ANALYSIS OF INTERNATIONALISATION OF COMPETITION LAWS AND POLICIES

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ABSTRACT

Globalization has made the economy to undertake a different path whereby since the 19th Century the world has been centralised and become a single global market. As a result of such centralisation, there are different matters of global interest which have been internationalised to bring about a well-functioning system. Competition or Antitrust law is one amongst the laws which have been internationalised to bring about a well-functioning legal regime that governs competitors in their affairs as well as their relationships with their consumers regardless of where such competitors and consumers are situated. This article highlights the internationalization of Competition or Antitrust law by understanding the significance of the law and different paths that were taken in order to strengthen such internationalization of Competition law and lastly the challenges that exists in the internationalisation of competition laws as well as suggested possible recommendations to be done.

INTRODUCTION

The history of Competition or Antitrust law is traced back from the efforts of Roman legislators who intended to regulate price fluctuations and to prevent unfair trade practices. Throughout the Middle Ages in Europe, Kings and Queens repeatedly cracked down on monopolies, including those that were created through State legislation.[i] The English Common law doctrine of restraint of trade therefore became the precursor to the modern Competition law. This came out after the codifications of the United States of America Antitrust statutes, which in turn had considerable influence on the development of European Community Competition laws after the Second World War (WWII), LEADING TO THE Increase of focus on international Competition enforcement in the current globalised economy.[ii]

Competition Law is a broad concept without a single or universally agreed definition; it is a body of law that is agreed at the promotion and maintenance of a fair market by regulating anti-competitive conducts by players in the business firms. The law is helpful to the players and stakeholders in the competition regime to get a better view and perspective on a country's economy. Antitrust law requires that any business regardless of its legal status, size and sector, needs to be aware and regulated by Competition laws.[iii]

Competition policies tend to govern how businesses interact between each other and with individual and corporate consumers. It is also said that a country's competition policy is the sum of its competition laws, that is a body of law both procedural and substantive which addresses different anti-competitive behaviours and the effect that its public policy may have on competitive processes in the economy. Therefore, there are points to be noted here hat Competition law and policies are two distinct concepts whereby Competition law is a subset of Competition policy due to the fact that Competition law is a wider entity that incorporated codified and uncodified rules that governs the Competition regime.[iv] For instance, in the United Republic of Tanzania Competition laws includes, the Fair Competition Act[v] as amended by the Finance Act 2020[vi], the Merchandise Marks Act[vii], Trade and Service Marks Act[viii], etc while competition polices includes the Trade Policy, Industrial Policy, Disinvestment Policy, Foreign direct Investment Policy, Fiscal Policy and Labour Policy.

Core Principles and Objectives of the Competition Policy

The primary aim and importance of Competition law is that it prohibits anti-competitive conduct by businesses and it allows different sectoral regulatory laws and its established organs where the market fails. It also caters from Government's policies such as liberalised trade policy, relaxed FDI and ownership requirements and regulatory reforms that enhance competition in local and international markets. There are basically nine principles Competition policies. The principles and objectives include the following;

i. Fostering competitive neutrality between public and private sector enterprises.
ii. Ensuring access to essential facilities.
iii. Facilitating easy movement of goods, services and capital.
iv. Separating policy making, regulation and operation functions.
v. Ensuring free and fair market process.
vi. Balancing Competition and intellectual property rights.
vii. Ensuring transparent, predictable and participatory regulatory environment.
viii. Notifying and publicising deviation from competition principles.
ix. Respecting international obligations.

INTERNATIONALISATION OF THE COMPETITION LAWS AND POLICIES

Internationalisation of the Competition laws and policies goes together with globalisation and economic interdependence which raises issues in several fields in the current era of economic integration.

Internationalisation of the Competition laws and policies refers to the entire action and or processes of bringing Competition laws and policies together so as to out them under the control of two or more sovereign nations.[ix] It also means agreements of using the same Competition laws and policies between tow or more countries and this can be achieved through Bilateral Investment Treaties (BITs) and or Multilateral Investment Treaties (MITs).[x] Many Competition problems have across border component for example; investigation and protection of price fixing, market sharing arrangements etc. and this happens when a business entity has

international or foreign jurisdiction in it. This makes it impossible for domestic laws to govern competition in that sphere; since domestic laws make it difficult for international laws to make an entry domestically. Internationalisation of Competition laws and policies is a concept that includes those attempts of governments or regulators and also alternative ways of dealing with cross jurisdictional anticompetitive conduct.[xi]

In most cases competition matters are regulated and governed by domestic laws, because competition issue shares national matters. In contrast to domestic laws, there is existence of international policies, that are considered as soft laws which are mere guidelines and not binding between the parties. These includes; International Centre Settlement of Investment Disputes (ICSID), Organisation for Economic Co-operation and Development (OECD), Trade Related Anti-Competitive Measures (TRAMs), International Competition Network (ICN) and World Trade Organisation (WTO) agreements etc. in the modern era of economic globalization, the field of Competition law and policy plays a vital role in fostering economic integration. Competition policy has attained a prominent spot in international economic policy discussions in as much as a nation's policies are no longer exclusively concerned with the business practices within its borders and addressing cross-border practices is no longer believed to be within the exclusive realm of a single national government. The evolution of such paradigm raises the issue of erosion of national sovereignty and creates the possibility of intergovernmental classes on the approach to in and addressing transactions that spill over frontiers. These disagreements risk frictions that may escalate into trade wars.[xii]

Key Aspects on Internationalisation of Competition Regulations

Several factors have accentuated importance of Competition law in the international arena. The allegedly decrease use of trade barriers, the revolution of communications technology, the falling restrictions on foreign investment, the deregulation tendency displayed by several countries as well as the adoption of market-friendly policies by several governments. Also, certain business phenomena and strategies have also played an important role.

To begin with, an unprecedented scale of cross-border merger activity has taken place as a result of the belief that acquiring or merging with local partners is the most profitable mode of entry into overseas markets, a belief which has been accentuated by the ongoing liberalisation of investment laws.[xiii]

Also, Competition issues are raised by such phenomena which includes the extent to which import competition may discipline the market power of domestic entities, what the Competition response should be to such transitions (mergers, acquisitions or joint venture) when they create efficiencies which lower the cost of supplying foreign markets but not domestic ones[xiv].

The international fragmentation of production and vertical integration has also played an important role. The internal organization of businesses and business to business contracting and relationships change in two ways;

First, a fragmentation of multistep production processes has occurred and firms have sold their corporate subsidiaries, replacing intrafirm transactions with transactions between firms, that is, the relocation of stages of production abroad. The effect of this did that component often cross many international borders before arriving to the consumer of the final products[xv].

The competition issues raised by these phenomena are that, in as much as arm's-length arrangements are subject to more competition scrutiny that supply agreements within firms, vertical disintegration will in all likelihood increase the competition enforcement activity.

Second, an additional business phenomenon that bears relevance in competition analysis is the spread of network-based industries. Because of the characteristics of network industries, the following competition concerns issue:

The incentive to price -discriminate charging higher prices to consumers with price- inelastic demands, whether monopoly in one product can be leveraged into another, the potential for intergovernmental disagreement over standard setting by private entities, and that standard setting could be used to masquerade a discriminatory measure by domestic firms in detriment of foreign competitors[xvi].

Although most countries are turning to market economy and some of them are still on a transitional stage (the so-called "transition economies"), the reforms being undertaken involve areas such as price liberalization, deregulation, de-monopolization, privatization, trade liberalization, and foreign direct investment liberalization[xvii]. The reforms taking place are being made at different paces in different countries and, while the price to pay is frequently notorious and affects well-organized constituencies, the benefit which outweigh the disadvantages are not evident to the public at large, which is greatly benefited. In such context,

it is worth noting that even the so-called "developed market economies" have not always been true champions of free trade. Many of said countries shielded substantive portions of their economy from free-market forces. Amongst these were the so-called "natural monopolies" which often for alleged 'prudential' or 'social' considerations granted monopoly right through regulation which shielded them from competitive forces and competition rules. By and large, competition law is an important component. This concern led the UNCTAD to state at the X Bangkok Declaration that

> "*The international community as a whole has the responsibility to ensure an enabling global environment through enhanced co-operation in the fields of trade, investment, competition and finance so as to make globalization more efficient and equitable".*[xviii]

The Journey to Internationalization of Competition Laws and Policies

The whole concept of internationalisation of competition laws and policies seems to have been difficulty in finding its ways since then as seen in the different charters below, but not limited to: -

- **The Havana Charter**

Following the end of Second World War (WWII) in the year 1945 the United Nations (UN) sought to establish mechanisms that co-ordinate international trade and avoid the repetition of events that led to the occurrence of the conditions of the 1930's that is the Great Economic Depression (GED). To such end, the efforts focused on establishing multilateral institutions in economic co-operation fields, amongst which the creation of an International Trade Organization (ITO) took major relevance. A United Nations Conference on Trade and Employment (UNCTE) took place in Cuba in the City of Havana from November 21, 1947 to March 24, 1948 where fifty-seven sovereign nations sought to create what became known as the *"Havana Charter".*[xix]

The *Havana Charter,*[xx] created the ITO as a specialized agency of the UN. The fields encompassed by the ITO were diverse and comprehended not only governmental trade disciplines but also rules involving restrictive business practices. Even though no specific competition law chapter was included, provisions having a positive impact on competition as related to international trade permeated through the entire document. For instance, *Article 46.1, in Chapter V of the Havana Charter,*[xxi] read: "*Each Member shall take appropriate measures*

and shall cooperate with the ITO to prevent, on the part of private or public commercial enterprises, business practices affecting international trade with restrain to competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives of the Charter. There, the foregoing established the beginning of a long and bumpy process of establishing an international system of regulation on competition.

- **General Agreement on Tariffs and Trade**

Although the *Havana Charter,*[xxii] was unable to elicit international acceptance, the trade policy chapter survived. It was amended and transformed into the General Agreement on Tariffs and Trade (GATT) which, although originally conceived to be of provisional application, it has effectively managed to survive where others have perished and has remained as the only multilateral institution governing international trade for the second half of the 21st Century.[xxiii] It became known as GATT 1948.

To contrast it with later versions like the *Havana Charter,*[xxiv] GATT did not directly proclaim principles of competition. Nonetheless, the market-oriented competitive character of GATT, with its provisions seeking to eliminate artificial barriers and discriminatory practices, paved the way for the establishment of a code of international competition applicable to inter-State trade. Since the GATT's inception diverse rounds seeking to improve trade liberalization and elimination of trade distorting practices have taken place, from which the Tokyo Round (1973-1979) and the Uruguay Round (1986-1994) are deemed significant improvements in the international trade landscape.

To a great extent because of the tariff cuts implemented during the Tokyo Round, the weighted average tariff on manufactured products in the world's nine major industrial nations. Addressing the International Aspects of Competition Law, Mr. Peter Sutherland's the GATT Director General[xxv] was quoted saying, *"The conclusion of the Uruguay Round is a "defining moment in modern economic and political history*". The foregoing, coupled with the trade liberalization agreements and codes created in the context of the several rounds and international efforts under the auspices of GATT, has resulted in an internationally agreed-upon set of rules and codes of conduct which have been put in place which, although not directly targeting competition, have indirectly enhanced competitive outcomes because of their market-oriented character. To begin with, rules and procedures closely connected to

competition were put in place. But also, a broader application of competition rules has been established. Of particular importance is GATT which establishes multilateral regulation of restrictive business practices by firms which include Article VIII (Monopolies and Exclusive Services Suppliers) and Article IX (Business Practices). In fact, GATT Article IX resembles the *Havana Charter.*[xxvi] Because of such voluntary approach, the outcome was that the undesirable situation where few countries accepted only some commitments resulting in a less then uniform nor coherent regime.

International Aspects of Competition Law or practices discriminating among producers, among buyers, or among consumers as well as practices which hamper the buyer in the free choice of his supplier; subsidies or state assistance, or special charges imposed by the state restrictive practices tending toward the division of markets or the exploitation of the consumer." Also, Article 65 of said treaty prohibited agreements and concerted practices that tended to "prevent, restrict, or distort the normal operation of competition" within the Community.[xxvii] Furthermore, Article 66,[xxviii] established provisions restricting "unauthorized concentrations". Later, the 1957 Treaty of Rome,[xxix] was more definite in its competition measures. It included the establishment of a system to ensure that competition is not distorted in the Common Market Article 3, and considered inconsistent with the common market, *"All agreements between firms and all concerted practices likely to affect trade between Member States"*,

Article 85, particularly agreements that directly or indirectly fixed prices or other trading terms, limited production or investments, and shared markets. Also, abuse of a dominant position was prohibited. Article 86. B. Is mainly on the ongoing efforts where, the historical efforts described before have created an inertia on several international fronts which merit independent mention.

- **Governmental Initiatives**

In the year 1953 a committee comprising delegates from six industrialized nations and four developing ones (India, Mexico, Pakistan and Uruguay.) elaborated a United Nations Draft Convention on Restrictive Practices that received United Nations Economic and Social Council (UNESC) endorsement and which was sent to UN member nations for ratification. Seven nations endorsed the Draft Convention. However, the U.S. did not ratify it because of strong opposition from the U.S. business community. This led to its demise.

Developed countries have displayed a lack of agreement on the question as to how to address competition issues raising international concern and, hence, most efforts have been, to a great extent, independent. Although the American Bar Association's Special Committee on International Antitrust concluded in 1991 that no worldwide standards for competition law are feasible[xxx], in 1994 the U.S. Congress passed the International Antitrust Enforcement Assistance Act[xxxi] , which authorizes the Attorney General and the Federal Trade Commission to enter into mutual assistance agreements with foreign competition authorities, to exchange confidential information and the issuing of subpoenas by the Justice Department so as to obtain evidence in assistance of competition authorities in other countries even if the alleged behavior does not violate US law. Under the authority of the said law, the U.S. has entered into many such international agreements, including one with Mexico on July 2000[xxxii]. On another front, the then U.S. Attorney General, Janet Reno, and Assistant Attorney General, Joel Klein, on November 1997 created the International Competition Policy Advisory Committee ("ICPAC") with the purpose to address the following topics which includes multi-jurisdictional merger review, interface of trade and competition issues; and the future directions in enforcement cooperation between U.S. antitrust authorities and their counterparts around the world, particularly in their anticartel prosecution efforts.

The *ICPAC* produced a Final Report on Competition Policy on 2000 with important recommendations in all competition fields warranting international concern. Across the Atlantic, Also, *the one-signatory one-vote* provision meant that this UN program would thus stimulate all anticapitalistic participating nations to instigate harassing complaints against the United States and other participating nations whose nationals have the most extensive world trade and will so imperil them in their most vital operations.

Nonetheless, the *OECD* initiatives constitute steps forward in the tackling of international behavior representing competition issues.

Amongst the diverse efforts of the OECD, the following standout which includes the initiative to elaborate an International Antitrust Code Working Group, draft International Antitrust Code as a GATT-MTO Plurilateral Trade Agreement which was received with skepticism by the OECD, the OECD Competition Committee report adopted on 2001 on leniency programs to

fight hard core cartels and the several conferences and recommendations of the OECD's Joint Group on Trade and Competition[xxxiii].

Such broad mandate included assisting developing countries in the creation of a competition law and policy framework, promoting a competition culture, examining issues related to competition which are particular to development and the relationship between competition and competitiveness and trade-related aspects of competition and the possibility of international agreements on competition.[xxxiv]

Importantly**,** UNCTAD is also working on the elaboration of a model law or laws on restrictive business practices[xxxv]. Academic Initiatives In 1993 a private group of professors and experts, headed by Professor Wolfgang Fikentscher of Munich, elaborated a proposal for an international agreement they called the "*Draft International Antitrust Code"*[xxxvi]. The document was conceived as an international agreement to be concluded within the aegis of GATT or WTO as a Plurilateral Trade Agreement and under the conviction that private activity that clogs markets has often been outside the realm of regulation. Hence, given the foregoing, the best manner to encourage adequate enforcement to pry-open world markets was through the said initiative. The Munich Draft sets forth certain minimum standards believed essential to any competition law system. In doing so it declared that,

> *"The international community as a whole has the responsibility to ensure an enabling global environment through enhanced co-operation in the fields of trade, investment, competition and finance… so as to make globalization more efficient and equitable".*[xxxvii]

- **The World Trade Organization (WTO)**

The WTO marks the beginning of a new era of global economic co-operation. The WTO's task is to establish an international trading system based on a free trade and open market, and competition policy that covers both domestic and international markets. Moreover, the WTO aims at eliminating and reducing governmental trade barriers, such as tariffs, and quantitative restrictions. Under the auspices of the general arrangement of tariffs and trade GATT of 1947, eight trade negotiations were conducted, the last of which was Uruguay round. the WTO was created as a result of the Uruguay round, which was about fifty years after the proposals from the *Havana Charter,*[xxxviii] and international trade organisation failed. Within the WTO context

it has been stated that "The issue is not whether competition policy questions will be dealt with in the WTO context, but how, and, in particular, how coherent will the framework be within which this will be done"[xxxix]. At the 1996 Ministerial Conference several parties sponsored an international competition law within the WTO framework. Even though no consensus was achieved, a working group was created with the goal to examine the interaction between trade and competition policy so as to identify areas that may be which establishes a duty of cooperation and assistance.

The WTO is based on the principles of the Most Favoured Nations MFNs, national treatment, and transparency. The three principles, are the most fundamental principles of the WTO, and all are designed to establish and maintain non-discrimination and openness in the international market. A good number of provisions are related to WTO however are still not used since the provisions are scattered, they are not incorporate in a single document or a coherent body of competition rules. However, this does not mean that WTO agreements do not include competition provisions. As trade liberalization progresses through international negotiations, issues of how to deal with private trade restraints exercised by private enterprises will become increasingly important. When governments control international trade, cartels and other similar restraints of international trade are relatively unimportant, because trade is restricted by the public authorities anyway and there is relatively little room for private restraints of trade. However, where trade liberalization has been achieved, the trading system requires that private trade restraints be dealt with in particular way. The first report of the working group was presented before the WTO General Council on November 1998 and the matter was kept in the WTO agenda; from the preceding discussion it may be observed that the issue of how to effectively address international competition related activity has attracted interests of many international actors.

A) WTO Conferences in Attempts to Foster Internationalization of Competition Regime

The WTO framework has four arms such as the Singapore ministerial conference 1996, Doha ministerial conference 2001, Cancun Ministerial conference 2003 and the July decision of 2004. These conferences were called with attempts to solve challenges and reach consensus on the internationalization of the Competition laws and policies as follows: -

i. Singapore Ministerial conference, 1996.

Notwithstanding the absence of binding competition rules within the WTO, competition concerns have been long a staple question within the international trading system. The draft of the 1984 Havana charter, which was designed to create the international trade organisation, addressed the possibility that international cartels and restrictive business practices would frustrate the market access. The main task here was to consider issues, main trade and competition policies, to see the interaction and competition of each other.

ii. Doha ministerial conference 2001

Doha Ministerial conference which was a result of the Singapore conference to make follow ups on the achievement reached, this came up with some declaration of Doha conference of 2001 on the modality of negotiations and on how to address the issues raised during Singapore conference and problem facing developing Countries in implementations of the WTO agreements. The agenda spelled out in the Doha declaration was quite ambitious: it addressed not only traditional trade issues such as tariffs but also new issues such as investment, competition policy and environment. Unfortunately, the breadth of the agenda contributed to disarray in the ensuring negotiations. In hopes of expediting talks, the general council of the WTO subsequently dropped several controversial issues, among them competition policy, but the Doha talks are still deadlocked.

iii. Cancun Ministerial Conference, 2003

Cancun Ministerial conference of 2003 also came after the Doha conference for making follow ups on the co-principles(classification) including transparency, Procedural, fairness, provisions on hard core cartels; and effective ways for handling Voluntary on Competition Laws and policies among WTO members and to clarify in Competition Laws and support in developing Countries. Furthermore, this conference made follow ups of the Doha declaration and clarification on core principles including; transparency, non-discrimination and procedural fairness and provisions on hardcore cartels. However, after all ministerial conferences, there was no explicit consensus on how to go about the issues until the July 2004 decision.

iv. WTO Decision of July 2004

Unfortunately, while in the 2003 Cancun Conference there was no consensus reached and it was the end of it, until there was another conference on July of 2004 where WTO held that it

was no longer a matter of discussion and the failure was occasioned due to some State sensitive matters hence the WTO only had to issue the guidelines which were not binding but just to guide the States on the right way to go. During this time, it's when the general Chancellor of the WTO decided that, competition policies are not a matter of discussion anymore. This decision was reached because, matters concerning competition policies are sensitive discussions because they tend to interfere with the state sovereignty and national security. Unfortunately, no single effort has attracted sufficient persuasion to pass international muster or to gain acceptance as the venue of choice, notwithstanding the foregone efforts. The issue on the Internationalization of the Competition Laws remains under State domestic Laws even the principal of international laws cannot prevail that is to say the basic principle is territorial Laws are the basic key principle in Competition Laws but still there are mutual adjustments of States in Competition Laws in case of cross boarder's conflicts for instance *East African Community Fair competition Act*,[xl] which is used for harmonisation in conflicts between EAC partner states. The US has introduced the best practise in Competition Laws and policies which has three principles in resolving Competition conflicts namely: -

Minimum Contact principal-where the key question here as to whether substantial direct enforceable effect on the domestic market would suffice to justify the application of the domestic Laws? or whether some element of some domestic business conduct would have to be established for competition law to be established?

Principal of reasonableness-this is when one State laws may not be considered reasonable under the Law of another State and if that the case then there would have not been any conflict between the States.

Principal of Balancing State Interest- this is when at all times there must be balancing of State principles.

- **The Organisation for Economic Co-Operation and Development (OECD)**

The Organisation for Economic Co-Operation and Development (OECD) has the primary mission of promoting policies designed to achieve the highest sustainable development and rising standard of living in Member countries while maintaining financial stability and thus contributing to the development of the world economy, contributing to sound economic expansion in Member countries and the expansion of world trade on a multilateral non-

discriminatory basis. In the year 1967 the OECD issued various recommendations for its member states on the treatment they should give restrictive business practices. The effectiveness of such effort may be questioned to the extent said body lacks enforcement capacity, nonetheless, the OECD initiatives constitute step forward in the tackling of international behaviour representing competition issues.[xli]

- **The Efforts of the OECD in Internationalising Competition Regimes**

There are several initiatives that have been catered for by the OECD in its attempts to bring about an international consensus on the competition regime, such initiatives can elaborate hereinafter below, while highlighting several adopted steps which includes;

a. International Antitrust working Group, and a draft International Antitrust Code.
b. The OECD Competition Committee report adopted in 2001 on leniency programs to fight hard core cartels; and,
c. Several conferences and recommendations of OECD's Joint Group on Trade and Competition.

Generally, OECD has a non-binding effect however it encourages the government to tackle anti-competitive practices and to foster market-oriented entities through the world. It also provides a guideline on how to deal with it for example on areas of abuse of dominance and monopoly. The OECD joint groups hold round table discussions with business personnel and other entities, whereby results of such discussions are published to provide guidelines and guidance on this area. The OECD is also a forum for exchange of experiences, and it being a forum requires practitioners to stay in touch with practices from peers and academic studies. It is a forum where the best practices on competition and consumers' welfare can be identified, published and disseminated and be sent to member states for recommendations.

- **The United Nations Conference on Trade and Development (UNCTAD)**

Refers to is a set of multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices which was adopted in 1980 by the United Nations General Assembly (UNGA) The main objective of the UNCTAD set, which is largely based on the *Havana Charter*[xlii], aimed at ensuring that the liberalization of tariffs and non-tariffs barriers pursuant to GATT was not impinged upon by restrictive business practices. Noticeably, the UNCTAD established double standard approach whereas, it first addresses governmental

action by means of its Principles and Rules for states at national, sub-regional and regional levels. On the other hand, it targets private action through its principles and rules for enterprises including transnational corporations in accordance to which firms must refrain from engaging in restrictive business practices.

The adoption of the UNCTAD set, even if not expected to lead to full harmonization of laws, was expected to facilitate the adoption of rules at national and regional level, establish common approaches and converge views which could help in the better understanding of competition issues and set the ground work for co-operation among states in the field. With reference to the 35th UNGA Resolution an intergovernmental group of experts on restrictive business practices was created within the UNCTAD framework which basic purposes are providing a forum for multilateral consultations and discussions, research, addressing matters involving the UNCTAD set and making recommendations to states.

- **Key Areas for Operationalization of UNCTAD**

Basically, UNCTAD as a programme under UN system, it has three main functions, namely;

a. To provide a forum for intergovernmental deliberation. Here, government representatives do meet with experts of consumer and competition matters and the main forum is the Annual meeting called I.G. E's
b. To undertake research, policy and analysis and data collection on issues that raise concern on member states and also works under research partnerships.
c. To provide technical assistance to developing countries to implement recommendations and best practices that results on the two above functions.

- **International Competition Network (ICN)**

Since its establishment in 2001, and building on important work done by the OECD, UNCTAD, WTO and other organisations the ICN has become pre-eminent global force in promoting international cooperation in competition law enforcement and shaping widely accepted international competition policy norms. The organisation's achievements span many areas, including merger review, anti-cartel enforcement, unilateral conduct, competition advocacy, and competition policy implementation. Work products range from recommended practices, case handling and enforcement manuals, reports, legislations. The main objective that led to

the creation of ICN is to ensure significant progress towards more convergence of competition laws.

- **Extra Territoriality and Principles of Public International Law**

International law comes to place when there is interaction between states and there can be interaction between private person and the state where international law principles are as well used. For example; international investment issues in case of dispute the principles used are public international law. The rules are stipulated in the MITs or BITs however if not present, then diplomatic protection is used. The basic principle for competition law jurisdiction is territorial jurisdiction. No state regulates international area based on competition matters because it is more of a state interference of sovereignty, so this area is vacuumed.

Therefore, what is used between states is the so-called mutual adjustments, brought about by national rules between competing parties. For example, the *EAC Competition Law,*[xliii] which demands each EAC partner state to make laws relating to competition matters. *Article 8 (4) of the EAC Treaty,*[xliv] states to the effect that Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of the *EAC Treaty.*[xlv] Thus, when states deviate on mutual adjustments it's when international law principles minimum standards come to place. Including;

i. Minimum Contacts Principle

This principle offers a wide range of connecting factors to be relied upon to establish court's state jurisdiction. The key issue is whether substantial, direct and foreseeable effect on domestic object would suffice to justify the application of domestic competition law or whether some elements of domestic business conduct would have to be established for competitions to be applied. Minimum contact theory comes into place when either or both of the parties seem to be from outside the court's territorial jurisdiction. It is used as a method to establish the court's jurisdiction over the parties to a case by determining their quality and intensity of their contact i.e., services with the forum stated; which is the state where the case has been instituted as it can be seen in *Re Wood Pulp Cartel: A. Ahlstrom Oy and Others v. E.C. Commission (Wood Pulp Case).*[xlvi]

ii. Balancing state interest principle

It is a doctrine or legal theory originated from the decision of US Supreme Court. The principle states that, conflicts of jurisdiction and interests between governments are decided based on the balance of interests between them.

iii. The Principles of Reasonableness and Rationality

It merely means in cases states should not decide through single minded pursuit of their regulatory goal but should exercise restraints. There has to be a room to argue on this reasonableness. The standard of reasonableness is related to another standard of assessing determinations, namely rationality. Depending on the idea of rationality to which reasonableness differs from rationality in various respects. Rationality as optimality that is making the best choices can be opposed to an idea of reasonableness that also covers suboptimal determinations, as long as they result from appropriate efforts of bounded agents. Thus, an economical, administrative or political determination, while being suboptimal (a different choice would have achieved to a higher extent the goals of the decision maker), may still be reasonable, being appropriate or sufficiently good in regards to the epistemic situation in which that determination was adopted.

CHALLENGES ENCOUNTERED IN THE PROCESS OF INTERNATIONALIZING COMPETITION LAWS AND POLICIES

It has been noted that the current status quo of competition enforcement, is coupled with certain trends in international affairs, has generated the following problems with regards to competition law enforcement.[xlvii] Which includes one, competition regulating authorities increasingly target foreign nationals and foreign based companies in their enforcement efforts and increasingly seek access to evidence located abroad. The foregoing is particularly true in the fields of cartel and merger enforcement and secondly conduct is investigated by multiple competition agencies simultaneously, each applying its own substantive laws. The problem from the clashes above on competition led to trends which are from Brunswick, Bangkok Declaration, Global Dialogue and Dynamic Engagement;

In the increasing globalization of business, the increasing proliferation of new competition laws around the world, the increasing acceptance of the principle that foreign conduct may fall

within the scope of a nation's competition law and within the jurisdiction of that nation's courts if that conduct has adverse "effects" on consumers in that country; and the increasing liberalization of government-sponsored trade-barriers, which has had the effect of exposing private sector conduct that frustrates market access by foreign-based competitors.

In an International Aspects of Competition Law which referred parallel enforcement are that matters sensitive to other countries may be affected, and simultaneous parallel investigations run the risk of inconsistent remedies.

The frequency of parallel investigations in the concentration control area is increasing. Because of the proliferation of concentration review controls many concentrations need to be notified to a number of enforcement bodies, each with different notification thresholds, review processes and substantive approval criteria.

There is increasing pressure particularly from the US to apply competition law extraterritorially to resolve problems of market access. The application of US competition law to protect US exporters remains controversial, particularly angles which touch less diplomatic nerves, including positive comity principle.

Moreover, uncoordinated competition enforcement activities from multiple competition authorities addressing the same conduct which allegedly has effects in more than one jurisdiction is ever more frequently zealous. The mentioned problems are not theoretical, as real-life example of the described problems can be seen from the Boeing*/McDonnell Douglas case,*[xlviii] *the WorldCom/Sprint matter,*[xlix] *and the GE/Honeywell affaire*.[1]

Boeing/McDonnell Douglas, the landmark case *Boeing/McDonnell Douglas* has important legal, economic and political ramifications. Both Boeing and McDonnell Douglas were the two remaining U.S. producers of commercial jet aircraft and jointly represented 70% of sales worldwide. Their only competitor was Airbus, a European consortium, which had Spanish, Italian, German and British firms. Hence, the market was very concentrated but could not be qualified as without competition since intense rivalry existed among competitors and each sale is generally big and important. In 1997 Boeing purchased McDonnell Douglas. The reactions of the competition authorities involved US and EU are worth mentioning.

The U.S. Federal Trade Commission determined that McDonnell Douglas was no longer a competitive force in the market and cleared the concentration. In the FTC's opinion, the effect on competition would be negligible since McDonnell Douglas adding to Boeing's high market share had little effect on future sales increase potential.

Also, it was esteemed that banning the deal would have deleterious effects on U.S. security interests. The EC took a different stance. The former Directorate-General found the transaction unlawful under EC law due to the proven facts that it enhanced the dominance of Boeing both on a worldwide and European basis and vested an unfair International Aspects of Competition Law; the fact that Boeing had exclusive long-term supply and maintenance arrangements (for 20 years) with many airline companies would lead to an anticompetitive environment; and the possibility of cross-subsidies would provide Boeing the opportunity to benefit from government aids McDonnell Douglas received for military R&D programs.

In a nutshell, the concern raised by EC authorities was that Airbus might be squeezed out of the market. The EU Merger Control Task Force used its broad jurisdictional authority, particularly the extraterritorial jurisdiction potential which sustained that, as long as the parties fell within their jurisdictional turnover thresholds, the Merger Control Task Force was legitimated to review the concentration.

As a result, it almost blocked the US$ 40 billion deal even though both firms were based in the US and had no productive assets in the European Union! The matter became politicized. Authorities on both sides of the Atlantic alleged that the companies involved were in receipt of illegal subsidies. The result was a destructive theatre of wrangling and questioning the quality of competition analysis in the decisions of each other. The matter almost led to a trade war. However, a deal was struck. Boeing agreed to: waive its right to exclusivity on the supply contracts; license patents derived from defence R&D funding at a reasonable royalty; lastly not to sign additional exclusive deals.

RECOMMENDATIONS

a. **The establishment of the Competition law and policy regime in each state jurisdiction**

The establishment and existence of the Competition law and policy regime is crucial because it acts as a basis of a legal framework when it comes to Competition matters in the country as well as regulate business firms in the market, but every one if not many have its setbacks including non or improper implementation of the given laws due to many factors such as lack of enough funds, luck of enough well trained personnel in the competition field and awareness to the general public.

b. Formulation of board or commission in each state which shall facilitate the existence of a strong competition law regime

The board or commission in each state among other roles shall function to represent the law regime that governs competition in the international aspect of establishing international competition laws.

CONCLUSION

As noted above, due to globalization and trade liberalization, the value of competition and competition law has been recognised. This among other things has led to removal and hindrances of the flow of trade and investment worldwide.

With the challenges, strength (like that of the US) and difficulties in the competition laws and policies in each jurisdiction it has become difficulty in having a so called one (common) international law and policies around the World as even of now some Countries have no competition laws in place to date.

Some have just recently passed it and it is to say the internationalisation of competition laws and policies is of now not easily to be implemented commonly by All the States in The World Internationalisation of Competition Laws and Policies have still a long way to go.

ENDNOTES

[i] The United Nations Conference on Trade and Development (UNCTAD), World Investment Report: Transnational Corporations, Market Structure and Competition, 1997.
[ii] Ibid.
[iii] TEMU, G., (2014) Reflection on Enforcement of Competition Rules in Tanzania, East Africa Law Review, Vol. 41.
[iv] EDUARDO, P. M., (2016) Competition Policy and Trade in the Global Economy: Towards an Integrated Approach, E15 Expert Group on Competition Policy and the Trade System – Policy Options Paper. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.
[v] Fair Competition Act, 2003. Act No. 8 of 2003
[vi] Finance Act 2020. Act No. 18 of 2020.
[vii] Merchandise Marks Act, 1963. Act No. 3 of 1963. [Cap. 85 R.E. 2012].
[viii] Trade and Service Marks, 1986. Act No. 12 of 1986.
[ix] EDUARDO, P. M., (2016) Competition Policy and Trade in the Global Economy: Towards an Integrated Approach, E15 Expert Group on Competition Policy and the Trade System – Policy Options Paper. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.
[x]PETERSMANN, E. U. (2006). Role of Competition Policy in Providing More Equitable Playing Field for Development in Globalizing Markets: Challenge for Governments and Multilateral Organisations. UNCTAD Series on Issues in Competition Law and Policy, United Nations, Geneva Political Economy, Vol.58:3.
[xi] QAQAYA H. and LIPIMELE G., The Effects of Anti-Competitive Business Practices on Developing Countries and their Development Prospects.
[xii] GERBER, D.C, Globalization and competition law: Conflict, Uncertainty and the Promise of Convergence.
[xiii] PATRICK, A.& GAUGAN. Mergers, Acquisitions, And Corporate Restructurings. 2d. Ed. John Wiley and Sons, 1999, Explores the Reasons of The Rationales For Corporate Mergers And Acquisitions As Well As A History Of Several Merger Waves. (Cited By Simon J. Evenett, Alexander Lehmann and Benn Steil, Antitrust Policy in An Evolving Global Marketplace.
[xiv] PATRICK, A.& GAUGAN. Mergers, Acquisitions, And Corporate Restructurings. 2d. Ed. John Wiley and Sons, 1999, Explores the Reasons of The Rationales For Corporate Mergers And Acquisitions As Well As A History Of Several Merger Waves. (Cited By Simon J. Evenett, Alexander Lehmann and Benn Steil, Antitrust Policy in An Evolving Global Marketplace.
[xv] *Ibid*
[xvi] SYKES, A.O., (2015), Product Standards for Internationally Integrated Goods Markets. The Brookings Institution, Washington D.C.
[xvii]BRUSICK, P., UNCTAD's Role in Promoting Multilateral Co-operation on Competition Law and Policy. World Competition, vol. 24, No. 1, 2001, at 32.
[xviii] Bangkok Declaration, Global Dialogue and Dynamic Engagement, para. 4
[xix] Havana Charter for an International Trade Organization, Mar. 24, 1948 (United Nations Conference on Trade and Employment, Havana, Cuba), reprinted in U.S. Dep't St. Commercial Policy Series 113 (1947) (Dep't St. Publication 3117).
[xx] Havana Charter for an International Trade Organization, Mar. 24, 1948 (United Nations Conference on Trade and Employment, Havana, Cuba), reprinted in U.S. Dep't St. Commercial Policy Series 113 (1947) (Dep't St. Publication 3117).
[xxi] Havana Charter for an International Trade Organization, Mar. 24, 1948 (United Nations Conference on Trade and Employment, Havana, Cuba), reprinted in U.S. Dep't St. Commercial Policy Series 113 (1947) (Dep't St. Publication 3117).
[xxii] *Ibid.*
[xxiii] BEGLINGER, T.C., & WESSEL, G. (2011), Essential EU Competition Law in Charts. The Regulation of the State in Competitive Markets in the EU, Minneapolis.
[xxiv] Havana Charter for an International Trade Organization, Mar. 24, 1948 (United Nations Conference on Trade and Employment, Havana, Cuba), reprinted in U.S. Dep't St. Commercial Policy Series 113 (1947) (Dep't St. Publication 3117).
[xxv] The GATT Director General.

[xxvi] Havana Charter for an International Trade Organization, Mar. 24, 1948 (United Nations Conference on Trade and Employment, Havana, Cuba), reprinted in U.S. Dep't St. Commercial Policy Series 113 (1947) (Dep't St. Publication 3117).
[xxvii] THOMAS, P., the World Trade Organization: Law, Practice and Policy, the Oxford International Law Library, Oxford University Press, 2006.
[xxviii] Art. 66 of the Formative Treaty of the European Coal and Steal Community between France, West Germany, Belgium, Holland, Italy and Luxembourg, 1951.
[xxix] Treaty of Rome, or Treaty establishing the European Economic Community, of March 1957.
[xxx] American Bar Association, Section of Antitrust Law, Special Committee on International Antitrust Report 294 (1991).
[xxxi] Publ. L. 103-438, 108 Stat. 4597
[xxxii] Trade Reg. Rpt. (CCH) 13,509). Available at www.usdoj.gov/atr/icpac/5145.htm
[xxxiii] OECD (2020), Using Market Studies to Tackle Emerging Competition Issues.
[xxxiv] Bangkok Declaration, Global Dialogue and Dynamic Engagement, para. 4.)
[xxxv] The latest version, entitled Model Law on Competition, is available in document TD/RBP.5/7 at UNCTAD's competition website
[xxxvi] (International Antitrust Code Working Group Proposed Draft 1993), published and released on July 10, 1993, 64 Antitrust & Trade Reg. Rep. (BNA) No. 1628 (Aug. 19, 1993) (Special Supplementt
[xxxvii] Bangkok Declaration, Global Dialogue and Dynamic Engagement, para. 4.)
[xxxviii] Havana Charter for an International Trade Organization, Mar. 24, 1948 (United Nations Conference on Trade and Employment, Havana, Cuba), reprinted in U.S. Dep't St. Commercial Policy Series 113 (1947) (Dep't St. Publication 3117).
[xxxix] WTO Annual Report 1997. (1997) Vol 1, at 32.
[xl] The East African Community Competition Act, 2006.
[xli] Organization for Economic Co-operation and Development (OECD) (2008), The OECD Organization for Economic Co-operation and Development. Available at https://www.oecd.org/newsroom/34011915.pdf.
[xlii] Havana Charter for an International Trade Organization, Mar. 24, 1948 (United Nations Conference on Trade and Employment, Havana, Cuba), reprinted in U.S. Dep't St. Commercial Policy Series 113 (1947) (Dep't St. Publication 3117).
[xliii] The East African Community Competition Act, 2006.
[xliv] Art. 8(4) Treaty for the Establishment of the East African Community, 1999, art. 77.
[xlv] Treaty for the Establishment of the East African Community, 1999, art. 77.
[xlvi] 4 Comm. Mkt. L. R. 901 (1988)
[xlvii] FULLERTON, L., & MAZARD, C.C., International Antitrust Co-Operation Agreements. World Competition, Vol. 24, No. 3, 2001, Pgs. 410-412.
[xlviii] Case No IV/M.877.
[xlix] Case No COMP/M.1741-MCI.
[l] REV. 1029, 1031-32 (1998.