

The Contribution of the United Nations to the Emergence of Global Antitrust Law

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This Article examines the contribution of the United Nations Conference on Trade and Development (UNCTAD) to the emergence of an international framework for antitrust. It is the first systematic analysis of UNCTAD's contribution to international antitrust since the 1980s—when the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the Set) was adopted. The Set still constitutes the only universally applicable instrument in the area of antitrust and its validity has been constantly reaffirmed by international conferences organized by UNCTAD, the most recent one being held in 2005. However, the Set's existence has also been shadowed: first, by its weak legal effect and, second, by the emergence of new international fora for competition policy, such as the World Trade Organization and the International Competition Network (ICN). This Article re-examines the legal effects of the Set, taking into account the evolution of the legal and political context of global antitrust; the adoption of a significant number of international, regional, and bilateral trade agreements containing various aspects of competition law provisions; and numerous antitrust cooperation agreements. It concludes that even if it is unlikely that the Set produces, by itself, any binding effect, it may eventually contribute to the emergence of a customary international norm against restrictive business practices. Nor is the importance of UNCTAD's Set limited to the issue of its legal effect; by providing a balanced approach to the relationship between competition law and the specific needs of developing countries, the Set may provide a model for a future international agreement on antitrust that could address the interests of both developed and developing countries.

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I. INTRODUCTION

Despite the failure of the World Trade Organization (WTO) to achieve consensus in Cancun regarding the need to launch negotiations on an international framework for antitrust in the context of the WTO,¹ global governance of competition law and policy remains an important issue for international trade and development.² This belief is supported by the fact that the initiative for adopting international rules for antitrust is not a recent development; rather, it is the continuation of an old story, in which the United Nations’ contribution has been significant. An analysis of this contribution is of interest, especially because of the important role developing countries play in the process of internationalization of competition rules. This study will focus on the contribution of the United Nations and, more specifically, of UNCTAD to the emergence of global competition law.

The role of UNCTAD has been underestimated by commentators, the overwhelming majority of whom focus on the role of other international fora, such as the WTO or the ICN in the internationalization of antitrust. The main explanation for this lack of interest is that the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, adopted by UNCTAD in 1980,³ is

1. See General Council, *Doha Work Programme: Decision Adopted by the General Council on 1 August 2004*, WT/L/579 (Aug. 2, 2004) (dropping competition policy from the WTO’s Doha Round).

2. Frédéric Jenny, *Competition Law and Policy: Global Governance Issues*, 26 WORLD COMPETITION L. & ECON. REV. 609 (2003) [hereinafter Jenny, *Competition Law*]; Frédéric Jenny, *Competition, Trade and Development Before and After Cancun*, in 30 ANNUAL PROCEEDINGS OF THE FORDHAM CORPORATE LAW INSTITUTE 631, 654 (Barry E. Hawk ed., 2004) [hereinafter Jenny, *Competition, Trade*].

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

thought not to have binding effect. However, while there was little doubt in 1980, when the Set was adopted, that it did not have any binding effect, the same conclusion may not be reached today; the validity of the Set has been constantly reaffirmed in subsequent international conferences (United Nations Conference To Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for Control of Restrictive Business Practices (Review Conference)).⁴ Twenty-seven years after its adoption, it is also part of a broader trend: the international expansion of competition law, now considered the primary tool to regulate increasingly global markets.⁵ It is therefore important to reassess the legal effect of the Set in view of these recent developments. This study concludes that even if the Set does not have, by itself, any binding effect, it may contribute to the emergence of a customary international rule against restrictive business practices and, therefore, could eventually lay the foundations for a global competition law regime.

The object of this study is not to reflect on the desirability of the emergence of global competition law, which is an issue that already has been covered extensively.⁶ Indeed, a policy analysis of the appropriateness of global antitrust does not take into account that an increasing number of international agreements on antitrust issues have already been adopted and that international networks, such as the ICN and the European Competition Network (ECN), are now in operation.⁷ If these international agreements and networks exist, it is certainly because governments consider them necessary in order to tackle anti-competitive behaviour that their own antitrust legislation cannot handle. This study will therefore start from the assumption that some form of international

4. Fifth United Nations Conference To Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Anatolya, Turk., Nov. 14-18, 2005, *Report*, ¶ 1, U.N. Doc. TD/RBP/CONF.6/15 (Feb. 10, 2006) [hereinafter Fifth U.N. Conference].

5. See TONY A. FREYER, *ANTITRUST AND GLOBAL CAPITALISM 1930-2004*, at 5-7 (2006).

6. See COMPARATIVE COMPETITION LAW: APPROACHING AN INTERNATIONAL SYSTEM OF ANTITRUST LAW (Hanns Ullrich ed., 1998); COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY 1, 1 (Richard A. Epstein & Michael S. Greve eds., 2004); MAHER M. DABBAH, *THE INTERNATIONALISATION OF ANTITRUST POLICY* (2003); Aditya Bhattacharjya, *The Case for a Multilateral Agreement on Competition Policy: A Developing Country Perspective*, 9 J. INT'L ECON. L. 293, 295 (2006); Harry First, *Evolving Toward What? The Development of International Antitrust*, in 1 THE FUTURE OF TRANSNATIONAL ANTITRUST: FROM COMPARATIVE TO COMMON COMPETITION LAW 23 (Josef Drexler ed., 2003); Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT'L L. 911 (2003); Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478 (2000).

7. Andrew T. Guzman, *The Case for International Antitrust*, in COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY, *supra* note 6, at 99 ("We already live in a world of international competition policy:").

competition law is normatively desirable and focus on a positive analysis of the United Nations' contribution to this area.

Part II reviews the reasons that lead UNCTAD to intervene in this field and the specificities of its approach. Part III explores the legal effects of the Set and its contribution to the possible emergence of an international customary law of antitrust. Part IV highlights UNCTAD's role in the international governance of competition law and particularly considers the benefits of UNCTAD compared to other international fora for internationalizing antitrust, especially regarding the integration of developing countries in the international trading system.

II. THE UNITED NATIONS AND THE "LINKAGE" OF COMPETITION AND DEVELOPMENT

The Set is the outcome of developing countries' efforts during the 1960s and 1970s to question the foundations of the international trade system and develop a "New International Economic Order."⁸ The provisions of the Set are therefore inspired by the aim of economic development of the less developed countries,⁹ an objective that consequently affects the substantive provisions of the Set and explains the specificities of its approach.

A. *The Move Towards International Antitrust Rules and the Quest for a "New International Economic Order"*

Many attempts have been made to achieve international rules on antitrust. The first formal discussion of possible international action against restrictive business practices took place in 1927, when, under the auspices of the League of Nations, the Industrial Committee on the International Economic Conference considered a proposal for a multilateral convention for the unification of national competition

8. See MOHAMMED BEDJAOU, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER 133-34, 143 (1979); THOMAS M. FRANCK & MARK M. MUNANSANGU, THE NEW INTERNATIONAL ECONOMIC ORDER: INTERNATIONAL LAW IN THE MAKING? (1982); JERZY MAKARCZYK, PRINCIPLES OF A NEW INTERNATIONAL ECONOMIC ORDER: A STUDY OF INTERNATIONAL LAW IN THE MAKING (1988); Norbert Horn, *Normative Problems of a New International Economic Order*, 16 J. WORLD TRADE L. 338 (1982); Karl P. Sauvant, *Toward the New International Economic Order*, in THE NEW INTERNATIONAL ECONOMIC ORDER: CONFRONTATION OR COOPERATION BETWEEN NORTH AND SOUTH? 3 (Karl P. Sauvant & Hajo Hasenpflug eds., 1977); Robin C.A. White, *A New International Economic Order*, 24 INT'L & COMP. L.Q. 542 (1975).

9. Dale A. Oesterle, *United Nations Conference on Restrictive Business Practices*, 14 CORNELL INT'L L.J. 1, 14-15 (1981).

statutes.¹⁰ This proposal presumed that all international industrial agreements restraining trade that were not reported to the League of Nations were illegal.¹¹ Joint national institutions attached to a single international institution would carry out investigations and enforcement.¹² The proposal also established national and international procedures and sanctions against restrictive business practices.¹³ Nevertheless, the proposal failed because national approaches to restrictive business practices remained diverse.¹⁴ For example, no consensus was reached on whether cartels represented a restriction on trade, as evidenced by the fact that in some countries they were considered a “proper and desirable means to rationalization” of the production.¹⁵

It was only after the end of World War II that a stronger consensus developed as to the importance of adopting anti-cartel statutes.¹⁶ The prohibition of cartels was thought of as a means to protect economic and political democracy and to preserve peace.¹⁷ This period was also

10. REPORT AND PROCEEDINGS OF THE WORLD ECONOMIC CONFERENCE, HELD AT GENEVA, MAY 4TH TO 23RD, 1927, League of Nations Doc. C.356.M.129.1927.II (1927).

11. Dale B. Furnish, *A Transnational Approach to Restrictive Business Practices*, 4 INT'L LAW 317, 319 (1970).

12. *Id.*

13. *Id.*

14. Lazar Focsaneanu, *Les Pratiques commerciales restrictives et le droit international*, in 10 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 267, 277 (1964). A report was adopted unanimously. U.S.S.R. and Turkey abstained from the vote, as did the United States. The latter abstention was justified by the conference's relatively favourable attitude to industrial cartels. *Id.*

15. Furnish, *supra* note 11, at 320. Concerning the restrictive effect on competition of cartels, a comparison of the German and American approach illustrates this regulatory diversity. While, in the United States, cartel agreements were considered per se illegal as violating the Sherman Act, in pre-war Germany, cartels were considered an optimal way of industrial organization and were generally favored. See DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS chs. 4-5 (1998); Philippe Brusick, *UN Control of Restrictive Business Practices: A Decisive First Step*, 17 J. WORLD TRADE L. 337, 338-39 (1983).

16. See, for example, the adoption of the Law Relating to the Prohibition of Private Monopoly and Methods of Preserving Fair Trade, adopted in Japan on April 12, 1947. Harry First, *Antitrust in Japan: The Original Intent*, 9 PAC. RIM L. & POL'Y J. 1 (2000). In Germany, the *Gesetzes gegen Wettbewerbsbeschränkungen* (GWB) was adopted in 1958. This text replaced the anti-cartel laws adopted by the occupation powers (the United States, England, and France) in 1945. *Id.* at 268-69, 276-333.

17. Focsaneanu, *supra* note 14, at 272-73. Article III(B)(12) of the Final Declaration of the Potsdam Conference, which was issued on August 2, 1945, provided for the immediate decentralization of the German economy in order to put an end to the excessive concentration of economic power of cartels, trusts, and other monopolies. *Report on the Tripartite Conference of Berlin*, 13 DEP'T ST. BULL. 153, 156 (1945). In order to comply with this article, American, British, and French military governments within the zone of occupation adopted regulations prohibiting excessive economic concentration. E.J. Cohn, Book Review, 17 MOD. L. REV. 493, 493 (1954) (reviewing HANS WÜRDINGER, FREIHEIT DER PERSÖNLICHEN ENTFALTUNG, KARTELLUND WETTBEWERBSRECHT (1953)).

marked by the creation of the Charter for an International Trade Organization (ITO), which sought to establish a liberalized system of international commerce that would be as free as possible from both state and private restraints.¹⁸ The Havana Charter of 1948 expressed a concern for the restrictive effect of some business practices,¹⁹ without adopting the more active approach proposed by the United States and the United Kingdom in their 1945 Proposals for Expansion of World Trade and Employment.²⁰ However, the proposals never took effect; the United States Department of State publicly withdrew its request for ratification by the United States Congress.²¹ The General Agreement on Tariffs and Trade (GATT), which was ultimately ratified by the United States, did not contain any provisions equivalent to those of Chapter V of the Havana Charter, and there was no particular effort made in the attempted revision of the GATT in 1954-55 to extend the scope of the agreement to restrictive business practices.²²

The United Nations Economic and Social Council (ECOSOC) took up the subject of restrictive business practices in the early 1950s, and an ad hoc committee drafted an international code.²³ This initiative, however, did not end successfully because the United States again withdrew its support, preferring a gradual convergence of national laws

18. George Bronz, *The International Trade Organization Charter*, 62 HARV. L. REV. 1089, 1090 (1949).

19. United Nations Conference on Trade and Employment, Nov. 21, 1947-Mar. 24, 1948, *Havana Charter for an International Trade Organization*, art. 46(1), U.N. Doc. E/CONF.2/78 (Mar. 24, 1948). Chapter V of the Havana Charter is comprised of nine articles (articles 46-54). According to article 46(1) of the charter:

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

Id. art. 46(1); Bronz, *supra* note 18, at 1116; Furnish, *supra* note 11, at 324-26; John E. Lockwood, *Proposed International Legislation with Respect to Business Practices*, 41 AM. J. INT'L L. 616 (1947).

20. See U.S. Dep't of State, Pub. 2411, Commercial Policy Series 79 (1945), *cited in* Furnish, *supra* note 11, at 323 (proposing that the International Trade Organization should address "restrictions imposed by private combines and cartels").

21. Eleanor M. Fox, *Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade*, 4 PAC. RIM L. & POL'Y J. 1, 3 (1995); Furnish, *supra* note 11, at 326.

22. George Bronz, *An International Trade Organization: The Second Attempt*, 69 HARV. L. REV. 440, 444 (1956).

23. U.N. Econ. & Soc. Council [ECOSOC], Off. Rec., 16th Sess., Supp. No. II, U.N. Doc. No.E/2380 (1953). For a detailed analysis, see Sigmund Timberg, *Restrictive Business Practices: Comparative Legislation and the Problems That Lie Ahead*, 2 AM. J. COMP. L. 445, 463-64 (1953).

on this issue.²⁴ In 1960, the contracting parties of the GATT adopted ad hoc notification and consultation procedures for dealing with conflicts of interest in this area.²⁵

The actions undertaken under the auspices of UNCTAD²⁶ and, specifically, the United Nations Conference on Restrictive Business Practices (UNCRBP) were the continuation of the post-war efforts for an international antitrust framework. However, the motivations of the conference were not the same as in the previous initiatives; the impetus came this time from developing countries, which had recently gained their independence and were seeking to impose a New International Economic Order (NIEO) on developed countries in order to redistribute the world's wealth in their favour.

The NIEO was first introduced in Resolutions 3201 (S-VI) (The Declaration on the Establishment of a New International Economic Order (the Declaration)) and 3202 (S-VI) (Programme of Action on the Establishment of a New International Economic Order (the Programme)) of May 1, 1974, during the sixth special session of the United Nations General Assembly.²⁷ It was held that the NIEO should be

based on equity, sovereign equality, interdependence, common interest and co-operation among all States, irrespective of their economic and social systems which shall correct inequalities and redress existing injustices, make it possible to eliminate the widening gap between the developed and developing countries and ensure steadily accelerating economic and social development and peace and justice for present and future generations.²⁸

The NIEO was thus founded on certain principles, notably the preferential and non-reciprocal treatment for developing countries and the supervision of the activities of transnational corporations by taking

24. Furnish, *supra* note 11, at 327.

25. *See id.* at 328-29. The GATT instituted a voluntary procedure for consultation between member states. Members were encouraged to consult privately on the harmful effects of any restrictive practices in which their nationals were participating. After these discussions concluded, the parties submitted a report to the GATT secretariat. *Id.* at 328.

26. G.A. Res. 1995 (XIX), ¶ 1, U.N. Doc. A/Res/1995 (XIX) (Dec. 30, 1964) (adopting UNCTAD as a permanent organ of the General Assembly).

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

28. Declaration, *supra* note 27, pmbl.

measures in the interest of the national economies of the countries where such transnational corporations operate.²⁹

“The NIEO was intended to be a *global challenge* to existing international economic relations.”³⁰ The term “new” distinguishes the international economic order developed after World War II, which was mainly inspired by the economic theory of the comparative advantage. The new economic order would insist on a more equitable division of wealth between nations and take into account the special circumstances of developing countries.³¹ This stands in contrast to the GATT system, which was developed by the western states and was animated exclusively by the objective of free trade; during this period, there were no special provisions for developing countries and their interests were not sufficiently taken into account.³² The GATT promoted a free international trade system, whereas developing countries favoured a more interventionist approach.

Together with the Declaration, the General Assembly approved, without voting, the Programme.³³ The Programme consisted of a number of measures that had to be undertaken within the framework of the United Nations. The objective was to strengthen the role of the U.N.

29. See *id.* ¶ 4(g), (n). These two points were not, however, accepted by some developed countries. See FRANCK & MUNANSANGU, *supra* note 8, at 7.

30. ANTONIO CASSESE, INTERNATIONAL LAW 400 (2001).

31. Declaration, *supra* note 27, ¶ 2 (“The present international economic order is in *direct conflict* with current developments in international political and economic relations.” (emphasis added)). The oil crisis of 1973 and the rise of the price of raw materials accentuated the importance of the developing countries in the international economy and, consequently, their political power. *Id.* As paragraph 2 of the Declaration explains:

The developing world has become a powerful factor that makes its influence felt in all fields of international activity. These irreversible changes in the relationship of forces in the world necessitate the active, full and equal participation of the developing countries in the formulation and application of all decisions that concern the international community.

Id.; Sidney Dell, *The Origins of UNCTAD, in UNCTAD AND THE SOUTH-NORTH DIALOGUE: THE FIRST TWENTY YEARS* 10, 10-11 (Michael Zammit Cutajar ed., 1985) [hereinafter UNCTAD AND THE SOUTH-NORTH DIALOGUE].

32. Moving away from the concept of a single undertaking and the policy of nondiscrimination underlying the original GATT, General Agreement on Tariffs and Trade, art. I(1), Oct. 30, 1947, T.I.A.S. 1700, 55 U.N.T.S. 194, in 1964, UNCTAD and the developing countries proposed the Generalized System of Preferences, which was implemented in 1979. See Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, L/4903 (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.) at 203 (1980). The document provides an enabling clause, which permits derogation from GATT’s article 1 provision on Most Favoured Nation status (MFN), thereby allowing developed countries to give preferential treatment to developing countries. *Id.* ¶ 1.

33. Programme, *supra* note 27.

system in the field of international economic co-operation.³⁴ Specific mention was made of the role of UNCTAD, a permanent organ of the General Assembly created in 1964, to promote international trade while serving the interests of the developing countries.³⁵ The creation of UNCTAD as a permanent institutional body was the result of developed countries' failure to convince the developing world that the issue of trade and development could be handled through GATT.³⁶ The developed countries accepted the establishment of UNCTAD, but "continued their efforts immediately thereafter to preserve and strengthen GATT as the principal negotiating and legal instrument in the field of international trade, and to limit UNCTAD's role and its growth."³⁷

In the 1970s, the UNCTAD undertook a number of initiatives to implement the Programme. One of the most important missions of UNCTAD was the regulation and control over activities of transnational corporations that, according to developing countries, diminished their sovereignty by interfering in their internal affairs.³⁸

The goal of regulating transnational corporations was pursued by the adoption of a number of international codes of conduct. These were addressed not only to states but also to transnational corporations³⁹—aimed, for example, at ending restrictive business practices,⁴⁰ increasing developing countries' access to technology,⁴¹ or changing significantly the working arrangements of shipping conferences in order to enable developing countries to participate fully in maritime trade.⁴² The Set was an important part of this programme.⁴³

34. *Id.* intro.

35. *Id.* ¶ I(3)(a)(i).

36. Dell, *supra* note 31, at 25; see also R. Krishnamurti, *UNCTAD as a Negotiating Instrument on Trade Policy: The UNCTAD-GATT Relationship*, in UNCTAD AND THE SOUTH-NORTH DIALOGUE, *supra* note 31, at 33.

37. Krishnamurti, *supra* note 36, at 35 ("GATT's operations and programmes in regard to developing countries were therefore stepped up, Part IV of the General Agreement was adopted, the GATT Committee on Trade and Development established, and sustained efforts were mounted to enlist developing country membership of GATT?").

38. UNCTAD, *The Elements of the New International Economic Order*, in THE NEW INTERNATIONAL ECONOMIC ORDER: CONFRONTATION OR COOPERATION BETWEEN NORTH AND SOUTH?, *supra* note 8, at 39, 39-40.

39. A.-A. Fatouros, *Le projet de Code international de conduite sur les entreprises transnationales: essai préliminaire d'évaluation*, 107 JOURNAL DU DROIT INTERNATIONAL 5, 7 (1980).

40. Stuart E. Benson, *The U.N. Code on Restrictive Business Practices: An International Antitrust Code Is Born*, 30 AM. U. L. REV. 1031 (1981).

41. See Surendra J. Patel, *The Technological Transformation of the Third World: Main Issues for Action*, in UNCTAD AND THE SOUTH-NORTH DIALOGUE, *supra* note 31, at 124.

42. See Lawrence Juda, *World Shipping, UNCTAD, and the New International Economic Order*, 35 INT'L ORG. 493 (1981); M.J. Shah, *The UN Code of Conduct for Liner Conferences: A*

The model of competition law promoted by the Set was therefore inspired by an interventionist approach to the market. The Set's use of the word "equitable" expresses the importance accorded to the development dimension of competition policies and the need to establish a preferential treatment for developing countries. An analysis of the principles of the Set is necessary to understand this approach.

B. The Specificities of the UNCTAD Restrictive Business Practices Set

The Set reflects two different approaches to international competition rules.⁴⁴ On one hand, developing countries did not consider the proper purpose of the Set to be the preservation and promotion of international competition; rather, they aimed for enhancement of economic development, which in their view was related to their capacity to regulate transnational corporations.⁴⁵ On the other hand, the developed countries viewed the Set as a means of maintaining and promoting market competition.⁴⁶

This dual approach is reflected in the battle for the definition of the expression "restrictive business practices." Whereas the developing countries adopted a broad definition of this term in order to integrate the effect on trade and development,⁴⁷ the developed countries insisted that an effect on trade and development should not constitute, by itself, a

Case Study in Negotiation, in the Context of the South-North Dialogue, in UNCTAD AND THE SOUTH-NORTH DIALOGUE, supra note 31, at 203. However, the code has failed in its effort to establish a more equal situation between the rich North and the poor South. See OKECHUKWU C. IHEDURU, THE POLITICAL ECONOMY OF INTERNATIONAL SHIPPING IN DEVELOPING COUNTRIES (1996).

43. See Programme, *supra* note 27, ¶ V(6), Regulation and Control over the Activities of Transnational Corporations ("[A]ll efforts should be made to formulate, adopt and implement an international code of conduct for transnational corporations . . . [t]o regulate their activities in host countries, to eliminate restrictive business practices and to conform to the national development plans and objectives of developing countries, and in this context facilitate, as necessary, the review and revision of previously concluded arrangements.").

44. For a commentary on the principles of the Set, see Benson, *supra* note 40; Thomas L. Brewer, *International Regulation of Restrictive Business Practices*, 16 J. WORLD TRADE L. 108 (1982); Philippe Brusick, *UNCTAD's Role in Promoting Multilateral Co-operation on Competition Law and Policy*, 24 WORLD COMPETITION 23 (2001); Brusick, *supra* note 15; Joel Davidow, *The UNCTAD Restrictive Business Practices Code*, 13 INT'L LAW. 587 (1979); Rajan Dhanjee, *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Practices—An Instrument of International Law?*, 28 LEGAL ISSUES OF ECON. INTEGRATION 71 (2001); Debra L. Miller & Joel Davidow, *Antitrust at the United Nations: A Tale of Two Codes*, 18 STAN. J. INT'L L. 347 (1982); Oesterle, *supra* note 9.

45. Oesterle, *supra* note 9, at 17-18.

46. *Id.* at 20.

47. *Id.* at 19.

restrictive business practice.⁴⁸ The text of the Set more strongly reflects the second approach. It covers practices that (a) limit access to markets or unduly restrain competition *and* (b) that have an adverse effect on international trade, particularly when it affects developing countries.⁴⁹ The above definition is the result of a compromise. Indeed, the developed countries achieved their goal of limiting the scope of the definition of restrictive business practices and, in exchange, they “did not insist on omitting all references to the particular concerns of the developing countries.”⁵⁰

In addition to the definition of restrictive business practices, the developed and developing nations differed in their opinions of the Set’s reach. The developing countries considered that the Set should apply only to transnational firms and should exempt the industries of the developing world.⁵¹ Developed countries, in contrast, believed the Set should apply to all firms, regardless of their national origin and their nature as public or private entities. Furthermore, the developed countries insisted that the issue was import and export cartels blocking the access to national markets, which needed not involve transnational corporations.⁵² An *a priori* distinction based on the nationality of the firms did not correspond to the objective of the Set, which aimed to enhance competition. Companies within developing countries can affect international trade through restrictive trade practices that are not necessarily essential to their development, but are likely to affect other developing countries.⁵³

With respect to the control of restrictive business practices, the Set finally adopted a compromise between the principle of universality advocated by developed countries and the principle of preferential treatment, which reflected the desire of developing countries to benefit from rules taking into account their specific economic situation. Reflecting the developed countries’ standpoint, article B provides that the Set applies to the restrictive business practices of *all* enterprises, “including those of transnational corporations . . . irrespective of whether

48. See Davidow, *supra* note 44, at 591.

49. *Id.* (“[T]he definition must be read to state that an offense exists when a practice abuses a dominant position by limiting access to markets or unduly restraining competition *and* such practice has an adverse effect on trade or development.”).

50. Benson, *supra* note 40, at 1041; Dhanjee, *supra* note 44, at 76. The approach, however, minimizes the effect of the practices to development by asking first to establish a restriction of market access or an undue restraint of trade.

51. Oesterle, *supra* note 9, at 17.

52. Benson, *supra* note 40, at 1036.

53. *Id.* at 1037.

such practices involve enterprises in one or more countries,” and to “all countries and enterprises regardless of the parties involved in the transactions, acts or behaviour.”⁵⁴

Nevertheless, the Set also established a certain degree of preferential treatment for developing countries. Article C(6) provides that “[i]n order to ensure the fair and equitable application of the Set of Principles and Rules,” application of the Set should take into account “the extent to which the conduct of enterprises, whether or not created or controlled by States, is accepted under applicable legislation or regulations.”⁵⁵ In addition, according to article C(7), developed countries “should take into account in their control of restrictive business practices the development, financial and trade needs of developing countries, in particular of the least developed countries” by “[p]romoting the establishment or development of domestic industries,” and by “[e]ncouraging their economic development through regional or global arrangements among developing countries.”⁵⁶ Consequently, the Set emphasizes the application of the doctrine of comity⁵⁷ towards developing countries.⁵⁸

The Set does not establish a complete harmonization of antitrust rules but simply encourages a minimum standard of antitrust enforcement.⁵⁹ States are free to adopt more stringent antitrust standards and apply per se prohibitions for a certain number of restrictive practices. The code embraces the principle of non-discrimination and provides that foreign-owned companies and local firms are to be treated similarly.⁶⁰

54. Set, *supra* note 3, art. B(4), (7). However, the Set does not apply to intergovernmental agreements, nor to restrictive business practices directly caused by such agreements. *Id.* art. B(9).

55. *Id.* art. C(6).

56. *Id.* art. C(7).

57. The doctrine of comity refers to the courteous recognition by one nation of the laws and institutions of another nation.

58. Benson, *supra* note 40, at 1038. *Contra* Joel Davidow, *International Antitrust Codes: The Post-Acceptance Phase*, 26 ANTITRUST BULL. 567, 574 (1981) (“[N]either [article] overrides the ultimate prosecutorial discretion of each nation in enforcing its own antitrust laws.”).

59. Article E(1) of the Set provides that “States should, at the national level or through regional groupings, adopt, improve and effectively enforce appropriate legislation and implementing judicial and administrative procedures for the control of restrictive business practices.” Set, *supra* note 3, art. E(1). In addition, according to article E(2), “States should base their legislation primarily on the principle of eliminating or effectively dealing with acts or behavior of enterprises which . . . limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on their trade or economic development.” *Id.* art. E(2).

60. *Id.* art. E(3). The principle of non-discrimination is expressed in the phrase “on the same basis to all enterprises.” *Id.* There is no preferential treatment for developing countries concerning the scope of the competition statutes. Nevertheless, their interest should be taken into account in the next step of the competitive assessment. This implies that the antitrust standards

This was a concession to developed countries, which did not want to distinguish between firms according to their nationality.⁶¹ The Set, however, stresses that the trade and development of developing countries should be taken into account in deciding whether to “seek appropriate remedial or preventive measures to prevent and/or control the use of restrictive business practices within their competence.”⁶² This provision is consistent with article C(7), which, as previously discussed, prevails upon developed nations to take developing nations’ needs into account when enforcing antitrust law. The term “within their competence” does not seem to oblige, to the extent that the Set is binding, states to an extraterritorial application of their competition legislation in order to protect the trade and development of the developing countries.⁶³ However, states with greater experience in competition law should, on request, share their experience with, or provide technical assistance to, other states wishing to develop or improve their competition law systems.

The Set also anticipates measures for international implementation. These include collaboration, mutual assistance, exchange of information on the restrictive practices of firms, and the application of national laws on an international, regional, and/or sub-regional level.⁶⁴ To this end, an Intergovernmental Group of Experts on Restrictive Business Practices, operating within the framework of UNCTAD, was created to provide a forum for, and means of, multilateral consultations to undertake and periodically disseminate studies and research on competition law issues, to collect information on matters relating to the Set, and to make reports and recommendations to the states.⁶⁵ Although there is no specific mention of the effect of the rules, article G(2) provides that “States which have accepted the Set of Principles and Rules *should* take appropriate steps at the national or regional levels to meet their commitment to the Set of Principles and Rules.”⁶⁶

In conclusion, the generality of the Set’s approach, hesitating between universality and specificity, competition and development, is the

applied to the examination of the anticompetitive effect of business practices should take into account the interest of developing countries, as well as the effects of the practice on competition. It is possible then to infer that this article embodies in the objectives of the competition policy of developed countries (which may adopt a consumer welfare based approach or have broader objectives) the aim of economic and industrial development of the developing nations.

61. Benson, *supra* note 40, at 1046.

62. Set, *supra* note 3, art. E(4).

63. Oesterle, *supra* note 9, at 46.

64. See Set, *supra* note 3, arts. E(7), F (setting out the regional and subregional level and the collaboration at the international level, respectively).

65. *Id.* art. G.

66. *Id.* art. G(2) (emphasis added).

consequence of the conflicting views of developing and developed countries concerning its objectives. If, for developing countries, the principal objective of the Set was to control the activity of multinational firms, following the principles of the NIEO, for developed countries, it was to preserve world competition and consumer welfare.⁶⁷ The suspicion of the “collectivist” influences behind UNCTAD’s work played a symbolic, but nevertheless important, role in dissuading developed western countries from completely embracing the initiative.⁶⁸ This disagreement also explains the “weak” legal nature of the Set and the failure of the UNCTAD to serve as the principal framework for internationalizing antitrust.⁶⁹

The increasing role of the WTO, and more recently the ICN, in the elaboration of international antitrust standards or of an international framework for cognitive convergence in this area has also put UNCTAD in a defensive position. Despite the developing countries’ lofty expectations for the Set, they found that UNCTAD was no longer the protagonist of the process; instead, it came to play a secondary role⁷⁰ to the WTO. However, the increasing importance of the development dimension of the WTO and the failure to reach a consensus within the organization on the need to start negotiations on competition policy, following the ministerial conference in Cancun in 2004, offers UNCTAD a chance to become an indispensable partner in the project to establish an international antitrust framework. In particular, it is submitted that the Set may produce some legal effects or at least that this eventuality should not be excluded *ab initio*.

67. See Spencer Weber Waller, *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust*, 42 U. KAN. L. REV. 557, 599 (1994).

68. For a critical analysis of UNCTAD’s mission and intellectual foundations, see STANLEY J. MICHALAK, JR., U.N. STUDIES: UNCTAD: AN ORGANIZATION BETRAYING ITS MISSION 73 (1983).

69. This failure was explained by John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT’L L. 205, 219 (2000) (“Although some regulatory schemes were adopted and some were not, the ‘code of conduct’ approach largely failed in its broader objectives because the developed world, and the Reagan Administration in the United States in particular, simply refused to play the game.”).

70. With the exception of articles written by administrators of the UNCTAD (Brusick, *supra* note 44; Dhanjee, *supra* note 44), the author was unable to find articles in legal periodicals dealing with UNCTAD’s recent contribution to the establishment of international antitrust standards. This contrasts with the number of articles or monographs concerning the WTO’s contribution to international antitrust.

III. THE “WEAK LEGAL NATURE” OF THE UNITED NATIONS SET: DOES THE SET CREATE LEGAL OBLIGATIONS?

The Set was adopted by General Assembly resolution 35/63 of 5 December 1980.⁷¹ It has been in operation since and the Fifth Review Conference reaffirmed its validity.⁷² However, the majority of commentators consider that the Set has no binding effect.⁷³ They claim that UNCTAD issued the code, acting as an organ of the General Assembly and that it is common understanding that the actions of the General Assembly itself are not legally binding.⁷⁴ However, the validity of the Set has been confirmed by a General Assembly resolution. Consequently, the legal nature of the Set is distinguishable from other codes of conduct adopted by UNCTAD, which were not endorsed by the General Assembly. In other words, because of its adoption by the General Assembly, the Set may demand a higher degree of obligation than other UNCTAD codes. The fact that the General Assembly adopted a resolution on the Set is therefore a relevant issue in examining the nature of the legal obligations that it creates.⁷⁵ At the same time, it is highly unlikely that the Set can produce any intrinsic legal effects as a resolution of the General Assembly.⁷⁶

Even in the absence of intrinsic legal effects, it is possible to argue that the continuous reaffirmation of the Set’s validity since its adoption in 1980 may lead to the formation of a customary international obligation to prohibit restrictive business practices affecting international trade.⁷⁷ Indeed, while the initial assessment of the binding effect of the Set, as an act of the General Assembly, may not change over time, this is not the

71. G.A. Res. 35/63, pmb., U.N. Doc. A/RES/35/63 (Dec. 5, 1980).

72.

The Fifth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, . . . [r]eaffirms the fundamental role of competition law and policy for sound economic development and the validity of the UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.

Fifth U.N. Conference, *supra* note 4, ¶ 1.

73. *E.g.*, Richard Schwartz, *Are the OECD and UNCTAD Codes Legally Binding?*, 11 INT’L LAW. 529, 533-34 (1977).

74. *Id.*

75. Nguyen Huu Tru, *Les Codes de conduite: Un bilan*, in 96 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 45, 47 (1992).

76. Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 EUR. J. INT’L L. 879, 882-83 (2005). Intrinsic legal effects “exist to the full extent that the explicit and implicit powers of the [General Assembly] allow for them.” *Id.* at 879.

77. The Fifth Review Conference, convened at Antalya, Turkey, 14-18 November 2005, adopted a resolution reaffirming the validity of the Set. *See* Fifth U.N. Conference, *supra* note 4.

case if we consider the Set as the starting point for the formation of a customary international rule, which is by nature evolving and dynamic. Even if it is always hard to determine the moment when *lex feranda* is transformed into *lex lata* by the mystical process of custom formation,⁷⁸ the discovery of this new norm being left to the courts, it is important to examine this possibility regarding the Set by taking into account its broad political and legal context and assessing its extrinsic effects.⁷⁹

A. *The Intrinsic Legal Effect of the Set as a General Assembly Resolution*

It is important for our analysis first to examine the legal obligations to which a General Assembly resolution can give birth. This question turns on the legislative or normative power of the General Assembly.⁸⁰ We will examine the legal force of the Set in regard to the theory of General Assembly resolutions (declarations) as special law-making acts.⁸¹ The question is complex because the Set is not only an act of *interna corporis*, an act taken by the General Assembly concerning the organization of the General Assembly or its rules of procedure,⁸² but also a resolution that will have effects on the external sphere of the organization, specifically on the domestic legal order of its member states.⁸³ Indeed, the Set aims to produce effects outside the organization's

78. Pierre-Marie Dupuy, *L'unité de l'ordre juridique international: Cours général de droit international public (2000)*, in 297 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 197 (2003).

79. Öberg, *supra* note 76, at 895-96 (“[Legal effects] are extrinsic because, although it is declarations that have legal effects, these are directly based on international customary law. Between the two there is no intermediary instrument providing the adopting body with intrinsic powers.”).

80. For an analysis of the international legal consequences of General Assembly resolutions, see Richard A. Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782 (1966); Gaetano Arangio-Ruiz, *The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations*, in 137 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 419, 444-45 (1974).

81. Arangio-Ruiz, *supra* note 80, at 444-45.

82. *Id.* The resolution adopting the Set is addressed to UNCTAD, an organ created by the General Assembly and subject to its authority; thus, the resolution has a binding effect on UNCTAD. Indeed, under article 22 of the Charter of the United Nations, “[t]he General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.” U.N. Charter art. 22.

83. The political implications of accepting the legislative function of the General Assembly would be considerable. A broad interpretation is supported by the developing countries, which have a clear majority in the General Assembly. Under this interpretation, the resolutions of the General Assembly might serve as a means to achieve the progressive development of the law towards a greater acceptance of the developing countries' positions, especially concerning the programme for the establishment of a new international economic order

legal order by asking member states to “adopt, improve and effectively enforce” antitrust legislation.⁸⁴ In regard to the type of acts adopted by international organizations, Philippe Sands and Pierre Klein consider that the interpretative approach must be more restrictive and that “the power to adopt normative acts binding on members in the ‘external sphere’ must be expressly stated in the organisation’s constituent instruments and may not be implied.”⁸⁵ Therefore, the binding effect of Resolution 35/63 depends on the power given in the U.N. Charter to the General Assembly to adopt binding decisions concerning this particular issue.

The language of the Charter,⁸⁶ the *travaux préparatoires* of the San Francisco conference,⁸⁷ and the practice of the United Nations and that of its member states lead the majority of authors to conclude that “the *general* powers granted to the Assembly under those Articles do not involve binding decision-making except where it is specially so provided expressly or by implication.”⁸⁸ The International Court of Justice (ICJ) held in the *South-West Africa* case that “resolutions of the United Nations General Assembly . . . [are] only recommendatory in character and have no binding force.”⁸⁹ The ICJ has, however, recognized the

(NEIO). In contrast, the developed countries, particularly the United States, refuse to accept any binding effect of the resolutions of the General Assembly. See Mark Ewell Ellis, Comment, *The New International Economic Order and General Assembly Resolutions: The Debate over the Legal Effects of General Assembly Resolutions Revisited*, 15 CAL. W. INT’L L.J. 647, 666 (1985).

84. Set, *supra* note 3, art. E(1).

85. PHILIPPE SANDS & PIERRE KLEIN, *BOWETT’S LAW OF INTERNATIONAL INSTITUTIONS* 280 (2001).

86. See Christopher C. Joyner, *U.N. General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation*, 11 CAL. W. INT’L L.J. 445, 452 (1981) (“Within the United Nations system there exists no international law-creating organ, per se. That is, the Charter does not confer upon any organ special powers of legislation comparable to those normally vested in the municipal legislatures of states. Although the General Assembly may draft, approve, and recommend international instruments for multilateral agreement, it cannot through its own volition make them binding upon member states.”).

87. Stephen M. Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law*, 73 ASIL PROC. 301, 301 (1979) (“[A]t the San Francisco Conference on International Organization, only one state voted for a proposal that would have permitted the General Assembly to enact rules of international law that would become binding for the members of the Organization once they had been approved by a majority vote in the Security Council.”).

88. Arangio-Ruiz, *supra* note 80, at 445. Arangio-Ruiz rejects the theory that the General Assembly’s resolutions binding effect is, *in abstracto*, legitimized by customary rule, *id.* at 452-60, and the “[d]octrine of Assembly declarations as the expression of the ‘Will’ of the ‘Organised International Community.’” *Id.* at 460; see also Falk, *supra* note 80, at 783; Kay Hailbronner & Eckart Klein, *Article 10*, in 1 THE CHARTER OF THE UNITED NATIONS—A COMMENTARY 257, 268-73 (Bruno Simma ed., 2002); Schwartz, *supra* note 73, at 533-34.

89. *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Second Phase, 1966 I.C.J. 6, 229-30 (July 18) (Koo, J., dissenting); see also Legal Consequences for the States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council

exceptional binding effect of General Assembly resolutions in areas such as admission of new member states and voting procedure or apportionment of the budget; yet, without exception, these examples refer to internal matters of the U.N. legal order.⁹⁰ It therefore seems highly unlikely that Resolution 35/63 has any intrinsic legal effect.

Nonetheless, the binding effects of resolutions do not derive only from their quality as "special law-making acts" of the General Assembly; rather, they may also derive from their status as rules of international law "within the framework of existing law-making and law-determining processes."⁹¹ Thus, their binding effect is established by their connection to a traditional source of international law, especially international agreements and customary international law.⁹²

B. *The "Extrinsic Effects" of the Set*

The impact of a resolution on the formation of international law could confer a binding character. With regard to the existence of an agreement, it is generally accepted that the conclusion of a treaty requires the express agreement of the states involved to be legally bound. As certain authors observe, however, a vote in favour of a U.N. resolution neither satisfies customary procedural requirements nor necessarily expresses an intent of the states to assume contractual obligations vis-à-vis other states.⁹³ It is clear that the Set does not constitute an agreement because none of the states that participated in the process agreed, in advance or after the adoption of the Set, to accept the resolution as binding.⁹⁴ However, it is generally accepted that General Assembly

Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 292 (June 21) (FitzMaurice, J., dissenting); Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa, Advisory Opinion, 1955 I.C.J. 67, 117 (June 7) (separate opinion of Judge Lauterpacht) ("I have elaborated at what may appear to be excessive length a point which seems non-controversial, namely, that recommendations of the General Assembly are not binding.").

90. Öberg, *supra* note 76, at 892-95.

91. Arangio-Ruiz, *supra* note 80, at 469.

92. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 254-55 (July 8) ("The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*"); SANDS & KLEIN, *supra* note 85, at 272.

93. Hailbronner & Klein, *supra* note 88, at 238.

94. The resolution does not constitute an agreement *per se*. More precisely, the legal effect of the resolution is not derived from the recommendation itself, but from the instrument into which the resolution is integrated. See Arangio-Ruiz, *supra* note 80, at 486 ("Assembly resolutions do not, *per se*, integrate agreement . . . it is inappropriate to consider declarations of any of them as an organic species of international agreements.").

resolutions can be used as evidence of customary international law.⁹⁵ As such, the Set may constitute material evidence of the emergence of a new customary international rule. One could also argue that even if the Set does not, by itself, constitute evidence of the existence of a customary international rule, it may have contributed to its formation and could be considered as part of the *faisceau d'indices* that is usually considered as evidence of the emergence of a new customary rule.

1. The Set as Evidence of the Existence of a Customary International Rule

It is not the primary aim of this study to consider the theory of international custom.⁹⁶ Instead we will focus on the potential contribution of the Set and of Resolution 35/63 in adopting it to the emergence of a customary rule. However, a brief survey of the principles applicable to the formation of customary international law will contribute to a better understanding of the extrinsic legal effects of the Set.

a. The Principles of Customary International Law: A Brief Survey

The theory of customary international law is far more complex and ambiguous than this brief survey will imply.⁹⁷ The relationship between international custom and international organizations constitutes perhaps

95. Hailbronner & Klein, *supra* note 88, at 271; *see also Nuclear Weapons*, 1996 I.C.J. at 254-55.

96. Custom may be explained as a concerted practice that fulfills both quantitative and qualitative requirements. Indeed, the simple practice of a small number of states does not constitute custom (though perhaps local custom); practice must be universal or enjoin “increasing and widespread acceptance.” *Fisheries Jurisdiction (U.K. v. Ice)*, 1974 I.C.J. 3, 26 (July 25). At the same time, the practice must be long established and the practicing states should be representative.

97. *See generally* ANTHONY A. D’AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (1971); MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES* (1999); H.W.A. THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION: AN EXAMINATION OF THE CONTINUING ROLE OF CUSTOM IN THE PRESENT PERIOD OF CODIFICATION OF INTERNATIONAL LAW* (1972); KAROL WOLFKE, *CUSTOM IN PRESENT INTERNATIONAL LAW* (1993); Michael Akehurst, *Custom as a Source of International Law*, 47 *BRITISH Y.B. INT’L L.* 1 (1977); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 *U. CHI. L. REV.* 1113 (1999); Andrew T. Guzman, *Saving Customary International Law*, 27 *MICH. J. INT’L L.* 115 (2005); Frederic L. Kirgis, Jr., *Custom on a Sliding Scale*, 81 *AM. J. INTL L.* 146 (1987); Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 *AM. J. INTL L.* 757 (2001); Brigitte Stern, *Custom at the Heart of International Law*, 11 *DUKE J. COMP. & INT’L L.* 89 (Michael Byers & Anne Denise trans., 2001); Serge Sur, *Sources du droit international: La coutume*, in *JURIS-CLASSEUR DROIT INTERNATIONAL* 1 (1989); John Tasioulas, *In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case*, 16 *OXFORD J. LEGAL STUD.* 85 (1996).

the most complicated issue.⁹⁸ According to article 38(b) of the Statute of the International Court of Justice, international custom should be evidenced by “general practice accepted as law.”⁹⁹ Custom is composed of two elements: an objective or material one, which is state practice, and a psychological one, which is the subjective belief that this practice constitutes law (*opinio juris*).¹⁰⁰ In other words, states will behave a certain way because they are convinced it is binding upon them to do so.¹⁰¹ The articulation between these two elements has been very controversial; the traditional theory of custom insists on the material element, favouring an inductive approach, whereas the modern theory of custom emphasizes *opinio juris* and uses a deductive approach to

98. See generally GÉRARD CAHIN, LA COUTUME INTERNATIONALE ET LES ORGANISATIONS INTERNATIONALES: L'INCIDENCE DE LA DIMENSION INSTITUTIONNELLE SUR LE PROCESSUS COUTUMIER (2001).

99. Statute of the International Court of Justice, art. 38(b), June 26, 1945, 59 Stat. 1031, 1060 [hereinafter Statute of the I.C.J.].

100. Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 29 (June 3) (“It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States.”); North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (Feb. 20).

101. See *North Sea Continental Shelf*, 1969 I.C.J. at 44. The psychological element illustrates an anthropomorphist approach and is very difficult to verify because states may declare something and think the opposite. The intention of the states will thus be presumed by the declarations of their official representatives. This element is added as an independent criterion to that of state practice, which also constitutes part of the psychological element. In other words, *opinio juris*, the psychological element of custom, is composed of two sub-elements: an objective element (state practice) and an intention element (statement of belief). See also Roberts, *supra* note 97, at 757-58 (“*Opinio juris* concerns statements of belief rather than actual beliefs.”). This is the main complexity of international customary law theory. As is explained by Francesco Parisi, “The traditional formulation of *opinio juris* is problematic because of its circularity. It is quite difficult to conceptualize that law can be born from a practice which is already believed to be required by law.” Francesco Parisi, *Customary Law*, in 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 572, 573 (Peter Newman ed., 1998); see also Goldsmith & Posner, *supra* note 97, at 1118. The law and economics school accepts the two elements of customary law (quantitative element (state practice) and qualitative element (*opinio juris*)) but criticizes *opinio juris*. The main argument of this school is that rules of customary law emerge out of a “coincidence of interest,” rather than a “sense of legal obligation.” Goldsmith & Posner, *supra* note 97, at 1131-33; see also Vincy Fon & Francesco Parisi, *Customary Law and Articulation Theories: An Economic Analysis* 4 (George Mason Univ. Sch. of Law, Law and Economics Working Papers Series, Paper No. 02-24, 2002), available at <http://www.law.gmu.edu/faculty/papers/docs/02-24.pdf>. The concept of interest is defined in two ways; there is the “circumstantial interest” which consists of “the immediate costs and benefits of the action” and the “normative interest,” which is “the interest that [states] may have in establishing a customary rule, which would bind for the future,” *Id.* at 5. “[C]ustom formation becomes problematic when the circumstantial and normative interests of the parties are not aligned.” *Id.* at 18-19. Different model articulation theories have been proposed in this respect. *Id.* at 29 (“According to these doctrines, custom emerges when parties formulate like-minded articulations prior to or in conjunction with customary practice.”).

recognize the existence of a customary rule.¹⁰² If the “classic view has been that State practice is transformed into customary law by the addition of *opinio juris*[,] [r]ecent trends often reverse the process: following the expression of an *opinio juris*, practice is invoked to confirm *opinio juris*.”¹⁰³

This is not, however, the approach adopted by all commentators. The International Law Association (ILA) Committee on Formation of Customary International Law considers that the main function of *opinio juris* is “to indicate what *practice* counts (or, more precisely, does not count) towards the formation of a customary rule.”¹⁰⁴ State practice, and not *opinio juris*, is therefore believed to be the “most important” component of customary international law.¹⁰⁵ This voluntarist approach contrasts with the sociological/objectivist approach, which views the formation of customary rules as the outcome of a social necessity, thus limiting the role of state practice. This difference of opinion in what may appear a technical issue reflects an ideological controversy. Those who favour the importance of state practice “regard State sovereignty and sovereign will as the very roots of international law” and “are more inclined to look for consent . . . in the customary process.”¹⁰⁶ On the contrary, authors who follow a deductive approach and consider that *opinio juris* is the most important component of international custom “take a less State-centred standpoint.”¹⁰⁷ One should not overstate the importance of the distinction, however, because in reality it is often impossible to distinguish between the two elements.

Commentators take a broad view of what constitutes state practice and include not only physical conduct, but also verbal acts such as “[d]iplomatic statements . . . , policy statements, press releases, official manuals . . . comments by governments on draft treaties, legislation, decisions of national courts and executive authorities, pleadings before

102. Roberts, *supra* note 97, at 758. The artificial character of this dichotomy has also been criticized by Dupuy, *supra* note 78, at 165. Some recent studies cast doubt on the necessity of the existence of state practice and propose instead a “rational choice approach” that will look to “compliance and incentives affecting state behaviour,” adopting a game theoretical approach of states facing a repeated games prisoner’s dilemma. See Guzman, *supra* note 97, at 122.

103. Theodor Meron, *International Law in the Age of Human Rights—General Course on Public International Law*, in 301 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 385 (2004).

104. INT’L LAW ASS’N, COMM. ON FORMATION OF CUSTOMARY (GENERAL) INT’L LAW, FINAL REPORT OF THE COMMITTEE, in THE INTERNATIONAL LAW ASSOCIATION: REPORT OF THE SIXTY-NINTH CONFERENCE, London 712, 721 (2000) [hereinafter hereafter ILA REPORT].

105. *See id.* at 724.

106. *Id.* at 713-14.

107. *Id.* at 714.

international tribunals, statements in international organizations and the resolutions these bodies adopt.”¹⁰⁸ For example, the adoption of a resolution by an organ of an inter-governmental organization may be regarded “as a series of verbal acts by the individual Member States participating in that organ,”¹⁰⁹ and thus may constitute state practice.¹¹⁰ In order to qualify as state practice, this pattern of conduct should have accumulated in “sufficient *density*, in terms of uniformity, extent and representativeness.”¹¹¹ However, it is enough that there is “sufficient uniformity for the *main principles* . . . even if that was not necessarily so . . . for detailed rules.”¹¹² While the customary rule is in the process of emerging, it is still possible for a state that persistently objects not to be bound, even when the customary rule is eventually crystallized.¹¹³

The quest for the existence of *opinio juris* is not a mere exercise in legal abstraction. Usually, the court will exclude *opinio juris*, the subjective element of international custom, by examining patterns of conduct that could be considered in an objective analysis. The fact that there is strong evidence of *opinio juris* does not exempt the court from examining patterns of conduct, but may invert the process, causing the court to examine first *opinio juris* and then state practice.

In the *North Sea Continental Shelf* case, the ICJ first examined practice and then *opinio juris*.¹¹⁴ This is the normal interpretation of article 38 of the ICJ’s statute, which defines international custom as “general practice accepted as law.”¹¹⁵ The court found that, in order for practice to reflect the existence of *opinio juris*, two conditions must be fulfilled:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a

108. *Id.* at 725.

109. *Id.* at 730.

110. *Contra* Öberg, *supra* note 76, at 22 (arguing that General Assembly resolutions do not constitute state practice if they are considered evidence of *opinio juris*).

111. ILA REPORT, *supra* note 104, at 731. The ICJ decided in the *Asylum* case that a customary rule must be “in accordance with a constant and uniform usage practised by the States in question.” *Asylum* (Colom. v. Peru), 1950 I.C.J. 266, 276 (Nov. 20).

112. ILA REPORT, *supra* note 104, at 734 (citing *Continental Shelf* (Libya v. Malta), 1985 I.C.J. 13, 33 (June 3)).

113. *Id.* at 751; *see also* Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRITISH Y.B. INT’L L. 1 (1986).

114. *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (Feb. 20).

115. Statute of the I.C.J., *supra* note 99, art. 38.

subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough.¹¹⁶

In *Nicaragua v. United States*, the position of the court shifted towards an inversion of the process.¹¹⁷ Contrary to the *North Sea Continental Shelf* case, where the court adopted an inductive approach and examined whether practice was accepted as law before moving to the subjective element of custom, in *Nicaragua v. United States*, the ICJ established the subjective element, *opinio juris*, concerning the principle of non-interventionism. It is in the light of this subjective element that the court considered later the relevant practice.¹¹⁸

In the analysis of *opinio juris*, the court may also take into account conduct that has not necessarily been qualified as state practice in the first step of the analysis. This creates the false impression that the court sometimes ignores the objective element of custom and focuses on the subjective. In reality, the objective element is always present in a more or less pronounced form because *opinio juris* is always incorporated in patterns of conduct. However, these patterns of conduct may not always fulfil the criteria of the first step of the analysis (uniformity, extent, and representativeness) in order to qualify as state practice. Thus, in *Nicaragua v. United States*, the court seemed to have deduced *opinio juris* by examining the General Assembly resolutions that reaffirmed the principle of non-intervention contained in the U.N. Charter¹¹⁹ as well as the attitude of the states towards these General Assembly resolutions.¹²⁰ At the same time, the Court demanded very little evidence of uniform, extensive, and representative state practice.¹²¹ Consequently, the General Assembly resolutions may contribute to the process of creating

116. *North Sea Continental Shelf*, 1969 I.C.J. at 44.

117. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 98 (June 27).

118. *Id.* at 98 (“It is . . . in the light of this ‘subjective element’ . . . that the Court has to appraise the relevant practice.”).

119. *See id.* at 196.

120. *See id.* at 99-100 (“This *opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions . . .”).

121. *See id.* at 98 (“The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule.”).

customary law by providing evidence of both state practice¹²² and *opinio juris*.¹²³

However, a General Assembly resolution, even if it has been unanimously adopted, is not conclusive evidence of the emergence of a new customary rule. It is also important to prove that there was “a clear intention on the part of their supporters to lay down a rule of international law.”¹²⁴ Resolutions should manifest the existence of a wide international consensus on a particular issue, according to specific criteria. According to some authors, these criteria, which integrate the two elements of customary law, are: “(1) a requisite degree of consensus in support of the resolution, (2) language which adequately indicates and describes the resolution’s legal nature, (3) sufficient expectations that the resolution is legally binding, and (4) a requisite degree of implementation and reliance upon the resolution.”¹²⁵ To the extent that the criteria are fulfilled, the resolution can provide conclusive evidence of the existence of a customary norm.

Therefore, it appears that there can be no definitive conclusion regarding the extrinsic legal effect of General Assembly resolutions because it depends on the particular characteristics of each resolution.¹²⁶ The resolution itself, or, rather, its intrinsic characteristics, such as language, the conditions of its vote, and the *état d’esprit* of its authors, do not constitute the only elements that are considered. Some extrinsic

122. ILA REPORT, *supra* note 104, at 772 (“[F]or States without the material means for concrete activity in the field in question . . . verbal acts [such as GA resolutions] may be the only form of practice open to them.”).

123. In *Nicaragua v. United States*, the court considered that General Assembly’s resolutions may “reflect” the existence of *opinio juris*. *Military and Paramilitary Activities*, 1986 I.C.J. at 103; *see also* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 254-55 (July 8):

General Assembly resolutions, even if they are not binding [(of themselves)—intrinsic effect], may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.

Note, however, the dissenting opinion of Judge Schwebel. “[I]n its Opinion, the Court concludes that the succession of resolutions of the General Assembly on nuclear weapons ‘still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons.’ In my view, they do not begin to do so.” *Id.* at 318 (Schwebel, J., dissenting).

124. ILA REPORT, *supra* note 104, at 772.

125. Ellis, *supra* note 83, at 692-93.

126. According to arbitrator René-Jean Dupuy, “the[ir] legal value is variable.” *Texaco Overseas Petroleum Co. v. Libyan Arab Republic*, 17 I.L.M. 1, 29 (Int’l Arb. Trib. 1978).

elements (implementation and reliance upon the resolution), which are subsequent to the adoption of the resolution and which refer to the attitude of states and their responsiveness to the resolutions, also should be taken into account.¹²⁷ Without these extrinsic elements, the resolution can at best be considered as a *commencement de la preuve* and not as sufficient evidence of the existence of customary law.¹²⁸

b. Analysis of the UNCTAD Set

As a starting point, it should be mentioned that the Set did not recognize or consolidate pre-existing norms, “nor did its adoption ‘crystallize’ any nascent customary rules.”¹²⁹ Studies undertaken before the adoption of the Set prove that there was no consensus regarding the existence of international competition standards, despite continuing efforts at negotiation.¹³⁰ However, as has been recognized by some commentators, “it remains to be determined whether the formulation and incorporation into the Set of any competition norms, and their adoption, may have generated norms *de lege ferendae*, and whether an *opinio juris* has by now emerged transforming the content of such norms into binding customary rules—or whether there are signs that such a process may happen in the future.”¹³¹ The Set could constitute a material source of a new customary rule.

The fact that the Set was adopted only twenty-seven years ago, in 1980, is not a determinative factor. The ICJ held in the *North Sea Continental Shelf* cases that this “is not necessarily, or of itself, a bar to the formation of a new rule of customary international law” as long as “within the period in question, short though it might be, State practice . . . should have been both extensive and virtually uniform in the sense of the provision invoked.”¹³² The permanent and continuous contacts between states in the modern era may explain the formation of customary rules even after a relatively short period of time.¹³³

127. Öberg, *supra* note 76, at 895-903.

128. An *a contrario* interpretation of Judge Schwebel’s opinion in the *Nuclear Weapons* Advisory Opinion supports this interpretation. 1996 I.C.J. at 318.

129. Dhanjee, *supra* note 44, at 86.

130. See Focsaneanu, *supra* note 14; Furnish, *supra* note 11.

131. Dhanjee, *supra* note 44, at 86.

132. *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, at 43 (Feb. 20).

133. Dupuy, *supra* note 78, at 167. See, however, the more reserved opinion of Meron, *supra* note 103, at 389, for whom even if “[o]bviously the time required for the maturation of custom has been shortened . . . changes in the time factor have been less drastic than often suggested.”

This analysis of the existence of a customary rule will focus on two sources: the Set and General Assembly Resolution 35/63, which adopted the Set. The resolution was passed unanimously and “without recorded objections,”¹³⁴ which strengthens the case for binding effect.¹³⁵ It affirmed without ambiguity that it “[a]dopts the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, approved by the United Nations Conference on Restrictive Business Practices.”¹³⁶ The language used by the resolution, along with its unanimous passage, establish that the General Assembly fully validated the Set. Indeed, the resolution does not refer to anything other than the Set.¹³⁷ However, the text of the resolution does not contain any information as to the legal status of the Set.

The silence of the General Assembly on this point can be explained in two ways: either it is the expression of the General Assembly’s intention not to give the Set any legal value, or the General Assembly thought it superfluous to do so, believing the simple reference to the rules in the Set was sufficient to confer legal effect. Furthermore, according to General Assembly Resolution 33/153, UNCRBP had to take “all decisions necessary for the adoption of, a set . . . including a decision on the *legal* character of the principles and rules.”¹³⁸ It may be argued that the resolution delegated the task of determining the legal nature of the future Set to the UNCRBP, which, after the adoption of the Set, transmitted it to the General Assembly “having taken all decisions necessary for its adoption as a resolution.” The silence of General Assembly Resolution 35/63 could be explained as an implicit acceptance that the legal value of the Set is that of a General Assembly resolution. In adopting the Set, the General Assembly may have considered that its

134. Oesterle, *supra* note 9, at 55.

135. See *Texaco Overseas Petroleum Co. v. Libyan Arab Republic*, 17 I.L.M. 7, at 30 (Int’l Arb. Trib. 1978) (“The consensus by a majority of States belonging to the various representative groups indicated without the slightest doubt universal recognition of the rules therein incorporated.”).

136. G.A. Res. 35/63, *supra* note 71, ¶ 1.

137. Except the preamble of Resolution 35/63, which recalls Resolutions 3201 and 3202 concerning the establishment of NIEO; Resolution 3281, containing the Charter of Economic Rights and Duties of States; and Resolution 3362 on development and international economic cooperation. The later text suggests, as explained by Oesterle, *supra* note 9, at 55, that “the arguments of Group of 77 countries for discriminatory treatment of their indigenous industries, in accord with New International Economic Order principles, will reappear in arguments on the meaning of language in the agreement.”

138. G.A. Res. 33/153, ¶ 2, U.N. Doc. A/RES/33/153 (Dec. 20, 1978) (emphasis added).

decisions could have legal effect.¹³⁹ Even if, as we have previously affirmed, the theory of the legislative function of the General Assembly is not valid, resolutions of the General Assembly can at least be considered as evidence of the fact that there was an *expectation* that the resolution could be legally binding and contribute to the establishment of an *opinio juris*. It follows that if, during the negotiation of the Set, there was no agreement among developing and developed countries concerning its legal value, as is attested by the use of the term “should” and not “shall” originally proposed by the developing countries in the operative provisions of the Set,¹⁴⁰ the unanimous vote in favour of resolution 35/63 is evidence of a consensus on the general principles adopted by the code with the view that these principles, in particular, must have some legal effect.

The ILA's report notes that in the *Continental Shelf (Libya/Malta)* case, the ICJ considered that “there was sufficient uniformity for the *main principles* to have become part of international law, even if that was not necessarily so (at least at that time) for detailed rules about, say, the allocation of surplus stocks.”¹⁴¹ The more positive language used at parts A (objectives) and B (definition and scope of application) of the Set seems to confirm this interpretation and the possibility of the main principles of the Set. This language was chosen “to ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization” of trade or “to attain greater efficiency in international trade and development” by “[t]he creation, encouragement and protection of competition” being transformed into international customary rules.¹⁴²

139. The process has similarities with that used in several national legal systems, where the parliament, exercising its legislative function, delegates to another authority or commission of experts the establishment of detailed norms.

140. Indeed, parts C, D, E, and F of the Set expressing states' and multinational firms' responsibility in applying the principles of the Set use systematically nonbinding terminology. *E.g.*, Set, *supra* note 3, art. C(1) (“Appropriate action *should* be taken in a mutually reinforcing manner at national, regional and international levels to eliminate, or effectively deal with, restrictive business practices . . . adversely affecting international trade” (emphasis added)); *id.* art. D(1) (“Enterprises *should* conform to the restrictive business practices laws, and the provisions concerning restrictive business practices in other laws, of the countries in which they operate.” (emphasis added)); *see also* Benson, *supra* note 40, at 1034-36 (citing further examples concerning the absence of a legal value of the Set).

141. ILA REPORT, *supra* note 104, at 734.

142. Set, *supra* note 3, art. A(1), (2). *See in particular* the terms used in part B(ii) of the Set: “The Set of Principles and Rules *applies* to restrictive business practices,” *id.* Art. B(4) (emphasis added); “The provisions of the Set of Principles and Rules *shall* be universally applicable to all countries and enterprises regardless of the parties involved in the transactions, acts or behaviour,” *id.* Art. B(7) (emphasis added); “The Set of Principles and Rules *shall* not

One could nevertheless object to the conclusion that General Assembly Resolution 33/153 could not delegate the decision on the binding effect of the Set to the UNCRBP, as it did not have the authority to determine the legal status of the Set in the first place. Consequently, it could not delegate that authority.¹⁴³ In addition, developed nations generally do not accept the theory of the binding effect of General Assembly resolutions, and even if they vote to approve such a resolution, they do not always “really mean it.”¹⁴⁴ It is, therefore, important to examine state practice, in order to verify the “requisite degree of implementation and reliance upon the resolution.”¹⁴⁵ Put differently, “what states *do* is more important than what they say.”¹⁴⁶

A key element in determining the legal effect of the Set in the emergence of *opinio juris* is the views expressed during the five yearly conferences held to review its implementation and the adoption of other resolutions reaffirming its principles.¹⁴⁷ The continuous adoption of resolutions and international declarations pertaining to a specific principle—e.g., those that prohibit the restrictive business practices that affect trade and, in particular, developing countries—reinforces such principles and demonstrates the existence of a commitment among the community of states.

The First Review Conference in 1985 reflected the disagreements between the developing and developed countries concerning the legal effect of the Set.¹⁴⁸ Developing countries considered that the Set had not

apply to intergovernmental agreements, nor to restrictive business practices directly caused by such agreements,” *id.* art. B(9) (emphasis added).

143. I am indebted to Andrew Guzman for this remark.

144. Schwebel, *supra* note 87, at 302 (“[T]he members of the General Assembly typically vote in response to political not legal considerations. They do not conceive of themselves as creating or changing international law The issue often is one of image rather than international law Thus General Assembly resolutions are neither legislative nor sufficient to create custom, not only because the General Assembly is not authorized to legislate but also because its members . . . don’t ‘mean it.’ That is to say, in fact, states often don’t meaningfully support what a resolution says and they almost always do not mean that the resolution is law.”). This theory implies that “statement of belief” cannot be considered as evidence of *opinio juris*, contrary to what we assumed previously, but it is what the states do that counts. *See also* Goldsmith & Posner, *supra* note 97, at 1115-16 (“[C]ase studies demonstrate that courts and commentators rely too heavily on what nations say *at the expense of what they do and why*, and they tend to limit CIL [customary international law] to behavioral regularities that are ‘good’ from their normative perspective, denigrating regularities that are bad as ‘comity’ or a violation of, or an exception to, the CIL rule.” (emphasis added)).

145. Ellis, *supra* note 83, at 693.

146. Schwebel, *supra* note 87, at 302.

147. Dhanjee, *supra* note 44, at 95. Since the adoption of the Set in 1980, UNCTAD has held a conference to review the Set every five years, in 1985, 1990, 1995, 2000, and 2005.

148. *Id.*

attained its primary objective and that it had to become binding in the long run, whereas developed countries insisted on its informal character, focusing on the need to enhance international cooperation and technical assistance for developing countries.¹⁴⁹ The conference did not succeed in adopting any resolution.¹⁵⁰ A consensus between developed and developing countries was reached in the Second Review Conference in 1990. The delegates adopted an approach that was “mostly in line with” the developed countries’ views that the Set should be implemented by the developing countries at the national level, while at the same time putting in place a detailed framework for technical assistance to these countries under UNCTAD.¹⁵¹ The Third Review Conference emphasized international aspects of competition policy by requiring the intergovernmental group of experts to examine the existence of common ground.¹⁵² It also acknowledged that difficulties in the identification of common ground usually reflect “differences among economic theories, or among competition laws or policies.”¹⁵³ Thus, a consensus may exist on the importance of competition law norms worldwide, but not on their content.

The Fourth Review Conference, in 2000, moved a step further when it adopted a resolution that reaffirmed the validity of the Set and recommended that the General Assembly “subtitle the Set for reference as ‘UN Set of Principles and Rules on Competition.’”¹⁵⁴ The objective of this change of terminology was to strengthen the visibility of the United Nations system in international antitrust. The General Assembly refused, without a vote, to endorse the recommendation of the Fourth Review Conference regarding the subtitling of the Set.¹⁵⁵ It nevertheless stressed the role of competition law and policy for international trade and decided to convene the Fifth Review Conference under the auspices of UNCTAD in 2005.¹⁵⁶ Resolution 55/182 was followed by the São Paulo Consensus, adopted by UNCTAD in June 2004, which reaffirmed UNCTAD’s role in

149. *Id.*

150. *Id.*

151. *Id.* at 96.

152. Third United Nations Conference To Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Geneva, Switz., Nov. 13-21, 1995, *Resolution*, ¶ 11, U.N. Doc. TD/RBP/CONF.4/14 (Nov. 28, 1995).

153. *Id.* ¶ 11(b).

154. Fourth United Nations Conference To Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Geneva, Switz., Sept. 25-29, 2000, *Resolution*, ¶ 1, U.N. Doc. TD/RBP/CONF.5/15 (Oct. 4, 2000) [hereinafter Fourth U.N. Conference Resolution].

155. G.A. Res. 55/182, U.N. Doc. A/RES/55/182 (Jan. 18, 2001).

156. *Id.* ¶ 27.

ensuring “that anti-competitive practices do not impede or negate the realization of the benefits that should arise from liberalization in globalized markets, in particular for developing countries and LDCs [least developed countries].”¹⁵⁷

In 2005, the General Assembly adopted Resolution 59/221 on trade and development, following the proposal of the government of Qatar on behalf of the Group of 77 Member States (developing countries) and China, which explicitly stressed

the importance of strengthening and enabling the . . . efforts to prevent and dismantle anti-competitive practices and promote responsibility and accountability of corporate actors at both the international and the national levels, thereby enabling developing countries’ producers, enterprises and consumers to take advantage of trade liberalization, and encourages developing countries to consider establishing competition laws and frameworks best suited to their development needs, complemented by technical and financial assistance for capacity-building, taking fully into account national policy objectives and capacity constraints.¹⁵⁸

The resolution was adopted by a vote of 166 in favour to 2 against (one of them being the United States), with 6 abstentions (Australia, Canada, Israel, Japan, New Zealand, and the Republic of Korea).¹⁵⁹ The countries that voted in favour were both developing and developed countries, such as the European Union Member States.¹⁶⁰

Continuing the process of periodical review of the Set, the Fifth Review Conference took place in November 2005. The conference unanimously adopted a resolution that reviewed all aspects of the Set, recognised the fundamental “role of competition law and policy for sound economic development,” and reaffirmed the validity of the Set, calling upon all member states to make every effort to fully implement its provisions.¹⁶¹ The resolution noted “the continuing adoption, application or reform of national competition laws and policies and the increase in relevant bilateral and regional agreements and in international

157. U.N. Conference on Trade & Dev. [UNCTAD], 11th Sess., São Paulo, Braz., June 13-18, 2004, *São Paulo Consensus*, ¶ 95, U.N. Doc. TD/410 (June 25, 2004).

158. G.A. Res. 59/221, ¶ 30, U.N. Doc. A/RES/59/221 (Feb. 11, 2005). Paragraph 30 was not included in the draft resolution, which simply endorsed the work of the UNCTAD in different areas of international trade and more specifically competition policy, but was added later.

159. General Assembly, *Reports of the Second Committee*, U.N. GAOR, 59th Sess., 75th plen. mtg. at 6, U.N. Doc. A/59/PV.75 (Dec. 22, 2004).

160. *Id.*

161. Fifth United Nations Conference To Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Antalya, Turk., Nov. 14-18, 2005, *Report*, pmb., ¶ 1, U.N. Doc. TD/RBP/CONF.6/14 (Nov. 23, 2005).

cooperation in this area” and recognised “the positive contribution made by the Set and by UNCTAD to the promotion of competition policy.”¹⁶²

The continual process of reviewing and reaffirming the validity of the Set, with the participation of countries belonging to various representative groups may constitute state practice and evidence of customary law. However, the fact that there is a state practice compatible with the principles of the Set does not necessarily mean that this state practice implemented the principles of the Set or that the states considered these principles legally binding.¹⁶³ In fact, many states do not consider that they are bound by the Set for the simple reason that most of its provisions are highly imprecise. The absence of a binding mechanism for implementation or enforcement¹⁶⁴ might be used as an argument against the recognition of the legal effects of the Set.¹⁶⁵

Yet, the absence of a binding mechanism does not mean that states are free to ignore the Set¹⁶⁶ or that it does not constitute a legal rule.¹⁶⁷ When international law does not provide for centralised enforcement by an international court or institution, its enforcement must be based on a decentralised system. Nonetheless, in order to be obeyed, in the absence

162. *Id.* pmb1.

163. There is no evidence in the process of review of the principles of the Set that developed countries considered themselves bound by the Set. The “unprecedented level of consensus” in the recognition of the importance of competition policy, at the international and national level, which was observed in the Fourth Review Conference (*see* Dhanjee, *supra* note 44, at 97), is not an element that can be considered in favour of a legal binding effect of the Set, but is mainly explained by the worldwide recognition of the importance of competition policy and may constitute evidence of a nascent or existing *opinio juris* on the need to prohibit restrictive business practices that affect trade.

164. Set, *supra* note 3, art. G(4) (“[I]n the performance of its functions, neither the Intergovernmental Group nor its subsidiary organs shall act like a tribunal or otherwise pass judgement on the activities or conduct of individual Governments or of individual enterprises in connection with a specific business transaction. The Intergovernmental Group or its subsidiary organs should avoid becoming involved when enterprises to a specific business transaction are in dispute.”).

165. Benson, *supra* note 40, at 1034.

166. *See* Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT’L L. 345, 368 (1998) (describing compliance as an “elusive concept”). This author challenges the traditional conception of compliance as a “correspondence of behavior with legal rules.” *Id.* at 346. He considers that “the assumption that conformity and non-conformity are binary is not an adequate reflection of international practice, in which degrees of conformity or non-conformity and the circumstances of particular behavior often seem more important to the participants.” *Id.* at 348.

167. *See* Anthony A. D’Amato, *Is International Law Really “Law”?*, 79 NW. U. L. REV. 1293, 1314 (1985) (“Occasionally people or states will break laws despite the presence of enforcement machinery, but that does not mean that there were no laws to begin with.”).

of a specific enforcement mechanism, international norms must have a certain degree of legitimacy.¹⁶⁸

Thomas M. Franck defines legitimacy as “a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.”¹⁶⁹ For this author, four indicators of rule-legitimacy exist: “determinacy, symbolic validation, coherence, and adherence; . . . to the extent a rule, or rule process, exhibits these four properties it will exert a strong pull on states to comply.”¹⁷⁰ Concerning determinacy, according to this author, “the more determinate a standard, the more difficult it is to justify non-compliance.”¹⁷¹ Determinacy has two aspects: it can be defined as “more or less synonymous with clarity”¹⁷² (textual determinacy) but it is also accepted that “[a] rule with low textual determinacy may overcome that deficit if it is open to a process of clarification by an authority recognized as legitimate by those to whom the rule is addressed”¹⁷³ (procedural or institutional determinacy). This theory is appealing because it also takes into account the cases where the rule is expressed in the form of a standard,¹⁷⁴ what the author calls “sophist rules.”¹⁷⁵ These rules may create a paradox,

168. See generally THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990). The importance of legitimacy in explaining the compliance of states to international law highlights the internal aspect of a legal rule, which we can generally explain as “the *sense*” of the existence of a legal obligation, a product of “reflective critical attitude.” See H.L.A. HART, *THE CONCEPT OF LAW* 56-57, 88-117 (2d ed. 1994). Other theories than legitimacy have been proposed in order to explain the compliance of states to international law. See Harold Hongju Koh, *Why Do Nations Obey International Law*, 106 *YALE L.J.* 2599, 2603 (1997). Law and Economics based international law theories generally explain compliance as a function of national self-interest. See Goldsmith & Posner, *supra* note 97, at 1115 (“States do not comply with CIL [Customary International Law] because of a sense of moral or legal obligation; rather, CIL emerges from the states’ pursuit of self-interested policies on the international stage.”).

169. FRANCK, *supra* note 168, at 24.

170. *Id.* at 49.

171. *Id.* at 54.

172. *Id.* at 52.

173. *Id.* at 61, 80 (“[L]ack of *textual* determinacy may be redressed by *process* determinacy.”).

174. On the distinction between rules and standards, see: Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 *DUKE L.J.* 557 (1993); Pierre Schlag, *Rules and Standards*, 33 *UCLA L. REV.* 379 (1985); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 *HARV. L. REV.* 22 (1993); and Cass R. Sunstein, *Problems with Rules*, 83 *CAL. L. REV.* 953 (1995).

175. FRANCK, *supra* note 168, at 85.

a sophist rule of complex, elastic texture, employing a subjective, qualitative standard to measure compliance and configured by exculpatory *why* and *to whom* considerations, while superficially appearing to have less legitimacy than an idiot rule because it has less textual clarity and certainty, might better predict and influence actual state behavior precisely because it makes more sense or seems more just. It will thus exert a stronger compliance pull.¹⁷⁶

Nevertheless, the author stresses that there must be “a process for the rule’s case-by-case application which, itself, is widely accepted as legitimate,” otherwise “[s]ophist rules lacking this interpretative component tend to be seen as mere hunting licenses for states to do whatever they wish.”¹⁷⁷ This process does not have to assure compliance, but only preserve a coherent interpretation of the meaning of the rule, according to certain principles.¹⁷⁸

A close examination of the Set demonstrates that these criteria are not fulfilled. The Set does not provide for a bright-line rule, for example, a per se prohibition of certain restrictive practices. It institutes instead a rule-of-reason approach, reflected by the use of the word “unduly” in defining the restriction of competition and employs the highly indeterminate term of “market access.”¹⁷⁹ As explained in the first part of this study, the exact scope of these concepts cannot be determined easily as it depends on the intensity of their effects. For example, it is widely accepted that export cartels affect market access. However, it seems difficult to determine, *in abstracto*, if a practice will have the effect of restricting market access unduly, which supposes that states can justify this restriction by a legitimate public purpose.¹⁸⁰ In conclusion, the Set establishes a standard, or a sophist type rule. However, in order to

176. *Id.*

177. *Id.*

178. *Id.* at 163. The concept of “coherence” is distinguished by the author from that of “consistency.” While “a rule’s inconsistent application does not necessarily undermine its legitimacy as long as inconsistencies can be explained to the satisfaction of the community by a justifiable distinction,” the same cannot be said for incoherence. Thus, sophist rules face the problem of incoherence, “which emerges if the principles underlying it fail to connect rationally with other rules, or with parts of the same rule.” *Id.*

179. The choice of a rule of reason approach is not explained by any economic rationale. Instead, it reflects the disagreement and the absence of consensus concerning the legal effect of the Set. It is therefore an element negating the existence of an *opinio juris* concerning the binding effect of the Set and of the subsequent resolution.

180. The Set does not define categories of business practices that can have an adverse effect on competition or can restrict market access. The list of business practices contained in articles D(3) and D(4) are examples of potential restrictive practices, but this restrictive effect must always be determined in light of the analysis of the conditions fixed by the chapeau of articles D(3) and D(4). Set, *supra* note 3, art. D(3)-(4).

produce some legal effects, and not be a mere hunting license, the standard should also have an interpretative component. The Set does not institute an interpretative mechanism, which could also be an enforcement mechanism.¹⁸¹ Article G(4) provides:

In the performance of its functions, neither the Intergovernmental Group nor its subsidiary organs shall act like a tribunal or otherwise pass judgment on the activities or conduct of individual Governments or of individual enterprises in connection with a specific business transaction. The Intergovernmental Group or its subsidiary organs should avoid becoming involved when enterprises to a specific business transaction are in dispute.¹⁸²

In addition, none of the review conferences attempted to clarify the substantive principles of the Set.

For these reasons, the Set does not appear to have any legal binding effect and does not, by itself, constitute conclusive evidence of the existence of a customary international rule on restrictive business practices. Even so, the Set may still contribute to the formation of a customary international rule and prove, along with some other patterns of conduct, the emergence of *opinio juris* and the existence of state practice.

2. The Set Contributes to the Formation of a Customary International Rule

It is submitted that, although it seems unlikely that the Set constitutes in itself conclusive evidence of *opinio juris*, if considered in the context of other international initiatives in this area, it may contribute to the formation of a customary international rule.

Indeed, an important number of international treaties concluded during the last decades include provisions on competition law. The numerous antitrust cooperation agreements and antitrust mutual assistance agreements that were signed during this period reflect the intention of the drafting states to avoid positive or negative conflicts of jurisdiction resulting from the extraterritorial application of antitrust laws or to improve the effective enforcement of domestic competition law in an increasingly global marketplace. These agreements may provide evidence of state practice recognizing the importance of tackling restrictive business practices that affect trade. It is not the objective of

181. The *in concreto* analysis needed in order to interpret and determine the content of a standard is provided by the existence of an enforcement mechanism.

182. Set, *supra* note 3, art. G(4).

this study to examine in detail these different international initiatives in competition law. Nevertheless, a brief survey of the different international initiatives will provide useful information regarding the possible emergence of *opinio juris*.

One could mention the existence of provisions related to competition law in international agreements of quasi-universal application, such as the WTO.¹⁸³ Although these provisions fall short of establishing an international competition law regime, some authors advance that “with marginal additional interpretation of GATT rules, cartels can already be addressed in the existing WTO framework *if* the national enforcement capacity exists.”¹⁸⁴

In addition, some WTO Member States committed to follow the Reference Paper on Telecommunications Services (the Paper), which requires members to take appropriate measures in order to prevent anti-competitive practices by major suppliers.¹⁸⁵ In particular, the Paper prohibits signatories from engaging in anti-competitive cross-subsidization, using information obtained from competitors with anti-competitive results, and failing to make necessary technical information about essential facilities and commercially relevant information available to other service suppliers on a timely basis.¹⁸⁶ The Paper also provides that interconnection with major suppliers must be ensured on a non-discriminatory basis and “in a timely fashion, on terms, conditions . . . and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided.”¹⁸⁷

The provisions of the Paper gave rise to recent litigation initiated by the United States against Mexico in the *Mexico-Measures Affecting*

183. General Agreement on Trade in Services, arts. VIII-IX, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 (1994); see also Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 40, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement]. For a detailed analysis, see KEVIN C. KENNEDY, *COMPETITION LAW AND THE WORLD TRADE ORGANISATION: THE LIMITS OF MULTILATERALISM* (2001); PHILIP MARSDEN, *A COMPETITION POLICY FOR THE WTO* (2003); ROLAND WEINRAUCH, *COMPETITION LAW IN THE WTO* (2004).

184. Bernard Hoekman & Petros C. Mavroidis, *Economic Development, Competition Policy, and the World Trade Organization* 16 (World Bank, Policy Research Working Paper No. 2917, 2002).

185. World Trade Org., Reference Paper on Telecommunications, Negotiating Group on Basic Telecommunications 1.1 (Apr. 24, 1996), http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

186. *Id.* at 1.2.

187. *Id.* at 2.2(a)-(b).

Telecommunications Services case (*Telmex* case). The case concerned the failure of Telmex, a former monopoly and the major supplier of basic telecommunications services in Mexico, to refrain from engaging in anti-competitive practices.¹⁸⁸ The United States claimed that Mexico was in breach of section 1.1 of the Paper because it allowed Telmex to operate a cartel, fix rates for international interconnection, and restrict the supply of basic telecommunications services, which raised the costs of the termination of calls in Mexico by U.S. carriers. The practice mainly affected American consumers. Its aim was to prevent a price war between Mexican carriers concerning the interconnection rates charged to American firms for incoming calls, as this would “drive the rates of all carriers too low to support infrastructure build-out,” which was a high priority for Mexico.¹⁸⁹ Mexico contended that article 1.2 of the Paper did not include cartels. Rather, the Mexican Government maintained that the Paper referred to types of anti-competitive practices other than the business practices at issue, which were imposed by the Federal Commission of Telecommunications (COFETEL). Mexico argued that these practices constituted state action, which could not fall within the scope of competition law.¹⁹⁰

The WTO panel in *Telmex* gave a broad definition to the term “anti-competitive practices,” suggesting that this expression covers all “actions that lessen rivalry or competition in the market,” in addition to the restrictive business practices that were listed in article 1.2.¹⁹¹ In examining the meaning of anti-competitive practices, the panel referred to its use in member states’ own competition legislation and to related provisions of some international instruments that address competition policy, such as the Havana Charter, the Set, the Organisation for Economic Co-operation and Development (OECD), and the WTO Working Group on the Interaction between Trade and Competition Policy.¹⁹² It finally concluded that “[i]nternational commitments made under the GATS ‘for the purpose of preventing suppliers . . . from engaging in or continuing anti-competitive practices’ are . . . designed to

188. Panel Report, *Mexico-Measures Affecting Telecommunications Services*, ¶ 3.1, WT/DS204/R (Apr. 2, 2004) [hereinafter *Telmex*]; see Eleanor M. Fox, *The WTO's First Antitrust Case—Mexican Telecom: A Sleeping Victory for Trade and Competition*, 9 J. INT'L ECON. L. 271 (2006); Damien J. Neven & Petros C. Mavroidis, *El Mess in TELMEX: A Comment on Mexico—Measures Affecting Telecommunications Services*, 5 WORLD TRADE REV. 271 (2006).

189. *Telmex*, *supra* note 188, ¶¶ 3.1(b), 4.161.

190. *Id.* ¶¶ 4.290-.292.

191. *Id.* ¶ 7.230-.231.

192. *Id.* ¶ 7.235-.236.

limit the regulatory powers of WTO Members.”¹⁹³ The panel reached this conclusion despite the fact that Mexico had a competition law in place; the panel considered that Mexico had not taken appropriate measures to prevent the anti-competitive practices. This is a remarkable case as it is the first time that, in the WTO context, competition policy concerns trumped the strict wording of a trade agreement such as the Paper.¹⁹⁴

The fact that no agreement has been reached in starting multilateral negotiations on competition law under the WTO agreement should not be considered as an element raising doubts on the possible emergence of *opinio juris* concerning the need to address internationally restrictive business practices that affect trade and development. As was explained by the chairman of the working group on competition and trade, “none of the opponents objected to the principal goal of the EU (i.e. to contribute to the fight against transnational anticompetitive cartels which restrict trade)” but “they objected to the specific proposal of the EU because they considered that as it applied to them the cost of this proposal would outweigh its benefits.”¹⁹⁵

It is also noteworthy that “nearly all bilateral or regional trade agreements negotiated in the recent past . . . or which are in the process of being negotiated . . . include a competition chapter or competition provisions.”¹⁹⁶ These agreements have been concluded by states representing different degrees of development and from different regions of the world,¹⁹⁷ thus reflecting “the understanding on the part of the trade community that trade liberalization will deliver its expected benefits only if some form of market governance ensures that anticompetitive practices do not defeat the purpose of negotiated trade concessions.”¹⁹⁸

It is accordingly possible to argue that, in view of these international agreements, the Set may contribute to the emergence of an international

193. *Id.* ¶ 7.244.

194. In the *Kodak/Fuji* film case, the WTO Panel adopted a more cautious approach in extending the scope of the GATT rules to this type of public/private restraints. See Panel Report, *Japan—Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (Mar. 31, 1998). See also the critical comments of Neven & Mavroidis, *supra* note 188, at 291 (“[T]he fundamental, quintessential obligation of all WTO adjudicating bodies is not to undo the balance of rights and obligations as struck by the negotiating partners.”).

195. Jenny, *Competition, Trade*, *supra* note 2, at 647.

196. *Id.* at 654.

197. For an extensive analysis of the competition-related provisions in regional trading agreements, see Oliver Solano & Andreas Sennekamp, *Competition Provisions in Regional Trade Agreements* (Org. for Econ. Co-operation and Dev., Trade Policy Working Paper No. 31, 2006); see also U.N. CONFERENCE ON TRADE & DEV., COMPETITION PROVISIONS IN REGIONAL TRADE AGREEMENTS: HOW TO ASSURE DEVELOPMENT GAINS (Philippe Brusick et al. eds., 2005), available at http://www.unctad.org/en/docs/ditclp20051_en.pdf.

198. Jenny, *Competition, Trade*, *supra* note 2, at 654.

customary rule prohibiting restrictive business practices. This eventuality has already been examined by arbitrators and the courts, but without reaching this conclusion. For example, in the case of *United Parcel Service of America, Inc. v. Canada*, which was brought under Chapter 11 of the North American Free Trade Agreement (NAFTA agreement), the arbitration tribunal refused to consider that there was a customary international law obligation to prohibit or regulate anti-competitive practices.¹⁹⁹ In that case, UPS claimed that the state-owned Canada Post Corporation had engaged in anti-competitive practices, such as leveraging, predatory practices, cross-subsidization between the monopoly activities and those open to competition, and that the Canadian government's failure to enforce its competition law was a breach of its obligations under the NAFTA agreement. Specifically, it argued that Canada had breached article of the NAFTA agreement, which imposed a minimum standard of treatment for foreign investors.²⁰⁰ According to this article, "[e]ach party shall accord to investments of investors of another Party treatment *in accordance with international law*, including fair and equitable treatment and full protection and security."²⁰¹ UPS argued that the article also covered anti-competitive practices and should be interpreted broadly.²⁰²

The question was, therefore, whether there was a customary international law or a treaty obligation to prohibit or regulate anti-competitive practices. The tribunal examined the existence of sufficient state practice and *opinio juris*.²⁰³ Relying on the submissions of Canada, the United States, and Mexico, it concluded that many states do not have competition laws and that the national competition legislation of the NAFTA member states "differs markedly, reflecting their unique economic, social and political environment."²⁰⁴ According to the tribunal, "there is no indication . . . that any of that legislation was enacted out of a sense of general international legal obligations"; and, therefore, the element of sufficient state practice was absent.²⁰⁵ It also found that the many bilateral treaties for the protection of investment did not reflect "an understanding of the existence of a generally owed international legal

199. *United Parcel Serv. of Am. Inc. v. Gov't of Canada*, Award on Jurisdiction (Nov. 22, 2002), available at <http://www.dfait-maeci.gc.ca/tna-nac/documents/Jurisdiction%20Award.22Nov02.pdf> [hereinafter N.A.F.T.A. Arbitration].

200. *Id.* ¶¶ 10, 12.

201. *Id.* ¶ 71 (emphasis added).

202. *Id.* ¶ 72.

203. *Id.* ¶ 84-87.

204. *Id.* ¶ 85.

205. *Id.*

obligation which, moreover, has to relate to the specific matter of requiring controls over anticompetitive behaviour.”²⁰⁶ Furthermore, multilateral treaty and codification processes in the context of the WTO showed that “WTO Members are only now beginning to address the possibility of negotiating competition rules on a multilateral basis.”²⁰⁷ Finally, the tribunal determined that the International Law Commission’s decision not to regulate the development of anti-competitive practices within individual states indicated that there was “no rule of customary international law prohibiting or regulating anticompetitive behaviour.”²⁰⁸

The emergence of a customary international rule prohibiting restrictive business practices has also been examined by some domestic courts. For example, in *Kruman v. Christie’s International PLC*, the United States District Court for the Southern District of New York rejected the plaintiff’s argument, which maintained that anti-competitive activities such as price-fixing have risen to the level of customary international law, as bordering “on the frivolous.”²⁰⁹ Citing the divergence among competition policies of different nations, the court affirmed that “[t]here is no substantial support for the proposition that there is an international consensus proscribing price fixing that fairly might be characterized as customary international law, much less an international consensus that price fixing gives rise to tort claims on behalf of victims.”²¹⁰ As a consequence of this rather abrupt dismissal, the plaintiffs did not argue this theory on appeal.²¹¹

A more careful analysis of these decisions reveals that courts failed to examine in depth the possibility of the emergence of a customary international rule prohibiting restrictive business practices. Both the NAFTA tribunal and the district court referred to the absence of antitrust legislation in many countries in order to deny the existence of sufficient state practice. However, for a customary international rule to emerge, the existence of practice in countries representative of the different groups of the international community is enough; there is no need to prove that this practice is shared by an overwhelming majority of states. Indeed, some countries may be concerned about restrictive business practices that affect trade, but may have not yet adopted relevant competition legislation because of the lack of technical expertise or because this will

206. *Id.* ¶ 86.

207. *Id.* ¶ 87.

208. *Id.* ¶ 92.

209. 129 F. Supp. 2d 620, 627 (S.D.N.Y. 2001).

210. *Id.*; see also *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 717 (D. Md. 2001).

211. *Kruman v. Christie’s Int’l Plc.*, 284 F.3d 384, 392 n.1 (2d Cir. 2002).

impose a significant administrative burden, which, in light of the size of their economies, could not be justified by the benefits of competition law to their consumers. Moreover, national legislation or decisions of national courts and executive authorities are not the only examples of state practice. One also has to consider comments by governments on draft treaties, statements in international organizations, and the resolutions that these bodies adopt. The courts made no effort to examine these aspects of state conduct.

In addition, a large number of world economies have recently adopted some form of competition legislation. The enactment of competition law by important jurisdictions, such as China²¹² and India,²¹³ may alter courts' conclusions if they see it as reflecting the increasing importance of antitrust legislation worldwide and an international consensus on the objective necessity to tackle restrictive business practices that affect competition and trade. Indeed, in many jurisdictions, the adoption of competition legislation is considered a sign of modernity and economic progress.

The statement of the NAFTA tribunal concerning the absence of bilateral treaties can also be explained by the specific facts of the case. The tribunal considered *only* bilateral treaties concluded for the protection of investment; the tribunal failed to consider the numerous competition law-related provisions that exist in bilateral and regional trade agreements. Neither the tribunal nor the district court referred to the existence of multilateral agreements with competition law-related provisions or to the Set.

Another problem is that these decisions seem to condition the emergence of a customary international rule on the existence of a broad consensus prohibiting specific anti-competitive practices, such as price-fixing or the abuse of a monopoly position. However, complete uniformity of state practice is unnecessary; it is enough that there is a consensus regarding the core principles, even if there is disagreement on the detailed rules. This issue has not been addressed adequately by the decisions. Thus, the emergence of a customary international rule should not be excluded *prima facie*; the general character of the principles also should be considered. The more general and opaque, the less binding these principles will be. The emergence of a customary rule prohibiting state-sanctioned business practices that affect international trade, such as

212. The People's Republic of China draft antimonopoly law is in the process of being adopted. For an analysis of earlier initiatives, see MARK WILLIAMS, *COMPETITION POLICY AND LAW IN CHINA, HONG KONG AND TAIWAN* (2005).

213. *See generally* The Competition Act, 2002, No. 12, Acts of Parliament, 1993 (India).

exempting certain export cartels from the application of antitrust law,²¹⁴ should not be dismissed before a more detailed examination of relevant state practice and *opinio juris* has taken place. The Set should form part of a systematic analysis of all the international treaties (trade agreements, antitrust cooperation agreements) containing competition law-related provisions, and the position of states as expressed in international fora such as the OCDE, the ICN, or the ECN.

In conclusion, the Set could contribute to the emergence of a customary international obligation prohibiting restrictive business practices. It is clear that the numerous bilateral and multilateral international conventions with competition law-related provisions have taken antitrust out of the exclusive domain of domestic jurisdiction.²¹⁵ However, the significance of the Set in global antitrust law is not limited to its legal effect. Given its linkage of competition and development, the Set provides a different model of international antitrust law than initiatives undertaken in other fora, such as the WTO, the OECD, or the ICN. The next Part will therefore focus specifically on UNCTAD's contribution to the international governance of antitrust.

IV. UNCTAD'S CONTRIBUTION TO THE INTERNATIONAL GOVERNANCE OF ANTITRUST

The political effects of the Set were extremely limited for two main reasons. First, in the eyes of developed countries, such as the United States, the Set represented a populist or process-based conception of antitrust, which contrasted with the prevailing economic efficiency rationale and moved away from "development interests" and distributive justice concerns.²¹⁶ As a consequence, "[a]t least in the United States, the UNCTAD Code became a non-document, although that part of the code that overlaps with allocatively efficient antitrust continues to be cited with approval."²¹⁷ Second, the absence of a clear, legally binding effect reduced the political importance of the Set. Given these shortcomings,

214. For example, export cartels are exempted from the application of antitrust laws in the United States under the Webb-Pomerene Act, 15 U.S.C. §§ 61-66 (2000), and the Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1223 (codified in scattered sections of 12, 15 and 30 U.S.C.).

215. See UNCTAD, *Experiences Gained So Far on International Cooperation on Competition Policy Issues and the Mechanisms Used*, TD/B/COM.2/CPL/21/Rev.1 (Apr. 19, 2002) (providing an overview of the different international treaties in this field).

216. Eleanor M. Fox, *Harnessing the Multinational Corporation To Enhance Third World Development—The Rise and Fall and Future of Antitrust as Regulator*, 10 CARDOZO L. REV. 1981, 2012 (1989).

217. Eleanor M. Fox, *Competition Law*, in ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 340, 375 (2002).

UNCTAD lost its attractiveness as an efficient framework for internationalizing antitrust, especially compared to other international institutions such as the OECD²¹⁸ or the ICN.²¹⁹

UNCTAD's contribution regained momentum after the launch of initiatives to establish an international antitrust framework under the WTO umbrella.²²⁰ It became clear that integrating competition provisions in the WTO could not be done without emphasizing its development dimension in order to secure a wider consensus.²²¹ Indeed, neither the OECD nor the ICN, which focus on pure competition law, sufficiently address the development dimension of international competition rules. The willingness to negotiate an international agreement under the framework of the WTO enhanced the position of developing countries, making it possible for them to achieve trade-offs in the negotiation process, such as the establishment of special and differential treatment (SDT) clauses, which preserved their interests.²²² UNCTAD's long tradition of representing the interests of developing countries, its legitimacy as part of the U.N. system, and its continued focus on the

218. See Org. for Econ. Co-operation & Dev., *Recommendation of the Council Concerning Action Against Restrictive Business Practices Affecting International Trade Including Those Involving Multinational Enterprises* 1, C(78) 133 Final (July 20, 1978); Org. for Econ. Co-operation & Dev., Recommendation of the Council, "Minimizing Conflicting Requirements: Approaches of Moderation and Restraint" (1987) (replacing *Revised Recommendation of the OECD Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade*, C(95)130/FINAL (July 28, 1995)); see also Org. for Econ. Co-operation & Dev., *Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels*, C(98)35/FINAL (Mar. 25, 1998).

219. See Int'l Competition Network Web site, <http://www.internationalcompetitionnetwork.org/> (last visited Jan. 30, 2007).

220. See World Trade Organization [WTO], Singapore Ministerial Declaration, ¶ 20, WT/MIN(96)/DEC, 36 I.L.M. 220 (1997) (establishing "a working group to study issues raised by Member States relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework").

221. Since the failure of the ministerial conference to achieve agreement in Seattle in 1999, the WTO has been more sensitive to developmental issues and to the interest of developing countries. See Gary P. Sampson, *The World Trade Organization After Seattle*, 23 WORLD ECONOMY 1097 (2000). The Doha Ministerial Declaration, adopted in 2001, evaluated the possible contribution of competition policy to trade and development and emphasized the development dimension of international antitrust. See WTO, Ministerial Declaration of 14 November 2001, ¶ 23, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).

222. Brusick, *supra* note 44, at 30; Andrew T. Guzman, *International Antitrust and the WTO: The Lesson from Intellectual Property*, abstract (Berkeley Program in Law & Econ., Working Paper Series, Paper No. 36, 2000) ("[I]nternational antitrust needs to be negotiated in a forum that allows for transfers, making the WTO the best available forum."); see also Alan O. Sykes, *Externalities in Open Economy: Antitrust and Their Implications for International Competition Policy*, 23 HARV. J.L. & PUB. POL'Y 89, 95 (1999) ("[B]y locating the agreement within the WTO, an opportunity for side payments arises that may sway nations otherwise reluctant to sign the agreement.").

linkage between competition and development were important factors in the re-emergence of UNCTAD as an agreement “facilitator” in the process.²²³

Providing technical support to the competition authorities of developing countries may be one facet of UNCTAD’s contribution.²²⁴ If a global antitrust standard is to be adopted in the future, a more difficult role for UNCTAD would be defending a more flexible approach that integrates a degree of SDT, either in the form of common substantive rules or in the less ambitious form of a non-discrimination principle.²²⁵ However, given the range of development found within developing nations, a multilateral agreement in the field of competition law may limit the regulatory autonomy of some states in terms of their capacity to pursue industrial policies, development strategies, and social objectives.²²⁶

223. Brusick, *supra* note 44, at 24; Merit E. Janow & Cynthia R. Lewis, *International Antitrust and the Global Economy: Perspectives on the Final Report and Recommendations of the International Competition Policy Advisory Committee to the Attorney General and the Assistant Attorney General for Antitrust*, 24 *WORLD COMPETITION* 3, 18 (2001).

224. The proposals of the European Union to the Working Group on the Interaction Between Trade and Competition Policy made clear that there was a need for a more active UNCTAD contribution to the internationalisation process, especially for the provision of specific support to competition authorities in developing countries. For the European Commission, there should be a “simple division of tasks in this area [of competition law], with UNCTAD undertaking technical assistance and other international organizations assuming responsibility for the elaboration of rules and dispute settlement.” See Fourth United Nations Conference To Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Geneva, Switz., Sept. 25-29, 2000, *Report*, ¶ 22, U.N. Doc. TD/RBP/CONF.5/16 (Nov. 9, 2000). The representative of the United States, *id.*, disagreed with the proposal of the European Commission and considered that work had to be done “at the multilateral level, with a role for UNCTAD in this connection.” The importance that the U.S. representative accorded to UNCTAD’s work can be explained by the fact that the United States was opposed to the conclusion of an international agreement on antitrust (considering it a “premature” evolution). *Id.* The choice of UNCTAD was thus a consequence of the belief that the multilateral framework for antitrust should not be legally binding, as would have been the case if, following the proposals of the European Commission, the work was done in the framework of the WTO.

225. Concerning the rationale for special and differential treatment in the context of the WTO agreements, see Constantine Michalopoulos, *The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organization* 15-16 (World Bank, Policy Research Working Paper No. 2388, 2000), at 15, available at <http://econ.worldbank.org/view.php?topic=16&type=5&id=1143>; see also Thomas Cottier, *The Erosion of Non-Discrimination: Stern Warning Without True Remedies*, 8 *J. INT’L ECON. L.* 595 (2005).

226. The *Telmex* case constitutes an interesting example, because the particular social objectives pursued by Mexico and the need to fund telecommunications infrastructure did not affect the Panel’s conclusion on the existence of an “anticompetitive practice” and the application of section 1.1 of the Paper. See Fox, *supra* note 188, at 289 (advancing a different motivation behind the Mexican rules: “a motivation to pay back, and to continue the privileges of, a politically well-connected former state-owned monopoly and its politically powerful owner”). The application of the proportionality principle may nevertheless provide a tool that could avoid deviations from the protection of legitimate objectives.

This preservation of autonomy may be necessary to achieving long-term goals and can be beneficial in the *initial* stage of development.²²⁷ Many economists agree that competition policy is useful for developing countries. In fact, most “insist that the kind of competition laws or policies that would be most useful for these countries is not necessarily the same as the kind of competition laws or policies usually advocated by developed countries.”²²⁸ Accordingly, a distinction should be drawn between developing countries with different levels of development and international trade.²²⁹

The Plan of Action, which was adopted by UNCTAD in February 2000, stressed that the UNCTAD’s policy towards an international agreement on restrictive business practices had to take into account the development dimension.²³⁰ In light of this plan, the Fourth Review Conference defined the future mission of UNCTAD in terms of competition issues. The conference suggested a focus on institutional capacity building, competition advocacy, public education, competition studies, and competitiveness and development.²³¹ The conference also noted “the ways in which possible international agreements on competition might apply to developing countries, including through preferential or differential treatment, with a view to enabling them to introduce and enforce competition law and policy.”²³² It is likely that, based on the conference’s reasoning, the introduction of SDT in a future international agreement on competition could be one of the main contributions of UNCTAD to global antitrust.²³³

The UNCTAD report *Closer Multilateral Cooperation on Competition Policy: The Development Dimension*²³⁴ is more explicit concerning the different types of SDT. According to this report, there are

227. Frédéric Jenny, *Globalization, Competition and Trade Policy: Convergence, Divergence and Cooperation*, in COMPETITION POLICY IN THE GLOBAL TRADING SYSTEM 295, 308 (Clifford A. Jones & Mitsuo Matsushita eds., 2002).

228. *Id.* at 314.

229. See Hunter Nottage, *Trade and Competition in the WTO: Pondering the Applicability of Special and Differential Treatment*, 6 J. INT’L ECON. L. 23, 42 (2003); see also Michalopoulos, *supra* note 225, at 35. See generally MICHAL S. GAL, COMPETITION POLICY FOR SMALL MARKET ECONOMIES (2003).

230. UNCTAD, *Plan of Action*, ¶¶ 139-143, U.N. Doc. TD/386 (Feb. 18, 2000).

231. Fourth U.N. Conference Resolution, *supra* note 154, ¶¶ 16-18.

232. *Id.* ¶ 19(d).

233. For an analysis of the forms that can take special and differential treatment under the WTO agreements, see Nottage, *supra* note 229, at 28.

234. UNCTAD, CLOSER MULTILATERAL COOPERATION ON COMPETITION POLICY: THE DEVELOPMENT DIMENSION (2002), available at <http://r0.unctad.org/en/subsites/cpolicy/gvaJuly/docs/DohaFinal-en.pdf#search=%22Closer%20Multilateral%20Cooperation%20on%20Competition%20Policy%20UNCTAD%22>.

four types of special and differential treatment that could be considered.²³⁵ The most reasonable option is to organize technical cooperation between developing and developed countries, in particular capacity-building and exchange of experience in antitrust enforcement. A second option is the establishment of “[t]ransition periods allowing for temporary flexibility and graduality—flexibility with respect to the law’s adoption and implementation” complemented by a full array of fundamental competition law elements.²³⁶ A third option is to institute “sectoral exceptions or exemptions covering certain anticompetitive practices under certain specified conditions” and to “give developing countries the right to declare certain sectoral exceptions for developmental reasons,” which “would not be subject to a time limit.”²³⁷ Finally, a fourth option is to institute “[s]pecific undertakings for developed countries to eliminate their own exceptions and exemptions on a non-reciprocal basis.”²³⁸

The type of SDT will certainly depend on the binding effect of the international competition rules that come into being in the future. For example, the more competition rules limit the autonomy of developing states, the more important it becomes for such rules to include an SDT, specifically those that provide for transition periods and the possibility of exceptions and exemptions. In any case, rules should at least preserve the capacity of developing countries to pursue development strategies and industrial policy objectives, while at the same time providing them with the technical assistance to meet the obligations assumed under international law.²³⁹

More concretely, the integration in the future agreement of a special provision (exemption clause)²⁴⁰ authorizing developing countries to

235. *Id.* at 26.

236. *Id.*

237. *Id.*

238. *Id.*

239. Provisions providing technical assistance and co-operation exist in the context the TRIPS Agreement, *supra* note 183, art. 67; Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments-Results of the Uruguay Round, 1868 U.N.T.S. 120 (1994); Agreement on the Application of Sanitary and Phytosanitary Measures, art. 9, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments-Results of the Uruguay Round, 1867 U.N.T.S. 493; Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 27(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments-Results for the Uruguay Round, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

240. These types of legislation, adopted only for a fixed period of time (but renewable), should be reported to a set international institution or the WTO (if the future agreement on competition is integrated into the WTO system), in conformity with the principle of transparency

adopt, under certain conditions, sector-specific exemptions to the prohibition of restrictive business practices will preserve their capacity to enhance firms' cooperation when this is necessary for their development strategies.²⁴¹ Developed countries should also take into account, in the enforcement of their competition policy, the development, financial, and trade needs of developing countries.²⁴² They could apply the principle of positive comity when restrictive business practices of a firm in their territorial jurisdiction produce anti-competitive effects on a developing country's market, which, given the lack of enforcement capacity, authorities are not able to tackle effectively.²⁴³ This positive comity should be compulsory when requested.²⁴⁴ A further possibility is to give developing countries affected by anti-competitive practices the opportunity to sue in the courts of developed countries. Alternatively, a "special prosecutor" acting on behalf of developing countries' consumers could be appointed to sue.²⁴⁵ This outsourcing of competition law enforcement would be more effective if national courts were willing to hear cases on restrictive practices that did not cause any domestic injury and affected only foreign consumers.²⁴⁶ Finally, developed nations must eliminate the exceptions that benefit their export cartels when such practices produce anti-competitive effects within developing countries,

(procedural requirement). They should, at the same time, be broad enough in scope so as not to be considered individual acts targeting certain firms.

241. This provision will be equivalent to that of article C(ii)(6) of the Set. It corresponds also to the third type of special and differential treatment. *See* UNCTAD, *supra* note 234, at 26.

242. This provision will be equivalent to that of article C(7) of the Set, *supra* note 3.

243. The procedure of enforcement of the principle of positive comity could be similar to that of the Agreement Between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, U.S.-E.C., June 4, 1998, 37 I.L.M. 1070 (1998). According to article III of the Agreement:

The competition authorities of a Requesting Party may request the competition authorities of a Requested Party to investigate and, if warranted, to remedy anticompetitive activities in accordance with the Requested Party's competition laws. Such a request may be made regardless of whether the activities also violate the Requesting Party's competition laws, and regardless of whether the competition authorities of the Requesting Party have commenced or contemplate taking enforcement activities under their own competition laws. *Id.* art. 3.

244. *See* Jenny, *Competition Law*, *supra* note 2, at 622 ("[T]he introduction of 'compulsory positive comity' was dropped some time ago.").

245. Hoekman & Mavroidis, *supra* note 184, at 23 & n.26 ("[L]egislation would need to be revised, and there would need to be acceptance that national resources could be used to the benefit of foreign consumers—i.e., be seen as an 'in-kind' type of development assistance. . . . Enforcement costs could be recovered to a lesser or greater extent through fines imposed.").

246. *See* Bhattacharjea, *supra* note 6, at 310. However, as the same author remarks the recent case of the United States Supreme Court in *Empagran v. F. Hoffman-LaRoche Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005), has closed, at least for the moment, this option.

while at the same time preserving competition in the global marketplace.²⁴⁷

These measures contrast with the principle of non-discrimination and the conventional wisdom that conceive competition regulation as having the objective to protect home consumers or economic efficiency. The adoption of these principles would mark the elaboration of a cosmopolitan paradigm of state regulation:²⁴⁸ in implementing their antitrust legislation, states should not only consider their own national interest, but also the effects that the application of the particular regulations will have on the economy and stability of developing countries.²⁴⁹ States would thus express their commitment to developing nations.

The proponents of the economic efficiency objective could object that the effect of restrictive business practices on the economic development is a pecuniary externality and should therefore not be included in the cost-benefit analysis. Indeed, it is commonly accepted that, unlike technological externalities, pecuniary externalities do not create any prima facie case for public intervention.²⁵⁰ Nevertheless, pecuniary externalities may be relevant if the specific public policy pursues distributive justice concerns and aims to redistribute revenue from developed countries to developing countries. This is particularly important given the inherent discrepancy (distributive injustice) between the producers and consumers of developed and developing countries.

V. CONCLUSION

The Set was initiated by UNCTAD and adopted by a resolution of the General Assembly. It marked the beginning of the United Nations' involvement in the area of competition policy. It is the first and, thus far, the only universally applicable instrument in the area of antitrust. Initiated by the developing countries, its objective was to limit the rising power of transnational firms and to integrate a development dimension in

247. This provision corresponds to the fourth option of special and differential treatment described previously. See UNCTAD, *supra* note 234, at 26.

248. This term is highly imprecise. For an analysis of this principle in the context of the WTO, see Steve Charnovitz, *WTO Cosmopolitics*, 34 N.Y.U. J. INT'L L. & POL'Y 299 (2002).

249. See Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781, 1801 (2000) ("There is a need for an international economic order in which at least some players are charged with responsibility to enhance the welfare of the entire community.").

250. This conclusion stems from Ronald Coase's theorem, Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960), that absent transaction costs, a mutual beneficial outcome will anyway be achieved between the owner of the resource and the individuals that would like to have access to it.

competition policy. Nevertheless, disagreements between developed and developing countries concerning the Set's interpretation, the absence of legally binding effect, and its political philosophy have considerably weakened its role in global antitrust relative to other international fora. However, the increasing internationalisation of competition law and policy, the accent that the WTO has recently put on the development of its mission, as well as the failure to initiate negotiations on competition issues during the Doha Round, because of the opposition of certain developing countries, reinforce the importance of the United Nations', and, more specifically, UNCTAD's contribution to global antitrust.

The Set may serve as inspiration for the spontaneous (through customary international law) or organized (through an international antitrust agreement) emergence of a global antitrust regime. Having said that, it is important to assess the types of obligations and constraints that a global antitrust standard may impose on states. There are two essential requirements. First, there should be an obligation not to exempt restrictive business practices that affect trade, such as export cartels, from the application of competition law. In addition, there should be a positive obligation to adopt and enforce effectively competition statutes against restrictive business practices, even if the latter does not have adverse effects on local consumers.

The first requirement may be achieved either by the emergence of a customary international rule on restrictive business practices or the adoption of an international agreement. The second requirement is most effectively achieved through an international agreement that would make possible the monitoring of the effectiveness of competition law enforcement by the parties to the agreement. Imposing positive obligations also involves the definition of common antitrust standards for specific restrictive business practices and/or the application of the principle of non-discrimination.

The Set may also constitute a source of customary international law on the prohibition of restrictive business practices that affect trade. The prospect of the emergence of a customary rule on specific restrictive business practices, such as export cartels, should not be dismissed *ab initio*. The Set could also provide a model for a competition law that integrates a degree of SDT for developing countries; however, the effectiveness of SDT in enhancing development has been recently challenged, and many authors argue that direct payments to developing countries, or the liberalization of sectors in which these countries have a comparative advantage, such as agriculture, would provide a more

effective development tool.²⁵¹ While this may be true in some circumstances, it is also important to acknowledge that SDT addresses economic and political realities that cannot be easily set aside.²⁵² The adoption of competition law provisions will also impose costs that developing countries are not ready to incur, as they may prefer to spend their scarce resources on other policy priorities. Considerations of industrial policy, such as creating national champions, may also play a more important role at an earlier development stage, justifying an exemption from an across-the-board application of competition law.²⁵³

Introducing a degree of flexibility and reflexivity is a prerequisite for the emergence of a global antitrust standard that will sufficiently take into account the specific characteristics of developing economies and the need for regulatory experimentation. It is possible to achieve these objectives either by negotiating cooperation/harmonization of substantive antitrust rules, at a bilateral or inter-regional level, or by adopting a global antitrust regime, which, by providing for exemptions, will accommodate a “policy space” for developing countries.²⁵⁴ It is obvious from the discrepancy of economic and political power between developed and developing countries that a global antitrust regime allows for a more effective consideration of the demands and interests of developing countries.

251. For a discussion and different conclusions, see WORLD TRADE ORG., THE FUTURE OF THE WTO, REPORT BY THE CONSULTATIVE BOARD TO THE DIRECTOR-GENERAL SUPACHAI PANITCHPAKDI, paras. 88-102 (2004), available at http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf; Cottier, *supra* note 225; Gene M. Grossman & Alan O. Sykes, *A Preference for Development: The Law and Economics of GSP*, 4 WORLD TRADE REV. 41 (2005); Bernard Hoekman, *Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment*, 8 J. INT'L ECON. L. 405 (2005); Petros C. Mavroidis, *Cosi Fan Tutti [sic]—Tales of Trade and Development, Development and Trade*, 47 GERMAN Y.B. INT'L L. 39, 39-62 (2005).

252. See WTO Doha Work Programme Ministerial Declaration of 18 December 2005, ¶ 35, WT/MIN(05)/DEC (2005) (“We reaffirm that provisions for special and differential (S&D) treatment are an integral part of the WTO Agreements.”).

253. Bhattacharjea, *supra* note 6, at 323.

254. On the concept of “policy space,” see Hoekman, *supra* note 251.