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MULTILATERAL TRADE AGREEMENTS AND THE HARMONIZATION OF COMPETITION LAW IN LATIN AMERICAN AND THE CARIBBEAN: A PATH TO CONVERGENCE

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1. Introduction

Standardization of legal systems (as a mean for harmonization) has been studied in the literature, mostly related to financial, stock markets and antitrust regulation, leading usually to conclusions highlighting its advantages[1] for liberalization, free trade and competition[2]. This short paper will show how the process of harmonization of competition law has taken place in Latin America and the Caribbean (LATCA) through international instruments an international cooperation.

International trade reforms opened the path for competition law in the region as such ideas came to LATCA as a response to market liberalization.[3] New liberalization policies came as a set of structural changes to the law, aimed to ease the transformation of the legal system from a protectionist model to open economies, prone to the international exchange, with stricter rules for public finance and the administration of the State.[4] This new environment to open

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[1] Some authors say that it is certainly more convenient to be able to use the same mobile phone in different countries, buy a wireless Internet link that can be sold all over the world, it will generate more profits and presumably more jobs.

[2] See ROBERT PAHRE, LEADING QUESTIONS: HOW HEGEMONY AFFECTS THE INTERNATIONAL POLITICAL ECONOMY (U. Mich., Press., 1999).

[3] R Dornbusch, 'The Case for Trade Liberalization in Developing Countries' [American Economic Association] 6 The Journal of Economic Perspectives 69, 83. See DA Chalmers and CH Robinson, 'Why Power Contenders Choose Liberalization: Perspectives from South America' (1982) 26 International Studies Quarterly 3 and E Pantojas-Garcia, 'Trade Liberalization and Peripheral Postindustrialization in the Caribbean' (2001) 43 Latin American Politics and Society 57, 60-63

[4] I De León, *Latin American Competition Law and Policy: a Policy in Search of Identity* (International competition law series, Kluwer Law International, The Hague London 2001), 21-24. De Leon, citing Yergin and Stanislaw, makes a compelling argument for the causes of liberalization in South America including as a driver the presence, and their later work in the government, of several Latin American students in faculties of law and economics in the US such as Harvard, Yale, MIT and Chicago. According to De Leon, these technocrats contributed to the 'depth of the institutional turnaround brought about by *apertura*'. See: D Yergin and J Stanislaw, *Commanding Heights* (Touchstone, New York 1999), 240 and De León, *Latin American Competition Law and Policy: a Policy in Search of Identity*, 22. De Leon also cites the Washington Consensus as one of the drivers of the new trade policies in Latin America. See De León, *Latin American Competition Law and Policy: a Policy in Search of Identity*, 24-26. Peña also finds that the Washington

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international trade, or *apertura*, aided the consolidation of the regional trade agreements signed during the 1960s, which imposed the obligation on their member States to pass rules and regulations aimed to uniform legal institutions and smooth intra-regional trade.[5]

The re-launched regional communities, the Caribbean Community, the Andean Community and the Central American Common Market, encompassed almost all the countries in the region and helped implementing the pillars of free trade alongside with supranational legal and institutional organizations that complemented the structure of the legal systems in each of the jurisdictions involved.[6] This fact characterized LATCA's trade policy, since, in addition to changes in domestic regulation of trade, the community treaties aimed to establish a set of institutional principles to be followed by the States and to achieve greater harmonization of their legal regimes.[7] In this process of harmonization, competition law and policy arose as one of the structural pillars whose general end was to deregulate industries and increase the intensity of competition in local markets.[8] Regional competition policy, then, was considered as a tool to promote regional trade, standardize domestic legislation and prevent that the benefits of trade be lessened by private undertaking's behaviour.[9]

First we will shortly explain the rationale for harmonization of law and the need of convergence of global competition laws. Then we will turn to the international trade communities in the region of Latin America and the Caribben and show how they have implemented competition law in the regional and the local level. After reviewing such processes we will conclude.

2. Convergence and Global Competition Law

Convergence has been an interesting suggestion in *law and economics* literature[10] from a long time but the convergence discourse[11] is regularly proposed by tending to *expand common law*

Consensus period played a definitive role in the adoption of competition law in Latin America, despite its current influence is meaningless. See J Peña, 'Competition Policies in Latin America post Washington consensus' in P Marsden (ed) *Handbook of Research in Trans-Atlantic Antitrust* (Edward Elgar, Cheltenham 2006), 738, 752-3.

[5] See JM Salazar-Xirinachs and M Robert, *Toward Free Trade in the Americas* (Organization of American States; Brookings Institution Press, Washington, D.C. 2001) and M Rodríguez Mendoza, 'Dealing with Latin America's New Regionalism' in M Rodríguez Mendoza, P Low and B Kotschwar (eds), *Trade Rules in the Making: Challenges in Regional and Multilaterial Negotiations* (Organization of American States: Brookings Institution Press, Washington, D.C. 1999)

[6] To date some countries as Dominican Republic and Chile, have not agreed to join these regional communities, and have opted to develop a different commercial strategy based in bilateral free trade agreements.

[7] First, 'Theories of Harmonization: a Cautionary Tale', 36-37

[8] The Treaty of Chaguaramas for the Caribbean Community and the Agreement of Cartagena in the Andean Community, for example, had clear goals regarding deregulation and gradual implementation of competition in regulated industries. See J Tavares de Araujo Jr., 'Competition Policy' in JM Salazar X and M Robert (eds), *Toward Free Trade in the Americas* (OAS, Brookings Institution Press, Washington, D.C. 2001) and De León, 'A Proposal for a New Competition Policy in Latin America'

[9] For example Mercosur's *Decisión* 21-1994 set the minimum principles for Competition legislation to Mercosur's member States and Article 164 of the Treaty of Chaguaramas defined the obligation of Caricom's member States to harmonize their legislation to the standard defined by Caricom's Protocol VIII.

[10] *See* LARRY CATA BACKER, HARMONIZING LAW IN AN ERA OF GLOBALIZATION: CONVERGENCE, DIVERGENCE AND RESISTANCE (Carolina Press, 2005) (); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (8 ed. 1998) (supporting that the common law is more efficient than the civil law and therefore, the legal systems will converge to the common law institutional system); See Mark J. Roe *Chaos and Evolution in Law and Economics*, 109 *Harvard L. Rev.*, 641 (1996) (evaluating the classical paradigm of evolution of institutions and efficiency, and including chaos theory and mostly path dependency).

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regimes[12]. In competition policy *convergence* refers to reaching "consistency in antitrust law, policy, processes and economic theory across jurisdictional lines"[13]. The reasons are several for the recurrence of a transnational policy and the global antitrust law has increased in the last years[14], but most policymakers and legal economists argue for consistency in procedures, fairness in legal application and reduction of transaction costs[15].

Some international organizations have recommended the initiation of "national efforts" to implement a set of *best practices* in order to achieve those ends, increase social wealth and guarantee consumer sovereignty[16]. Some scholars have suggested that such process of convergence has started[17] in the competition policy of the UE and the US since the biggest market transactions have been developed among corporations based in such geographical locations. Antitrust law deals with competition. But, the aim of international competition law and policy is to ease antitrust legal regimes competition. Latin America and the Caribbean countries have been in the middle of such debate.

3. Regional Approaches

The process of harmonization in LATCA regional communities has had different approaches. As will be shown below, such approaches had different flows that show the distinct processes of the region. The Caribbean Community (hereinafter Caricom) harmonized its law by uploading Jamaica's law whereas the Andean Community of States (hereinafter CAS) to achieve harmonization used supranational law generally immediately applicable to member countries. The Central American Common Market economy members (hereinafter CACM) used an informal process of harmonization determined by the uniform transplantation of a peer's regime and the

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[11] Edward T. Swaine, The Local Law of Global Antitrust, 43 William & Mary L. Rev. 627, 641-46 (2001). William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 Brook. J. Int'l L. 403, 403-08 (1997) (describing creation of competition policy systems as element of law reform in transition economies). Timothy J. Muris, *Competition Agencies in a Market-Based Global Economy* (Brussels, Belgium, July 23, 2002) (Prepared remarks at the Annual Lecture of the European Foreign Affairs Review), *available at* http://www.ftc.gov/speeches/muris/020723/brussels. EDUARD M GRAHAM & J. DAVID RICHARDSON, COMPETITION POLICIES FOR THE GLOBAL ECONOMY (1997).

[12] The production of economic theory and legal theory are usually leaded by common law countries. *See* Chistoph Kern. Between Formalization and Simplification of Justice. (2007) On file with the author.

[13] See Einer Elhauge & Damien Geradin, GLOBAL ANTITRUST LAW AND ECONOMICS 2 (unpublished manuscript -on file with the authors).

[14] As well as the number of mergers of big transnational corporations as Miller and Bavaria, Procter and Gable and Gillette, among many other.

[15] See Edward T. Swaine, The Local Law of Global Antitrust, 43 William & Mary L. Rev. 627, 641-46 (2001). William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 Brook. J. Int'l L. 403, 403-08 (1997) (describing creation of competition policy systems as element of law reform in transition economies). Timothy J. Muris, *Competition Agencies in a Market-Based Global Economy* (Brussels, Belgium, July 23, 2002) (Prepared remarks at the Annual Lecture of the European Foreign Affairs Review), *available at* http://www.ftc.gov/speeches/muris/020723/brussels.

[16] ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD]. *Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations* (2005), OECD, *Recommendation of the Council concerning merger review* (2005); OECD, *Recommendation of the Council concerning structural separation in regulated industries* (2001); OECD, *Recommendation of the Council concerning effective action against hard core cartels* (1998); OECD, *Recommendation of the Council concerning co-operation between member countries on anticompetitive practices affecting international trade* (1995).

[17] Eleanor M. Fox, *US and EU Competition Law: A Comparison*, *in* GLOBAL COMPETITION POLICY edited by J. David Richardson and Edward M. Graham (1997).

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Common Market of the South (hereinafter Mercosur) using a negotiated set of Protocols to be implemented in each member country.

A. Article 170 and the Implementation of Jamaican Competition Law in the Caribbean

Caricom's harmonization process emerged implementing a member country's competition law as the Region's law. Article 170 of the Chaguaramas Treaty[18] aimed to create a standardized policy in order to improve trade among member states[19] and thus ordered States to uniform their competition laws. In attaining the purpose of standardization Caricom countries signed Protocol VIII.[20] Protocol VIII was inspired by Jamaica's Fair Competition Act,[21] the region's oldest competition regime. Jamaica's Act was suitable for such purpose as it was implemented in the nineties to open the economy to the new trade regulation and liberalization, necessary to discipline market participants in the newly formed market.[22]

The origins of Jamaican competition law, however, contrast with the genesis of Barbadian competition law, which is a response to the Treaty's article 170 regulations that ordered to 'take the necessary legislative measures to ensure consistency and compliance with the rules of competition and provide penalties for anti-competitive business conduct'.[23] Then in order to comply with such mandate, Parliament passed the Fair Competition Act,[24] using Jamaican and Caricom's protocol VIII, also the Fair Trading Commission was established by transforming the Public Utilities Board.[25] Trinidad's Fair Trading Act was enacted in 2006 with Act 13,[26] according to section 49 it was enacted to comply with the mandates of the Treaty.[27]

The Caribbean harmonization strategy departed from the transplantation of Jamaican competition law to the Regional regulation and then from the Region's competition Protocol to member countries domestic legislation. It must be clarifies, however, that the aims of each of

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[18] TREATY ESTABLISHING THE CARIBBEAN COMMUNITY, (Chaguaramas, 4 July, 1973), Preamble

[19] Ibid.,Art.170

[20] PROTOCOL VIII: PROTOCOL AMENDING THE TREATY ESTABLISHING THE CARIBBEAN COMMUNITY COMPETITION POLICY, CONSUMER PROTECTION, DUMPING AND SUBSIDES, (Basseterre, St. Kitts and Nevis, 14 March, 2000)

[21] FAIR COMPETITION ACT, 1993, (The Jamaica Gazette, Jamaica)

[22] The origins of this legislation date back to 1991 when the Government and scholars proposed the need for the adoption of a competition law regime. These proposals lead to the publication of the *Green Paper on the Proposals for a 'Competition Act'* where was highlighted the need to adopt a competition Act as a pillar of the new economic policy to be implemented in the island. The paper said: "the government of Jamaica had... articulated its policy objectives to foster, create and enhance an institutional framework which seeks to transform the country into a Market driven export-led economy... Competition legislation is central to those policy initiatives and in the promotion of competition policies'. See Government of Jamaica, *Green Paper on the Proposals for a 'Competition Act'* (Parliament of Jamaica, 1991), cited in D McKoy, *'Antitrust Law in Jamaica: The Fair Competition Act of 1993* [2005] 5 Journal of Transnational Law and Policy 183, 184

[23] TREATY ESTABLISHING THE CARIBBEAN COMMUNITY, s170(b)

[24] FAIR COMPETITION ACT, 2002, (The Laws of Barbados, Barbados)

[25] FAIR TRADING COMMISSION ACT, 2002, (The Laws of Barbados, Barbados)

[26] FAIR TRADING ACT, 2006, (Parliament of the Republic, Trinidad and Tobago)

[27] As the other Caricom states analyzed, T&T are also two small islands, whose economy has a strong component of services but that, within the region, is the most vital trading country, as it exports the largest amount of tradable goods abroad and in the region, and also imports, from intra-regional and abroad sources. See AV Smith-Hillman, *First a Glimmer, Now a ...? The Prospect of a Caribbean Competition Policy* 40 Journal of World Trade 405, 414

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these acts are different, and therefore some of the disparities in provisions are expected. Jamaica implemented its competition law as a tool for development, due to its uncompetitive markets, and aimed to attain international trade; Barbados and Trinidad, on the other hand, established their competition laws once certain level of economic development has been attained, since an international competition culture was already in place regardless of their strong tendencies to concentrated markets.[28]

B. From Decision 285 to the Fortaleza Protocol: Supranational Law and Agreed Implementation in CAS and Mercosur

The enactment of harmonized rules of competition in the Andean Community and Mercosur was different from the recent harmonization in Caricom's Law. Both the ACS and Mercosur have as an aim the economic integration of its members.[29] But the strategies used to implement such goal differ. CAS used supranational legal and institutional organizations that complemented the institutions in each of the national jurisdictions involved.[30] On the other hand, the process of harmonization of competition law in Mercosur was structured using multilateral decisions and protocols enacted by the Common Market Commission.[31]

CAS' supranational approach was structured by the Andean Parliament, which passed Decision 230 during 1987 as the first set of measures to impede certain practices that distorted the process of regional competition.[32] These practices mainly condemned price distortions and restrictions of supplies in the Region, and were not a proper set of prohibitions of anticompetitive behaviour. A few years later, Decision 285-1991[33] repealed Decision 230 and defined a set of minimum standards of competition law in the region, establishing a system of competition law for infringements in the Community and an institutional framework to cope with such investigations. As a result of such effort, in the early nineties most of CAS countries developed their own systems, some with much more restrictions than those defined by Decision 285.[34]

The later process led all the Andean Community members but Ecuador to enact a national competition laws. Peruvian and Venezuelan competition laws were enacted in early 1990s. In Peru Legislative Decree 701[35] approved the general regime for the promotion of competition and Act 25868[36] created the National Institute for the Defence of Competition (hereinafter Indecopi).[37] Colombia used the binary structure of Decision 285 implemented by Decree 2153 of

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[28] T Stewart, AN EMPIRICAL EXAMINATION OF COMPETITION ISSUES IN SELECTED CARICOM COUNTRIES: TOWARDS POLICY FORMULATION (Sir Arthur Lewis Institute of Social and Economic Studies, St. Augustine, Trinidad 2004),41

[29] ACUERDO DE CARTAGENA, (Cartagena, 26 May, 1969), Preamble

[30] Ibid.,

[31] TRATADO DE ASUNCIÓN, (Asunción, Paraguay, 26 March, 1991)

[32] DECISIÓN 230, 1987, (Gaceta Oficial, Acuerdo de Cartagena),Art.1.

[33] DECISIÓN 285, 1991, (Gaceta Oficial, Acuerdo de Cartagena)

[34] Decision 285 defined also a general prohibition and a set of prohibitions for anticompetitive agreements and abuse of dominance. See Ibid., Arts.5-7

[35] DECRETO LEGISLATIVO 701, 1991, (Diario Oficial, Peru)

[36] DECRETO LEY 25868, 1992, (Diario Oficial, Peru)

[37] See Decisión 285-1991

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1992.[38] Venezuela enacted its competition regime in 1992, with the Promotion and Protection of Free Competition Act.[39] Regarding Bolivia and Ecuador have the poorest legislative development. Bolivia's competition law was enacted in 2008, with Decree 29519,[40] which assigned the Superintendency of Enterprises as competition authority. Ecuador has not enacted a national competition law yet. However, it has as 'suppletive' competition legislation the Andean Community's Decision 608[41] since Decision 616 of 2005 ordered that Decision 608 may remain as a default rule until competition legislation is enacted by the country.[42]

On the other hand, the process of harmonization in Mercosur went ahead with the Treaty of Asuncion and the Ouro Preto Protocol[43] which guided the consolidation of the common market. The goals of the Treaty required common legal instruments and deep institutional reforms in order to achieve uniformity of law and free circulation of goods and services.[44] Article 4 of the Treaty of Asuncion obliged States to develop a common policy and rules of competition[45] and such mandate was consolidated with the Fortaleza Protocol[46] where the member countries adopted the regulation of competition for the community[47] and used as a set of minimum principles for domestic law.[48] And all these decisions and protocols constitute the institutional arrangement of Mercosur aimed to guarantee 'free access to market and the equal distribution of the benefits of the process of economic integration'.[49]

C. Soft-harmonization of Competition Law in the Central American Common Market (CACM)

The CACM is the oldest free trade community in the region, but the least developed. The Multilateral Treaty on Free Trade and the Central American Economic Integration[50] in 1958 and the Treaty of Managua[51] in 1960, provided the region with the first instrument of economic integration between Central American Countries.[52] Despite efforts to attain integration, only in 1993 the Central American countries amended the Treaty of the CACM[53] and, by means of the

[38] DECRETO 2153, 1992, (Diario Oficial, Colombia)

[39] LEY PARA PROMOVER Y PROTEGER EL EJERCICIO DE LA LIBRE COMPETENCIA, 1992, (Diario Oficial, Venezuela)

[40] DECRETO SUPREMO 29519, 2008, (Gaceta Oficial, Bolivia)

[41] See Decisión 608

[42] DECISIÓN 616, 2005, (Gaceta Oficial, Comunidad Andina), Art.1-2

[43] PROTOCOLO DE OURO PRETO, (Ouro Preto, Brazil, 17 December, 1994)

[44] J Tavares de Araujo Jr. and L Tineo, *The Harmonization of Competition Policies among Mercosur Countries* (2004) 24 Brookling Journal of International Law 441

[45] Tratado de Asunción, Art.4

[46] PROTOCOLO DE DEFENSA DE LA COMPETENCIA, (Fortaleza, Brazil, 17 December, 1996)

[47] Ibid., Art.1

[48] Ibid., Art.1

[49] PDC, preamble

[50] CONVENIO DE TEGUCIGALPA, (Tegucigalpa, 10 June, 1958)

[51] TRATADO DE MANAGUA, (Managua, 13 December, 1960)

[52] PROTOCOLO DE SAN JOSÉ, (San José, Costa Rica, 23 July, 1962)

[53] PROTOCOLO DE GUATEMALA, (Ciudad de Guatemala, 29 October, 1992)

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Protocol of Guatemala,[54] modified the preferences and institutions to hasten the economic integration of Central America.

The institutional reform in the Protocol of Guatemala established a new set of regional bodies including a Parliament and a Court of Justice[55] but deeper institutional and organizational frameworks have yet to be established. One of those institutional frameworks not yet enacted is competition law. Article 25 of the Guatemala Protocol[56] imposed on members States the obligation to pass and to put in place uniform rules for the defence of competition. Member countries, however, have individually developed their regimes barely transplanting Costa Rican law. Costa Rica established its competition regulation in the nineties[57] following the Mexican model. Panama also enacted its first competition statute in 1996[58] and both, Costa Rica and Panama, reviewed their legislation during the period in which competition legislation in other countries of the CACM was enacted. Nicaragua,[59] Honduras[60] and El Salvador[61] enacted their competition laws during such period and have started implementing their legislation.

In spite of the fact that Article 25 of the Guatemala Protocol did not set a formal community guideline for Central American countries, the CACM's Secretariat established the Working Group on Competition Policy for Central American Integration[62] in 'charge of executing the first phase of a regional strategy on Central America based on the goals stated on the Guatemala Protocol'.[63] This initiative has had as role to define concurrent policies in competition legislation and interpretation and has allowed CACM countries to converge in the enactment of their laws.

4. Conclusion

As can be seen in the above paragraphs trade communities in Latin America and the Caribbean (LATCA) have played an important role in the process of enactment and implementation of LATCA's Competition Law and that each community's approach to uniform domestic laws was different in deepness and transplantation flow. The literature has stated that not only trade policy[64] but also legal origins,[65] and markets size[66] have the most significant weight

[54] Ibid.

[55] Ibid.

[56] Ibid, Art.25

[57] LEY 7472, 1994, (Asamblea Legislativa, Costa Rica); DECRETO EJECUTIVO 25234, 1994, (Diario Oficial, Costa Rica); DECRETO 30267, 2002, (Diario Oficial, Costa Rica). The main act has been reformed by several pieces of regulation as Ley 7623 de 1996, Ley 7854 de 1998, Ley 8343 de 2002 and Ley 8591 de 2007.

[58] LEY 29, 1996, (Gaceta Oficial, Panama)

[59] LEY 601 de 2001, 2001, (Gaceta Oficial, El Salvador)

[60] DECRETO 357, 2005, (La Gaceta, Honduras)

[61] DECRETO LEGISLATIVO 436, 2007, (Diario Oficial, El Salvador)

[62] V Velásquez and others, *The Working Group on Competition Policy of the Central American Integration* (2008) 1 Central American Competition Bulletin 1, 1

[63] Ibid., 2

[64] See S Miroudot, E Pinali and N Sauter, *The Impact of Pro-Competitive Reforms on Trade in Developing Countries* (OECD, Paris 2007); H First, 'Theories of Harmonization: a Cautionary Tale' in H Ullrich, W Fikentscher and U Immenga (eds), *Comparative Competition Law: Approaching an International System of Antitrust Law* (1. Aufl. edn, Proceedings of the Workshop, Bruges, College of Europe, July 3-5, 1997 Nomos, Baden-Baden 1998); GB Doern and S Wilks (eds), *Comparative Competition Policy: National Institutions in a Global Market* (Clarendon Press, Oxford 1996)

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on the shape of competition law. Therefore, it is necessary to continue and ask: how LATCA countries have designed their competition law regimes? What are the enforcement systems? Which are the characters and structural design similarities in these countries? Which is the influence of international economic law, market size and legal origins on competition law structures?

[65] See R La Porta, F Lopez-de-Silanes and A Shleifer, 'Economic Consequences of Legal Origins' (2008) 46 Journal of Economic Literature 285; C Lee, *Legal Traditions and Competition Policy* (Institute for Development Policy and Managment, University of Manchester, Manchester 2004); S Djankov and others, 'The New Comparative Economics' (2003) 31 *Journal of Comparative Economics* 595

[66] See M Gal, *Size does Matter: Competition Policy in Small States* (Fair Trading Commission, St. Michael, Barbados 2006) and T Stewart, Is Flexibility Needed When Designing Competition Law for Small Open Economies? A View from the Caribbean' (2004) *Journal of World Trade* 725