration, however, the WTO states, “[T]he Working Group is currently inactive but the WTO Secretariat continues to respond to national requests for technical assistance in this area for the benefit of interested WTO Members and countries seeking accession to the WTO”.²²⁵

3.4.1 Literature opinions

In *International Competition Law and Policy: A Work in Progress* author Brendan Sweeney shares the view that an international competition regime already exists by default.²²⁶ So whilst no formal agreement has been signed and ratified by any nations, the fact that companies operate internationally means that an overlap of domestic policies unofficially serves to regulate competitive practices internationally. The question then is not whether an international competition standard must be developed but rather whether the existing standard must be codified. The difficulty in codifying this standard is because states have different

²²³ N Sekata (note 214 above; 10 – 11).

²²⁴ ‘Module 1 – Introduction to the World Trade Organisation (WTO)’ 2012 *World Trade Organisation (WTO) E-Campus* at 5.

²²⁵ ‘Investment and Competition: what role for the WTO?’ available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm#investment, accessed on 30 June 2019.

²²⁶ B Sweeney (note 19 above; 11 – 12).

policy needs, which is primarily contingent on their economic structure and development. The author does not hold a concrete view on whether the existing standard must be codified, but simply ends by stating that competition law is “very much a work in progress”²²⁷. However, it is pointed out that the current system of ‘default governance’ (or co-operative governance) might not stand for much longer because each country’s protectionist desires will require supranational oversight to ensure that commitments are honoured.²²⁸

Hoekman and Holmes go beyond the argument of whether or not an international competition legislation must be developed, and also consider whether the WTO should be involved in any development.²²⁹ Interestingly, and of relevance to this study, is that the focus on the article is from the perspective of developing countries. The authors contend that any developments should be done independently of the WTO because market access issues as opposed to competition will dominate the WTO agenda holistically. Whilst national competition focuses on national welfare considerations, the WTO is export driven. As noted earlier, similarly the OECD focuses primarily on the issues of its major countries, which are focused on market access and merger controls, and which are also largely irrelevant to developing countries. This is not to say the WTO would play no role. Moreover, it is encouraged that the WTO improves its transparency mandate to include information on the competition policy stance applied by governments and to continue to provide technical assistance, as it purports to do. Whilst the article accepts the need for the regulation of competition, the view is that, realistically, international measures might be far off and, in the interim, focus should be placed on developing domestic laws. The divergence in interests of nations is extensive, making commitment to a consolidated agreement difficult to obtain. However, the idea that this will only suffice in the *interim* is key to note. As has been mentioned, the authors point out that the development of many national competition agendas will further complicate competition relations, as conflicting principles will have no overarching authority. Further, co-operation of national policies will not prove adequate without enforcement through a supranational body, as enforcement will remain uncertain and inconsistent.²³⁰

In Trade and Competition at the WTO: Domestic Regulation and Competition Policy for Market Access Development²³¹ Jiro Tamura shares Hoekman and Holmes’ view that the WTO is not the appropriate platform for international competition issues, and further contends that the WTO regulates government actions, whereas competition needs to include the regulation of

²²⁷ B Sweeney (note 19 above; 17).

²²⁸ B Sweeney (note 19 above; 12).

²²⁹ B Hoekman and PS Holmes (note 13 above; 1).

²³⁰ B Hoekman and PS Holmes (note 13 above; 13).

²³¹ J Tamura (note 25 above; 15 – 16).

private business practices.²³² The author also suggests that the WTO needs to be more occupied with addressing the inadequacies within the trade regime, rather than shifting focus to competition.

Notably, the WTO has had an opportunity for more than a decade to develop international competition law and policy and has failed to do so. The lack of progress at the multilateral level is primarily as a result of the organisation's faulting, and because of that, bilateral efforts have been developed to fill the gap. However, these efforts have proved to have a limited effect due to the differences in national policies. Whilst multilateral agreements are more diverse and complex in scope than bilateral agreements, the debate on a proposed code needs to at least be started, before the problem of one-sided standards is expounded. The author also agrees that whilst the WTO is not the appropriate forum, it is not entirely without responsibility. Because anti-competitive practices will ultimately affect market access, Tamura contends that the WTO should at least develop its own competition category to facilitate efforts.²³³ The mandate of the category should be focused primarily on transparency through the exposure of different business practices internationally and the investigation into how each category deals with anti-competitive behaviour. In addition the WTO should ensure each of its member states has competition policies which are in line with the organisation's trade objectives.²³⁴

Whilst Woolcock acknowledges that there are inherent benefits to competition being included in the agenda of the WTO, ultimately the author continues the trend of arguing that the WTO's role in developing an international competition standard should be limited.²³⁵ In favour of WTO involvement is the fact that the WTO is more 'rules-based', the probability of compliance would be greater than compliance through the OECD or UNCTAD. Also, because of the interlink between trade and competition, it would make sense for the WTO be involved in the development of a competition agenda. The core principles of the WTO suggest that the role of the organisation should be: transparency – require member states to publish their competition laws and notify WTO committees, provide information on decision-making and application of laws (as is the general approach); and non-discrimination – ensuring foreign companies are treated alike and the same as national companies. Thus, the case would not be for the WTO to play no role at all, but for the role of the organisation to be advisory rather than developing and enforcing. A key challenge would be consolidating the differing needs of countries as a 'one size fits all' approach would be ill suited. Developing countries, such as

²³² J Tamura (note 25 above; 15 – 16).

²³³ J Tamura (note 25 above; 16).

²³⁴ J Tamura (note 25 above; 15).

²³⁵ S Woolcock (note 11 above; 39).

those found in Africa, South America and some of Asia, have especially been weary of adopting international policies. The reasons for this scepticism include the fact that their markets are too small to necessitate the expense of introducing such a policy; the fear that it would serve as a basis for larger international companies to overrun their national markets and because other areas of trade and economy were viewed as being of greater priority²³⁶. However, the author proposes the introduction of forms of special and differential treatment to developing countries, as is provided for in the WTO, to appease their concerns. These include – but are not limited to – flexibility in the commitments made by developing countries, including longer transition period, the ability to opt out of part of the commitments, and technical assistance.

It is not satisfactory to hold that, by virtue of competition existing inherently through trade, informal competition practices are in any event adhered too. The *Boeing-McDonnell Douglas (MDD)* case is a good example of how, even where co-operation is agreed to between countries, where legislation is in conflict, each country will favour its own standard and application. Because the WTO – or any other organisation – has failed to construct a multilateral approach, international competition is now fragmented.²³⁷ This is reason enough for a more robust approach. The fact that it would impose financial burdens on countries, especially developing countries, is a poor argument. Smaller countries actually stand to benefit from an international standard because it would protect their interests against anti-competitive behaviour by large dominant firms. Developing countries have less capacity and resources to discipline anti-competitive practices nationally, and could benefit from the support of the international community.²³⁸ Further, the need for the regulation of competitive practices warrants the expense. As has been implemented in the WTO, to alleviate the burden on developing countries, more developed countries can provide technical support and a flexible approach, especially because the development of such a policy stands to serve a greater good. Where the markets of developing countries are protected against anti-competitive practices, the firms of developed countries trading within those countries stand to benefit from the protection too.

The role of the WTO should be limited most prudently because the multilateral body despite ample time has failed to develop a competition policy that promotes trade, while addressing the concerns of developing countries, and how opening the markets further exposes them. Further, talks on competition within the Doha Agenda have indefinitely ceased and it is safe to say that it is unlikely that the organisation will consider competition anytime soon. In the

²³⁶ S Woolcock (note 7 above; 39 – 41).

²³⁷ B Sweeney (note 16 above; 12).

²³⁸ B Hoekman and PS Holmes (note 9 above; 15.)

meantime, however, national policies are being developed and regional and bilateral competition agreements are being entered into. Whilst the benefit of this is that anti-competitive practices are not continuing entirely unregulated, the risk is a convulsion of standards, each with different and conflicting effects.

However, the WTO can be looked to as a model. The major concern is that a single competition standard is not possible to achieve, however, decades ago the same was assumed about a single trade standard. The development of the WTO was years in the making, and still today requires improvement, but it shows that multilateral cooperation is possible. Therefore, whilst a multilateral agreement or organisation will not, realistically, be developed overnight, it is imperative that the matter be addressed with urgency.

3.5 CONCLUSION

Because of the intricate relationship between trade and competition- as highlighted throughout this paper- the more steps the WTO takes to liberalize trade, the more international competition will increase. Naturally, the increase in international competition will lead to anti-competitive practices. Without these practices being monitored, regulated and prevented, the work of the WTO stands at risk of being undone²³⁹. However, that being said, whilst trade and competition shares a comparative goal of economic liberalization, it is not the same. For this reason, it cannot be regulated in the same manner nor by the same organisation²⁴⁰.

The WTO should work co-operatively with whichever organisation is tasked with developing a multilateral competition policy, but it should not be tasked with developing the policy itself for the following reasons:

- i. the regulation of international competition has remained on the agenda of the WTO for a number of years without much progress being made, therefore, keeping the WTO in the forefront will likely result in stagnation²⁴¹;
- ii. trade and competition, and a number of their key objectives, are in many respects too divisive to be regulated singularly²⁴²; and
- iii. an international competition policy can have the effect of allowing countries to combat any anti-competitive implications that are resultant of their WTO obligations²⁴³.

²³⁹ 'Module 1 – Introduction to the World Trade Organisation (WTO)' 2012 *World Trade Organisation (WTO) E-Campus* at 7 – 8.

²⁴⁰ S Woolcock (note 11 above; 40).

²⁴¹ J Tamura (note 25 above; 15 – 16).

²⁴² B Hoekman and P Holmes (note 13 above; 15).

²⁴³ B Hoekman and P Holmes (note 13 above; 15).

It is for this reason that, whilst the WTO should play an advisory role in the development of a multilateral competition framework policy, the development of said policy should not be within the auspice of the organisation. This definition in itself demonstrates the discord between how the WTO addresses international competition relations in comparison to how domestic policies seek to remedy anti-competitive practices. Thus, chapter four will look specifically at South Africa and the extent to which a consistent international competition standard may affect its development.

CHAPTER FOUR:

SOUTH AFRICA'S PERSPECTIVE ON INTERNATIONAL COMPETITION AND THE 'PROUDLY SOUTH AFRICAN' CAMPAIGN

4.1 INTRODUCTION

This Chapter first seeks to unpack South Africa's trade obligations and trade relations before determining how these relate to its stance on competition practices. Following the 1994 democratic election, South Africa still had a long way to go to counter the effects of being ostracized from the international community because of the apartheid regime. The country attempted to remedy its strained relations, following the release from the various embargos, by joining the World Trade Organisation (WTO) and becoming an active GATT Member State.

To do so, South Africa had to commit to radical reform to bring its market practices in line with that of the WTO expectations as, until that point, it had operated in an isolated fashion, with closed markets. Whilst the benefit of re-joining the international community- in many respects, including trade- was evident, this also meant that the opening of its market would expose the country to international competition, which, until this point, it had been sheltered from. With the rapid development of its trade policies, South Africa also needed to improve its competition policies to protect its now exposed economy from anti-competitive practices.

Against the brief backdrop, this chapter firstly discusses the focused country, South Africa, signing of the Marrakesh Agreement of 1994, and its renewed involvement and active participation in the GATT Rounds of Negotiations- particularly the Uruguay Round- before discussing the development of the country's existing competition legislation. In addition, the chapter will discuss its cooperative competition commitments. Finally, the Chapter considers the Proudly South African campaign and logo, including a brief consideration of its purpose and effects and how this relates to South Africa's GATT commitments.

4.2 SOUTH AFRICA AND THE WORLD TRADE ORGANISATION (WTO)

From 1991, South Africa's apartheid system began showing cracks- as a result of heavy internal and external pressures- and in anticipation of the end of the apartheid regime, the country began considering the importance and benefit of regional and international economic

and trade co-operation²⁴⁴. The appeal to join the World Trade Organisation (WTO) community was attractive for South Africa, given the benefits of being a WTO member. Given its wide membership, the organisation indisputably has a substantial economic impact on both its members, and even those excluded from the organisation. As such, it is plausible to argue that it is not in the best interests of any country- particularly not developing countries- to not be included within the cocoon of protection afforded by the WTO. Through the organisation, alliance with other members ensures economic and political benefit, particularly through increased market access. At the time, for South Africa, in particular, involvement in the WTO would mean a means of rectifying it has tarnished, pariah state, as resultant of the apartheid government. Further, through the WTO, the country has a means of improving its international status by showing good citizenship and responsible leadership. Negotiations between South Africa and the organisation began in 1994, in the new democratic era, and South Africa officially became a WTO member on 1 January 1995. In 1996 the new government introduced the Growth, Employment and Redistribution (GEAR) programme in 1996. GEAR is a strategy designed to restructure a country's economic activities to achieve an increase in employment prospects, a redistribution of the country's resources, an improvement of basic socio-economic facilities, including health and education, and overall an advancement of the state's duty to realize the basic human needs of its civilians.²⁴⁵ The country pledged allegiance to the WTO's trade liberalisation agenda to endorse an export growth strategy to remedy the effect on the economy from the previous sanctions placed.²⁴⁶

However, despite fairly recent WTO membership, South Africa has been a signatory to the General Agreement on Tariffs and Trade (GATT) since 1948, and was one of the twenty three founding members, regarded as a developed country according to GATT standards (i.e. not subject to special and differential treatment). However, as mentioned above, the country's controversial political regime led to years of isolation from the multilateral trading system.²⁴⁷ Thus, the GATT Council conducted a Trade Policy Review of South Africa in 1993.²⁴⁸ The trade policy review mechanism (or the TPRM) of the GATT enables its Council "[...] to conduct a collective review of the full range of trade policies and practices of each GATT member at

²⁴⁴ R Thomas 'The World Trade Organisation and Southern African Trade Relations' 1999 *Southern African Legal Information Institute (SAFLII)* at 1.

²⁴⁵ 'Growth, Employment and Redistribution: A Macroeconomic Strategy' 1996 *Department of Finance (Republic of South Africa)* at 1.

²⁴⁶ D Lee 'South Africa in the WTO' 2006 *Kent Academic Repository* at 1 – 2.

²⁴⁷ A Hirsch 'South Africa and the GATT' 1993 *The South African Institute of International Affairs (SAIIA)* at 1.

²⁴⁸ *GATT Council Evaluation – Trade Policy Review of South Africa* GATT/1583 (1 – 9 June 1993) at 1.

regular periodic intervals to monitor significant trends and developments which may have an impact on the global trading system”.

Despite being a signatory since 1948, this was the first time the country had been subject to such a review. The critique of South African trade system is that the tariff structure was too complex, and not binding and transparent; barriers to trade were prevalent, especially in the agriculture sector; and overall the system showed high levels of protectionist practices. Whilst the Council still took into account the fact that the country was burdened with political uncertainty at the time the review was conducted, the South African government still made a commitment to reviewing its existing policy to bring it in line with the standards of the GATT and the WTO²⁴⁹. In summary, the GATT Secretariat encouraged South Africa to align its trading system with that recognised by the GATT members, especially as the sanctions placed by the international community were now largely dismantled, allowing the country to undergo significant transformation.²⁵⁰

Following the 1993 review, South Africa became involved in the Uruguay Round of Negotiations and experienced pressure from other GATT members to liberalise its trade policies, especially since it had done little to comply with its GATT obligations until this point, relying on the guise of international sanctions and large separation from the international community.²⁵¹ As a result, South Africa was faced with an ultimatum- change or face the consequences of retaliation.²⁵² Following years of conducting its trade outside the disciplines of the GATT, South Africa elected to comply. This led to the signing of the Marrakesh Agreement on of the General Agreement on Tariffs and Trade (or the WTO Agreement) in December 1994 and the country’s ultimate ascension to the WTO in January 1995.²⁵³

Despite its ostracism from the international community, South Africa still participated in every GATT Round of Negotiations; however, its role was merely a formality and it hardly adhered to the trade and tariff concessions negotiated on.²⁵⁴ The Uruguay Round was different. Given its desire to be welcomed back into the international trade system and to be accepted into the WTO, South Africa took its commitment to the Uruguay Round serious²⁵⁵. The Uruguay Round itself is recognised as the most ambitious Round of the GATT history, as it tackled new trade

²⁴⁹ *GATT Council Evaluation – Trade Policy Review of South Africa* GATT/1583 at 1.

²⁵⁰ *GATT Council Evaluation – Trade Policy Review of South Africa* GATT/1583 at 1 – 5.

²⁵¹ L Blumberg ‘South Africa and the Uruguay Round’ (1995) 12 (5) *Development Southern Africa* at 768 – 769.

²⁵² L Blumberg (note 251 above; 769).

²⁵³ M Soko ‘Thrown in at the deep end: South Africa and the Uruguay Round of multilateral trade negotiations, 1986 - 1994’ (2010) 29 (2) *Politeia* at 5.

²⁵⁴ D Keet ‘South Africa’s Official Position and Role in Promoting the WTO’ 2001 *Transnational Institute* at 2.

²⁵⁵ M Soko (note 253 above; 5).

issues, including the incorporation of trade in agriculture and textiles, trade in services, intellectual property and competition. This caused contention amongst member states as developing countries prioritized the former, whilst developed countries were more concerned with the latter. The fear of developing countries was that developed countries would use their resources and power to strong-arm developing countries into agreeing to their proposals whilst not making any concessions in favour of developing countries.²⁵⁶ In the end, developing countries felt short-changed. Their belief is that they had made a number of concessions and were at a disadvantage as they did not have the expertise to substantively take part in negotiations. In turn, whilst developed countries did agree to liberalize trade in agriculture, the introduction of a host of new issues left developing countries feeling like the results delivered were not meaningful to them.

During the Uruguay Round, South Africa attempted to have its developed country status changed to that of a developing country, which would enable it to rely on certain flexibilities. However, this was opposed by the US, Japan and other major countries, and instead South Africa was deemed a transitional economy, which allowed it a certain degree of flexibility in implementing trade reforms.²⁵⁷ However, given its ostracism from trade negotiations for a substantial period, South Africa entered the round of negotiations overwhelmed and barely able to keep up with negotiating issues. As a result, it had very little negotiating power or influence over the outcome of the Round. Ultimately, South Africa agreed to a five-year tariff reform, with industries such as textiles, clothing and automotive affording an exception of eight years. South Africa's commitment to the Uruguay Round showed the international community that it was serious about trade and economic reform.²⁵⁸

Whilst its entry back into the international trade market through the Uruguay Round and WTO membership was beneficial to South Africa's dwindling economy, it was not without benefit to the WTO as well. Given South Africa's fluidity as a 'transitional economy', it has ties to both developing and developed countries and has been able to act as a conduit between the two, particularly in Africa, where South Africa has largely maintained the strongest economy and infrastructure.²⁵⁹ Even though the WTO has been reluctant to rid South Africa of its developed country status, much of its aspirations within the organisation- such as a focus on reducing tariff barriers in the textile and agricultural industries- mirror that of developing countries.²⁶⁰ It has long been argued that developing countries have very little contribution to WTO trade concessions, and South Africa is no exception. Despite this, however, South Africa has still

²⁵⁶ M Soko (note 253 above; 7 – 8).

²⁵⁷ M Soko (note 253 above; 9).

²⁵⁸ M Soko (note 253 above; 10 – 12).

²⁵⁹ D Lee (note 246 above; 2).

²⁶⁰ D Lee (note 246 above; 2 – 3).

had relative success in the informal- or 'green room'- meetings at the Seattle Ministerial Conference in 1999, as well as the mini-ministerial meetings between the Singapore, Doha and Cancun Ministerial Conferences. South Africa has even gone as far as acting as the 'green man' (or 'Friend of the Chair') at the Doha Ministerial Conference, where South Africa's then Minister of Trade and Industry, Alec Erwin, chaired meetings on policy-making in the WTO.²⁶¹

4.3 THE DEVELOPMENT OF COMPETITION LAW IN SOUTH AFRICA

Following the changes made to its international trade relations as part of its new democratic state, South Africa's focus also changed to improving its existing competition law and policy. Whilst trade was centred on integration back into the international community, competition was focused more locally, concerned with rectifying the wrongs of the apartheid government, more specifically economic distortions and lack of development for the majority. Thus, economic efficiency is at the core of the country's objectives.²⁶²

The new government had a challenging task ahead, addressing poverty, unemployment and a wealth and resource distribution distortion. An attempt to remedy the economic injustices of the past was done in part by reformulating the competition legislation, namely the introduction of legislation such as the Competition Act 89 of 1998, and its subsequent amendments.²⁶³ In its consolidated form, these Acts have established three agencies, namely the Competition Commission, the Competition Tribunal and the Competition Appeal Court. The responsibility of these agencies is to enforce and regulate the laws laid out in the corresponding Acts. In summary, the Act has a political scope, in that it attempts to develop small and medium-sized enterprises and ensure a broader distribution of ownership to remedy the income and wealth disparity amongst South Africans.²⁶⁴ More in line with general competition provisions, the Act also addresses the abuse of power by dominant firms,²⁶⁵ price discrimination²⁶⁶, the regulation of mergers²⁶⁷ and restricted agreements.²⁶⁸

²⁶¹ D Lee (note 246 above; 2 – 3).

²⁶² T Hartzenberg 'Competition Policy and Practice in South Africa: Promoting Competition for Development Symposium on Competition Law and Policy in Developing Countries' (2006) 26 (3) *Northwestern Journal of International Law and Business* at 667 – 668.

²⁶³ Competition Amendment Act 35 of 1999, Competition Amendment Act 15 of 2000, Competition Second Amendment Act 39 of 2000 and Competition Amendment Act 1 of 2009.

²⁶⁴ T Hartzenberg (note 262 above; 668 – 669.)

²⁶⁵ S 7 – 8 of Act 89 of 1998.

²⁶⁶ S of Act 89 of 1998.

²⁶⁷ S 12 – 18 of Act 89 of 1998.

²⁶⁸ S 4 – 5 Act 89 of 1998.

Of the competition agencies, the role of the Competition Commission is that of an investigator, and addresses concerns regarding restrictive agreements and practices, the abuse of dominant positions and unfair mergers.²⁶⁹ The existing Competition Commission differs from its predecessor, the Competition Board, which existed under the Maintenance and Promotion of Competition Act 96 of 1979, as the Competition Commission acts independently from the Department of Trade and Industry (DTI), whereas the Competition Board operated as an administrative board within the Department of Trade and Industry. In addition, recommendations would previously be made to the Minister of Trade and Industry, with whom the power to make the final decision vested.²⁷⁰ Now the decision-making authority is the Competition Tribunal, based on referrals made following the investigations of the Competition Commission.²⁷¹ The complainant can also refer complaints directly to the Competition Tribunal, if the Commission makes a decision of non-referral.²⁷² The responsibility of the Competition Appeal Court is to confirm, set aside or amend any decision or order made by the Competition Commission or Tribunal and referred to it for appeal or review.²⁷³

As discussed in brief in Chapter 3, one of the primary roles of the Organisation for Economic Co-Operation and Development (OECD) is a review of the existing competition policies of both its members and some non-members.²⁷⁴ The purpose of the review is to create a dialogue between national competition authorities in different jurisdictions to foster transparency and promote global co-operation.²⁷⁵ As such, in 2003 South Africa undertook to be subject to a peer review by sixty of its peers.²⁷⁶ From the outset, it was acknowledged that what made the peer review of South Africa particularly interesting is its diverse market. Regarded as a middle market, the South African economic position is difficult to classify, as explained earlier. This is because the South African economy is regarded as the strongest in Africa, and continues to expand through its natural resources, such as diamonds and gold. However, in many respects the country still has a floundering economy, based in part on its previous isolation from the international trade and economic industry also on its history of central ownership (with the apartheid government owning more than 40% of the country's enterprises during its era)

²⁶⁹ S 19 – 25 and S 44 – 50 of Act 89 of 1998.

²⁷⁰ T Hartzenberg (note 262 above; 671).

²⁷¹ S 26 – 43, S 51 – 57 and S 60 of Act 89 of 1998.

²⁷² S 51 (3) and (4) of Act 89 of 1998.

²⁷³ S 58 of Act 89 of 1998.

²⁷⁴ See Chapter 3 – Competition Law and Policy and the Role of the World Trade Organisation (WTO) – of this paper (page 38 – 39).

²⁷⁵ 'Competition Law and Policy in South Africa' 2003 *OECD Peer Review* at 3.

²⁷⁶ 'Competition Law and Policy in South Africa' 2003 *OECD Peer Review* at 3 – 4.

and its unequal distribution of wealth and income.²⁷⁷ The peer review distinguishes six key goals prevalent in the Competition Act²⁷⁸, namely:

- (i.) “[...] the efficiency, adaptability and development of the economy”,
- (ii.) consumer welfare,
- (iii.) socio-economic welfare, including increased employment,
- (iv.) participation in the global market,
- (v.) participation of SMEs in the economy, and
- (vi.) the inclusion of the historically disadvantaged in ownership.

In summary, the Act is primarily concerned with rectifying inequity and inefficiency.²⁷⁹ Businesses have appealed to the new government to relax its stance towards competitive practices to ensure the world markets are now opened to them, but the Department of Trade and Industry (DTI) contended that a stronger domestic stance towards competition would prepare the country for an international competition policy.²⁸⁰ Instead, competition would be encouraged so as to promote foreign investment in local firms and liberalize trade.²⁸¹ In addition to the areas of competition covered by the Act, and as discussed above, the Act also allows certain exemptions from its prohibitions.²⁸² An exemption can be granted by the Commission for a specified term and is applicable to restrictive business practices or abuse of dominance. However, this is not left to the discretion of the Commission, but is rather subject to an investigation, where it is determined whether the conditions, as set out, are met. Ultimately, the peer review encourages better transparency, such as public comment and notices, to ensure special interest and protection is afforded to certain groups and industries, especially because the exemption procedure itself is broad and allows an act that would ordinarily be a violation to meet the requirements of and qualify for an exemption.²⁸³

²⁷⁷ ‘Competition Law and Policy in South Africa’ 2003 *OECD Peer Review* at 9 – 11.

²⁷⁸ Act 89 of 1998.

²⁷⁹ ‘Competition Law and Policy in South Africa’ 2003 *OECD Peer Review* at 17 – 18.

²⁸⁰ ‘Competition Law and Policy in South Africa’ 2003 *OECD Peer Review* at 18.

²⁸¹ ‘Competition Law and Policy in South Africa’ 2003 *OECD Peer Review* at 20.

²⁸² S 10 of Act 89 of 1998.

²⁸³ ‘Competition Law and Policy in South Africa’ 2003 *OECD Peer Review* at 22.

4.4 SOUTH AFRICA'S BILATERAL COMPETITION AGREEMENTS AND PARTICIPATION IN GLOBAL CO-OPERATION

As alluded above, the Competition Act is South Africa's national legislation regulating competition practices, however, it has some extra-jurisdictional effect as it not only regulates activity within the Republic, but also activity that has an effect within the Republic²⁸⁴. In addition the Act instructs the application and consideration of foreign and international law in its interpretation.²⁸⁵

However, outside of its national legislation, South Africa also has regional and bilateral relationships governing its competition stance with other states. Within Africa, South Africa is already party to the Southern African Development Community (SADC)²⁸⁶ and the Southern African Customs Union (SACU)²⁸⁷, which, in essence, governs cross-border investment and intra-regional trade activities. Thus, this requires competition law and policy too not only cover national activities, but to also be regional in character. Both the SADC and the SACU acknowledge this need for regional co-operation in order to address anti-competitive practices by multinational firms that can have a cross-border effect, even if it is effected within a single jurisdiction.²⁸⁸

Further, the SADC Trade Protocol requires member states to "[...] implement measures within the Community that prohibit unfair business practices and promote competition".²⁸⁹ Pursuant to Article 25 of the SADC Trade Protocol, in 2009 the member states signed the SADC Declaration on Regional Co-operation in Competition and Consumer Policies "to prohibit unfair business practices and to promote competition and co-operation in the region".²⁹⁰ As per the SADC, "[T]he Declaration encourages Member States to establish a transparent framework that contains appropriate safeguards to protect confidential information of the parties, and appropriate national judicial review".²⁹¹ Thus, priority is given to those Member States that do not yet have an existing competition authority, with the Community being responsible for aiding

²⁸⁴ S 3(1) of Act 89 of 1998.

²⁸⁵ S 1(3) of Act 89 of 1998.

²⁸⁶ SADC 'Member States – South Africa' available at <http://www.sadc.int/member-states/south-africa/>, accessed on 30 June 2019.

²⁸⁷ SACU 'Member States – South Africa' available <http://www.sacu.int/show.php?id=546>, accessed on 30 June 2019.

²⁸⁸ W Viljoen (note 37 above).

²⁸⁹ Article 25 of the Southern African Development Community (SADC) Trade Protocol 2005.

²⁹⁰ SADC 'Economic Development – Trade in Goods' available at <http://www.sadc.int/themes/economic-development/trade/competition-policy/>, accessed on 30 June 2019.

²⁹¹ SADC 'Economic Development – Trade in Goods' available at <http://www.sadc.int/themes/economic-development/trade/competition-policy/>, accessed on 30 June 2019.

with said development. In addition, the SADC Secretariat established a Competition and Consumer Policy and Law Committee responsible for the oversight of Member State co-operation so as to unite the laws and policies of each State.²⁹² Likewise, in 2002 the SACU developed the SACU Agreement in terms of which Article 40 states:

1. Member States agree that there shall be competition policies in each Member State.
2. Member States shall co-operate with each other with respect to the enforcement of competition laws and regulations

However, according to Viljoen, whilst the provisions existed, compliance with these provisions did not.²⁹³ In 2015 South Africa and Namibia entered into a Memorandum of Understanding (MOU)²⁹⁴ in terms of which co-operation in bilateral competition would be formalised and made consistent with their own national laws. Thus, the MOU provides that when both Namibia and South Africa undertake an investigation in terms of their own national law, but which has an effect on the other member, they commit to cooperating “[...] to the extent that is appropriate and practicable [...]”.²⁹⁵ Article 4 of the MOU includes a list of co-operation activities, including exchange of information, co-operation in investigations, transparency in stances on substantive policy issues²⁹⁶ *et al.* Similarly then, Kenya followed suite and signed an MOU²⁹⁷ with South Africa as well, showing the propensity for bilateral competition to not simply be limited to a provision or undertaking included in the SADC and SACU Protocol and Agreement, with no real effect, but an undertaking that Member States have come to understand and appreciate the importance of.

²⁹² SADC ‘Economic Development – Trade in Goods’ available at <http://www.sadc.int/themes/economic-development/trade/competition-policy/>, accessed on 30 June 2019.

²⁹³ W Viljoen (note 43 above).

²⁹⁴ Memorandum of Understanding between Competition Commission South Africa and Namibian Competition Commission in the field of Competition Law, Enforcement and Policy 2015.

²⁹⁵ W Viljoen (note 43 above).

²⁹⁶ Memorandum of Understanding between Competition Commission South Africa and Namibian Competition Commission in the field of Competition Law, Enforcement and Policy 2015 (hereinafter MoU South Africa – Namibia 2015) at 3 – 4 available at <http://www.compcom.co.za/wp-content/uploads/2016/05/MOU-between-the-Competition-Commission-and-the-Namibian-Competition-Commission.pdf>, accessed on 01 July 2019.

²⁹⁷ Memorandum of Understanding on Bilateral Co-operation between the Competition Commission of South Africa and the Competition Authority of Kenya 2016 (hereinafter MoU South Africa – Kenya 2016) available at <http://www.compcom.co.za/wp-content/uploads/2016/05/CCSA-and-CAK-MOU.pdf>, accessed on 01 July 2019.

Globally the South African Competition Commission has also recently concluded MOUs with the European Commission (EC)²⁹⁸ and with BRICS.²⁹⁹ Like the Namibian MOU, the purpose of these agreements is to “develop and strengthen co-operation in the field of competition law and policy”³⁰⁰. However, none of these MOUs appear to take into account and address which policy will be given preference where there is a divergence in effect of application of the two. This is especially concerning for the BRICS MOU, where the policies of four different states must be accounted for. Thus, as the MOUs tend to spell out, they are only as enforceable to the extent that is possible³⁰¹. This is evidenced by the wording of the MOUs, such as South African – Namibian MOU which states that the provisions of the MOU are not intended “[...] to create any legal rights or obligations under international law³⁰²”. The South African – Kenyan MOU further states that the discretion to decide whether to undertake enforcement of the provisions lies with the respective parties³⁰³. All of the MOUs provide that, where there is inconsistency between the provisions of the MOU and the domestic laws of the signatories, the domestic laws will prevail³⁰⁴. Thus, the MOUs have no binding effect, and are based on co-operative compliance.

In summary, these MOUs provide an understanding upon which their signatories make the following commitments for the enforcement of international competition regulation:

- i. Promoting transparency through the exchange of national competition policies, laws and rules, and the sharing of any non-confidential information and views concerning competition policy enforcement and development³⁰⁵;
- ii. Reasonable cooperation, subject to their respective national laws and policies, in investigations and prosecutions for anti-competitive practices committed within their respective borders³⁰⁶;

²⁹⁸ Memorandum of Understanding between the Directorate-General Competition of the European Commission and the Competition Commission of South Africa 2016 (hereinafter MoU South Africa – EC 2016) available at <http://www.compcom.co.za/wp-content/uploads/2016/05/MOU-between-DG-Comp-and-CCSA-22-June-2016.pdf>, accessed on 01 July 2019.

²⁹⁹ Memorandum of Understanding between the Competition Authorities of the Federative Republic of Brazil, the Republic of India, the People's Republic of China and the Republic of South Africa on Co-operation in the Field of Competition Law and Policy 2016 (hereinafter MoU BRICS 2016 available at <http://www.compcom.co.za/wp-content/uploads/2016/05/MoU-BRICS.pdf>, accessed on 01 July 2019.

³⁰⁰ MoU BRICS 2016 (note 299 above; 2).

³⁰¹ W Viljoen (note 43 above).

³⁰² Article 8 (2) of the MoU South Africa – Namibia 2015 (note 296 above; 5).

³⁰³ Clause 11 of the MoU South Africa – Kenya 2016 (note 297 above; 5).

³⁰⁴ Clause 2.1.4 of the MoU BRICS 2016 (note 299 above; 4); Clause 3.4 of the MoU South Africa – Kenya 2016 (note 297 above; 2); Article 2 (1) of the MoU South Africa – Namibia 2015 (note 296 above; 3); and Clause 5 of the MoU South Africa – EC (note 298 above; 2).

³⁰⁵ Clause 2.1.1 of the MoU BRICS 2016 (note 299 above; 4); Clause 3.1.1 of the MoU South Africa – Kenya 2016 (note 297 above; 2); Article 4 (f) of the MoU South Africa – Namibia 2015 (note 296 above; 4); and Clause 4 of the MoU South Africa – EC (note 298 above; 2).

³⁰⁶ Clause 6.3 of the MoU BRICS 2016 (note 299 above; 6); Clause 12 of the MoU South Africa – Kenya 2016 (note 297 above; 4); and Clause 8 of the MoU South Africa – EC (note 298 above; 3).

- iii. Promoting participation in international conferences and seminars related to competition issues, and working to develop research in the field of competition law enforcement³⁰⁷; and
- iv. The review of all cross-border mergers and cross-border activities³⁰⁸

4.5 THE PURPOSE AND EFFECT OF THE ‘PROUDLY SOUTH AFRICAN’ CAMPAIGN

The Proudly South African (SA) campaign was launched in 2001 and later, in line with it, the Local Procurement Accord was established in October 2011 by representatives of local businesses and the South African government. The aim of the Accord is to foster job creation by improving localisation by 75% by 2022.³⁰⁹ The Accord itself is split into a number of commitments by both the public and private sectors, including:

4.5.1 Commitment by government

1. leveraging public procurement, by amending the Preferential Procurement Policy Framework Act 5 of 2000 (hereafter referred to as the PPPFA) to include a designated quota of resources and services to be procured by the government and its entities within each industry;³¹⁰
2. to establish necessary standards for measurement and verification of local content;³¹¹ and
3. localisation commitments in infrastructure procurement.³¹²

³⁰⁷ Clause 2.1.3 of the MoU BRICS 2016 (note 299 above; 4); Clause 3.5 of the MoU South Africa – Kenya 2016 (note 297 above; 3); Article 4 (d) of the MoU South Africa – Namibia 2015 (note 296 above); and Clause 4 (d) and (e) of the MoU South Africa – EC (note 298 above; 2).

³⁰⁸ Clause 3.3 of the Memorandum of Understanding on Bilateral Co-operation between the Competition Commission of South Africa and the Competition Authority of Kenya 2016; and Clause 4 (d) and (e) of the Memorandum of Understanding between the Directorate-General Competition of the European Commission and the Competition Commission of South Africa 2016.

³⁰⁹ Department of Economic Development *Local Procurement Accord Publication 2011* available at file:///C:/Users/A/Downloads/Accord_Procure.pdf, accessed on 01 July 2019 at 4.

³¹⁰ Department of Economic Development *Local Procurement Accord Publication 2011* available at file:///C:/Users/A/Downloads/Accord_Procure.pdf, accessed on 01 July 2019 at 8.

³¹¹ Department of Economic Development *Local Procurement Accord Publication 2011* available at file:///C:/Users/A/Downloads/Accord_Procure.pdf, accessed on 01 July 2019 at 8 – 9.

³¹² Department of Economic Development *Local Procurement Accord Publication 2011* available at file:///C:/Users/A/Downloads/Accord_Procure.pdf, accessed on 01 July 2019 at 10.

4.5.2 Commitment by businesses

1. the support for local manufacturing;³¹³
2. investment and funding in domestic manufacturing sectors;³¹⁴
3. complementing state procurement policies and strategies³¹⁵; and
4. analysing and reviewing their supply chain activities³¹⁶.

4.5.3 Commitment by organised labour

1. to promote local procurement;³¹⁷
2. “[...] to align the investment philosophies, strategies and mandates of their pension funds to advance local procurement [...]”;³¹⁸ and
3. to engage in shareholder and corporate governance activism.³¹⁹

4.5.4 Commitment by community constituencies

1. to create awareness and social mobilisation of local procurement;³²⁰ and
2. commit to strengthen social economy enterprises through participation in supply chains.³²¹

³¹³ Department of Economic Development *Local Procurement Accord Publication 2011* available at file:///C:/Users/A/Downloads/Accord_Procure.pdf, accessed on 01 July 2019 at 11 – 13.

³¹⁴ Department of Economic Development *Local Procurement Accord Publication 2011* available at file:///C:/Users/A/Downloads/Accord_Procure.pdf, accessed on 01 July 2019 at 14.

³¹⁵ Department of Economic Development *Local Procurement Accord Publication 2011* available at file:///C:/Users/A/Downloads/Accord_Procure.pdf, accessed on 01 July 2019 at 14 -15.

³¹⁶ Department of Economic Development *Local Procurement Accord Publication 2011* available at file:///C:/Users/A/Downloads/Accord_Procure.pdf, accessed on 01 July 2019 at 15.

³¹⁷ Department of Economic Development *Local Procurement Accord Publication 2011* available at file:///C:/Users/A/Downloads/Accord_Procure.pdf, accessed on 01 July 2019 at 16.

³¹⁸ Department of Economic Development *Local Procurement Accord Publication 2011* available at file:///C:/Users/A/Downloads/Accord_Procure.pdf, accessed on 01 July 2019 at 17.

³¹⁹ Department of Economic Development *Local Procurement Accord Publication 2011* available at file:///C:/Users/A/Downloads/Accord_Procure.pdf, accessed on 01 July 2019 at 18.

³²⁰ Department of Economic Development *Local Procurement Accord Publication 2011* available at file:///C:/Users/A/Downloads/Accord_Procure.pdf, accessed on 01 July 2019 at 19.

³²¹ Department of Economic Development *Local Procurement Accord Publication 2011* available at file:///C:/Users/A/Downloads/Accord_Procure.pdf, accessed on 01 July 2019 at 20.

4.5.5 Overall commitments

1. to partner with the 'Proudly South Africa' campaign;³²² and
2. to implement the Accord.³²³

The aim of the Proudly South African campaign is to in essence spread the Local Procurement Accord to the community by encouraging consumers to buy and source local goods and services. The purpose is naturally to bring money into the South African economy. Thus, local businesses are encouraged to mark their products with the Proudly SA logo- the registered trademark of the campaign, which is the South African flag in a circular shape with a tick - to make them identifiable to consumers. Not only does the campaign encourage support of local produce, it also ensures that goods that bear the logo observe environmental standards and the enterprise follows fair labour practices. Thus the qualifying requirements of the campaign are:

1. The production and manufacturing of the product must be at least 50% local and any imported materials must have undergone a "substantial transformation";
2. The product or service must be of a high quality, as approved by the regulatory bodies of that particular industry;
3. The South African labour legislation and labour practices must be complied with; and
4. The South African environmental standards must be adhered to.³²⁴

Due to financial challenges and budgetary constraints, the true effect of the campaign has not been determined. Thus, there is, to date, no way of determining whether the campaign has, in fact, benefitted the South African economy and achieved the desired result.³²⁵ However, a general study of the effect of country of origin markings indicates that such markings might not achieve the intended effect as, rather than being swayed to purchase locally, consumers from developing countries tend to associate products sourced from developed countries as

³²² Department of Economic Development *Local Procurement Accord Publication 2011* available at file:///C:/Users/A/Downloads/Accord_Procure.pdf, accessed on 01 July 2019 at 21.

³²³ Department of Economic Development *Local Procurement Accord Publication 2011* available at file:///C:/Users/A/Downloads/Accord_Procure.pdf, accessed on 01 July 2019 at 22.

³²⁴ 'Why buy local' available at <http://www.proudlysa.co.za/consumer-site/consumer.html>, accessed on 30 June 2019.

³²⁵ Parliamentary Monitoring Group *Meeting Report of meeting held on 19 June 2007* available at <https://pmg.org.za/committee-meeting/10134/>, last accessed on 01 July 2019.

being of a better quality.³²⁶ Still, there are some countries- both developed and developing- that, owing to patriotism, tend to support local production.³²⁷ Thus, the study finds that “understanding the guidelines that consumers use when evaluating the quality of products and making purchasing decisions is imperative to manufacturers of consumer products and marketers”³²⁸. This indicates that the Proudly SA campaign might have been premature and that the initiators of the campaign might have fared better by marketing and promoting the purchasing of local products to seduce consumers to source local before investing money into the campaign itself. However, this does not conclude that the campaign itself is fruitless; on the contrary, it could in fact create the result desired and thus serve as a much needed boost to South Africa’s economy.

Whilst the GATT does not contain any specific rules concerning country of origin markings, and instead contending that each country is free to determine its own criterion surrounding how goods entering their markets must be marked. The purpose of this flexible approach is to minimise the already stringent formalities assigned to imports.³²⁹ However, the problem with this approach is that it seems to not take into account that rules of origin can, inherently, be contradictory to the GATT’s national treatment principle. By endorsing a campaign that encourages consumers to source local goods, GATT members can be guilty of not treating foreign and national goods equally. In fact, there have already been conflicts of opinion amongst members about the limitation of country of origin markings, and the view that the WTO and GATT should regulate the format of these markings has so far gone unheeded.³³⁰

4.6 CONCLUSION

South Africa has come a long way in its attempts to remedy the burdens and effects of its history. Having reinforced its GATT commitments and signed on to the WTO Agreement, the country appreciates that one of the ways in which it can improve its economical state is by being involved in the international trade regime. However, with that involvement comes increased competition. Moreover, whilst competition is generally endorsed for a healthy, developing economy, anti-competitive behaviour can have the effect of undoing the progress

³²⁶ H Kalicharan ‘The effect and influence of country-of-origin on consumers’ perception of product quality and purchasing intentions’ (2014) 13 *International Business & Economics Research Journal* at 897.

³²⁷ H Kalicharan (note 326 above; 897).

³²⁸ H Kalicharan (note 326 above; 900).

³²⁹ ‘Trade Topics – Rules of Origin: Technical Information’ available at https://www.wto.org/english/tratop_e/roi_e/roi_info_e.htm, accessed on 01 July 2019.

³³⁰ ‘Attempts to harmonize preferential rules of origin’ available at <http://www.wcoomd.org/en/topics/origin/instrument-and-tools/comparative-study-on-preferential-rules-of-origin/specific-topics/general-topics/failed-agr-eur.aspx?p=1>, accessed on 01 July 2019.

already made. South Africa has attempted to manage this by improving its own national competition policy and interlinked competition authority; however, this only has the effect of regulating competition within the Republic. Its numerous bilateral competition agreements are also very limited in application and success because they operate in a cooperative fashion. Thus, these agreements rely on the goodwill of their signatories in faithfully applying their provisions, as opposed to them being enforced. The result is that, where the application of the national policies of each signatory conflicts, it is only natural to infer that each country will elect a protectionist approach, rather than a harmonious one. This means that cooperative agreements are unstable and uncertain in effect.

Whilst the Proudly South African campaign is another admirable way for the country to attempt to boost its domestic economy, it, too, is not without uncertainty. The risk is that the campaign can either have the adverse intended of detracting the support of consumers who only trust international quality of goods, as opposed to supporting local. In addition, whilst the GATT and WTO appear to take a fairly lax approach to rules of origin, given the criticism of the lack of structure, it could take a stronger stance in forcing its Member States to adhere to an approach that is line with its national treatment policy.

CHAPTER FIVE: CONCLUSION

5.1 INTRODUCTION

In concluding this paper, this chapter reverts to the original research questions, namely how is the regulation of competition and trade related within the international community; how are the shortfalls concerning the regulation of competition within the international community being addressed; what should the WTO's involvement be in addressing these shortfalls; and finally, does South Africa's stance to the regulation of competition comply with its obligations in terms of the WTO? Is the 'Proudly South African' logo and campaign in conformance with the WTO's National Treatment Policy?

Finally, recommendations are made concerning how the shortfall in the international regulation of competition should be addressed and what role of the WTO should be limited to in this regard.

5.2 THE REGULATION OF INTERNATIONAL TRADE AND COMPETITION

5.2.1 International Trade Framework (The General Agreement on Tariffs, Trade (GATT), and the formation of the World Trade Organisation (WTO)

The adoption of the General Agreement on Tariffs and Trade (GATT), and the later formation of the World Trade Organisation (WTO), has heralded an unprecedented interaction within the international community. As noted, following the Great Depression resultant of the World Wars, nations realized that a variable system – or lack thereof – regulating trade relations was not effective³³¹. What initially began as negotiations to reduce tariffs and open markets, has since evolved into an organisation responsible for removing barriers to trade; regulation labour standards and relations; means of economic development; removing antidumping and countervailing duties; developing free trade areas³³² *et al.*

The WTO achieved success through its many Rounds of Negotiations, including the original Geneva Round that led to the signing of the GATT in 1947;³³³ the development of many subsidiary GATT Agreements.³³⁴ However, these successes were not without fall backs,

³³¹ D Irwin (note 67 above; 1 – 2).

³³² S Suranovic (note 82 above; 4).

³³³ W Diebold (note 73 above; 10).

³³⁴ These include the GATT Anti-Dumping Agreement; the Agreement on Subsidies and Countervailing Measures; the Technical Barriers to Trade Agreement, and more commonly the General Agreement on Tariffs in Services of 1994 (GATS) and the Agreement on Trade-Related

including lack of consensus between contracting parties, particularly between developed and developing countries. The GATT faced many criticisms during the Tokyo, Uruguay and Doha Rounds, including the lack of coverage of issues concerning developing countries and the time it took to reach any consensus.³³⁵ Given the challenges experienced in trade issues, it is no wonder negotiations on competition were never made priority. Whilst the topic was broached during the Uruguay³³⁶ and Singapore Rounds,³³⁷ it was only during the Doha Round (or the Doha Development Agenda) that it was officially included on the agenda. However, even this was unsuccessful.³³⁸ For the Member States, it was imperative that development remain the primary focus of the negotiations and, as a result, topics such as agriculture, intellectual property and the development of international services took priority over international competition issues.³³⁹

5.2.2 International Competition

Despite the WTO's seeming reluctance to delve into the establishment of an international competition organisation, it is becoming apparent that the need for one is mounting. International trade itself boosts competition and competitive practices, making the regulation of these practices essential.³⁴⁰ Even outside of international trade, there exists a lapse in the regulation of competition internationally. As identified in the earlier chapters, currently competition is regulated through bilateral cooperation in the form of agreements between countries, or through compliance with the provisions endorsed by a few regulatory bodies.³⁴¹

The flaws in this approach are plentiful. Firstly, there lacks uniformity.³⁴² With co-operative agreements, countries are permitted and able to form their own way of governance and dictate their approach, within the confines of the agreement, to competition. Whilst this protects sovereignty, it does very little to improve the current standard whereby competition is

Aspects of Intellectual Property Rights of 1994 (TRIPS), both borne of the Uruguay Round of Negotiations.

³³⁵ 'Understanding the WTO: Basics. The GATT Years: from Havana to Marrakesh' 1995 available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm, accessed 20 June 2019.

³³⁶ 'Understanding the WTO: Basics. The GATT Years: from Havana to Marrakesh' 1995 available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm, accessed 20 June 2019.

³³⁷ R Sandrey (note 129 above).

³³⁸ 'The Doha Round' available at https://www.wto.org/english/tratop_e/dda_e/dda_e.htm, accessed on 26 June 2019.

³³⁹ 'WTO members secure "historic" Nairobi Package for Africa and the world' available at https://www.wto.org/english/news_e/news15_e/mc10_19dec15_e.htm, accessed on 26 June 2019.

³⁴⁰ B Hoekman and PS Holmes (note 13 above; 2)

³⁴¹ As evidenced by the work of organisations including the Organisation for Economic Co-Operation and Development (OECD) and the United Nations Charter on Trade and Development (UNCTAD).

³⁴² S Woolcock (note 11 above; 16 – 17).

‘ungoverned’ within the international sphere.³⁴³ International trade law indicates that oftentimes a self-serving approach must be set aside in favour of an approach that benefits the masses. In other words, state sovereignty might protect a country’s ability to dictate laws that it feels are most appropriate for its socio-economic environment, but poses threats to other countries that interact with it, especially if said laws are in direct contrast to what the other country directs on their own home soil.³⁴⁴ Further, the protection derived from sovereignty is limited³⁴⁵. Ultimately, where a country’s approach does not fit the desired mould of most others, that country exposes itself to the threat of exclusion. Thus, the pressure to conform to a universal standard- as opposed to protecting one’s own interest- becomes difficult to resist.³⁴⁶

5.3 ADDRESSING THE SHORTFALLS IN THE REGULATION OF INTERNATIONAL COMPETITION

As discussed in Chapter 1, the manner in which competition is currently being regulated is either through the implementation of domestic competition laws and policies, or through co-operative agreements between states. For reasons that will be expanded upon below, neither has proved wholly successful. The final suggested method is through the implementation of a unilateral competition agreement.

5.3.1 The implementation of domestic laws

Whilst the regulation of competition has continued to expand over time, as set out in chapter 1, there are still those countries, which have failed to introduce any form of governance where competition is concerned. As a result of resource constraints, developing and least developed countries are primarily devoid of any national competition laws and policies.

Their political environment also oftentimes limits these countries. The first reason for this is, whilst the regulation of competitive practices might have a socio-economic benefit, not all are in favour of competition being governed. As identified in chapter 1, a strong competition policy has the result of preventing monopolistic enterprises from retaining the market by denying rival access and firms cannot unilaterally determine prices as consumer interests must be

³⁴³ G Hufbauer and J Kim ‘International competition policy and the WTO’ (2009 54(2) *Federal Legal Publications Inc* at 334.

³⁴⁴ I Simonovic ‘State Sovereignty and Globalization: Are Some State more Equal?’ (2000) 28(3) *Georgia Journal of International and Comparative Law* at 38.2

³⁴⁵ I Simonovic (note 344 above; 382).

³⁴⁶ I Simonovic (note 344 above; 384 – 385).

accounted for. Depending on the might of the resistance, governments might experience difficulty in any attempts at what would be perceived as altering the status quo, thus, might deem it not worth it to upset these firms, leaving competition largely unregulated³⁴⁷.

Another concern, however, also discussed in chapter 1, is that developing countries just do not have the resources and capacity required to not only develop an anti-competitive agreement, but also to enforce it. It is important to establish a regulatory body that offers enough authority to sway actors from engaging in prohibited practices. As stated by Dr Michael Gal in *The Ecology of Antitrust Preconditions for Competition Law Enforcement in Developing Countries*³⁴⁸:

The higher the possibility of detection and sanctioning, the stronger the deterrence effects on market participants [...] Regulation by deterrence should be the main course of antitrust enforcement, as it is much more efficient than direct regulation of conduct in limiting anti-competitive conduct.³⁴⁹

A number of developing countries also do not view competition regulation as important. The consensus is that countries with smaller economies are already overwhelmed with more pressing issues, such as agriculture and trade, intellectual property rights, globalization and its impact on human rights and environmental policies. Thus, anti-competitive policies are deprioritized in favour of these issues. The research found that, what seems to not be taken into account is that competition oftentimes has a direct bearing on developing country economies. As such, most international competition policies cover areas such as anti-dumping practices, international cartels, cross-border market mergers and agreements, all of which have a direct effect on developing countries. Thus, developing countries should be weary of disregarding competition regulation as an issue that has no real bearing on them.³⁵⁰

5.3.2 Bilateral and multilateral co-operative competition agreements

Chapter 4 discussed the recent surge in co-operative competition agreements, as a means of bridging the gap of non-governance. In summary, the effect of these agreements are of little force as they rely on “gentlemanly compliance” as opposed to any means of enforcement.³⁵¹ There appear to be no consequences for lack of compliance and most agreements, in fact,

³⁴⁷ M Gal ‘The Ecology of Antitrust Preconditions for Competition Law Enforcement in Developing Countries’ 2004 *New York University Law* at 26.

³⁴⁸ M Gal (note 347 above; 26).

³⁴⁹ M Gal (note 347 above; 26).

³⁵⁰ S Nagaoka (note 159 above; 56).

³⁵¹ W Viljoen (note 43 above).

state that they are not intended to be binding in nature; and that any difference between the provisions of the agreement and any existing national policies of the parties or obligations in terms of any international laws will mean the national and international laws will prevail.

Almost as a means of finding a medium between no international regulation and the criticism of over regulation, countries have tended to steer towards entering into bilateral agreements. While this at least offers some protection, its success is questionable. As previously discussed,³⁵² the major issue with bilateral agreements is that its enforcement is literal. These agreements are entered into as a 'cooperation' effort, meaning countries must exhibit good intention in order for it to garner any success. This might initially prove sufficient, however, where countries have conflicting approaches, it is inevitable that a stalemate will be reached. Without an authority that would force either side to concede, countries can simply elect to ignore the enforcement of any provision that does not work in their favour. In other words, cooperation rarely suffices where there is a serious difference in policy.³⁵³

Regulatory overlap also poses an issue where a number of bilateral cooperation agreements exist, all in conflict with each other. Similar to the "spaghetti bowl phenomenon" experienced in free trade arrangements (FTAs),³⁵⁴ having multiple existing cooperative agreements will simply lead to a complicated entanglement of differing views and approaches and will allow countries to cherry pick competition policies that might be discriminatory and welfare reducing in effect.³⁵⁵ Thus, while bilateral cooperation agreements are at least a step in the right direction, they are unlikely to achieve long-term success, and might, in fact hinder progress by complicating negotiations.

5.4 THE ROLE OF THE WTO IN DEVELOPING AN INTERNATIONAL COMPETITION POLICY

5.4.1 The concerns of developing countries

From a developing country perspective, the international regulation of competition is seen as yet another means of wealthier, more powerful countries forming a platform to dictate their preferred model.³⁵⁶ This is the bitterness that has been borne of the WTO itself. The same should be said about the pressure to conform to an international standard of regulating

³⁵² Chapter 4 of this thesis, page 59 – 60.

³⁵³ B Sweeney (note 19 above; 66 – 67).

³⁵⁴ First referred to by Jagdish Bhagwati in 'US Trade Policy: The infatuation with FTAs', No 726 of a Paper Series published by Columbia University in 1995.

³⁵⁵ B Sweeney (note 19 above; 67).

³⁵⁶ C Lumina 'Free trade or just trade? The World Trade Organisation (WTO), human rights and development (Part 1)' (2008) 12 *Law, Democracy and Development* at 21.

competition; however, such pressure has been scarce. As stated above, countries- and in particular ones of smaller economies- feel the pressure to accept and conform to international standards of trade for fear of being left out, but this is not to say that the standard adopted is to their benefit. It appears to be a matter of selecting the lesser of two evils- defy international pressure and face complete exclusion, or give in to the pressure and adopt competition policies that are not necessarily advantageous to their own country's economy.³⁵⁷

The main criticism that appears to be made is that, for 17 years, and 6 rounds of negotiations, the WTO members have made removing trade barriers, ensuring tariff concessions and opening markets a priority. This is primarily beneficial to their own economies. Through open markets and reducing trade barriers, firms in developed countries can expand into international territories; in other words, improve foreign investment. This in turn motivates exports of produce, machinery and other capital goods. It also improves employment within the economy as foreign investment expands enterprises, which in turn creates the need for more jobs.³⁵⁸ It would then logically follow that the assumption would be that the same would occur vice versa, and developing countries would experience these benefits too.

Chapter 2 of this paper considers the history of developing countries that has resulted in reliance on western funding, creating an unequal bargaining power. As discussed, developed countries primarily benefit from having unlimited access to developing countries' resources, making them more inclined to prefer a competition model that retains this open market, rather than focusing on welfare benefits. This is one of the reasons that consensus between developed and developing countries on international competition issues appears doubtful.³⁵⁹

Another reason discussed in chapter 2 is the fear of lack of reciprocity that is meaningful. It is true that developed countries afford developing countries certain trade concessions; however, these appear to be conditional. The example previously discussed in chapter 2, the South Africa-USA chicken saga, serves as evidence of this. As the discussion revealed, the South African poultry industry could not compete with the extremely low price of the unwanted USA chicken being dumped, and the countries attempted to balance the impact of the alleged dumping by introducing tariff increases, were met with threats from the USA to exclude SA

³⁵⁷ A Narlikar 'International Trade and Developing Countries: Bargaining Coalitions in the GATT & WTO' 2003 *Routledge* at 11 – 12.

³⁵⁸ 'Open Markets Matter: The Benefits of Trade and Investment Liberalisation' 1999 *OECD Public Affairs Division* at 2 – 3.

³⁵⁹ S Patrick (note 60 above).

from AGOA completely.³⁶⁰ Thus, the fear is that the same will be prevalent in any attempts to negotiate on issues of competition, where the WTO is the driving force.

Given the weariness of developing countries, such as South Africa, where international trade is concerned, it only makes sense that the same weariness has transmitted into discussions concerning international competition regulation. Further, developing countries are concerned that entertaining talks on a possible international competition agreement will only mean the discussions being dominated by market access issues, rather than international antitrust³⁶¹. The agenda will become a means for trade officials to force competition officials to assist in opening markets, thus, making the primary focus of competition officials i.e. economic efficiency, a mere subsidiary focus to the promotion of importing and exporting.³⁶²

However, this is precisely why developing country participation must be endorsed. By shying away from international competition discussions for fear of being overshadowed, developing countries are already excluding themselves from the table. And there is no guarantee that developed countries will cease to participate without the input of developing countries, thus, increasing the possibility of an agreement being implemented without the needs of developing countries being accounted for. Thus, whilst the bargaining power might be unequal, the little power bestowed on developing countries should still be utilised to ensure that any competition policies developed not only support a liberal trade and investment regime, but also take into account the distinctive needs of developing countries, and ensure any laws developed are, in fact, actionable.³⁶³ As pointed out by Pradeep Gaur in Call for a Multilateral Competition Regime, whilst individual countries- especially those with smaller economies- might be unable to deal with cross-border competition infringement, but collectively their concerns might be better valued.³⁶⁴ Ultimately, for a competition regime to be beneficial to developing countries, it must not be directed to accessing and opening markets- that is the work of trade policies, and whilst competition should be in line with trade, it would make no sense for it to cover the same ambit. Instead, any policies developed must be welfare enhancing.

³⁶⁰ 'Unwanted American chicken dumped in South Africa' available at <https://www.health24.com/Diet-and-nutrition/Food-safety/unwanted-american-chicken-dumped-in-south-africa-20160324>, accessed on 30 June 2019.

³⁶¹ B Hoekman and PS Holmes (note 13 above; 1).

³⁶² B Hoekman and PS Holmes (note 13 above; 1 – 2).

³⁶³ B Hoekman and PS Holmes (note 13 above; 2).

³⁶⁴ P Gaur 'Call for multilateral competition regime' 2016 *TRALAC* available at <https://www.tralac.org/news/article/10653-call-for-a-multilateral-competition-regime.html>, accessed on 15 July 2019.

5.4.2 The concerns of developed countries

It is not only developing countries offering resistance where an integrated international competition policy is concerned. Whilst their reasons might differ, developed countries, such as the United States and European Union countries, are also reluctant to engage in discussions about an international competition regime, as evidenced in the discussion of chapter 3. The USA, in particular, has benefitted radically from the boost in international trade. Given this boost, there has been a need to develop state and federal competition laws to account for risks posed by cross-border activity, including mergers, joint ventures, imports and exports, is that the interests of consumers and businesses alike are affected by international activity. However, this development seems to be confined to the best interests of their own country, as opposed to what is universally best. The basis of development appears to be the desire to relax competition principles in order to ensure domestic firms have better success internationally.³⁶⁵

However, this notion is rejected by Michael Porter who attributes success to competitive relations, both domestically and internationally, and that efforts to relax competition laws only ends up undermining it.³⁶⁶ Thus, competition should not be stifled, but rather encouraged yet monitored and regulated. In fact, he contests that limiting competition might provide short term gains, but pursuing this approach “[...] will virtually guarantee that [nations] never achieve real and sustainable competitive advantage”.³⁶⁷ The research found that the USA’s weariness about developing an international competition regime on the basis that it will have the effect of stifling competition is misguided and the approach of allowing firms to continue practices with limited regulation in terms of competition holds no longevity. The USA’s reluctance seems to be driven by the desires of leading business firms.³⁶⁸

As explained in chapter 3, while the EU advocates for the implementation of an international competition policy, it is also not without its difficulties. The EU appears to only desire a policy that mirrors their own domestic policies. For this reason, the two major superpowers are at odds about negotiations. The EU has succeeded in getting the USA to appreciate that unregulated competitive practices only poses risks to their major industries, however, the USA is not prepared to concede to a policy that they believe does not best fit their needs. Unfortunately, without the cooperation of two major countries, it is difficult to get any negotiations underway. In addition, in their opposing approaches, it appears as if both the

³⁶⁵ R Pitofsky ‘The Effect of Global Trade on United States Competition Law and Enforcement Policies’ available at <https://www.ftc.gov/public-statements/1999/10/effect-global-trade-united-states-competition-law-and-enforcement-policies>, accessed on 01 July 2019.

³⁶⁶ R Pitofsky (note 365 above).

³⁶⁷ M Porter (note 38 above; 3 – 4).

³⁶⁸ G Hufbauer and J Kim (note 343; 330).

USA and the EU have disregarded that developing countries would not be agreeable to a policy with either of their preferred models.³⁶⁹

Overall, the apprehension of developed and developing countries alike is that the difficulty in synchronizing differing national policies to form a single standard is too tedious to undertake. The commonality between nations is the desire for efficiency and fairness for their domestic markets when interacting with international territories. However, while developing countries favour a policy focused on welfare gains, developed countries seem to prefer one that is driven by a market access agenda.³⁷⁰

5.5 INTERNATIONAL COMPETITION AND SOUTH AFRICA – THE ‘PROUDLY SOUTH AFRICAN’ CAMPAIGN

Like its African peers, South Africa appears to be faced with a conundrum. Having experienced the effects of being ostracised from the international community, South Africa has reinforced its commitment to international trade obligations, as a means of improving the country's economy. However, the price to pay for such commitment is an increase in competition and the risk of exposure to anti-competitive practices from other territories. To negate this effect, South Africa has taken strides to ensure its national competition authority and policy is advanced. However, without support from the international competition, the effect is limited. In addition, South Africa's involvement in bilateral competition agreements is also limited because they rely on the goodwill of their signatories of the application of the provisions, rather than enforcing commitment to the obligations. Its numerous bilateral competition agreements are also very limited in application and success because they operate in a cooperative fashion. This means that cooperative agreements are unstable and uncertain in effect.

The ‘Proudly South African’ campaign is well-intentioned, but the risk is that campaign is, in fact, in conflict with South Africa's National Treatment Policy obligation in terms of Article III of the GATT. Without certainty of international cooperation in regards to anti-competitive behaviour, it might not be the most opportune moment to be excluded from the international trade community. But if one of the major sources of threat is international trade itself, where does that leave South Africa?

³⁶⁹ G Hufbauer and J Kim (note 343; 330).

³⁷⁰ G Hufbauer and J Kim (note 343; 330).

5.6 RECOMMENDATIONS

The research found that bilateral co-operation agreements can facilitate overall discussions and negotiations, but it is preferred that they play an intermediary role only. Thus, it is recommended that their role should be to provide at least some form of co-operative governance until a consolidated international competition policy is drafted and implemented. Whilst the OECD and UNCTAD are not bilateral co-operative agreements, they play a similar role in that the application of their recommendations is based on co-operation as opposed to mandated regulation. Thus, their success is limited. Because their recommendations are not Acts or formal policies, they have no legal implications and only serve as guidelines-application relies on moral obligation.³⁷¹ However, their role as guidelines can be further beneficial. When discussing an international model, countries can look to these recommendations to elicit what has, in the past, been met with success and what has been criticised or objected. Thus, bilateral co-operative agreements, the OECD and UNCTAD recommendations can lay the foundation for what will ultimately form global co-operation.

The WTO faces much criticism where both trade and competition is concerned. In specific reference to competition, the view is that the organisation should focus more energy on improving the lapses in international trade regulation and that competition is not its field of expertise.³⁷² It is for this reason that it is recommended that the role of the WTO should be limited, so as not to deter participation in negotiations for the implementation of an international competition policy.³⁷³ This is not to say that the WTO should play no role in developing an international competition policy. Throughout the research, has emphasised that there is no denying that trade and competition are interlinked, thus, to wholly exclude the WTO would be problematic, especially if the resultant policy is in direct contrast with what the WTO dictates. Therefore, whilst the WTO should not be the driver in developing a competition policy, it can and should still play an advisory role. Given the success of the organisation in garnering international membership, it can be used as a model of how to negotiate and finalize a policy amongst so many nations.³⁷⁴

Finally, another reason WTO involvement should be limited is because, while the aim should be for a competition and a trade policy to correspond, unlike trade, competition must be concerned with welfare and efficiency rather than market access. Thus, to have a competition policy drafted outside the auspice of the WTO can ensure that any WTO provisions that are too stringent can be countered by competitive regulations. This is not to say that countries can

³⁷¹ S Woolcock (note 11 above; 16 – 17).

³⁷² G Hufbauer and J Kim (note 343; 330).

³⁷³ S Woolcock (note 11 above; 16 – 17).

³⁷⁴ S Woolcock (note 11 above; 40).

establish an outlet that will allow them to evade their trade obligations, but rather that WTO obligations which are too burdensome- especially for developing countries- can have their effects mitigated, where necessitated. This is discussed in direct relation to the Proudly South Africa campaign, a the focal point of the research, that is potentially contrary to the country's obligation in terms of the GATT's national treatment principle. As identified in chapter 3, there is no leading panel decisions that indicates whether or not South Africa is, in fact, at fault; however, should it be decided that SA's campaign is in contradiction with what the WTO mandates, it will serve our country well to have an international policy, with the same authority and effect of the WTO Agreements, that provides a basis for promoting, rather than stifling, competition. Thus, it is essential for an international competition policy to be developed, not only to monitor and regulate anti-competitive practices, but also to ensure that the alternative is not hindering fair competitive practices, as warned of by Porter.³⁷⁵

To dispel these concerns, developed country participation is pivotal. This is difficult given the mistrust harboured by developing countries. But the reality is that, for a competitive regime to have any effect, it cannot simply be drafted to the benefit of developed countries, with developing countries being compliant, but with all key players being in accord.³⁷⁶ Thus, whilst the WTO should not, in my view, act as principal proxy, lessons can be derived from the organisation. In particular, countries should attempt to remedy the approach of developing country exclusion and instead ensure developing countries are not only part of the discussion, but that their contributions are accounted for. The reality is that developed countries have an interest in protecting the market of developing countries for continued access and investment, and developing countries cannot achieve much success in the implementation of any regime without developed country resources and support.³⁷⁷

As discussed in Chapter 2, one of the inherent requirements of a successful international competition policy is flexibility, much like in the WTO agreements. The reality is that a "one size fits all" approach will not prove to be successful due to the difference in needs between countries, especially the difference between developed and developing countries. In this regard, the socio-economic needs and available resources of developing countries will be accounted for.³⁷⁸

Unfortunately, developing countries are reliant on foreign investment in order to advance. Optimistically, these countries will grow to become self-sufficient, but until such a time as that occurs, developed countries will have to shoulder the burden of providing aid to ensure

³⁷⁵ M Porter (note 38 above; 3 – 4).

³⁷⁶ C Lumina (note 356 above; 26).

³⁷⁷ C Lumina (note 356 above; 27).

³⁷⁸ Consumers International (note 15 above; 7).

continued developing country participation in international trade and competition. If this support is not provided, it is most likely that developing countries will feel the pressure to protect their industries from foreign competition.³⁷⁹ Flexibility might take the form of resource and financial aid, as well as allowing certain exemptions for developing countries, where it can be foreseen that compelled participation will be more harmful than beneficial to their developmental needs.³⁸⁰ Where it is not feasible to allow a complete mitigation of developing country obligations, another alternative could be allowing for different compliance periods. In other words, developing countries can be allowed an extension of time within which to introduce any international competition policy into their own domestic laws.³⁸¹ It will better serve all countries if the different economies are examined to determine what impact certain competition provisions will have on each.

5.7 CONCLUSION

Essentially, it is a matter of time before the cracks of lack of regulation, where competition is concerned, begin to show. As the international trade industry expands, the global effect of competition increases its reach too. It is for this reason that simply adopting national competition policies will not suffice for long.

Because an international competition policy is deemed by many an impossible feat to achieve, bilateral cooperative agreements appear to be an alternative. However, in my view, these will merely serve as a temporary measure. The usefulness of countries signing bilateral agreements for competition is that they can act as a guideline for the development of any future international agreement. However, the issue of lack of enforcement and regulatory overlap proves the agreements are of very little use in achieving multilateral harmony.

A key concern is that any international competition agreement must account for the needs of developing countries. One of the major criticisms of WTO involvement in the development of an international competition policy is that the WTO has become an organ of developed country needs. Any international competition policy developed must not only avoid doing the same, but must also ensure that its requirements are not so cumbersome on developing countries that, rather than working as a measure to boost their economies, it stifles their development objectives by exposing developing countries to more competition than it is capable of handling.

³⁷⁹ Consumer International (note 15 above; 27 – 28).

³⁸⁰ Consumer International (note 15 above; 28).

³⁸¹ Consumer International (note 15 above; 32).

The Proudly South African campaign is an example of the above. If interpreted strictly, the reality is that the campaign does not appear to comply with the standards endorsed by the WTO in its National Treatment Policy. However, if effected correctly, the campaign can stand to strengthen the country's economy in many respects. Thus, any international competition policy must consider the developmental needs of smaller economies and refrain from effecting blanket obligations that developed countries might be able to withstand, but which will adversely affect developing countries. Anti-competitive behaviour must be controlled and restrained, but stakeholders must be weary of restricting healthy competitive practices in turn. In other words, an organisation representing the development of international competition regulation will not fare well if it operates under the umbrella of the WTO. Whilst trade and competition are irrefutably connected, they are not one and the same, and competition must not be used as a means of further promoting market access whilst limiting economic development.

It is undeniable that a national competition policy is a mammoth task but, like the WTO and GATT before it, what once seemed impossible has now been achieved, albeit with certain faults. Thus, competition will realistically need to be broached in a piece meal fashion, but the overall objection should remain national compliance.

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18 March 2020

Ms Tamlyn Sanra Swinny (210545219)
School of Law
Howard College Campus

Dear Ms Swinny,

Protocol reference number: **HSS/0956/017M**

Project title: **Proudly South Africa Campaign: The interplay between particular global trade policies and competition mechanisms with specific focus on the role of the WTO in developing an international competition policy.**

Approval Notification – Amendment Application

This letter serves to notify you that your application and request for an amendment received on 04 March 2020 has now been approved as follows:

- Change in title

Any alterations to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form; Title of the Project, Location of the Study must be reviewed and approved through an amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

Best wishes for the successful completion of your research protocol.

Yours faithfully



.....
Professor Urmilla Bob
University Dean of Research

/ss

cc Supervisor: Ms Clydenia Stevens
cc. Academic Leader Research: Professor Shannon Bosch
cc. School Administrator: Mr Pradeep Ramsewak

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