GEPLAC ACTIVITIES

The New Competition Policy in Georgia

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> "If the EU is to follow through on its pledge to promote democratic good-governance in a difficult world, then Georgia must be a priority..."[1]

1. Introduction

The present article is based on the research and conclusions reached by the author during his implementation of the EU funded project "Advice on Legislative Reform in the Area of Competition Legislation" managed by GEPLAC, Phase V, on the Law on Free Trade and Competition, No. 1550-Is, as adopted by the Georgian Parliament on 3 June 2005 (the New Competition Law or the Law on Competition).

After the Rose Revolution, national authorities adopted the new competition law with the main effect of this programmatic act being to create a competition-law-free country; that is, in the main, with the exception of the general prohibition of state aids or subsidies. This result is achieved through its Article 16 that derogates all previously adopted rules in the field of competition. We will attempt to prove that the new legislation may not only damage the national consumer but also create mistrust of those nations and supranational organisations that unconditionally welcome Georgia as an equal partner in the globalised markets at the international level.

We will focus on the Partnership and Co-operation Agreement entered into with the European Communities and their Member States[2] (PCA) on the competition rules contained in legal instruments of the World Trade Organisation (WTO) and on the soft rules enshrined in the United Nations' or in the United Nations' Conference on Trade and Development's (UN and UNCTAD) efforts to tackle this area of law notably from the perspective of developing countries.

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[1] *Lynch*, Why Georgia Matters, Chaillot Paper No. 86, February 2006, 9-10. This booklet can also be downloaded from: http://www.iss-eu.org/chaillot/chai86.pdf.

[2] For a more detailed presentation of the PCA, see the Guide to the Implementation of the Partnership and Co-operation Agreement between Georgia and the European Communities and its Member States. The work can be downloaded from: http://www.geplac.org/publicat/pca/pca_guide_eng.pdf.

2. The Rationale behind Competition Law and Policy

Numerous articles and books discuss in detail the advantages and disadvantages of competition law and policy. It would be preposterous to give a full overview of the theories sustaining the need for competition law and policy in a market economy. We will simply list some of the basic general ideas supporting the adoption of competition law and policy in a market-oriented economy, as follows:

– the benefits of economic competition are lower prices, a wider choice and better quality of products and a greater efficiency in the allocation of resources,
– products and services can be offered at the lowest cost possible, thereby improving the productive efficiency and
– economic competition fosters creativity and technical development.

At the end of the 20th century, many countries chose to move away from the monopoly-oriented State planning system towards a market economy by means of reforming their national economic structures and the legal and administrative environment. The transition process has been very successful in some instances – such as the ten new Member States of the European Union which are former non-market economies – whilst other countries have encountered profound problems in detaching themselves from the past. In such countries, economic competition remains virtually non-existent and the population has very limited rights to prosper in a tolerant and non-interventionist environment.

2.1 The Georgian Constitution

The Georgian Constitution was adopted on 24 August 1995 and amended in February 2004.[3] In short, this is the first liberal Constitution in force in Georgia after the demise of the Soviet Union.

The primacy of international law is clearly regulated in Article 6(2) of the Georgian Constitution.[4] The required conformity of international treaties with the national Constitution certainly deserves some reflection for foreign countries and organisation entering into agreements with Georgia. For the sake of the present article, however, we are not further considering issues related thereto.

Pursuant to Article 30(2) of the Constitution, "[t]he State shall be bound to promote the development of free entrepreneurial activity and competition. Monopolistic activity shall be prohibited except for the cases permitted by law. The rights of consumers shall be protected by law".

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[3] An English translation of the Georgian Constitution can be downloaded from the website of the Venice Commission Council of Europe: http//www.venice.coe.int/docs/2004/CDL(2004)041-e.pdf, or http://www.parliament.ge/files/68_1944_216422_konst.pdf.

[4] Article 6(2) of the Georgian Constitution as amended by the Constitutional Law of Georgia of 30 March 2001: "The legislation of Georgia shall correspond to universally recognised principles and rules of international law. An international treaty or agreement of Georgia unless it contradicts the Constitution of Georgia, the Constitutional Agreement, shall take precedence over domestic normative acts".

It goes without saying that this constitutional provision required effective legal reforms in a newly independent state which was formally created after the Soviet Union dissolved into 15 Newly Independent States (NIS) on 25 December 1991. To this effect, the European Commission and other international donor organisations provided the Georgian authorities with technical assistance; the result of these international efforts is the "old competition legislation of Georgia"; that is, the set of laws and decrees abrogated according to Article 16 of the New Competition Law.

2.2 The Partnership and Co-operation Agreement

The nature of Partnership and Co-operation Agreements (PCA) is a matter in which the European Union has invested considerable efforts to define. Partnership and Co-operation Agreements contain definitively the fundamental trade component that feeds the rationale for any free-trade area[5] in the world. In addition, the PCAs also contain many other components such as the political dialogue, co-operation in the area of Human Rights or co-operation against international terrorism that certainly exceed standard free trade agreements. This is why PCAs are usually described as mixed agreements.

For the sake of this article, only the provisions concerning competition law and policy will be discussed.

Before commenting on the provision in the PCA specifically addressing competition, however, it is worth recalling that PCA Article 2 states that "respect for ... market economy principles underpin the internal and external policies of the parties and constitute essential elements of partnership and of this Agreement".

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[5] Free-trade areas are regulated in the GATT, Article XXIV as follows: "(4) The Contracting Parties recognise the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognise that the purpose of a customs union or a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other Contracting Parties with such territories.
(5) Accordingly, the provisions of this Agreement shall not prevent, as between the territories of Contracting Parties, the formation of a customs union or of a free-trade area; provided that:
...
(b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of Contracting Parties not included in such areas or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement, as the case may be; and ...
(8) For the purpose of this Agreement:
(b) a free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all trade between the constituent territories in products originating in such territories".

Article 13 of the PCA imposes market economy pricing for trade in goods.

This is to say that the EU authorities, when negotiating and entering into a PCA with Georgia, relied on the country's unconditional commitment to pursuing the transition process to a market economy as a process which could only be expected to be in line with generally accepted strategies.

As has been repeatedly stated in the doctrine, the main objective of the competition clause in Partnership and Co-operation Agreements is the creation of a level playing field for businesses on both sides in the future free-trade areas. Obviously, the EU intends to prevent the appearance of any market failure due to conflicting rules and practices applicable to economic configuration of the market that is feasible for private entities. It would be unthinkable that the European drift towards assisting development in former Communist countries and in the Mediterranean region is pursued when the basic rules applicable to competitors do not complement each other. The irregularities that would become available to infringe upon EU rules would bring down the advantages that could result from a partial co-operation. The competition clause, therefore, has become a standard provision in all PCAs and the European Commission has been actively promoting the approximation of national rules to EU principles and their adequate enforcement through technical assistance projects organised and implemented by well-trained officials.

It is unquestionable – not only for the European Union but for both parties – that strengthening economic links depends to a large extent on the approximation of the Georgian legislation to that of the EU and making it increasingly compatible.

The terms of PCA Article 43 state clearly:

"(1) The Parties recognise that an important condition for strengthening the economic links between Georgia and the Community is the approximation of Georgia's existing and future legislation to that of the Community. Georgia shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community.

(2) The approximation of laws shall extend to the following areas in particular: ... rules on competition..."

Whilst it is true that Article 43(1) simply contains a "best efforts" clause,[6] the European Commission has acquired extended experience in framing legislative and administrative reform processes in many countries around the world. It should be recognised that the successful enlargement of the European Union, which came into force on 1 May 2004, hinged on the previous approximation and harmonisation of the New Member States' legislation to that of the EU. In the end, such processes are always conditioned by the

[6] See Guide to the Implementation of the Partnership and Co-operation Agreement between Georgia and the European Communities, and their Member States, GEPLAC, page 98. This document can be downloaded from: http://www.geplac.org/publicat/pca/pca_guide_eng.pdf.

political commitment in the recipient country but the know-how acquired by the European Commission in the reform processes cannot be denied. The provisions calling for a political dialogue between Georgia and the European Community could have been invoked before taking the dramatic decision to suppress a whole set of rules in a legal system. The answer would have certainly advised the Georgian authorities to review their move.

On the other hand, it would be radically wrong to conclude that the approximation of laws can be initiated, undertaken or completed by abrogating most of the existing rules in a given field of law. The European Community is prone to giving financial support for technical assistance projects aiming at improving the Georgian legal system and, more precisely, in the field of competition law.[7] It is quite unlikely, however, that the European Commission will wholeheartedly approve the suppression of relevant pieces of legislation adopted – at least in part – on the basis of outputs produced by international experts and financed by the European Commission itself or other international donors. In addition, the new law on competition restores the vacuum in competition legislation that had characterised the Georgian legal system during the previous period of its history.

Finally, the new competition law empties PCA Article 44 of most of its content but without the European Communities' consent.

These comments should be interpreted at least as a risk factor for the future relations between the government of Georgia and the European Communities in the framework of the European Neighbourhood Policy. Such a risk could materialise for Georgia when one considers the duration of the PCA. According to PCA Article 97, "this Agreement is concluded for an initial period of ten years. This Agreement shall be automatically renewed year by year provided neither Party gives the other Party written notice of denunciation of this Agreement six month before it expires".

The PCA for Georgia entered into force on 1 July 1999.

The renewal of the PCA depends without any doubt from the perspective of the European Communities upon Georgia's transition process. The abrogation of most competition provisions in the Georgian legal system will certainly be one of the elements considered

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[7] PCA Article 44: "(1) Further to Article 43, the Community shall provide Georgia with technical assistance regarding the formulation and implementation of legislation in the field of competition, in particular as concerns:
- agreements and associations between undertakings and concerted practices which have the effect of preventing, restricting or distorting competition,
- abuse by undertakings of a dominant position in the market,
- state aids which have the effect of distorting competition,
- state monopolies of a commercial character,
- public undertakings and undertakings with special or exclusive rights and
- review and supervision of the application of competition laws and means of ensuring compliance with them.
(2) The Parties agree to examine ways to apply their respective competition laws on a concerted basis in such cases where trade between them is affected".

by the European Communities. The virtual abolition of Georgia's competition laws by a (more or less) conscious decision of the government established after the Rose Revolution will not be of any assistance at that point in time.

2.3 The World Trade Organisation and Competition

The multilateral trading system is based on a set of simple and fundamental principles enshrined in the General Agreement on Tariffs and Trade (GATT) and other legal instruments administered by the World Trade Organisation (WTO). The principles are worded in a comparatively clear language but all provisions in the WTO legal system can be described as not being self-executing as generally accepted by modern commentators.[8] This also means that rules contained in the GATT become directly applicable at the national level of contracting parties provided implementing laws or regulations formally enter into force in their respective territories. For the purpose of this article, this remark is particularly relevant as the absence of implementing laws or regulations may have the effect of exposing the target contracting party to disputes that can be settled only in accordance with the dispute settlement mechanisms of the WTO. This contingency could be removed if Georgia would again adopt laws and regulations in line with those that were abrogated in the new law on competition.

The second element of the multilateral trading system is the set of commitments which are aimed at opening up their borders to trade and which are adopted by the contracting parties. Technically speaking, the Schedules of Commitments become an integral part of the WTO Agreement.

A more detailed analysis of the situation created by the new law on competition would allow the conclusion that whilst Georgia is bound by its commitments under the Protocol of Accession to the WTO, the businesses established in its territory operate in a competition-law-free area. In the event that a dispute arises, Georgia would have to defend its case referring to an infringement by default before an arbitral tribunal created under the relevant provisions of WTO law whilst the incumbent business would remain invulnerable at the national and international levels. In this hypothesis, we consider that the general principle of non-retroactivity of laws would certainly further hinder the resolution of such a dispute. This outcome would most likely damage other exporters from Georgia in the present system of sanctions that may lead to measures affecting other industries such as, for example, compensation or the suspension of concessions.

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[8] For a more detailed discussion on this topic, see, among other titles, *Riesenfeld*, The Doctrine of Self-Executing Treaties and GATT: A Notable German Judgment, AJIL, Vol. 65, No. 3 (July 1971), 548-550. In addition, we refer to the text of TRIPS, Article 8(1) that clearly addresses the need for national legislation. Finally, the EC Council decision of 22 December 1994 on the conclusion of the Uruguay Round of Negotiations establishing the WTO clarifies that the Agreement establishing the WTO and its annexes are not susceptible of being directly invoked in Community or Member State Courts. OJ L336/2, of 23 December 1994.

2.3.1 Georgia's Representations on the Legal Protection of Economic Competition during the Accession Process to the WTO

On the one hand, during the Georgia's accession process to the World Trade Organisation, its negotiators disclosed a number of examples of information related to the level of protection of economic competition under its national laws and regulations. Those revelations were an integral part of Georgia's accession to the WTO.[9]

Georgia became a member of the World Trade Organisation on 14 June 2000. In accordance with the Protocol of Accession of Georgia to the Marrakesh Agreement establishing the WTO:[10]
"1. Upon entry into force of this Protocol, Georgia accedes to the WTO Agreement pursuant to Article XII of that Agreement and thereby becomes a Member of the WTO".

There is no other provision in the Protocol of Accession that conditions or reserves rights for Georgia or any of the other Contracting Parties. This means that Georgia has become a full member of the World Trade Organisation and that this country is bound by the WTO Agreement and its Schedules of Concessions. For this reason, we now have to address the different rules incorporated into the WTO Agreement which relate to competition law and policy.

2.3.2 WTO Rules and Policies in the Field of Competition

At the outset of this section, it is worth recalling that when the GATT was originally drafted in the late 1940s, rules on competition were designed to exist alongside those for trade in goods. The so-called Havana Charter, however, with its Chapter V on "Restrictive Business Practices" never came into force mainly due to US objections to its competition provisions. Without prejudice to this failure, some of its articles deserve special attention herein. Article 46 called on each Contracting Party "to take appropriate measures" and to co-operate with the proposed international organisation to "prevent ... 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 objectives ... set forth in Article 1". The practices included price fixing, territorial allocations, "discriminating against any particular enterprise," limiting production or fixing production quotas, "preventing by agreement the development or application of technology or invention whether patented or unpatented," "extending the use of rights under patents" to matters outside the scope of the grants and other practices similar to those enumerated

[9] The complete list of references to competition regulations disclosed by the Georgian authorities during the WTO accession process is available at GEPLAC V.
[10] WTO document No. WT/ACC/GEO/33. This document can be downloaded from: http: docsonline.wto.org /DDFDocuments/t/WT/ACC/GEO33.DOC.

above. The dispute settlement mechanism included not only consultations but investigations by the international organisation itself.

Mindful of fact that the Havana Charter was never adopted, competition rules have been slowly introduced in different WTO legal instruments that are presently in force. This notwithstanding, WTO Members still enjoy freedom to adopt competition laws under the GATT whilst the situation remains different under other WTO Agreements. The "freedom" referred to in the previous sentence should be interpreted in the sense that there is no provision in the GATT that imposes the obligation to adopt competition rules on WTO Members. This does not mean, however, that the GATT and the other WTO Agreements are devoid of any competition regulation. To the contrary, as we will see in the next pages, WTO law contains a large number of competition regulations.

The WTO legal system clearly provides for the protection of economic competition in different fields. In fact, there is a clear competition dimension in the existing WTO rules. This statement is consistent with the lack of an international treaty or agreement dealing exclusively with competition issues and administered by the WTO as has been discussed in the doctrine for many years.[11] In short, it is worth recalling that discussions at the WTO Working Group on Trade and Competition, established in 1997, have revealed little support for common rules on substantive competition law and for a global competition authority. This, however, is not to say that the WTO system turns a blind eye to the legal protection of competition.

A short review of existing competition rules in the WTO agreements (the GATT and its side agreements GATS and TRIPS) would lead to the following findings:

Monopolies for the import of goods – and not for the distribution of goods – are prohibited in accordance with Article II(4) GATT.[12] To give effect to this provision, some national laws are certainly necessary.

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[11] Among many articles and works, see: *Weinrauch*, Competition Law in the WTO – The Rationale for a Framework Agreement, BWV– Berliner Wissenschafts Verlag, Berlin, 2004.

[12] GATT, Article II(4): "If any Contracting Party establishes, maintains or authorises, formally or in effect, a monopoly of the importation of any product described in the appropriate Schedule annexed to this Agreement, such monopoly shall not, except as provided for in that Schedule or otherwise agreed between the parties which initially negotiated the concession, operate so as to afford protection on the average in excess of the amount of protection provided for in that Schedule. The provisions of this paragraph shall not limit the use by Contracting Parties of any form of assistance to domestic producers permitted by other provisions of this Agreement".

With respect to Article III(2), first sentence, GATT,[13] the 1987 Panel Report in the case "United States – Taxes on Petroleum and Certain Imported Substances"[14] notes:

"5.1.9 ... Article III(2), first sentence, obliges Contracting Parties to establish certain competitive conditions for imported products in relation to domestic products. Unlike some other provisions in the General Agreement, it does not refer to trade effects. ... Article III(2), first sentence, cannot be interpreted to protect expectations on export volumes; it protects expectations on the competitive relationship between imported and domestic products. A change in the expectations on the competitive relationship contrary to that provision must consequently be regarded as ipso facto as a nullification or impairment of benefits accruing under the General Agreement..."

Similarly, the 1958 Panel Report on "Italian Discrimination against Imported Agricultural Machinery"[15] found that:

"13. ... the fact that the drafters of Article III thought it necessary to include the [point (8)(b)] exemption for production subsidies would indicate that the intent of the drafters was to provide equal conditions of competition once goods had been cleared through customs".

Other Panel Reports contemplate regulations on the compulsory sale of "competitively available" national products (Canada – Administration of the Foreign Investment Review Act – FIRA[16]) or on restricted access for foreign beer to certain points of sale and mini-

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[13] GATT, Article III: "(1) The Contracting Parties recognise that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.
(2) The products of the territory of any Contracting Party imported into the territory of any other Contracting Party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no Contracting Party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph (1).
...
(8) (a) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.
(b) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies affected through governmental purchases of domestic products".

[14] Reference: L/6175 – 34S/136, Panel Report adopted on 17 June 1987. This document can be downloaded from: http://www.worldtradelaw.net/reports/gattpanels/superfund.pdf.

[15] Reference: L/833 – 7S/60, Panel Report adopted on 23 October 1958. This document can be downloaded from: http://www.worldtradelaw.net/reports/gattpanels/italianmachinery.pdf.

[16] Reference: L/5504 – 30S/140, Panel Report adopted on 25 July 1983. This document can be downloaded from:http://www.worldtradelaw.net/reports/gattpanels/canadafira.pdf.

mum price regulations (Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies[17]). Maximum price levels are declared to violate Article III GATT in the 1992 Panel Report "US – Measures affecting Alcoholic and Malt Beverages".[18]

Article III GATT has, therefore, been interpreted as providing imported products equal opportunities with respect to the national products (the "treatment not less favourable" – clause). The level playing field is thereby created notably with reference to discriminatory treatment based on national laws and regulations or on governmental interference in the market that is tantamount to adopting national laws and regulations.

Article XI, GATT[19] regulates the comprehensive elimination of quantitative restrictions to the international trade in goods. Admittedly, this article only refers at first sight to legal measures and it has been maintained, as a result, that private measures, including contractual constructions, were immune from article XI, GATT because governments are not responsible for contracts entered into by private entities. Be that as it may, an issue remains open for assessment; that is, the situation where public authorities encourage more or less openly the conduct of such private entities. Precisely, this point is one of the questions that the Panel in the 1988 Panel Report on the case "Japan – Trade in Semi-Conductors"[20] has answered in the following terms:

"117. All these factors led the Panel to conclude that an administrative structure had been created by the Government of Japan which operated to exert maximum possible pressure on the private sector to cease exporting at prices below company-specific costs... The Panel concluded that the complex of measures exhibited the rationale as well as the essential elements of a formal system of export control. The only distinction in this case was the absence of formal legally binding obligations in respect of exportation or sale for export of semi-conductors. The Panel concluded, however, that this amounted to a difference in form rather than in substance because the measures were operated in a manner equivalent to mandatory requirements. The Panel concluded that the complex of measures constituted a coherent system restricting the sale for export of monitored semi-conductors at prices below company-specific costs to markets other than the United States, inconsistent with article XI(1)".

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[17] Reference: L/6304 – 35S/37, Panel Report adopted on 5 February 1988. This document can be downloaded from: http//www.worldtradelaw.net/reports/gattpanels/canadaalcdistribution.pdf.
[18] Reference: DS23/R – 39S/206, Panel Report adopted on 19 June 1992. This document can be downloaded from: http://www.worldtradelaw.net/reports/gattpanels/usmaltbeverages.pdf.
[19] GATT, Article XI: "(1) No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any Contracting Party on the importation of any product of the territory of any other Contracting Party or on the exportation or sale for export of any product destined for the territory of any other Contracting Party".
[20] Reference: L/6309 – 35S/116, Panel Report adopted on 24 March 1988; this document can be downloaded from: http://www.worldtradelaw.net/reports/gattpanels/japansemiconductor.pdf.

Consequently, Article XI GATT also applies to measures adopted by governments to influence competition and or trade which are not legally binding.

Article XVII GATT[21] clearly distinguishes between "State enterprises" and "any enterprise" that has been granted "formally or in effect, exclusive or special privileges." It is quite convincing that the 1989 Panel Report in the case "Republic of Korea – Restrictions on the Import of Beef – Complaint by the United States"[22] found that:

"115. ... the existence of a producer-controlled monopoly could not in itself be in violation of the General Agreement".

For the purposes of this article, the most relevant part of GATT Article XVII relates to the need to apply "commercial considerations" to those enterprises' operations. If such "commercial considerations" are not reflected in the national legislation, especially in the competition rules, other Contracting Parties may complain and initiate a dispute settlement procedure.

It has been suggested that the so-called "non-violation complaints" regulated in GATT Article XXIII(1) would be the most adequate avenue for processing a case or dispute based on issues in the field of competition.[23] This being said, the author is not aware of any complaint lodged in the form of a non-violation complaint that dealt with matters related to the protection of economic competition.

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[21] GATT, Article XVII: "(1)(a) Each Contracting Party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discrimination treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.
(b) The provisions of subparagraph (a) of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, make any such purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other Contracting Parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.
(c) No Contracting Party shall prevent any enterprise (whether or not an enterprise described in subparagraph (a) of this paragraph) under its jurisdiction from acting in accordance with the principles of subparagraphs (a) and (b) of this paragraph".

[22] Reference: L/6503 – 36S/268, Panel Report adopted on 24 May 1989. This document can be downloaded from: http://www.worldtradelaw.net/reports/gattpanels/koreabeefu.pdf.

[23] *Cho*, GATT Non-violation Issues in the WTO Framework: Are They the Achilles' Heel of the Dispute Settlement Process?, Harvard International Law Journal, Vol. 39, No. 2. This document can also be downloaded from: http://www.jeanmonnetprogram.org/papers/98/98-9-.html.

The Agreement on Safeguards[24] expressly prohibits the use of any legal or contractual measure to influence the flow of international trade. Of course, any trade policy measure is likely to have an impact of sectoral competition structures.

The Agreement on Sanitary and Phytosanitary Measures (Articles 3 to 6) and the Agreement on Technical Barriers to Trade (Articles 3, 4 and 8) require WTO Members to adopt the least restrictive measure in their laws. Such technical restrictions have an evident impact on competition as they may exclude completely a given product from a market. An examination of the theoretical cases that may arise when a national competition law has not been adopted, but foreign standards are excluded from the market points toward the weak position of the Georgian authorities. These may have to defend their case before WTO Members without having adequate legal recourse against their national industry.

Other GATT side-agreements touch on competition issues as follows:

– Article 3(5) of the Agreement on the Implementation of Article VI of GATT includes for injury test the examination of "the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the pattern of consumption, trade-restrictive practices of and competition between foreign and domestic producers..." and

– Article 15(5) of the Agreement on Subsidies and Countervailing Duties includes a similar provision for its injury test and requires to examine "the volume and prices of non-subsidised imports of the product in question, contraction in demand or changes in the pattern of consumption, trade-restrictive practices of and competition between foreign and domestic producers..."

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[24] Agreement on Safeguards, Article 11 – Prohibition and elimination of certain measures: "(1) (a) A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement.
(b) Furthermore, a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or import side (an import quota applied as a safeguard measure in conformity with the relevant provisions of GATT 1994 and this Agreement may, by mutual agreement, be administered by the exporting Member. Examples of similar measures include export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory export cartels and discretionary export or import licensing schemes, any of which afford protection). These include actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members. Any such measure in effect on the date of entry into force of the WTO Agreement shall be brought into conformity with this Agreement or phased out in accordance with paragraph (2).
(c) This Agreement does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX, and Multilateral Trade Agreements in Annex 1A other than this Agreement or pursuant to protocols and agreements or arrangements concluded within the framework of GATT 1994.
(2) ...
(3) Members shall not encourage or support the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to those referred to in paragraph (1)".

The General Agreement on Trade in Services (GATS) contains a number of provisions related to economic competition wherein national rules on competition, for their implementation, would certainly be helpful.

GATS article VII[25] regulates, as its title indicates, the recognition of foreign authorisations, licenses or certifications of services. This coincides mutatis mutandis with the term "mutual recognition" in EU law. The recognition of foreign authorisations, licenses and certifications of services is conducive to trade in services across borders and opens up, therefore, competition in services.

Article VIII GATS[26] by and large coincides with the provisions contained in Article XVII GATT. Consequently, monopolies and exclusive service suppliers are subject to the most-favoured-nation clause which means that national competition rules should apply to them in certain circumstances.

The clearest provision with a competition dimension in GATS is certainly its Article XI[27] which bears the title "Business Practices". Certainly, GATS does not impose on its

[25] GATS, Article VII – Recognition: "(1) For the purposes of the fulfilment, in whole or in part, of its standards or criteria for the authorisation, licensing or certification of services suppliers, and subject to the requirements of paragraph (3), a Member may recognise the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, which may be obtained through harmonisation or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.
(2) A Member that is a party to an agreement or arrangement of the type referred to in paragraph (1), whether existing or future, shall afford adequate opportunity for other interested Members to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that education, experience, licenses, or certifications obtained or requirements met in that other Member's territory should be recognised.
3. A Member shall not accord recognition in a manner which could constitute a means of discrimination between countries in the application of its standards or criteria for the authorisation, licensing or certification of services suppliers, or a disguised restriction of trade in services. ...
5. Wherever appropriate, recognition should be based on multilaterally agreed criteria. ..."

[26] GATS, Article VIII – Monopolies and Exclusive Service Suppliers: "(1) Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's obligations under Article II [most-favoured-nation treatment] and specific commitments.
(2) Where a Member's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that Member's specific commitments, the Member shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments. ..."

[27] GATS, article IX – Business practices: "(1) Members recognize that certain business practices of service suppliers, other than those falling under Article VIII, may restrain competition and thereby restrict trade in services.
(2) Each Member shall, at the request of any other Member, enter into consultations with a view to eliminating practices referred to in paragraph (1). ... The Member addressed shall also provide other information available to the requesting Member, subject to its domestic law and to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Member".

Members any obligation regarding the scope or the enforcement of competition law but it is difficult to know how the Georgian public administration could satisfactorily deal with a consultation process and, most importantly, with designing its implementation within its borders under rule-of-law principles in the absence of a national law on competition. Furthermore, Article IX(2) GATS regulates co-operation and exchange of information between GATS Members. This means that it generally requires the enforcement of competition law which is a situation that Georgia could not cope with at the present time.

Part II, Section 8 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[28] regulates the control of anti-competitive practices in contractual licences. According to this provision, Members may take measures to fight anti-competitive practices in licensing agreements when they adversely affect trade and may impede the dissemination of technology. It is usually admitted that a classic problem in this field is the prohibition of parallel imports. If such a case arose in Georgia, the legal system would prove to be inadequate for sanctioning private par-

[28] TRIPS, Part II – Standards concerning the availability, scope and use of intellectual property rights, Section 8 – Control of anti-competitive practices in contractual licenses, Article 40: "(1) Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.
(2) Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grant back conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.
(3) Each Member shall enter, upon request, into consultations with any other Member which has cause to believe that an intellectual property right owner that is a national or domiciliary of the Member to which the request for consultations has been addressed is undertaking practices in violation of the requesting Member's laws and regulations on the subject matter of this Section, and which wishes to secure compliance with such legislation, without prejudice to any section under the law and to the full freedom of an ultimate decision of either Member. The Member addressed shall accord full and sympathetic consideration to, and shall afford adequate opportunity for, consultations with the requesting Member, and shall co-operate through supply of publicly available non-confidential information of relevance to the matter in question and of other information available to the Member, subject to domestic law and to the conclusion of mutually satisfactory agreements concerning the safeguard of its confidentiality by the requesting Member.
(4) A Member whose nationals or domiciliaries are subject to proceedings in another Member concerning alleged violation of that other Member's laws and regulations on the subject matter of this Section shall, upon request, be granted an opportunity for consultation by the other Member under the same conditions as those foreseen in paragraph (3)".

ties engaged in anti-competitive licensing actions based on their binding contractual relations.

Finally, the Plurilateral Trade Agreements contain further competition-relevant provisions. Georgia is not a member to those plurilateral agreements as it is currently in the process of negotiating its accession to the Agreement on Government Procurement. For this reason, we do not refer to the provisions contained therein which are competition-relevant.

Currently, the contracting parties are engaged in a new round of multilateral negotiations; the so-called the Doha Round of Negotiations. For the purpose of this article, the Doha Round of Negotiations underlines the present and future importance of competition law and policy at the WTO. According to the Ministerial Declaration[29] adopted on 14 November 2001 at the Fourth Session:

"23. Recognising the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.

24. We recognise the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral co-operation for their development policies and objectives, and human and institutional development. To this end, we shall work in co-operation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

25. In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hard-core cartels; modalities for voluntary co-operation; support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them".

In the Ministerial Declaration[30] adopted in Hong Kong on 18 December 2005 at the Fifth Session, it was agreed to reaffirm the Declarations and Decisions adopted at Doha and

[29] The Ministerial Declaration can be downloaded from: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.pdf.
[30] The Ministerial Declaration can be downloaded from: http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.pdf.

the Contracting Parties – including Georgia – and to give "their full commitment to give effect to them". Competition will therefore be debated by WTO Members in the future[31] and it is foreseeable that the interaction between national rules and international disciplines will become even more topical in such negotiations.

Considering that the WTO is a member-driven organisation with decisions taken usually on a consensus base, it will be quite remarkable if the Georgian authorities are able to maintain their rejection to national competition rules.

2.4 Other International Initiatives in the Field of Competition

In addition to the international rules discussed above – which were voluntarily adopted by Georgia – a number of initiatives embraced by international fora concern national competition laws and policies. It is not surprising that after the virtual disappearance of command economies and with the commencement of global transition processes in many countries, most international organisations analysed the pros and cons of specific rules for the economic liberalisation. A number of such initiatives, therefore, deserve being mentioned here despite not being formally binding for Georgia.

2.4.1 The OECD on the Co-operation between Competition Authorities, on Hard-core Cartels and on Merger Review

The Organisation for Economic Co-operation and Development (OECD),[32] created on 14 December 1960, has been analysing notably the horizontal relations between different competition authorities. This is certainly the result of the organisation's composition and objectives.

The first product of the OECD's works in the realm of competition regulation, therefore, was the (Revised) Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade[33] which was adopted at the Council's 856th Session on 28 July 1995. In this document, the OECD explains the needs for notifying, exchanging information and co-ordinating the actions of the different competition authorities when investigating cases that may affect important interests of another Member country or countries. It also makes clear the consultation and con-

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[31] Other indications in this sense can be found in the Agreement on Trade-Related Investment Measures (TRIMS), Article 9 – Review by the Council for Trade in Goods: "Not later than five years after the date of entry into force of the WTO Agreement, the Council for Trade in Goods shall review the operation of this Agreement and, as appropriate, propose to the Ministerial Conference amendments to its text. In the course of this review, the Council for Trade in Goods shall consider whether the Agreement should be complemented with provisions on investment policy and competition policy".

[32] Georgia is not a Member country of the OECD. The organisation's outputs, however, should be taken into consideration at least as dependable guidelines.

[33] OECD document No. C(95)130/FINAL. This document can be downloaded from: http://www.oecd.org/dataoecd/60/42/21570317.pdf.

ciliation proceedings that may be required during co-operation. Most importantly, the Annex to the Recommendations contains the Guiding Principles for Notification, Exchange of Information, Co-operation in Investigations and Proceedings, Consultations and Conciliation of Anticompetitive Practices affecting International Trade. The Annex contains a set of rules that can be used as guidelines for national regulations or even for bilateral agreements.

The OECD Recommendation of the Council concerning effective Action against Hard-Core Cartels,[34] adopted at the Council's 921st Session on 25 March 1998, relates specifically to national rules adopted with a view to fighting against such types of cartels. Hard-core cartels are defined as anticompetitive agreements, anticompetitive concerted practices or anticompetitive arrangements by competitors to fix prices, make rigged bids (or collusive tenders), establish output restrictions or quotas or share or divide markets by allocating customers, suppliers, territories or lines of commerce. Obviously, this Recommendation deals with substantive legal issues as opposed to the procedural or inter-agency provisions.

The Recommendation should be read in conjunction with the Best Practices for the Formal Exchange of Information between Competition Authorities in Hard-Core Cartel Investigations[35] which was approved in October 2005. The Best Practices were developed by the OECD's Competition Committee. Whilst the Recommendation concerns the substance of hard-core cartels, the Best Practices relate to procedural aspects related to exchanging information and providing information between competition authorities.

Finally, on 23 March 2005 the OECD Council adopted the Recommendation on Merger Review[36] that deals mainly with procedural questions and including co-ordination and co-operation in transnational mergers.

2.4.2 The UN Set on Restrictive Business Practices

UNCTAD has been focussing on competition since the United Nations General Assembly unanimously adopted its Resolution 53/63 in December 1980 together with the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices[37] (the UN Set). The UNCTAD, it bears stating, approaches this topic from the perspective of developing countries in a globalised world. This said, the UN Set is so far the only fully multilateral code in existence on competition law and policy.

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[34] OECD document No.C(98)35/FINAL; this document can be downloaded from: http://www.oecd.org/dataoecd/39/4/2350130.pdf.
[35] This document can be downloaded from: http://www.oecd.org/dataoecd/1/33/35590548.pdf.
[36] OECD document No. C(2005)34; this document can be downloaded from: http:webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/c(2005)34.
[37] UNCTAD document No.TD/RBP/CONF/10/Rev. 2. This document can be downloaded from: http: r0.unctad.org/en/subsites/cpolicy/docs/CPSet/rbpc10rev20en.pdf.

UNCTAD, in application of its mandate in the UN Set, holds the meeting of the Intergovernmental Group of Experts on Competition Law and Policy annually, and organises a Review Conference at Ministerial level every five years.

Further, at the Fifth UN Conference to review all aspects of the set of multilaterally agreed equitable principles and rules for the control of restrictive business practices (the Annual UN Conference), the members in attendance, in the Final Resolution adopted by the Conference at its closing plenary meeting on 18 November 2005, called upon all member states to make every effort to implement fully the provisions of the UN Set. Furthermore, they also called upon the member states to increase co-operation between their competition authorities and governments for the mutual benefit of all countries in order to strengthen effective international action against anticompetitive practices as covered by the UN Set. Such co-operation, it was stated, was particularly important for economies in transition such as is the case for Georgia.

The UN Set provides for the compilation of a Handbook on Competition Legislation. The Fourth UN Conference to Review All Aspects of the UN Set requested the UNCTAD Secretariat to continue to publish further issues of the Handbook which should be complemented by a summary of the main provisions of competition laws on the basis of inputs to be submitted by the member states.[38] This book is the result of a peer review undertaken by the UN Conference and presents the legal rules applicable to economic competition in some member states. It is indeed a useful tool for getting a first picture of the level of protection granted in a given state.

It is especially noteworthy that the 2001 edition covers Georgia, Morocco and the Ukraine.[39]

As for Georgia, the Handbook comments on the resolution of the Cabinet of Ministers of Georgia N323 on measures for demonopolisation of the national economy (adopted on 17 March 1992), on the decree on restriction of monopoly activity and competition (adopted in September 1992) and on the Law on Monopoly Activity and Competition (adopted on 17 October 1996). As previously mentioned, the latter legal act has been derogated by virtue of the new competition law of Georgia with the information about the Law on Monopoly Activity and Competition having become obsolete but hitherto remaining the only available source of information on the laws applicable to economic competition in the country.

The latest Handbook on Competition Legislation,[40] published on 27 February 2006, unfortunately does not contain any reference to the latest legal amendments in Georgia. It should be noted that Georgian authorities should take the responsibility of notifying UNCTAD of the legal amendments – in order to comply with the note of 8 March 1996 issued by the Secretary General of UNCTAD – requesting States, which had introduced

[38] UNCTAD document No. TD/RBP/CONF.5.15. This document can be downloaded from: http://www.unctad .org/en/docs/tdrbpconf5d15.en.pdf.
[39] The Handbook can be downloaded from: http://www.unctad.org/en/docs/c2clp17.en.pdf.
[40] The Handbook can be downloaded from: http://www.unctad.org/en/docs/c2clp50_en.pdf.

amending competition legislation since their last communication to the UNCTAD Secretariat, to provide the latter with their relevant legislation.

In addition to this, the UNCTAD Model Law on Competition[41] should be expressly mentioned in this context. As a model law, this document is a benchmark for legislators; it is by no means binding on UN members. Its use, however, should be encouraged notably in those countries where the transition process has advanced enough to justify the legal protection of private business activities.

3. Conclusions

By and large, the question examined in this article comes down to whether or not one can maintain that state building in a transition process can be implemented by means of abrogating fundamental laws that regulate the economy. One should not be blinded by attractive and also successful deregulation policies instituted in the last remaining Super Power in the world; that is, the United States and most notably under the Presidency of Ronald Reagan. There, the Sherman Act and other antitrust laws were left untouched whilst many other "red tape regulations" were rapidly called off. Competition laws were preserved and the sheer size of the economy allowed (or supported) the deregulation of many industries like the air transport industry.

If the Georgian authorities had decided to engage in a deregulation process similar to that of the United States in the 1980s, the conclusion would be that they have inverted the rules of the game. It has been argued that competition law and sector-specific competition policy are two complementary means of achieving effective competition in deregulated markets. Sector-specific policy, in turn, can be divided into structural measures and other aspects of firm behaviour. In advanced economies, there is a unanimous opinion in the sense that sector-specific regulation is critical in recently deregulated markets but that eventually it can be abolished. This will occur when competition has evolved to a point where the general competition rules are sufficient to ensure an efficient outcome.[42]

Deregulation operated properly would look to the sectoral laws that regulate an activity by restricting competition. Those laws deserve review, the sectors require structural reforms (even industrial policies including state aids) and newcomers should be let into the arena. The horizontal or vertical competition elements in all regulations, however, should be strengthened by all means to support the liberalisation process.

Furthermore, the Georgian constitutional provisions and the international law approved by Georgia unambiguously sustain the need of competition law and policy to include, most probably, even the development of human resources and further regulations in the field.

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[41] UNCTAD document No. TD/B/RBP/CONF.5/7/Rev. 2. This document can be downloaded from: http://www.unctad.org/en/docs/tdrbpconf5d7rev2_en.pdf.

[42] *Bergman*, Competition Law, Competition Policy and Deregulation, Swedish Economic Review 9(2002), 93-128, 95.