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COMPETITION POLICY, TRADE AND THE GLOBAL ECONOMY: EXISTING WTO ELEMENTS, COMMITMENTS IN REGIONAL TRADE AGREEMENTS, CURRENT CHALLENGES AND ISSUES FOR REFLECTION

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ABSTRACT

Competition policy, today, is an essential element of the legal and institutional framework for the global economy. Whereas decades ago, anti-competitive practices tended to be viewed mainly as a domestic phenomenon, most facets of competition law enforcement now have an important international dimension. Examples include: the investigation and prosecution of price fixing and market sharing arrangements that often spill across national borders and, in important instances, encircle the globe; multiple recent, prominent cases of abuses of a dominant position in high-tech network industries; important current cases involving transnational energy markets; and major corporate mergers that often need to be simultaneously reviewed by multiple jurisdictions. Beyond competition law enforcement *per se*, increasingly, major issues of competition policy (e.g., the impact on competition of the structure and scope of intellectual property rights or the role of state-owned enterprises) implicate the interests of multiple jurisdictions.

To date, efforts to establish a general agreement on competition policy in the framework of the international trading system have been unsuccessful. Nonetheless, provisions relating to competition policy are incorporated in the WTO General Agreement on Tariffs and Trade (GATT); the General Agreement on Trade in Services (GATS); the Agreement on Trade-Related Intellectual Property Rights (TRIPS Agreement); the Agreement on Trade-Related Investment Measures (TRIMs Agreement); and other WTO instruments. Effective national competition policies are also essential to realizing the benefits derivable from participation in the (plurilateral) WTO Agreement on Government Procurement (GPA). The importance of competition policy for world trade is also manifested by the increasing incorporation of undertakings on competition policy in the Protocols of Accessions that apply to new WTO Members, and in the work of the WTO Trade Policy Review Body, which systematically references developments regarding national competition policies in developed and developing jurisdictions.

Beyond this, as set out in this paper and further manifesting the significance of competition policy for international trade, detailed chapters on competition policy have been incorporated in numerous bilateral and regional trade agreements (RTAs) linking developed and developing economies around the globe.

The WTO Working Group on the Interaction between Trade and Competition Policy, which was active from 1997 through 2003 and which considered the case for a more general agreement on competition policy in the WTO, has been inactive since 2004. It is, nonetheless, available as a potential vehicle for stocktaking of developments and reflection on relevant issues if ever WTO Members find this useful and timely. A salient related consideration is that, whereas in 1997, when discussion commenced in the WTO Working Group, only around 50 economies in the world had national competition legislation, currently, about 135 WTO Members have such laws. These include all of the BRICS economies (Brazil, Russia, India, China and South Africa) and a large number of other developing WTO Members.

Concurrent with the foregoing developments, increasing attention is being given, in international policy circles, to particular issues of competition law enforcement and competition policy with significance for the global economy. These include:

- The international dimension of competition law cases: the resulting positive spillovers for economic welfare and potential for conflicts of jurisdiction;
- The broadening application of competition policy vis-à-vis intellectual property rights in the global economy;
- Important issues concerning the potential for monopolization and the maintenance of competition in digital markets;
- Issues concerning state-owned enterprises, the role of industrial policy and the maintenance of competitive neutrality in emerging economies; and
- A mounting concern, on the part of global businesses, to ensure non-discrimination, transparency and procedural fairness in competition law enforcement worldwide.

This paper reviews and reflects upon these and related developments. It proceeds from the premises that important synergies exist between trade and competition policy and that it is reasonable to acknowledge this and inquire whether additional steps are desirable to ensure the full realization of the relevant synergies. The paper is intended to serve as a resource for reflection on related issues, if and/or when WTO Members decide to undertake such an exercise. Even so, it is recognized that the issues are complex, and that simplistic or overly ambitious or prescriptive solutions will not be helpful. In this light, the closing portions of the paper reflect upon the importance of relevant international learning processes; the actual and potential contributions of the WTO in this regard; and prospects for the future.

Key Words:

Competition policy, anti-competitive practices, international trade policy, WTO agreements, regional trade agreements, state-owned enterprises, competitive neutrality, the digital economy.

JEL classification numbers:

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CONTENTS

1 INTRODUCTION

Competition policy, today, is an essential element of the legal and institutional framework for the global economy.[1] Whereas decades ago, anti-competitive practices tended to be viewed principally as a domestic phenomenon,[2] most facets of competition law enforcement now have an important international dimension. For example, a large proportion of anti-cartel prosecutions, the most 'hard core' aspect of competition law enforcement, concerns price fixing and market sharing arrangements that often spill across national borders and, in important instances, span the globe.[3] Left unchecked, these hold the potential to directly undermine the gains from trade.[4] Multiple recent, prominent cases of abuses of a dominant position in high-tech network industries (e.g. the numerous cases regarding practices of the *Microsoft Corporation* that have been pursued in various jurisdictions over the past two decades; the *Google* cases before the European Commission and other national competition authorities[5] or the 2015 *Qualcomm* case concerning patent licensing practices in China[6]) involve conduct that cuts across jurisdictions. The same is true of important current cases involving transnational energy markets (e.g., the European Commission's proceedings in the Gazprom inquiry[7]). In the area of merger control, major corporate deals routinely need to be notified and can potentially be subject to remedies imposed by 30 or more jurisdictions.[8] The positions taken by authorities in one jurisdiction regarding the remedies necessary in response to particular transactions can easily have spillover effects on other countries' markets.[9] Beyond competition law enforcement *per se*, major issues of competition policy (e.g., concerning the structure and scope of intellectual property rights (IPRs) or the role of state-owned enterprises (SOEs)) implicate the interests of an increasing number of jurisdictions.

The significance of competition policy for international trade and the potential need for formal state-to-state arrangements concerning this policy interface were recognized already in 1948, in the Havana Charter for an International Trade Organization (the Havana Charter). The Charter set out a surprisingly comprehensive and even, in some respects, prescient framework for

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[1] In this paper, 'competition policy' includes the full range of measures that governments take to suppress or deter anti-competitive behaviour and to promote the efficient and competitive operation of markets, including, but not limited to, the enforcement of competition law *per se*. See, for further discussion of the content and objectives of such policy, Part 3.1 below.

[2] To be sure, anti-competitive practices have long had an international dimension, often impacting on trade flows. An important, early example concerned the International Electrical Equipment Conspiracy (see, for the authoritative treatment, U.S., Congress, Committee on Interstate and Foreign Commerce, *International Electrical Association: A Continuing Cartel* (Washington, D.C.: U.S. Government Printing Office, 1980)). More generally, from its inception, the Treaty of the European Union (formerly the Treaty of Rome) had, as a core objective, the effective control of anti-competitive practices that were widely recognized as an impediment to the creation of a genuinely European market. See Robert D. Anderson and Alberto Heimler, 'What has Competition Done for Europe? An Inter-Disciplinary Answer' (2007) *Aussenwirtschaft (the Swiss Review of International Economic Relations)* 62(4), pp. 419-454. Pre-publication text available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1081563.

[3] See, for an summary of activity in diverse jurisdictions, DLA Piper, *Cartel Enforcement Global Review* (June 2017); available at https://www.dlapiper.com/~/media/Files/Insights/Publications/2017/06/3213720_Cartel_Enforcement_Global_Review_June_20177_V13.pdf.

[4] See WTO, 'Special Study on Trade and Competition Policy', in *WTO Annual Report 1997*, Chapter 4, available at https://www.wto.org/english/news_e/pres97_e/pr85_e.htm; Robert D. Anderson and Frédéric Jenny, 'Competition Policy, Economic Development and the Role of a Possible Multilateral Framework on Competition Policy: Insights from the WTO Working Group on Trade and Competition Policy', in Erlinda Medalla (ed.) *Competition Policy in East Asia* (Routledge, 2005), chapter 4, pp. 61-85; and Robert D. Anderson and Peter Holmes, 'Competition Policy and the Future of the Multilateral Trading System' (2002) *Journal of International Economic Law* 5(2) at 531–563.

[5] See Box 7 and relevant discussion in Part 4 .

[6] See Box 6 and relevant discussion in Part 4 . See also, for background, Allen & Overy, Antitrust in China: *NDRC v. Qualcomm* – One All. Available at http://www.allenovery.com/publications/en-gb/Pages/Antitrust-in-China-NDRC-v--Qualcomm-%E2%80%93-One-All.aspx.

[7] European Commission, *Antitrust: Commission invites comments on Gazprom commitments concerning Central and Eastern European gas markets*, 13 March 2017. Available at http://europa.eu/rapid/press-release_IP-17-555_en.htm. In May 2018, the Commission adopted a decision imposing on Gazprom a set of obligations that address the Commission's competition concerns and enable the free flow of gas at competitive prices in Central and Eastern European gas markets, to the benefit of European consumers and businesses. In case of non-compliance, the Commission can impose a fine of up to 10% of the company's worldwide turnover, without having to prove an infringement of EU antitrust rules. Available at http://europa.eu/rapid/press-release_IP-18-3921_en.htm.

[8] See, to cite just one current example, Bayer AG's $66 billion deal to acquire Monsanto. Reuters *'Bayer's Monsanto acquisition to face politically charged scrutiny'*, 14 September 2016. Available at https://www.reuters.com/article/us-monsanto-m-a-bayer-antitrust/bayers-monsanto-acquisition-to-face-politically-charged-scrutiny-idUSKCN11K2LG.

[9] See relevant discussion in Part 4 , below.

international cooperation in regard to anti-competitive business practices 'on the part of private or public commercial enterprises'.[10] The Charter devoted an entire chapter to the prevention of '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 [or have other harmful effects e.g. on development]'.[11] While the Havana Charter - whose development had earlier been led by the United States (US) in cooperation with its post-World War II allies - was later not ratified by the US and never came into effect, it remained a source of inspiration for the further development of the international trading system.[12] Furthermore, the issue of competition policy and its significance for trade continued to receive attention in the context of related negotiations and relevant provisions were incorporated in the General Agreement on Tariffs and Trade (GATT) in 1947 and in the World Trade Organization (WTO) agreements e.g. in the framework of the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Investments Measures (TRIMs Agreement), and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).[13]

The interaction between trade and competition policy was also an important element of the Doha Round of Multilateral Trade Negotiations (Doha Round) as the Round was originally conceived in 2001. The Doha Ministerial Declaration (Article 23) recognized 'the case for a multilateral framework to enhance the contribution of competition policy to international trade and development' and called for 'negotiations [to] take place after the Fifth Session of the Ministerial Conference [the Cancún Conference of 2003] on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations'.[14] Despite this, at the Cancún Conference, it was evident that no consensus existed either on the modalities for or on the basic desirability of negotiations on this topic. Developing countries mainly opposed negotiations, citing both a lack of negotiating capacity and apprehensions concerning the implications of a multilateral framework for related domestic policies and 'policy space'. In addition, while the European Union (EU) had resolutely championed the idea of a multilateral framework on competition policy, reflecting its experience with the central role of competition policy disciplines in the EU market integration project,[15] elements of the US Administration considered the idea to be premature and/or were apprehensive as to any negotiations or framework that could potentially impinge upon the discretion of national competition law enforcement authorities in their enforcement policies and decision-making.[16] Subsequently, the issue of competition policy was dropped from the Doha Round and the WTO Working Group on this topic has since been inactive.[17]

Notwithstanding the failure to reach a consensus on a specific negotiating agenda among WTO Members in the 2000s, very important complementarities exist between trade liberalization initiatives and the application of measures to suppress anti-competitive practices or arrangements. Both anti-competitive practices of firms and state-orchestrated arrangements that restrict competition can undermine the gains from trade liberalization in myriad ways. Perhaps, the clearest examples of such effects involve international cartels that allocate national markets among individual producers, abuses of a dominant position that limit access to facilities that are necessary for the importation of goods or services, and import cartels or anti-competitive vertical market restraints that exclude foreign suppliers from a market.[18] However, even international cartels or transnational abuses of a dominant position whose primary impact is on the price or supply of goods or services as opposed to the exclusion of market participants *per se* impact directly on the underlying objectives of the multilateral trading system. These envision trade liberalization not as an end in itself, but as a means to the attainment of rising living standards,

[10] See the Havana Charter for an International Trade Organization, chapter V, available at https://www.wto.org/english/docs_e/legal_e/havana_e.pdf; and, for relevant commentary, Part 2 below.

[11] *Id.*

[12] Peter van den Bossche, 'The Origins of the WTO' *in The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge University Press, 2017).

[13] See, for pertinent details, Part 2 below.

[14] See paragraph 23 of the Doha Ministerial Declaration adopted on 20 November 2001, WT/MIN(01)/DEC/1, available at https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

[15] See Anderson and Heimler, above note 2.

[16] See, for a classic statement of such concerns, Joel I. Klein, 'A Note of Caution with Respect to a WTO Agenda on Competition Policy' (Remarks to the Royal Institute of International Affairs, 18 November 1996), available at http://www.justice.gov/atr/ public/speeches/0998.htm. See also discussion in Part 2.6

[17] See Decision adopted by the General Council on 1 August 2004 (WT/L/579 of 2 August 2004; text available at https://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm), and, for relevant commentary, Anderson and Jenny, above note 4.

[18] Robert Anderson, Frédéric Jenny and Anna Caroline Müller, *Combatting Anti-Competitive Practices* (International Trade Centre, 2012). Available at http://www.intracen.org/combating-anticompetetive-practice/.

sustainable development, and growth, through trade and international investment.[19] These objectives are highly congruent with the ultimate goals of competition policy and can be directly undermined by international cartels and other anti-competitive practices.[20]

As another manifestation of complementarity, trade liberalization can itself be a powerful tool for addressing competition policy concerns, for example, where the liberalization of government procurement markets through participation in the WTO Agreement on Government Procurement (GPA) helps to make bid rigging more difficult.[21] More generally, trade liberalization is an effective vehicle for enhancing competition in many contexts (for example, in both primary products markets and in service industries with limited possibilities for competition involving purely domestic players).[22] It is widely acknowledged, as well, that the principles of non-discrimination, transparency and procedural fairness - which are among the 'founding' or 'cornerstone' principles of the WTO - have important application to competition law enforcement processes and institutions.[23]

In any case, a clear acceptance of the importance of competition policy for trade liberalization and market integration by a diverse set of economies worldwide is now manifested by the widespread incorporation of competition policy disciplines in regional and bilateral trade agreements (RTAs). Further recognition and acceptance of the role of such policy is evident from the increasing references to and inclusion of commitments on competition policy in the Protocols of Accessions that apply to new WTO Members, and in the work of the WTO Trade Policy Review Body, which systematically assesses and acknowledges the importance of national competition policies for trade, economic development and growth in developed and developing jurisdictions.[24]

Further to the above, since the cessation of work in the WTO Working Group on the Interaction between Trade and Competition Policy in 2004 (WTO Working Group), important contextual developments have occurred that arguably imply both a renewed need for better understanding of the relationships between trade and competition policy *and* increased capacity for such reflection in the international community. As will be elaborated below, relevant developments include the following:

- Competition laws and enforcement authorities have proliferated across transition economies and the developing world.[25] In all, around 135 countries are now considered to have active competition regimes.[26] This figure includes very important emerging/transition economies (e.g., Brazil, China, India, the Russian Federation, South

[19] See the Preamble to the Marrakesh Agreement establishing the WTO. Available at https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm.

[20] OECD Joint Group on Trade and Competition, *Complementarities Between Trade and Competition Policy,* COM/TD/DAFFE/CLP(98)98/FINAL, 1999. Available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=com/td/daffe/clp(98)98/final.

[21] Robert D. Anderson, William E. Kovacic and Anna Caroline Müller, 'Promoting Competition and Deterring Corruption in Public Procurement Markets: Synergies with Trade Liberalization' (2017) *Public Procurement Law Review*. An early version of this paper is available at http://e15initiative.org/publications/promoting-competition-and-deterring-corruption-in-public-procurement-markets-synergies-with-trade-liberalisation.

[22] See Robert D. Anderson and Anna Caroline Müller, *Competition Policy and Poverty Reduction: A Holistic Approach*, 2013 WTO Staff Working Paper ERSD-2013-02, available at https://www.wto.org/english/res_e/reser_e/ersd201302_e.htm.

[23] See WTO, Working Group on the Interaction between Trade and Competition Policy, Note by the Secretariat, The Fundamental WTO Principles Of National Treatment, Most-Favoured-Nation Treatment and Transparency (WT/WGTCP/W/127 of 7 June 1999; available at https://www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm); see also Claus-Dieter Ehlermann and Lothar Ehring, 'WTO Dispute Settlement and Competition Law: Views from the Perspective of the Appellate Body's Experience' (2002) *Fordham International Law Journal* 26:6, available at https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1901&context=ilj; and discussion in Part 2.1.1 . The majority of the regional trade agreements with competition policy chapters incorporate the principles of non-discrimination and transparency, see Part 3.3.2 , below.

[24] See Robert D. Anderson, Anna Caroline Müller and Nivedita Sen, 'Competition policy in WTO accessions: filling in the blanks in the international trading system', in Alexei Kireyev and Chiedu Osakwe (eds.), *Trade Multilateralism in the Twenty-First Century: Building the Upper Floors of the Trading System Through WTO Accessions* (Cambridge University Press and the WTO, 2018), pp. 299-319, and, for further discussion, Part 2.5 , below.

[25] Arguably, the original work of the WTO Working Group was an important factor in instigating/galvanizing this trend.

[26] William E. Kovacic and Marianela Lopez-Galdos, 'Lifecycles of Competition Systems: Explaining Variation in the Implementation of New Regimes' (2016) 79 *Law and Contemporary Problems* at 86. Available at https://scholarship.law.duke.edu/lcp/vol79/iss4/4.

Africa and Pakistan) that previously either had no competition laws at all (e.g., China)[27] or had limited or antiquated regimes which have now been effectively modernized. In some cases, the introduction of new competition regimes was a direct consequence of undertakings made in the course of such countries' WTO accession negotiations.[28] In contrast, in the late 1990s, only around 50 WTO Members had active competition regimes – a factor that understandably inhibited informed discussion of relevant issues[29];

- As already mentioned, the global significance of 'national' competition policies has been brought home in multiple high-profile competition law cases having cross-border effects and/or potentially global repercussions[30];

- Very significant progress has occurred in promoting better understanding of the objectives, modalities, and effects of competition policy worldwide, as a result of work undertaken by the International Competition Network (ICN), by other international organizations such as the Organisation for Economic Cooperation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD), through initiatives by non-governmental organizations (NGOs) such as the Consumer Unity and Trust Society (CUTS) and, importantly, by leading national agencies[31];

- Competition policy disciplines have been widely adopted in RTAs, providing important confirmation of the general relevance of competition policy standards as a complement to trade liberalization and suggesting possible approaches to particular issues at the multilateral level[32];

- The evolution of the world economy and, particularly, developments such as digitalization and the emergence of global value chains have raised new challenges for both competition authorities and the global community[33];

- The role of competition policy has, increasingly, been acknowledged in regard to global issues concerning intellectual property (IP), innovation and technology transfer. To be sure, the legitimate role of competition policy vis-à-vis IPRs was already explicitly acknowledged in the TRIPS Agreement, adopted in 1994 and brought into effect in 1995.[34] Still, in the early years of the Agreement, little attention was given to the relevant provisions. This situation is likely to change, as the role of IP and its relationship with competition policy have increasingly come under scrutiny in numerous jurisdictions,[35] and in international policy debate[36];

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[27] For further discussion, see for example, H. Stephen Harris, Peter J. Wang, Mark A. Cohen, Yizhe Zhang, and Sebastien J Evrard, *Anti-Monopoly Law and Practice in China* (Oxford, 2011), p. 1.

[28] See Anderson et al, above note 24; and Part 2.7

[29] In some cases, introduction of competition laws was linked to the national implementation of the TRIPS Agreement. For example, while negotiating the draft TRIPS Agreement, the negotiator from Malaysia 'became aware of the great need for Malaysia to legislate on competition law and […] had so advised the Ministry concerned. This was because the TRIPS Agreement (like other IP conventions) would give rise to monopolistic regimes that would be detrimental to Malaysia's interests if the country did not have anti-competition law like those enforced in the EC and the United States'. Eventually, Malaysia adopted its Competition Act in 2010 (Act 712). See Umi K.B.A. Majid, 'Negotiating for Malaysia', in Jayashree Watal and Antony Taubman (eds.), *The Making of the TRIPS Agreement': Personal insights from the Uruguay Round Negotiations* (World Trade Organization, 2015), p. 306.

[30] See relevant discussion in Part 4 .

[31] See, for relevant discussion, Hugh M. Hollman and William E. Kovacic, 'The International Competition Network: Its Past, Current and Future Role' (2011) 20 *Minnesota Journal of International Law*, pp. 274-323, at 301; and Part 5.1 , below.

[32] See, for relevant discussion, Part 3 of this paper and references cited therein. An important current reference is François-Charles Laprévote, Sven Frisch, and Burcu Can, *Competition Policy within the Context of Free Trade Agreements* (E15 initiative on Strengthening the Global Trade and Investment System for Sustainable Development, September 2015), available at http://e15initiative.org/wp-content/uploads/2015/07/E15-Competition-Laprevote-Frisch-Can-FINAL.pdf .

[33] See Part 4.3 below.

[34] See Part 2.3 below.

[35] See, for pertinent analysis, Robert D. Anderson, Anna Caroline Müller and Antony Taubman, 'Competition policy and the WTO TRIPS Agreement: an essential platform for policy application, and questions unresolved', to be published in Robert D. Anderson, Nuno Pires De Carvalho and Antony Taubman (eds.), *Competition Policy and Intellectual Property in the Global Economy* (Cambridge University Press, World Intellectual Property Organization and World Trade Organization, forthcoming 2018), chapter 3.

- Whereas previously the international business community was reluctant to support multilateral work on competition policy standards, more recently, there are signs of increasing awareness in the community of the potential downsides of a lack of coordination in competition law enforcement globally, possibly strengthening support for action to ensure adherence to the principles of non-discrimination, transparency, and procedural fairness in the field of competition policy.[37]

This paper is intended to serve as a resource for reflection on the above and related issues, if and/or when WTO Members or another appropriate body or bodies decide, in the future, to undertake such an exercise. The remainder of the paper is organized as follows: Part 2 examines specific areas of interface between competition policy and the *existing* WTO agreements, while also considering the past work of the WTO Working Group and recent developments concerning WTO Accession Protocols, Trade Policy Reviews and WTO's technical assistance activities. Part 3 reviews the treatment of competition policy in RTAs – a further very significant manifestation of synergies between the two policy areas. Part 4 outlines a series of current challenges for policy makers regarding the role of competition policy in the global economy. Part 5 develops an agenda for further exploratory work on competition policy issues in the framework of the WTO (if and when Members might wish to take this up), taking due account of the important work done to date in the ICN and in other international fora and contexts. Part 6 provides concluding remarks.

2 COMPETITION POLICY IN THE WTO: EXISTING ELEMENTS AND PAST DISCUSSIONS

As noted in the Introduction, the interface between international trade and competition policy has been a focus of interest since the founding of the present international trading system. In fact, interest in related issues dates back much further than that: in his classic *The Wealth of Nations* (published in 1776), Adam Smith gave much attention to issues concerning the interaction between trade and what today would be termed competition policy concerns, notably regarding state-designated trading monopolies.[38]

As noted, in the 1940s, restrictive business practices were a central element in the negotiations leading to the Havana Charter, which devoted an entire chapter to 'business practices affecting international trade which restrain competition, limit access to markets or foster monopolistic control'. [39] The Havana Charter was a historic attempt, in the aftermath of World War II, to establish a comprehensive framework for trade liberalization and the peaceful resolution of related disputes. The Charter did not, however, come into effect; in the event, President Truman declined to submit it to the US Senate for ratification when it became evident that it would likely be rejected.[40] In this context, the GATT, signed in 1947, became the principal multilateral instrument governing international trade from 1948 until the WTO was formally established as its successor in 1995, bringing a more comprehensive multilateral trading system into existence. Unlike the Havana Charter, the GATT did not embody a dedicated section on anti-competitive business practices as such. Nonetheless, as will be discussed below, it incorporates provisions that manifest a concern with competition policy issues.[41]

During the early years of the GATT, a 'Group of Experts' was appointed to study and make recommendations on the need to address restrictive business practices in international trade, resulting in 'the 1960 Decision on Arrangements for Consultations on Restrictive Business Practices'.[42] The Decision recognized that restrictive business practices' may hamper the expansion of world trade and the economic development in individual countries and thereby frustrate the benefits of tariff reduction and removal of quantitative restrictions',[43] but stopped short of creating

[36] See the World Intellectual Property Organization (WIPO) Development Agenda, Cluster A, Recommendation 7. Available at http://www.wipo.int/ip-development/en/agenda/recommendations.html.

[37] See International Competition Policy Expert Group (ICPEG), *Report and Recommendations* (a report sponsored by the US Chamber of Commerce), March 2017 available at https://www.uschamber.com/sites/default/files/icpeg_recommendations_and_report.pdf.

[38] Adam Smith, *The Wealth of Nations* (New York: Penguin Classics, 1986, first published 1776). Smith denounced the monopoly power of the East India Company, which he argued hurt both India and the UK, thus presciently highlighting the significance of international anti-competitive behaviour for trade and the related roles of private and public actors. See, for elaboration, Anderson and Holmes, above note 4.

[39] See chapter V of the ITO Charter, above note 11.

[40] See, for additional background and context, Douglas A. Irwin, Petros C. Mavroidis and Alan O. Sykes, *The Genesis of the GATT* (Cambridge University Press, 2008).

[41] See Part 2.1 , below.

[42] Restrictive Business Practices: Arrangements for Consultations, Decision of 18 November 1960, BISD 9S/28, available at http://www.worldtradelaw.net/misc/rbp1.pdf.download. See also, Report of Experts, Restrictive Business Practices: Arrangements for Consultations of 2 June 1960, L/1015, BISD 9S/170, available at http://www.worldtradelaw.net/misc/rbp2.pdf.download.

[43] *Id.*

binding rules to deal with such practices. It did establish a framework for *ad-hoc* notifications to address relevant issues.[44] The 1960 Decision was referred during the WTO era in the context of the *US-Japan* dispute relating to consumer photographic film and paper.[45]

Equally, the creation of the WTO did not bring about a comprehensive set of binding rules addressing anti-competitive business practices in international trade. However, the importance of measures to ensure the competitive operation of markets for the multilateral trading system was clearly manifested in a number of provisions and subordinate instruments that were incorporated in the various WTO agreements. As discussed below, particularly important examples of such agreements comprise the GATS, the TRIPS Agreement, the TRIMs Agreement and the GPA. In addition, since the creation of the WTO in 1995, competition policy has figured importantly both in WTO accession packages (i.e., the sets of undertakings that are adopted in relevant Protocols when new Members join the WTO) and in WTO Trade Policy Reviews. Furthermore, the WTO Working Group was active from 1997 through 2003 and carried out a wide-ranging study of the relationship between trade and competition policy and the implications of such policy for development and global prosperity.[46] These provisions and contexts, in which the role of competition policy has already been recognized in the framework of the multilateral trading system in specific and tangible ways, are discussed further below.

2.1 Competition Policy and the General Agreement on Tariffs and Trade: early elements of interest

As discussed, the GATT, which was originally negotiated in the 1940s, does not contain explicit binding rules on restrictive business practices. Importantly, however, the GATT principle of national treatment – on of the 'cornerstone' principles of the WTO – has potential application to competition law enforcement processes and institutions. The GATT also incorporates relevant concepts/rules in its provisions on state trading enterprise (STEs) and quantitative restrictions on exports.

2.1.1 Competition law and the GATT National Treatment Obligation

GATT Article III:4, concerning national treatment in regard to internal sales, distribution and use, provides that:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.[47]

There is little doubt that national competition laws can fall within the category of 'laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use'.[48] An interpretative note to Article III[49] makes it clear that the national treatment standard contained in GATT Article III applies to internal taxes and laws and regulations even where they are collected or enforced, in the case of imported products, at the point or time of importation. It might also be noted that GATT Article III:4 has been understood to apply to procedural as well as substantive laws, regulations and requirements.[50]

While the application of the national treatment obligation to competition laws is, in principle, straightforward, it can be difficult in practice. In particular, the exact scope of *de facto* discrimination issues potentially addressable under this provision is difficult to predict.[51]

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[44] See Sadeq Z. Bigdeli and Mira Burri-Nenova, 'Article IX GATS', in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds.), *WTO - Trade in Services* (Brill, 2008. Vol. 6), pp. 221-222.

[45] See Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, p. 1179, para. 6.37. Available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds44_e.htm.

[46] See Part 2.6 , below.

[47] The text of the WTO General Agreement on Tariffs and Trade (GATT). Available at https://www.wto.org/english/docs_e/legal_e/gatt47.pdf.

[48] See Ehlerman and Ehring, above note 23; and WTO 1997 Annual Report, above note 4.

[49] Available at https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art3_e.pdf.

[50] *United States – Section 337 of the Tariff Act of 1930*, para. 5.10, BISD 36S/345, L/6439, adopted on 7 November 1989; and WTO, above note 23.

[51] See Ehlerman and Ehring, above note 23. In relation to the market definition, the Panel in *Korea – Alcoholic Beverages* considered that it is not necessary to use the same criteria for defining markets under

Overall, as suggested by Ehlerman and Ehring:

> Competition laws of the WTO Members are currently subject to the dispute settlement system. The national treatment obligation prescribed by Article III:4 of the GATT 1994 is probably the most important test. It is not likely, yet not impossible, that a competition law *per se* violates Article III:4.[52]

2.1.2 State trading, exclusive or special privileges and monopolies

The impact that state trading activities can have on market access for imports has been a matter of long-standing concern in international trade relations.[53] By acting as a trader, a government may distort and/or impact international trade flows through its purchase and sales decisions without resort to other more direct means of trade regulation.[54] The fundamental rules regulating state trading enterprises are established in GATT Article XVII (State Trading Enterprises), including its Ad Article XVII of the GATT Annex I and Understanding on the Interpretation of GATT Article XVII.[55] Other related provisions include GATT Article II:4 (in relation to import monopolies), Ad Articles XI–XIV and XVIII of the GATT Annex I (restrictions made effective through state trading operations) ('the Interpretative Notes')[56], and Article 4.2 (footnote 1) of the Agreement on Agriculture, which similarly to the Interpretative notes restricts market access restrictions maintained through state-trading enterprises (see also relevant discussion in Part 2.1.3 , below).

The GATT recognizes that governments may choose to participate in international commerce in competition with private firms, but it does not leave governments with a free hand in how to carry out their trading operations. The main principle established under Article XVII:1 is that state trading is to be undertaken on a non-discriminatory basis:

> 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-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.

One of the questions that has arisen with regard to the interpretation of this provision is whether 'non-discriminatory treatment prescribed in [the GATT] for governmental measures affecting imports or exports by private trader' under Article XVII includes national treatment (Article III) in addition to most-favoured nation obligations (Article I). Scholars have remarked that both GATT and WTO panels in relevant cases have avoided making any findings with regard to this question,[57] suggesting that the issue remains unresolved in the WTO law and practice.

The second part of Article XVII:1 (para. b) requires that STEs afford the enterprises of other Members 'adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales'. The Panel in the case *Canada-Wheat Exports* concluded that an inquiry whether an STE has acted solely in accordance with commercial considerations must be undertaken with respect to the market(s) in which the STE is alleged to be engaging in discriminatory conduct. Additionally, it was stressed that paragraph (b) does not give panels a mandate to engage in a broader inquiry into whether, in the abstract, STEs are acting 'commercially', therefore there is no basis for interpreting that provision as imposing comprehensive competition-law-type obligations on STEs.[58]

The coverage of Article XVII is also not entirely certain. Its text distinguishes three types of enterprises: (i) 'a State enterprise, wherever located' that is established or maintained by a Member (State enterprise); (ii) 'any enterprise' that is granted 'formally or in effect, exclusive or

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Article III:2 as under competition law. Subsequently, the issue was not addressed by the Appellate Body. Available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds75_e.htm.

[52] See Ehlerman and Ehring, above note 23.

[53] For the background information, see WTO 1997 Annual Report, above note 4. See also discussions on SOEs in Parts 3.3.5 and 4.4 .

[54] Andrea Mastromatteo, 'WTO and SOEs: Article XVII and Related Provisions of the GATT 1994' (2017) *World Trade Review* 16.4: 601-618.

[55] Available at https://www.wto.org/english/docs_e/legal_e/08-17_e.htm.

[56] Interpretative notes state that: 'throughout Articles XI, XII, XIII, XIV and XVIII, the terms "import restrictions" or "export restrictions" include restrictions made effective through state-trading operations.

[57] See Mastromatteo, id, and sources cited therein.

[58] Appellate Body Report, *Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, 2739, para. 145.

special privileges' (privileged enterprise); and (iii) 'any enterprise', whether or not a 'State enterprise' or 'privileged enterprise'.[59]

The Understanding on the Interpretation of Article XVII introduced the following 'working definition' of STEs:

> Governmental or non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports.[60]

This definition seems to limit the set of relevant enterprises to those that have been granted 'exclusive or special rights or privileges'. At the same time, the meaning of exclusive or special rights or privileges is not further elaborated in the Understanding on the Interpretation of Article XVII. Another relevant document in this regard is the 'Illustrative List of the kinds of relationships between governments and STEs' developed in 1999 by the Working Party on STEs.[61] Based on Members' notifications, the Illustrative List provides non-binding guidance in relation to the scope of STEs which have two essential features: (i) 'a relationship to government through the latter's granting of a right or privilege'; and (ii) STE must conduct 'an activity which influences the level or direction of imports and exports'.[62]

Additionally, para. 3 of Article XVII recognizes that such enterprises might be operated so as to create serious obstacles to trade. Most concessions relating to the operation of state trading enterprises negotiated under the GATT have taken the form of tariff bindings,[63] although the possibility of other forms of restraints is explicitly recognized in Articles XVII:3 and II:4 of the GATT.

Another issue related to STEs is the regulation of import monopolies. The GATT generally allows WTO Members to maintain such monopolies. Subject to certain requirements, Article XX(d) provides a 'General Exception' to other WTO obligations for 'measures necessary to secure enforcement of monopolies' operated under Articles II and XVII of the GATT. The approach in the GATT has therefore been to encourage negotiations on commitments relating to the market behaviour of the monopolies or privileged enterprises themselves when they deal with imported vs domestic goods. As stated in Article II:4 of the GATT:

> If any contracting party establishes, maintains or authorizes, 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 as 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.

Although Article II:4 does not refer to state trading enterprises, it is generally recognized that import monopolies constitute a particular type of STEs – and that the provision imposes disciplines on the mark up practices of these.[64] Import monopolies must not operate so as to afford protection in excess of the bound tariff rate.

The GATT does not address whether import monopolies or exclusive/special rights should be maintained in a certain sector, and does not explicitly make their existence subject to negotiations. Yet, nothing prevents this question from being addressed by WTO Members. In that regard, it is noteworthy that, in context of recent accession negotiations, especially with formerly centrally planned/transition economies, commitments have been sought not just on the behaviour of enterprises that enjoy exclusive rights to import, but also on the existence of such rights – i.e. the market structure itself.[65] For example, on its accession to the WTO, China undertook obligations in

[59] For further details, see Mastromatteo, above note 54.

[60] The 'working definition' is explicitly stated to be without prejudice to the substantive provisions of Article XVII.

[61] The Working Party on State Trading Enterprises was established as a result of the Uruguay Round.

[62] Illustrative List, para. 6. For further information, see Mastromatteo, above note 54.

[63] Including in relation to concessions under the WTO Agreement on Agriculture, which has required the tariffication of non-tariff measures including those maintained through state trading enterprises.

[64] See Mastromatteo, above note 54.

[65] For further details, see Part 2.5 .

relation to trading rights and the liberalization of state trading monopolies in a number of sectors.[66]

2.1.3 Export restrictions

The rules of the GATT generally prohibit quantitative restrictions on exports (Article XI of the GATT) and recognize that quantitative restrictions must not be imposed not only through direct government action, but also through purchases of STEs.[67] WTO rules, however, do not prevent these entities from exerting market power in export markets through the prices they charge abroad.[68] In that regard, government-sponsored export cartels and/or other restraints might potentially breach the GATT rules generally prohibiting quantitative export restrictions.[69]

The issue of the relationship between competition laws and principles and government-sponsored arrangements whereby enterprises regulate their export prices or quantities has been the subject of much discussion. These arrangements are often entered into at the request of importing countries and, in such cases, are not motivated by a desire to exercise market power on the part of exporting companies. Even so, from a competition perspective they would raise issues similar to those raised by private export cartels, were it not for the role of the governments in initiating and/or supervising them.[70]

Further guidance with regard to export restraints is provided in the WTO Agreement on Safeguards (Safeguard Agreement), which requires WTO Members to 'not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side' (Article 11:1(b)).[71] Examples of such similar measures include export moderation, export price monitoring systems, export surveillance and discretionary export licensing schemes, where they afford protection to the importing country. This prohibition includes actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members. The Safeguard Agreement further requires Members not to encourage or support the adoption or maintenance by public and private enterprises of equivalent non-governmental measures. The Agreement thus recognizes that it is sometimes difficult to establish the degree of government involvement in such measures.[72]

With regard to purely private export cartels, WTO rules as they presently stand can play a limited role at best. The Panel in *Argentina – Hides and Leather* observed that, 'there is no obligation under Article XI for a Member to assume a full 'due diligence' burden to investigate and prevent cartels from functioning as private export restrictions'.[73] However, nothing prevents WTO Members from addressing such restrictions if relevant anti-competitive arrangements are established within or affect their jurisdiction and markets.

2.2 Competition Policy and the WTO General Agreement on Trade in Services: an essential nexus[74]

The GATS is a very significant element of the multilateral trade agreements that incorporates specific competition policy provisions. The importance given to the subject of

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[66] Protocol on the Accession of the People's Republic of China, WT/L/432, 23 November 2001, available at https://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm. See also Part 2.5 , below.

[67] The Interpretative Note to Article XI, XII, XIII, XIV and XVIII of the GATT. Reference is also made in the Agreement on Agriculture (footnote 1 of Article 4.2).

[68] Export duties (which in principle are not prohibited by the GATT) could also restrict exports. This could theoretically be subject to a 'tariff' binding in respect of export duties or bindings with a similar effect (such as on export mark-ups).

[69] See WTO 1997 Annual Report, above note 4.

[70] In the 1980s there was significant discussion of the relationship between voluntary export restraint arrangements, price undertakings and competition policy. Export industries, for instance, steel, automobiles and conductors, that were cooperating to restrict exports or respect minimum prices sometimes sought assurances that their actions would be exempt from or withstand challenge under the competition law in the country of importation. See S.W. Waller, *International Trade and US Antitrust Law* (1994, Clark Boardman Callaghan, Deerfield, II, United States); and WTO 1997 Annual Report, above note 4.

[71] Similar restriction is also set out in the Agreement on Agriculture (footnote 1 of Article 4.2).

[72] See WTO 1997 Annual Report, above note 4.

[73] Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, 1779, para. 11.52. In that case, the European Communities alleged that there is a cartel of tanners operating in the Argentinean market and that this cartel had as one of its objects the stifling of exports of its raw materials, bovine hides.

[74] Portions of this Part draw upon material published in Robert D. Anderson and Anna Caroline Müller, *Competition Law/Policy and the Multilateral Trading System: A Possible Agenda for the Future* (E15 initiative on Strengthening the Global Trade and Investment System for Sustainable Development, September 2015), available at http://e15initiative.org/publications/competition-lawpolicy-and-the-multilateral-trading-system-a-possible-agenda-for-the-future/.

competition policy in the overall framework of the GATS derives directly from the purposes of the GATS and the nature of the barriers that are addressed by the Agreement. Historically, in services industries, the scope for trade could be (and often was) directly and negatively impacted by the role of monopolies (whether state-owned or otherwise) as well as by practices that limited competition.[75]

The basic obligation in GATS Article VIII is to 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 fundamental obligations under Article II of the Agreement (the general obligation relating to most-favoured-nation treatment) and with that Member's specific commitments under the GATS. In that regard, it is important to note that the GATS covers the supply of services not only through the trans-border supply of a service, but also through the commercial presence of foreign service suppliers (i.e. through foreign investment) in the relevant market. These markets in turn may be the subject of monopolies or exclusive rights, which may hamper a new entrant to succeed in establishing its presence, hence a new entrant would not be allowed to supply the reserved services unless the monopoly rights are reduced or eliminated. Therefore, the right of foreign service suppliers to establish in markets which are subject of monopolies or exclusive rights has been a major issue of negotiation and area of commitment, especially in the field of telecommunications (see discussion below). [76]

In addition, GATS Article IX recognizes specifically that 'certain business practices of service suppliers […] may restrain competition and thereby restrict trade in services.' The scope of Article IX is wider than that of Article VIII, and potentially includes activities of service suppliers which may have a dominant position or collude in services markets and do not formally have monopoly rights extended by the government.[77] Article IX obliges WTO Members to enter into consultations with a view to eliminating such practices upon request by another Member – a clear example of a WTO provision recognizing the need for international cooperation in the resolution of competition policy concerns.

2.2.1 A further specific illustration in the area of services trade: the role of competition policy and the regulation of Basic Telecommunications Services

Commitments in telecommunications services were first made during the Uruguay Round in the text of the GATS. The GATS incorporates the separate Annex on Telecommunications, which was designed as a competition-related safeguard in this sector. The Annex provides guarantees for reasonable access to and use of public telecommunications, in a given market, by suppliers of all services benefiting from commitments scheduled by the member concerned.[78] Additionally, in the context of the post-Uruguay Round WTO negotiations on Basic Telecommunications Services that were conducted under the overall rubric of the GATS and were concluded in February 1997, most WTO members have committed to the regulatory principles spelled out in the so-called 'Reference Paper'[79] - a very significant specific example of the importance of competition policy for services trade concerns.

While in the Annex on Telecommunications WTO Members incur obligations whether or not they have liberalized or scheduled commitments in the basic telecommunications sector, the Reference Paper sets out specific obligations for competing basic telecoms suppliers. This is because the Annex addresses access to these services by users rather than the ability to enter markets to sell such services; the latter is addressed in schedules of commitments. As such, the beneficiaries of the disciplines in the Annex will be firms that supply any of the services included in a Member's schedules; including not only value-added and competing basic telecommunications suppliers, but other service operators, for example, that wish to take advantage of market access commitments made by a WTO Member. Therefore, the Annex obligations strike a balance between the needs of users for fair terms of access and the needs of the regulators and public telecommunications operators to maintain a system that works and that meets public service objectives.[80]

The Reference Paper is intended to address, among other possible concerns, situations in which the access to a public telecommunications network constitutes an essential facility,

[75] Anderson and Holmes, above note 4.
[76] WTO 1997 Annual Report, above note 4, p. 59.
[77] See Bigdeli and Burri-Nenova, above note 44, p. 223.
[78] See WTO, Telecommunications services, available at https://www.wto.org/english/Tratop_e/serv_e/telecom_e/telecom_e.htm.
[79] Telecommunications Services: Reference Paper, 24 April 1996, available at https://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.
[80] See WTO, Explanation of the Annex on telecommunications, available at https://www.wto.org/english/Tratop_e/serv_e/telecom_e/telecom_annex_expl_e.htm.

exclusively or predominantly provided by a single or a limited number of suppliers and for which there are no feasible substitutes: a situation which potentially constitutes an impediment to both competition and market access for competing service suppliers in related (downstream) markets. More generally, the Reference Paper both recognizes the threat of, and requires participating WTO Members to address, anti-competitive practices of dominant firms in this sector.

To address this concern, the Reference Paper sets out detailed rules relating to interconnection of downstream service providers with major suppliers on non-discriminatory terms; the prevention of anti-competitive acts such as cross-subsidization (or 'margin squeeze'); and the making available of information needed for efficient inter-connection. These rules draw on concepts of antitrust and regulatory policy such as exclusionary practices and the essential facilities doctrine.[81] The provisions on competitive safeguards require members to prevent major suppliers from engaging in anti-competitive cross-subsidization and from abusing control over information.[82] Arguably, some of the most significant competition safeguard obligations concern network interconnection, which must take place on non-discriminatory, transparent, and reasonable terms and at cost-oriented rates (among other obligations).[83] The Reference Paper also incorporates provisions regarding independent regulators, which require the regulatory body to be impartial, separate from, and not accountable to any service supplier.[84] In addition, it requires universal service schemes to be competitively neutral.

Key elements of the Reference Paper and related provisions of Mexico's GATS commitments were considered in the 2007 WTO Panel Decision in the *Mexico Telecoms (Telmex)* case.[85] In this case, which was brought against Mexico by the US, the Panel found that several features of Mexico's framework for regulation of international telecommunications services were in violation of its commitments under the Reference Paper. It is noteworthy that, rather than appealing the case to the WTO Appellate Body, Mexico chose to accept the Panel's ruling. In the view of some observers, it did so precisely because this was in the best interest of Mexico's consumers and the long-run development of its telecommunications sector.[86]

As to the systemic importance of the case, Professor Eleanor Fox concludes as follows:

> The Mexican telecom case illuminates why competition rules must extend cross-border and why hybrid trade-and-competition (public/private) restraints must be treated as a unified whole, if we are to realize the good potential of globalization. […] The GATS Annex with its Reference Paper is the first instrument providing a unified vision for disciplining linked public and private restraints. The Panel Report's interpretation of the antitrust obligation gives life to the discipline. A positive reading of the antitrust clause is a step forward on intertwined issues of trade and competition.[87]

While the Reference Paper's disciplines on anti-competitive practices proved their utility in the *Telmex* case, it may be useful to ponder relevant lessons in the context of a broader reflection process on trade and competition policy. A possible question for reflection would be whether there is a need for comparable disciplines in other infrastructure sectors (for example, postal services, energy)[88] that have network industry characteristics. Potentially, the establishment of such rules could be easier than the development of a broad horizontal framework for the application of competition policy at the multilateral level. At the same time, it should be recognized that the purposes of sectoral arrangements as compared to those of a horizontal framework, while allied, are not identical. Whereas a horizontal framework would be intended to promote the effective application of competition solutions across the board, sectoral approaches such as the Telecoms

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[81] Anderson and Holmes, above note 4.

[82] See par. 1 of the Reference Paper, above note 79.

[83] Carlos AP Braga, Carsten Fink, and Bernard Hoekman, 'Telecommunications-Related Services: Market Access, Deeper Integration and the WTO' (2002) *HWWA Discussion Paper* No. 1582002. Available at https://www.econstor.eu/handle/10419/19320.

[84] See par. 5 of the Reference Paper, above note 79.

[85] See Panel Report, *Mexico – Measures Affecting Telecommunications Services*, WT/DS204/R, adopted 1 June 2004, DSR 2004:IV, p. 1537. Available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds204_e.htm.

[86] See, for example, Gary Hufbauer and Sherry Stephenson, 'Services trade: Past liberalization and future challenges' (2007) *Journal of International Economic Law* 10.3: 605-630.; and, for a useful related commentary, Eleanor M. Fox, 'The WTO's first antitrust case–Mexican Telecom: a sleeping victory for trade and competition' (2006) *Journal of International Economic Law* 9.2: 271-292.

[87] Fox, above note 86.

[88] In the context of the services negotiations which were launched under the Doha Development Agenda in 2001, WTO Members have proposed to establish separate Reference Papers for other sectors. For instance, in 2005 the European Communities proposed to establish a Reference Paper in the postal and courier services sector, see TN/S/W/26 of 17 January 2005, available at https://www.wto.org/english/tratop_e/serv_e/postal_courier_e/postal_courier_e.htm.

Reference Paper respond to particular structural and market access concerns that are manifested in infrastructure sectors, which, at least in the past, have often been subject to extensive monopolization.[89] In that regard, recent competition-related concerns with regard to modern (as opposed to traditional) network industries operating across jurisdictions arguably show that the issues at hand remain relevant, even if not identical, and may benefit from systematic analysis at the international level.

2.3 Competition policy and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights: the quest for balance[90]

The TRIPS Agreement is another important example of the express recognition within a multilateral trade agreement of the role of competition policy.[91] The TRIPS Agreement provisions on competition policy result from the demands of developing countries during the TRIPS negotiations, and more generally the recognized role of competition policy in balancing the exercise of IPRs in jurisdictions around the globe.[92] Hence, a number of TRIPS negotiators (notably those negotiating for Brazil and India) attached importance to the maintenance, in the TRIPS Agreement, of scope for the issuance of compulsory licences and other measures to address abusive practices by national authorities.[93] Support for this objective was by no means limited to developing countries; but was also provided by developed countries such as Australia, Canada and Japan. In this context, the TRIPS negotiations revealed common policy concerns on the part of negotiators from the developed and developing world.[94]

At a broad level, Article 8.2 of the TRIPS Agreement stipulates that:

> Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

In the same spirit, but focusing on the specific issue of licensing practices, Article 40.1 of the Agreement notes that 'some licensing practices or conditions pertaining to IPRs which restrain competition may have adverse effects on trade and may impede that transfer and dissemination of new technology'.

To address this concern, Article 40.2 of the TRIPS Agreement recognizes the right of Member governments to take measures to prevent anti-competitive abuses of IPRs, provided that such measures are consistent with relevant provisions of the Agreement (for instance in avoiding discriminatory application). Article 40.2 also contains a short non-exhaustive illustrative list of practices which may be treated as abuses.[95] It should be noted that neither Article 8.2 nor Article 40.2 indicates that specific practices *shall* be treated as abuses or specifies remedial measures that must be taken. Hence, the competition provisions of the Agreement are permissive rather than prescriptive.[96]

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[89] See Anderson and Müller, above note 74.

[90] Portions of this Part draw upon material published in Anderson and Müller, above note 74.

[91] Anderson and Holmes, above note 4; Robert D. Anderson, 'Competition Policy and Intellectual Property in the WTO: More Guidance Needed?' in Josef Drexl, *Research Handbook on Intellectual Property and Competition Law* (Edward Elgar, 2008), chapter 18.

[92] See Anderson and Müller, above note 35; and Robert D. Anderson, Jianning Chen, Anna Caroline Müller, Daria Novozhilkina, Philippe Pelletier, Nivedita Sen and Nadezhda Sporysheva, 'Competition agency guidelines and policy initiatives regarding the application of competition law vis-à-vis intellectual property: an analysis of jurisdictional approaches and emerging directions' to be published in Anderson, Carvalho and Taubman (eds.), above note 35, chapter 17. Preliminary version available as a WTO Staff Working Paper ERSD-2018-02, 6 March 2018 (https://www.wto.org/english/res_e/reser_e/ersd201802_e.pdf).

[93] See, for detailed commentary, Piragibe dos Santos Tarrago, 'Negotiating for Brazil', chapter 12; and A.V. Ganesan 'Negotiating for India', chapter 11, in Watal and Taubman, above note 29. Historically, India has had concerns with the overall impact of IP on competition and its market economy. Reflecting this, India had an important role in securing agreement on the inclusion, in the TRIPS Agreement, of provisions dealing with anti-competitive and other perceived abuses of IP.

[94] See, for additional background, Antony Taubman and Jayashree Watal, 'Revisiting the TRIPS negotiations: Genesis and structure of this book', chapter 1, in Watal and Taubman, above note 29.

[95] These are exclusive grant-back conditions, conditions preventing challenges to validity and coercive package licensing.

[96] See Robert D. Anderson, 'Intellectual Property Rights, Competition Policy and International Trade: Reflections on the Work of the WTO Working Group on the Interaction between Trade and Competition Policy,' in Thomas Cottier and Petros Mavroidis (eds.), *Intellectual Property: Trade, Competition and Sustainable Development*, (Ann Arbour: University of Michigan Press, December 2002), chapter 17; and Anderson, Müller and Taubman, above note 35.

Article 40.3 provides that a Member considering action against the licensing practices of an IP owner that is a national or domiciliary of another Member can seek consultations with that Member. The latter Member is required to cooperate through the supply of publicly available non-confidential information of relevance, and of other information available to that Member, subject to domestic law and to the conclusion of mutually satisfactory agreements concerning the safeguarding of its confidentiality.[97]

Competition policy considerations are also embodied in the TRIPS Agreement provisions relating to the compulsory licensing of patents. Article 31 sets out detailed conditions that WTO Members must respect when granting compulsory licences. Article 31(k) stipulates, however, that Members are not obliged to apply certain of these conditions[98] where the compulsory licence is granted 'to remedy a practice determined after judicial or administrative process to be anti-competitive.' In particular, it removes the requirement under Article 31(b) to show that a proposed user has tried to obtain voluntary authorization from the right holder on reasonable terms and conditions and that such effort has not been successful within a reasonable period of time. Equally, it removes the requirement of Article 31 (f) that authorization for use of a patent under a compulsory licence be predominantly for the supply of the domestic market of the Member authorizing such use.[99]

Also, the general provision of the TRIPS Agreement (Article 67) on technical cooperation is of relevance to information sharing and capacity building in relation to anti-competitive IP practices.[100]

The competition-related provisions of the TRIPS Agreement, while representing an essential element of balance in the Agreement, also leave important questions unanswered.[101] For example, they do not define the basis on which practices may be deemed to be anti-competitive - that is, the evaluative standards to be employed. Consequently, the full set of practices that may be deemed anti-competitive (beyond the three examples mentioned) is left undefined. The TRIPS Agreement also provides little in the way of guidance regarding the remedies that may be adopted in particular cases, beyond making clear that any measures adopted must be consistent with other provisions of the Agreement. Professor Thomas Cottier, a Swiss negotiator during the Uruguay Round and prominent authority on issues concerning intellectual property and international trade, observes that:

> [N]egotiations should have extended into disciplines of competition policy relevant to IPRs, much as they could be partially observed in the reference paper on telecommunications in the GATS. Instead, the TRIPS Agreement left its parties with policy space to address competition policy in domestic law, ignoring the fact that most countries at the time would [not] have had competition law and policies in place. Perhaps the subsequent debate on access to essential drugs and the changes to the law of compulsory licensing could have been prevented if a broader approach had been adopted.[102]

These gaps heighten the technical challenges for WTO Members in putting the provisions to good (sound) use and also raise potential international coordination problems. For example, it could be the case that remedies imposed in one jurisdiction may impinge or be felt to impinge on behaviour and on economic welfare in other jurisdictions. The potential for such problems has already been seen in international tensions relating to remedies imposed in the various Microsoft, Google and other cases (for relevant discussion, see relevant sections in Part 4 , below). As suggested by Catherine Field, adviser to the United States delegation during the TRIPS negotiations, from an IP perspective, the lack of a common approach or international standards for application of antitrust or competition law leaves a right holder potentially vulnerable. Field argues that a more coherent international approach to the application of IP competition and antitrust measures 'may not necessarily require a renegotiation, but rather solutions within the established framework'.[103] In this context, and without implying any need for amendment to the TRIPS Agreement itself, there could be merit in a policy analysis and reflection exercise at the

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[97] Anderson, Müller and Taubman, above note 35.

[98] Specifically, those contained in paragraphs (b) and (f) of Article 31.

[99] Anderson, Müller and Taubman, above note 35.

[100] See, relevant discussion on WTO technical assistance in the area of competition policy in Part 2.9 below.

[101] Anderson, above note 91.

[102] See Thomas Cottier, 'Working together towards TRIPS', chapter 4, in Watal and Taubman, above note 29.

[103] See Catherine Field, 'Negotiating for the United States', chapter 8; and Antony Taubman, 'Thematic review: Negotiating "trade-related aspects" of intellectual property rights', chapter 2, in Watal and Taubman, above note 29.

multilateral level to further elucidate the relationship between competition policy and IPRs and promote international policy coherence in this important area.[104]

2.4 Competition policy and the WTO Agreement on Government Procurement: essential complements for good performance in public procurement markets[105]

Competition policy plays a very important role in the WTO GPA, even though this is only fleetingly recognized in the treaty text. In broad terms, the GPA aims at promoting the welfare of citizens by ensuring an appropriate degree of transparency in government procurement regimes and by providing market access to foreign suppliers (thereby augmenting, very substantially in some cases, possibilities for obtaining value for money through competition).[106] Provisions similar to the GPA are incorporated in many RTAs, entered into both by parties to the GPA and by non-parties.[107]

The GPA itself does not establish separate rules regarding anti-competitive practices as tools to combat bid rigging in public procurement. Rather - as a trade liberalization agreement with operational impact in this sector - it serves an important complementary purpose: it both expands the number of potential competitors for individual procurements and increases their diversity. As such, it directly attacks the underlying conditions that are known to facilitate supplier collusion, especially the unnecessary closing of markets and/or limitations on the scope for participation of alternative suppliers.[108]

The enforcement of competition (antitrust) rules can fairly be characterized as an essential adjunct to the Agreement, and to the opening up of procurement markets generally.[109] This is because the possibility of rigging bids can never be eliminated altogether, merely by opening procurement processes to foreign competitors (since the latter may also be party to bid-rigging conspiracies). Therefore, even after procurement rules have been liberalized, competition policy has a very important role to play in addressing residual regulatory barriers to supplier participation and in ensuring that foreign bidders are not excluded by private sector anti-competitive behaviour.[110]

Although the importance of competition law rules against bid-rigging is well known to competition authorities, this and the general significance of market opening in the public procurement sector may be less well known to WTO negotiators. Conversely, competition authorities may not, in all cases, be aware of the scope for international liberalization to expand the underlying possibilities for beneficial competition in the public procurement sector and to help in the deterrence of bid rigging - therefore meriting the authorities' support. The GPA also has an important interface with the prevention of corruption in procurement markets that are covered by the Agreement[111] – the point being that collusion and corruption often go hand-in-hand and may therefore need to be tackled together. All of this points to the need for a 'joined up' approach to the detection and prevention of bid rigging in public procurement markets, bringing together the competition, anti-corruption and international trade communities.[112]

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[104] See also Anderson, above note 91.

[105] Portions of this Part draw upon material published in Anderson and Müller, above note 74.

[106] Robert D. Anderson and Anna Caroline Müller, 'The revised WTO Agreement on Government Procurement (GPA): key design features and significance for global trade and development', (2018) *Georgetown Journal of International Law* 48.4. Preliminary text available at https://www.wto.org/english/res_e/reser_e/ersd201704_e.pdf.

[107] Robert D. Anderson, Anna Caroline Müller and Philippe Pelletier, 'Regional Trade Agreements and Procurement Rules: Facilitators or Hindrances?' in A. Georgopoulos, B. Hoekman and P. Mavroidis (eds.), *The Internationalization of Government Procurement Regulation* (Oxford: Oxford University Press, 2017), chapter 2, pp. 56-85. A preliminary version is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2707219##.

[108] Robert D. Anderson and William E. Kovacic, 'Competition policy and international trade liberalisation: essential complements to ensure good performance in public procurement markets' (2009) *Public Procurement Law Review* 18.2: 67-101; Anderson et al, above note 18.

[109] See, for related discussion, Anderson and Kovacic, above note 108; Anderson et al, above note 18.

[110] Anderson and Kovacic, above note 108.

[111] Anderson et al, above note 18.

[112] See Robert D. Anderson, Alison Jones and William E. Kovacic, 'Preventing Corruption, Supplier Collusion and the Corrosion of Civic Trust: A Procompetitive Program to Improve the Effectiveness and Legitimacy of Public Procurement', *George Mason Law Review* (forthcoming, 2019).

2.5 Competition Policy and the Agreement on Trade-Related Investments Measures: a springboard for future action?

Another important complementary relationship exists between competition policy and investment.[113] Both contribute to the promotion of trade and economic development in multiple ways. Until recently the main areas of work in the WTO on trade and investment comprised the TRIMs Agreement and the GATS.[114] More recently, as agreed at the 11th WTO Ministerial Conference in Buenos Aires in 2017, discussions have commenced with the aim of developing a multilateral framework for facilitating foreign direct investment.[115]

Even though the WTO agreements do not establish relevant disciplines related to competition policy and trade–related investment measures, the relevance of this relationship is recognized in the mandate for future negotiations in the TRIMs Agreement. Specifically, Article 9 of the TRIMs Agreement sets out a negotiation mandate for the Council for Trade in Goods. It foresees that, within five years from the entry into force of the WTO Agreement, the Council review the operation of the TRIMs Agreement and may propose amendments to its text to the Ministerial Conference. The Agreement specifies that the review should consider in particular whether the TRIMs Agreement should be complemented with provisions on competition policy.[116]

In a related vein, the Singapore Ministerial Declaration of 18 December 1996 established a working group to analyse the relationship between trade and investment, '[having] regard to the existing WTO provisions on matters related to investment and competition policy and the built-in agenda in these areas, including under the TRIMs Agreement, and on the understanding that the work undertaken shall not prejudge whether negotiations will be initiated in the future'.[117]

In 1999, the Council for Trade in Goods initiated a review of the operation of the TRIMs Agreement.[118] As requested by WTO Members, the WTO and UNCTAD Secretariats jointly prepared a study on the use and effects of TRIMs and other performance requirements, which served as input for discussions.[119] The joint study elaborated on examples of WTO Members' bilateral investment treaties (BITs) which, in addition to the relationship between investment and competition, recognize the interface of competition policy and IP. Some BITs (mainly concluded by the United States, Canada and Japan) go beyond the scope of the TRIMs Agreement and prohibit mandatory requirements with respect to, *inter alia*, the transfer of technology:

> (2) Neither Contracting Party may impose any of the following requirements in connection with permitting the establishment or acquisition of an investment or enforce any of the following requirements in connection with the subsequent regulation of that investment:
>
> […]
>
> (e) to transfer technology, a production process or other proprietary knowledge to a person in its territory unaffiliated with the transferor, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority, either to remedy an alleged violation of competition laws, or acting in a manner not inconsistent with the provisions of this Agreement.[120]

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[113] OECD, *A policy framework for investment: competition policy*, 25-27 October 2005, available at https://www.oecd.org/investment/investmentfordevelopment/35488898.pdf.

[114] The GATS covers services supplied by a service supplier of one Member, through commercial presence, in the territory of any other Member (Mode 3 — Commercial presence).

[115] WTO, *New initiatives on electronic commerce, investment facilitation and MSMEs,* 13 December 2017, available at https://www.wto.org/english/news_e/news17_e/minis_13dec17_e.htm.

[116] The text of the TRIMs Agreement, available at https://www.wto.org/english/docs_e/legal_e/18-trims_e.htm.

[117] WTO, Singapore Ministerial Declaration, WT/MIN(96)/DEC, 18 December 1996, available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=48267,32665&CurrentCatalogueIdIndex=0&FullTextHash=1&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

[118] At the meeting of 15 October 1999, the Council for Trade in Goods had formally opened the required review. See, WTO, Council for Trade in Goods, Minutes of the Meeting, G/C/M/41, 22 November 1999, available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=31398&CurrentCatalogueIdIndex=0&FullTextHash=1&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

[119] WTO, Trade-related Investment Measures and Other Performance Requirements, G/C/W/307, 1 October 2001, available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=42800,32046,29250&CurrentCatalogueIdIndex=2&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True#.

[120] Article V of the BIT between Canada and the Philippines. Similar language is established in BITs between Canada and Barbados (1996), the Philippines (1995), Trinidad and Tobago (1995) and Venezuela

In the past couple of decades, an increasing number of RTAs have incorporated investment chapters. This can be seen as recognition not only of the relationship between investment and trade but also their linkages with other subjects, including competition policy and IP. While the review process of the TRIMs Agreement has not yet resulted in the incorporation of competition policy provisions, Article 9 is commonly regarded as evidence of the TRIMs Agreement's negotiators' awareness of the close link that exists between competition policy and trade-related investments measures.[121]

2.6 The work of the WTO Working Group on the Interaction between Trade and Competition Policy (1997 – 2003): ahead of its time?[122]

The WTO Working Group on Trade and Competition Policy (WTO Working Group) was engaged in a wide-ranging study of the relationship between trade and competition policy and the implications of such policy for development and global prosperity from 1997 to 2003. While the Working Group has since been inactive, important insights can still be drawn from the work undertaken. Indeed, the work programme of the Working Group could still be of relevance in framing any agenda for future work in this area.

In the first two years, the work of the Working Group was guided by terms of reference set out in the Chairman's 'Checklist of Issues'. Under those terms, the work focused, among others, on the impact of anti-competitive practices of enterprises and associations on international trade, and specifically on:

- the impact of state monopolies, exclusive rights and regulatory policies on competition and international trade;
- the relationship between the trade-related aspects of IPRs and competition policy;
- the relationship between investment and competition policy; and the impact of trade policy on competition.[123]

Without overstating the extent of overall agreement or convergence that was reflected in this work, it did manifest a very high degree of interest and substantive engagement across the WTO's membership. In all, the work generated more than 220 papers along with other analytical inputs contributed by participating WTO Members. The (perhaps surprising) commonality of views that was evident with respect to key underlying issues can be contrasted with the divergence of views that marked subsequent consideration of specific proposed actions or policy measures.[124]

For example, the Working Group had no difficulty in recognizing the general significance of competition policy for economic development (recognizing the detrimental effects of cartels and other practices on the welfare of citizens), and referred specifically to a large number of ways in which anti-competitive practices of firms in addition to state monopolies and privileges could undermine or disrupt the beneficial effects of trade liberalization.[125] It noted, as well, that 'the role of competition policy in addressing anti-competitive practices of enterprises that [affect] international trade might be particularly important in a developing country setting'.[126] The Group also referred to 'the heightened importance of competition policy as a tool of development in the current, globalizing economic environment, as compared to previous eras'.[127]

Subsequently, from 1999 to 2001, the Working Group pursued a refocused mandate emphasizing '(i) the relevance of fundamental WTO principles of national treatment, transparency, and most-favoured-nation treatment to competition policy and vice versa; (ii) approaches to

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(1996); and in the *U.S. Prototype Treaty* (1998), available at http://unctad.org/Sections/dite_tobedeleted/iia/docs/compendium/en/175%20volume%206.pdf.

[121] Eleanor M. Fox and Amedeo Arena, 'The International Institutions of Competition Law: The Systems Norms', in Eleanor M. Fox and Michael J. Trebilcock (eds.), *The design of competition law institutions and the global convergence of process norms: The GAL competition project* (Oxford University Press, 2012).

[122] Portions of this Part draw upon material published in Anderson and Müller, above note 74.

[123] The full version of the Chairman's 'Checklist of Issues' available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=1725,51054,68747,10147,3614,17496,20020,31410,49145&CurrentCatalogueIdIndex=8&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

[124] Anderson and Müller, above note 89; see also Anderson and Jenny, above note 4.

[125] WTO, Report of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WT/WGTCP/6, 2002, available at https://www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm.

[126] *Id.*

[127] *Id.*

promoting cooperation and communication among Members, including in the field of technical cooperation; and (iii) the contribution of competition policy to achieving the objectives of the WTO, including the promotion of international trade.'[128]

Although this work admittedly was characterized by an absence of agreement on any particular outcomes, the work done in relation to the revised mandate yielded broad agreement on certain fundamental points. For example, there was a general acceptance that adherence to principles of non-discrimination, transparency, and procedural fairness in competition law/policy enforcement procedures is vital to both the effectiveness and the public acceptability of such law and policy.[129] It is striking that this focus on ensuring non-discrimination, transparency, and procedural fairness in competition law enforcement and competition policy which was a key focus of the work done in the WTO Working Group was subsequently picked up and became a central tenet of work in the International Competition Network (ICN) and related current initiatives (see relevant discussion in Parts 1 , 4.5 and 5.1 , below).

The foregoing is *not* to say that all WTO Members were ready to agree on specific proposals to implement these principles (those proposals were still to be developed at the time the Working Group was suspended). Rather, the clear majority of participating WTO Members considered the issues to be important and relevant to the future development of such policy at the national and/or international levels. This is not surprising given the importance that established competition agencies themselves give to these principles.[130]

Pursuant to the Doha Ministerial Declaration, the work of the Working Group was further refocused to emphasize specific elements of a possible 'multilateral framework on competition policy' as proposed by the proponents of such a framework, particularly the EU. These comprised core principles, including transparency, non-discrimination, and procedural fairness; provisions on 'hard-core cartels'; modalities for voluntary cooperation (between competition agencies); and support for progressive reinforcement of competition institutions in developing countries through capacity building'. By the end of 2002, the Working Group had completed a wide-ranging analysis of these elements. Subsequently, the four elements cited became the main proposals that were considered by the WTO's Members in the context of the Cancún Conference in 2003.

At the WTO Ministerial Conference in Cancun, Mexico, the majority of WTO Members rejected the launch of negotiations on a multilateral framework on competition policy incorporating the above elements. This outcome was not due exclusively to problems associated with the competition proposals *per se* but also to wider WTO negotiating priorities and concerns and a general backlash, at the time, against the WTO and its work.[131] Still, concerns regarding the competition policy proposals themselves must also be acknowledged. The latter concerns included (i) scepticism and/or a lack of understanding on the part of developing countries' representatives regarding their potential interests in relation to the suppression of anti-competitive practices; (ii) concerns on the part of the same countries regarding a lack of negotiating capacity in this area; and (iii) as already noted, reservations on the part of certain developed country national competition authorities on the implications of a possible multilateral framework for their investigative and prosecutorial independence. Subsequent to the Cancun Conference, the General Council of the WTO decided, as part of the so-called 'July package' of 2004, that no further work would be undertaken toward negotiations on competition policy (or on the separate but related issues of investment and transparency in government procurement) for the duration of the Doha Round.[132]

In sum, the work of the WTO Working Group was broad, substantive, and multifaceted. Without yielding agreement on specific negotiating proposals (on which there was no consensus), it showed significant depth of insight and relative commonality of views on important underlying issues, e.g. the complementary roles of competition policy and trade liberalization; the harmful consequences of anti-competitive practices for development, and the need for appropriate remedial measures.[133] The suspension of the Working Group and its failure to reach consensus in Cancún cannot, today, be taken as indicating a lack of interest among WTO Members in competition policy and its relation to trade policy. To the contrary, as we have noted - and building

[128] WTO, Reports of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WT/WGTCP/3, 4 and 5 respectively, 1999, 2000 and 2001, available at https://www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm.

[129] WTO, above note 125.

[130] See, for example, Christine Varney, 'Coordinated Remedies: Convergence, Cooperation and the Role of Transparency', Remarks to the Institute of Competition Law, Paris, 15 February 2010, available at http://www. justice.gov/atr/public/speeches/255189.htm.

[131] See, Anderson and Müller, above note 89 and references cited therein.

[132] Anderson and Müller, above note 89.

[133] *Id.*

on the recognition in several WTO instruments of the importance of competition - existing disciplines with regard to some competition related matters, such as, for instance, STEs, have been expanded in the Accession Protocols of some WTO Members, and competition policy matters have been increasingly discussed in the context of WTO Trade Policy Reviews.

2.7 Competition policy commitments in WTO Accession Packages: 'filling in the blanks'[134]

An important emerging area in which the competition policy and trade interface is addressed is found in WTO Accession Packages. The role of competition policy has been increasingly addressed by working parties during the accessions of new WTO Members. By September 2018, 36 new Members had acceded to the WTO pursuant to Article XII of the Marrakesh Agreement establishing the WTO ('the Article XII Members').[135] In a vast majority of these accessions (around 80%), the acceding state is requested to provide information on its domestic competition policy regime, which in itself, indicates a clear recognition and acceptance by WTO Members of the importance of competition policy as a tool of economic integration.[136] Furthermore, in some accession processes, linkages between competition policy and other trade-related matters have been addressed.[137]

Importantly, this recognition of the importance of competition policy has grown over time. Almost all accessions concluded in the last ten years included notifications on competition policy as a substantial matter for negotiations.[138] Also, these notifications have become more detailed.

The Article XII Members' Accession Packages address competition policy in two ways. First, acceding governments make specific notifications of national competition policies and laws. This information covers the following aspects: the objectives of the regime, its enforcement mechanisms by relevant agencies, as well as, the work under way to put in place an effective competition regime where one is not already existent. Second, they undertake pro-competitive commitments and reforms related to trade liberalization during the accession process.

The objectives of the domestic competition regime are defined in about half of new Members' notifications.[139] Overall, Article XII Members recognize that an efficient competition regime is crucial to the realization of the benefits of trade liberalization. Other objectives also include the safeguarding of free competition, the creation of favourable market conditions, consumer's protection, and the fostering of economic or technological development.[140]

According to their notifications, a majority of the recently-acceded Members had competition laws at the time of accession[141] and were able to provide further information on their respective national competition agencies. An analysis of the Article XII Members' notifications suggests a correlation between the level of country's development and the existence of an effective domestic competition law enforcement system.[142] Most acceding economies that did not have competition policy rules in place at the time of their WTO accession (including LDCs) undertook to develop a relevant competition policy instrument.[143] Furthermore, a majority of acceding states also undertook to further improve and strengthen their domestic competition systems.[144] Such

[134] For further information, see Anderson et al, above note 24.

[135] The WTO completed accessions include: Ecuador (1996); Bulgaria (1996); Mongolia (1997); Panama (1997); Kyrgyz Republic (1998); Latvia (1999); Estonia (1999); Jordan (2000); Georgia (2000); Albania (2000); Oman (2000); Croatia (2000); Lithuania (2001); Moldova, Republic of (2001); China (2001); Chinese Taipei (2002); Armenia (2003); The former Yugoslav Republic of Macedonia (2003); Nepal (2004); Cambodia (2004); Saudi Arabia, Kingdom of (2005); Viet Nam (2007); Tonga (2007); Ukraine (2008); Cabo Verde (2008); Montenegro (2012); Samoa (2012); Russian Federation (2012); Vanuatu (2012); Lao People's Democratic Republic (2013); Tajikistan (2013); Yemen (2014); Seychelles (2015); Kazakhstan (2015); Liberia (2016); Afghanistan (2016).

[136] See Anderson et al, above note 24.

[137] For instance, the working party for the Russian Federation engaged in a detailed discussion during its accession regarding the linkages between competition and IP. See Anderson et al, above note 24.

[138] The only exception is Vanuatu.

[139] See Anderson et al, above note 24.

[140] The latter is of particular relevance especially for least-developed countries (LDCs).

[141] 22 of 36 (60%) recently acceded Members had a competition law at the time of accession.

[142] See Anderson et al, above note 24.

[143] For instance, Cambodia, Nepal and Tonga acknowledged the absence of legislation specifically governing competition and committed to seek assistance to develop a competition system suited to their individual market conditions.

[144] This very significant observation is not limited merely to states having no or very rudimentary competition legislation at the time of accession (such as Cabo Verde and Jordan), or LDCs (such as Afghanistan, Lao PDR, Liberia, Nepal and Yemen), but also covers states that were, at the time of their accession, already members of the European Union or in the process of acceding to it, such as Latvia (an EU member state), the former Yugoslav Republic of Macedonia (an EU accession candidate) and Montenegro (an

commitments regarding further improvements and related discussions during accession processes clearly show the role that the WTO can play in supporting effective competition regimes.

Similarly to the rules in existing WTO agreements discussed above, a broad range of WTO accession commitments also touch upon trade-related concerns linked to competition policy that go beyond the enforcement of competition law *per se*. These include, for example, relevant notifications and commitments on state monopolies, state owned enterprises (SOEs) and privatization. Many acceding countries undertook to prevent or reduce the influence of state monopolies on trade and limited the number of STEs.[145] Furthermore, competition principles are also attached to WTO concepts, such as fair pricing practices, consumer benefits, and open, liberalized markets. Such commitments by the WTO Article XII Members, to certain extent, expand related GATT disciplines.[146] For example, specific disciplines that aim to deal with anti-competitive cross-border effects of SOEs were incorporated in China's WTO Accession Protocol to the WTO.[147]

The WTO accession process itself can be understood as a platform to launch, deepen and consolidate structural transformation efforts of the acceding economies by fostering pro-competitive market reforms that go beyond and complement the adoption and enforcement of competition law rules *per se*. Most of acceding governments, in addition to providing information on/defining state-trading enterprises, have engaged in market liberalization and privatization of state-owned entities, even in historically state-controlled sectors such as energy, infrastructure and railways. These undertakings of acceding Members clearly contribute to their economic integration into the multilateral trading system.[148]

The combination of notifications, commitments and references related to competition policy may provide an important starting point in the course of any (eventual) further work on this topic in the WTO. In that regard, these notifications indicate the importance given by WTO Members to the transparent and non-discriminatory application of competition legislation and policy. Furthermore, they highlight a clear awareness of the importance of an effective pro-competitive reform as a tool of economic integration. In that sense, these notifications, commitments and references represent another important data point confirming the fundamental complementarity of competition policy and trade liberalization.

2.8 Competition policy in WTO Trade Policy Reviews: Routine Acceptance of the Role of Competition Policy as an important and legitimate focus of the WTO

One of the core functions and responsibilities of the WTO is to administer the Trade Policy Review Mechanism (TPRM), which provides for 'the regular collective appreciation and evaluation of the full range of individual Members' trade policies and practices and their impact on the functioning of the multilateral trading system'.[149] Trade Policy Reviews are carried out on the basis of two reports that describe the trade policy and practices of the Member under review: a report supplied by a Member itself (Report by the WTO Member); and a report prepared by the WTO Secretariat, based on information available and provided by the Member under review (Report by the Secretariat, TPR). Since 1995, the WTO Secretariat has prepared 377 TPRs, which provide a comprehensive overview and analysis of the WTO Member's trade policies, including information on competition policy and the relevant laws and institutional framework.[150] Tellingly, some WTO Members report on developments in competition policy in their own reports. Therefore, even though these reports do not serve as a basis for the enforcement of specific obligations under the

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EU accession candidate). Moldova undertook to enforce legislation on competition, replacing its older, outdated anti-monopoly legislation and creating an independent body for governance of competition. See Anderson et al, above note 24.

[145] Usually, even if SOEs enjoy special trading privileges, acceding WTO Members commit to notifying and providing information on such entities from the date of accession, and guarantee that such entities operate within the scope of the GATT and the GATS.

[146] See Part 2.1.1 .

[147] As discussed in Part 2.1.1 , China undertook obligations in relation to trading rights and the liberalization of state trading monopolies in a number of sectors. In particular, China agreed to progressively liberalize the availability and the scope of the right to trade, so that, within three years after accession all enterprises in China would have the right to trade in all goods, with the exception of those identified in its Accession Protocol, which could continue to remain subject to state trading. See China's Accession Protocol, above note 66; and Mastromatteo, above note 54.

[148] See Anderson et al, above note 24.

[149] Annex 3 to the WTO Agreement 'Trade Policy Review Mechanism', para. A(i). Available at https://www.wto.org/english/tratop_e/tpr_e/annex3_e.htm. It is important to note that the TPRM is 'not […] intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures, or to impose new policy commitments on Members' (TPRM: A(i)).

[150] As of 20 September 2018. All TPRs are available at https://www.wto.org/english/tratop_e/tpr_e/tp_rep_e.htm#chronologically.

WTO agreements, these reports and ongoing discussions in the TPRB[151] are a useful source of information on WTO Members' competition policy settings.

Recent TPRs have incorporated competition policy as a separate subsection in the section on 'Measures Affecting Production and Trade', which usually also include a subsection on SOEs. The subsections on competition policy describe the WTO Member's competition policy framework, including competition laws and legislation relevant to consumer protection; the institutional framework for their enforcement/competition authority; relevant enforcement experience; price control policies etc. Over the last years, the level of detail of these subsections in both the Secretariat's and the WTO Member's Reports has expanded. The subsections on competition policy can, for example, include extensive information on recent developments in regulation and enforcement; in detecting, investigating and prosecuting anti-competitive practices; leniency programmes and/or settlements reached; investigation procedures, including standards applied (*per se* approach or *rule-of-reason* approach); penalties; international/regional/bilateral cooperation initiatives on competition policy etc.

Furthermore, the TPRB meetings provide an effective platform to share experience on competition policy enforcement and discuss competition concerns related to trade policy, such as, for instance, exemption of SOEs from competition legislation in some jurisdictions (see, for example, Box 1).[152] Significant attention is also paid to the competition policy – IP interface.[153]

Box 1. Trade Policy Review of Mexico: competition policy discussion during the TPRB meeting

On 5 and 7 April 2017, the TPRB undertook the sixth review of the trade policies and practices of Mexico.

The Report by the Secretariat indicated inter alia that the legal framework for Mexico's competition policy underwent far-reaching changes during the review period (2012-2016). These developments in Mexico's competition policy were discussed intensively during the TPRB meeting. It was highlighted that the competition policy reforms contribute to the promotion of free competition and to preventing and combating monopolies, monopolistic practices, cartels and other restrictions on the efficient functioning of markets.

Members expressed their appreciation for the positive impact of such reforms, including in individual sectors, such as broadcasting.

In addition to recognizing the importance of the overall progress of Mexico's competition policy reforms, some WTO Members encouraged Mexico to use its newly strengthened competition law to ensure transparent and fair allocation of slots at its international airport in Mexico City, and to ensure that the allocation process does neither create barriers to entry for new players in the market nor a deterrent for further investment by companies already in Mexico.

The relevance of competition policy matters in connection to intellectual property rights was also recognized. During the meeting, some WTO Members indicated that Mexico's competition policy reform brings more vitality into the market and encouraged Mexico to continue to make efforts to strengthen the enforcement of intellectual property rights, both at the border and within Mexico.

Source: Trade Policy Review of Mexico, Minutes of the Meeting, WT/TPR/M/352, 5 and 7 April 2017, available at https://www.wto.org/english/tratop_e/tpr_e/tp452_e.htm.

Interestingly, subsections on competition policy are also included in the TPRs of WTO Members that have not yet established comprehensive competition laws as such.[154] The policies of these Members are scrutinised with regard to their institutional framework and any measures related to consumer protection, price controls and state-owned enterprises. In several such

[151] The TPRB is actually the WTO General Council — comprising the WTO's full membership — operating under special rules and procedures. Relevant discussions in the TPRB are available in the Minutes of the meetings and TPRB Chairperson's Concluding Remarks. Overview of the developments in the international trading environment based on the TPR reports and relevant discussions during the TPRB's meetings is covered in the Annual Reports by the Director General (pursuant to para. G of the TPRM). Available at https://www.wto.org/english/tratop_e/tpr_e/tpr_e.htm.

[152] See, for instance, WTO, *Trade Policy Review: China, Concluding remarks by the Chairperson,* 20 and 22 July 2018, available at https://www.wto.org/english/tratop_e/tpr_e/tp442_crc_e.htm.

[153] For instance, during the discussion of the China's TPR, the WTO Members 'welcomed the publication of provisions geared to avoiding conflict between IP protection and competition policy enforcement'. See WTO, above note 152.

[154] See WTO, Trade Policy Review Report by the Secretariat, Sri Lanka, WT/TPR/S/347, 27 September 2016, available at https://www.wto.org/english/tratop_e/tpr_e/s347_e.pdf; WTO, Trade Policy Review Report by the Secretariat, Guatemala, WT/TPR/S/348, 28 September 2016, available at https://www.wto.org/english/tratop_e/tpr_e/s348_e.pdf (As stated in the Report, Guatemala is the only country in Central America that still has neither competition policy legislation nor a competition authority).

instances, other WTO Members have called for the adoption, by the Member in question, of relevant legislation.[155] The initiation of relevant work by Members lacking formal competition legislation has also been welcomed by participating WTO Members.[156]

The inclusion of competition policy in WTO Members' TPRs, in itself, clearly recognizes the trade policy relevance of competition policy measures, and their possible impact 'on the functioning of the multilateral trading system' (as set out in the mandate given by the WTO Members in the TPRM).[157] Further, the progressively deepening discussions of competition policy matters during the TPRB meetings provide evidence for an increasing interest of WTO Members in this subject over time. This diversifying and evolving interest transcends traditional north-south or developed-developing distinctions between WTO Members.

2.9 WTO Trade-related Technical Assistance in the area of Competition Policy

Trade-related Technical Assistance (TRTA) is another core function of the WTO. Its avowed purpose is to enhance the human and institutional capacities of developing and LDCs WTO Members and Observers to take full advantage of the rules-based multilateral trading system, meet their obligations and enforce their rights, and deal with emerging trade-related challenges.[158] In this respect, at WTO's Ministerial Conference in Doha in 2001, Ministers declared that:

> We confirm that technical cooperation and capacity building are core elements of the development dimension of the multilateral trading system, and we welcome and endorse the New Strategy for WTO Technical Cooperation for Capacity Building, Growth and Integration. We instruct the Secretariat, in coordination with other relevant agencies, to support domestic efforts for mainstreaming trade into national plans for economic development and strategies for poverty reduction. The delivery of WTO technical assistance shall be designed to assist developing and least-developed countries and low-income countries in transition to adjust to WTO rules and disciplines, implement obligations and exercise the rights of membership, including drawing on the benefits of an open, rules-based multilateral trading system. Priority shall also be accorded to small, vulnerable, and transition economies, as well as to members and observers without representation in Geneva.[159]

Again, at the WTO's Ministerial Conference in Nairobi, Ministers 'reiterate[d] the importance of targeted and sustainable financial, technical, and capacity building assistance programmes to support the developing country Members, in particular LDCs, to implement their agreements, to adjust to the reform process, and to benefit from opportunities presented'[160] and noted 'the substantial progress [achieved] in [the] WTO's technical assistance and capacity building'.[161]

TRTA is provided by the WTO Secretariat on a regular basis in the form of seminars, workshops and symposia in Geneva and in regional or national capitals. Participation in these programmes is normally open to officials nominated by participating WTO Member governments or Observers. National seminars can be organized for individual WTO Members/Observers with particular needs, on specific request by those Members/Observers to the Secretariat. Regional workshops, to which all WTO Members and Observers in a particular region are invited, are organized for all regions of the developing world and economies in transition (generally according to a two-year cycle).[162]

In the aftermath of the Cancún Ministerial conference and the 2004 "July package" decision of the WTO General Council putting on hold any possible negotiations in the area of competition policy, the WTO Secretariat ceased providing broadly-based technical assistance on competition

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[155] For instance, WTO Members 'commended Paraguay for having implemented competition policy legislation and for creating a competition authority'; 'not[ed] the lack of competition policy legislation and of a competition authority [in Guatemala and] called for Guatemala to adopt legislation in the area as soon as possible'. See WTO, Annual Report by the Director-General, *Overview of developments in the international trading environment*, WT/TPR/OV/20, 16 November 2017, p. 74, 83.

[156] See, for instance, during the TPR of Nigeria, the WTO Members welcomed the draft competition law and looked forward to its entry into force, see WTO, above note 155, p. 80.

[157] Para. A of Trade Policy Review Mechanism (TPRM), available at https://www.wto.org/english/docs_e/legal_e/29-tprm_e.htm.

[158] WTO, Biennial Technical Assistance and Training Plan 2018–19, WT/COMTD/W/227/Rev.1, dated 23 October 2017.

[159] Paragraph 38 of the Doha Ministerial Declaration, above note 14. See also the 2001 TA strategy, WT/COMTD/W/90, dated 21 September 2001.

[160] WTO, Nairobi Ministerial Declaration adopted on 19 December 2015, WT/MIN(15)/DEC, available at https://www.wto.org/english/thewto_e/minist_e/mc10_e/mindecision_e.htm.

[161] *Id.*

[162] For more information see WTO, WTO technical assistance and training, available at https://www.wto.org/english/tratop_e/devel_e/teccop_e/tct_e.htm.

policy matters. Still, activities focusing principally on other areas (e.g., IP and government procurement) have continued to touch on competition policy concerns to the extent that these are implicated by the relevant Agreements and the interest is manifested. Activities focused on the GPA are aimed at familiarizing participants with the relationship of the GPA to trade, competition, good governance and development. As is hardly surprising, the issue of bid rigging is often raised by participants in this context.[163] Likewise, issues concerning anti-competitive practices and their appropriate treatment have arisen in the context of workshops/seminars on the TRIPS Agreement.[164]

More recently, increased demand has been manifested for WTO technical assistance activities relating to competition policy more generally, to the extent that it is already embodied in the existing WTO Agreements. In October 2016, at the request of Ecuador, the WTO Secretariat organized a National Seminar on Trade, Competition Policy and Investment. The main objectives of the programme were to familiarize participants with the interface and complementary roles of trade, investment and competition policy; to enhance participants' understanding of selected existing WTO agreements and related jurisprudence as they relate to investment and competition policy; and to elaborate on current practices with regard to investment and competition policy in RTAs.

Subsequently, the WTO Secretariat has twice organized broader workshops on the topic of "Competition Policy, Trade and Development: Reviewing Practical Experience with existing WTO Agreements." These events, presented with significant input from the OECD and UNCTAD and with the participation of prominent international scholars, have focused squarely on experience with respect to competition policy provisions that are already built into the existing WTO agreements. Important specific areas of interface explored in the workshops include competition policy and trade in services; competition policy and the TRIPS Agreement; and competition policy and government procurement. Issues related to current international cooperation efforts on competition policy in international forums and the treatment of competition policy in RTAs were also addressed. The demand for participation in these activities has outstripped the number of available places, by a factor of three or four times.[165]

3 THE TREATMENT OF COMPETITION POLICY IN REGIONAL TRADE AGREEMENTS: A FURTHER MANIFESTATION OF POLICY COMPLEMENTARITY

The inclusion of (often detailed) chapters on competition policy in regional trade agreements is a further, very significant illustration of the de facto acceptance, by a broad cross-section of WTO Members, of the importance of competition policy for trade and trade liberalization. To be more precise, out of the 280 RTAs notified to the WTO and available in the WTO's Regional Trade Agreements Information System,[166] *around 80% contain either dedicated chapters or provisions on competition policy (56%) or less detailed provisions recognizing the importance of competition policy for trade (23%)*.[167] This section of the paper examines the scope, content and purpose of these chapters/provisions, as a source of further insight into the interaction of trade and

[163] For an example of a recent technical assistance activity, see the 2018 Advanced Global Workshop on Government Procurement, held at the WTO from 10 to 14 September 2018, available at https://www.wto.org/english/news_e/news18_e/gpro_14sep18_e.htm.

[164] The specific mandate for technical cooperation in IP and trade-related matters is provided in the TRIPS Agreement (see, Article 67). For an example of a recent technical assistance activity, a two-week Advanced Course on Intellectual Property for Government Officials, jointly organized by the WTO and the WIPO in March 2018, available at https://www.wto.org/english/news_e/news18_e/igo_12mar18_e.htm. For more discussion on the IP-competition policy interface, see Part 2.3 .

[165] These events are strictly and uniformly without prejudice to the views and interests of WTO Members in these areas.

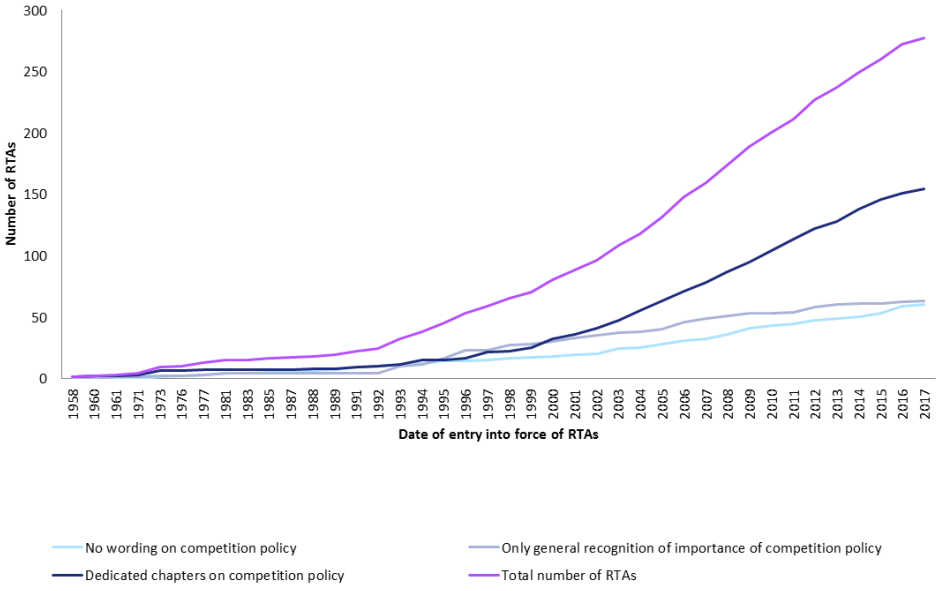
[166] See the WTO Regional Trade Agreements Information System (WTO RTA Database), available at http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx. By January 2018, there have been 305 notifications in the WTO RTA Database pursuant to various WTO obligations (Enabling Clause; GATT Art. XXIV and GATS Art. V), including notifications of the newly acceded parties to previously notified RTAs. For the purposes of the current analysis, however, the notifications of the original entry into force of the RTA and subsequent notifications of the newly acceded parties are treated as "1" in order to avoid duplication. The analysis in this section also refers, to the extent relevant, to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which was released on 21 February 2018 and has not yet been notified to the WTO. Available at https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text/.

[167] For additional information on analysed RTAs and the classification of competition provisions developed by the authors see Appendix Table 1 and Appendix Table 2.

competition policy in the modern global economy. While providing a new empirical analysis, it also builds importantly on earlier studies. [168]

Not only is the number of RTAs including competition policy provisions growing: the content of these provisions have evolved significantly. Initially, RTA parties often only recognized the importance of competition policy for trade, [169] and did not include fully-fledged chapters on competition policy. This began to change in the 2000s (see Graph 1 below). RTAs adopted since then increasingly incorporate dedicated chapters of provisions, often with comprehensive coverage of issues pertaining to competition policy, such as obligations to promote competition, legislation and institutional requirements, principles for competition law enforcement, specific anti-competitive practices, and cooperation and coordination in competition law enforcement. Increasingly, RTAs also deal with designated monopolies or SOEs, whether within comprehensive chapters on competition policy or in separate, dedicated chapters on these topics. In addition, a minority of competition policy chapters in RTAs, in particular those associated with the European Union, contain provisions on state aid.

Graph 1. Treatment of competition policy in RTAs (1958 – 2017)



Source: WTO RTA Database

3.1 Objectives of competition policy provisions in RTAs

Many RTAs with dedicated competition provisions address objectives of competition policy as it relates to trade. The following are among those most frequently recognized in the relevant agreements:[170]

- ensuring that the potential gains from trade liberalization are not undermined by anti-competitive practices. For example, the North American Free Trade Agreement (NAFTA) [171] recognized, as far back as in 1994, that measures prohibiting anti-

[168] See, in particular, Laprévote et al, above note 32; Robert Teh, 'Competition provisions in Regional Trade Agreements' (2009) *Regional Rules in the Global Trading System* 8: 418-491; and Robert D. Anderson and Simon Evenett; *Incorporating Competition Elements into Regional Trade Agreements: Characterization and Empirical Analysis*, 2006.

[169] See, e.g., the 1993 Russia-Tajikistan RTA, which recognizes that 'general methods of business practices aimed at hindering or limiting competition or disrupting the competitive environment in the territories of the Contracting Parties' shall be considered incompatible with the purposes of the agreement. For the list of RTAs with the provisions on general recognition of competition policy see Appendix Table 2. The Treatment of Competition Policy in RTAs: Basic Coverage of Agreements with provisions, which generally recognize importance of competition policy, below.

[170] See also Laprévote et al, above note 32.

[171] On 1 October 2018, the US, Canada and Mexico reached an agreement in the renegotiation of the NAFTA, which was initiated in 2017. Until the United States-Mexico-Canada Agreement (the USMCA) will come into effect following the completion of internal ratification procedures, the NAFTA currently remains in effect. See the Office of the United States Representative, *United States-Mexico-Canada Agreement*, available at https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico.

competitive business conduct 'will enhance the fulfilment of the objectives of this Agreement'.[172] The underlying concern here is that, if left unchecked, anti-competitive practices such as cartels and abuses of a dominant position (that reduce competition, limit output and raise prices) will produce results contrary to the aims of trade liberalization (to improve economic welfare by permitting enhanced competition, expanding output and lowering prices);

- promoting economic efficiency, development and prosperity. Competition chapters in RTAs describe their economic objectives in terms ranging from 'economic efficiency and consumer welfare' [173]; 'economic and social development' [174]; 'facilitating efficient functioning of markets'[175]; to '[improving] and [securing] an investment friendly climate, [and] a sustainable industrialization process'. [176] The potential explanation for the inclusion of such goals is that in the past decade, solid evidence has accumulated reflecting the harm of anti-competitive practices on the welfare of citizens, for example through raising: (i) the prices of internationally traded input goods; (ii) the prices of business infrastructure services including rail, port and railway facilities that are essential for getting products to market; and (iii) otherwise raising the costs of both business inputs and final goods and services to consumers;[177] and

- ensuring that competition law, itself, is not applied in ways that adversely affect business confidence and/or favour domestic as compared to foreign enterprises. For this purpose, more around half of RTAs with dedicated competition chapters include provisions on transparency; and around one third of these RTAs include provisions on non-discrimination and procedural fairness[178] to ensure that RTA trade partners follow these general principles in competition law enforcement.

3.2 Regional approaches to addressing competition policy in RTAs

Certain 'generic' approaches to the content and structure of dedicated chapters on competition policy were originally defined by a number of scholars in association with particular regions, namely: (i) a European approach (applied by the EU and the European Free Trade Area (EFTA) countries); (ii) a NAFTA-based approach (applied by the US and Canada); and (iii) an 'Oceanian' approach, embodied in the Australia New Zealand Closer Economic Relations-Trade Agreement (ANZCERTA). [179] The following elaborates on these approaches as a basis for understanding the origins of current agreements. In addition to these recognized approaches, further sections summarize the main characteristics of competition policy chapters in RTAs signed by Asian, Latin American, Middle Eastern countries, and the Commonwealth of Independent States (CIS). The novel approach of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), specifically Chapter 16 of this agreement, is also briefly discussed.[180] The point will be made that, increasingly, a degree of convergence is evident across the relevant approaches.

Historically, the EU and, perhaps to a lesser extent, the EFTA countries have favoured relatively detailed provisions requiring RTA parties to prohibit specific anti-competitive practices to the extent that they affect trade, and to regulate state aids as well as enterprises entrusted with special or exclusive rights. Generally, such provisions correspond to relevant articles of the Treaty on the Functioning of the European Union (TFEU)[181] or (where relevant) the EFTA Agreement.[182]

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[172] Article 1501 of the NAFTA.

[173] See, for example, article 12.2 of the US-Singapore RTA; article 13.1 of the China-Chile RTA; article 15.2.1 of the Peru-Republic of Korea RTA; article 11.1 of the EAEU-Vietnam RTA; and article 16.1 of the CPTPP. In addition to the recognition of consumer welfare in the objectives of the chapter on competition policy the CPTPP, the chapter incorporates the separate subsection on consumer protection, see article 16.6 of the CPTPP, above note 166.

[174] See, for example, article 259 of the EU-Colombia-Peru RTA.

[175] Article 116 of the India-Japan RTA.

[176] Article 47.1 of the EU-Overseas Countries and Territories.

[177] For additional analysis, see Anderson and Müller, above note 22.

[178] Discussed in Part 3.2 .

[179] These regional approaches were also defined in Laprévote et al, above 32; and in O. Solano and A. Sennekamp, 'Competition Provisions in Regional Trade Agreements', *OECD Trade Policy Paper Series, No. 31,* 2006.

[180] See above note 166.

[181] The Treaty on the Functioning of the European Union (TFEU), available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT. The common rules on competition are set out in Title VII of the TFEU.

[182] The EFTA Agreement, available at http://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAagreement.pdf.

However, often, EU and EFTA RTAs do not deal extensively with cooperation and coordination in competition law enforcement. Rather, RTA provisions are complemented with more specific agreements between participating competition agencies in European and neighbouring jurisdictions. In a sense, the TFEU itself is the quintessential example of the European approach in that it incorporates substantive provisions on competition policy as an underpinning of the Union itself, without however regulating all aspects in detail.[183]

In contrast, RTAs influenced by the NAFTA approach (mainly those involving the US and Canada)[184] have typically included provisions on cooperation and coordination in competition law enforcement in addition to those on SOEs and designated monopolies (often, the latter are treated in chapters that are separate from the chapters on competition policy *per se*), sometimes without further defining the 'anti-competitive conduct' against which the parties are committed to take measures. Some RTAs associated with this approach also establish significant requirements relating to non-discrimination, transparency and/or procedural fairness that apply to competition law enforcement to ensure that due process is respected and competition law is not applied in a discriminatory manner. Competition provisions in these agreements typically are excluded from dispute settlement; with the exception of provisions relating to SOEs and designated monopolies.[185]

The Oceanian approach, which has not been extensively replicated in other regions, provides another model for addressing competition-related issues in an RTA by establishing competition policy as a main tool to address concerns related to unfair competition.[186] In the framework of ANZCERTA Australia and New Zealand committed to extensively coordinate their competition policies, for instance, in investigations, research and unnecessary duplication. [187]

In other regions, competition policy provisions in RTAs have followed less clear patterns; however, certain similarities and characteristics can be identified. Recent RTAs involving Asian economies highlight the importance of 'horizontal' principles, such as transparency, non-discrimination and procedural fairness for competition law enforcement and include detailed provisions on cooperation (including technical assistance).[188] RTAs among Latin American countries often include 'rendez-vous clauses' regarding future negotiations, including endeavours to harmonize competition laws,[189] and provisions on monopolies.

As for the members of the CIS, contrary to RTAs concluded in the 1990s[190] (which limited themselves to the recognition of the importance of some competition principles to trade), recent ones, such as the Treaty on the Eurasian Economic Union (TEAEU) between Armenia, Belarus, Kazakhstan, the Kyrgyz Republic and the Russian Federation, contain a dedicated chapter on

[183] See Anderson and Heimler, above note 2. For the discussion on the evolution of the EU competition regime see also part on the European Union in Anderson et al, above note 92.

[184] The NAFTA competition chapter has been included in renegotiation of the Agreement. The new Competition Chapter under the USMCA substantially updates and goes beyond the original NAFTA disciplines in this area. The United States, Canada, and Mexico have agreed to obligations providing increased procedural fairness in competition law enforcement so that parties are given a reasonable opportunity to defend their interests and ensured of certain rights and transparency under each nation's competition laws. For the text of the chapter see above note 171.

[185] See, for example, the Canada-Chile RTA, the US-Singapore RTA, and the Japan-Mexico RTA.

[186] The ANZCERTA limits an application of traditional trade defense measures (i.e. anti-dumping and countervailing measures).

[187] See the Cooperation Agreement between the Australian Competition and Consumer Commission and the New Zealand Commerce Commission, 2007, available at https://www.accc.gov.au/system/files/Cooperation%20agreement%20between%20the%20ACCC%20%26%20the%20NZCC.pdf. See also the text and objectives of the ANZCERTA, 1983. Available at http://dfat.gov.au/trade/agreements/in-force/anzcerta/Documents/anzcerta1.pdf.

[188] See, for example, the Japan-Indonesia RTA and the Korea-Singapore RTA.

[189] See, for example, article 15.01 of the Dominican Republic-Central America RTA: 'The Parties shall ensure that the benefits of this Agreement are not impaired by anti-competitive business practices. In the same way, countries will try to move towards the adoption of common provisions to avoid such practices'.

[190] Around 25 RTAs between the CIS (mainly bilateral) have entered into force in the period of 1993-2003. These RTAs included standard clause which had established a general prohibition of anti-competitive agreements and abuse of dominance: 'The Parties consider that unfair business practice is incompatible with agreement's objectives and undertake not to permit, in particular, but not exceptionally, the following methods: (i) agreements between enterprises, decisions of their associations and common methods of business practice that aim to prevent or restrict competition or violate its conditions at the territories of the Sides; (ii) actions, through which one or several companies using their dominant condition, restrict competition on the whole areas of the Sides or on the substantial part of the Party's territory'. See, for instance, Article 8 of the Georgia-Kazakhstan RTA (Appendix Box 1. Examples of RTAs incorporating general recognition of competition principles in Appendix).

competition policy.[191] The TEAEU competition chapter not only establishes general principles and rules of competition with regard to the territories of the Treaty members, but also addresses anti-competitive practices affecting transboundary markets, which are defined as those having an effect on the territory of two or more members of the Treaty.[192]

Middle Eastern and African countries, when signing RTAs with the EU, EFTA, and NAFTA countries generally follow the approach of their counterpart.[193] Some of the RTAs between African countries (e.g. the West African Economic and Monetary Union - WAEMU) establish a Competition Council in order to facilitate the application of the requirements related to competition policy in addition to setting out a general prohibition of anti-competitive agreements, abuse of dominance and state aid which distorts competition.[194] In March 2018, African Union (AU) leaders launched the African Continental Free Trade Area (AfCFTA), which is expected to boost intra-African commerce and lead to important development gains. They recognized that complementary policies such as consumer protection and competition policies need to be implemented in light of the growing trade liberalization among the economies of the region.[195] Therefore, the AfCFTA sets out competition policy as one of the topics to be addressed in the second phase of the Transitional Implementation Work Programme of the AfCFTA.[196]

Chapter 16 of the CPTPP, building on competition policy chapters of existing RTAs, and in particular the ones which follow the NAFTA approach, contains significantly enhanced disciplines on procedural fairness in competition law enforcement (Article 16.2).[197] Importantly, the agreement incorporates novel provisions on private enforcement.[198] Meaningful attention is also given to provisions on cooperation and technical assistance. In addition to the CPTPP's competition policy chapter, the agreement includes new binding rules on SOEs (see s Part 3.3.5 below).

Despite some variations in the foregoing regional approaches, a growing degree of convergence between competition policy provisions in RTAs can be observed over time. Today, most RTAs addressing competition policy include a well-established core set of provisions, such as references to existing competition laws and their further development; the prohibition of anti-competitive practices; regulation of SOEs and designated monopolies; and a cooperation clause. The next subsection provides further detail on such specific provisions.

3.3 Overview of specific competition policy provisions in RTAs

As mentioned earlier, 155 RTAs (around 56% of the total 280 RTAs notified to the WTO and analysed by the WTO Secretariat) have dedicated chapters or provisions on competition policy.[199] Graph 2 below illustrates the range of issues addressed in RTAs with dedicated competition policy chapters.

Most of the RTAs with dedicated competition chapters stipulate which anti-competitive practices are to be regulated and/or the measures which are to be implemented to address them (80% of such RTAs include provisions on anti-competitive agreements and abuse of dominance, while the issue of merger control is included in around 23% of such RTAs, increasingly in recent ones). Most of the RTAs with dedicated competition chapters (66%) provide for cooperation on competition policy, and are designed to facilitate the establishment and further development of competition principles. The adoption or maintenance of competition laws (55%) and the establishment of competition authorities (around 30%) are often required in competition chapters and further contribute to the abovementioned objectives. Recently concluded RTAs increasingly include 'horizontal principles' such as transparency (49%), non-discrimination and procedural fairness (32%). Most RTAs address the regulation of SOEs and designated monopolies (62% of the

[191] The TEAEU was signed in December 2014 and entered into force in January 2015. An unofficial translation of the EAEU Treaty into English is available at the WTO RTA Database, above note 166.

[192] All violations of the general rules of competition that have or may have an adverse effect on competition in the transboundary markets (except for financial markets) are to be suppressed by the Eurasian Economic Commission (EEC) - a permanent regulatory body of the EAEU. See Annex 19 of the TEAEU.

[193] See, for example, the EU-South Africa RTA and the EFTA-Morocco RTA.

[194] See Articles 88-89 of the WAEMU.

[195] Mesut Saygili, Ralf Peters and Christian Knebel, *African Continental Free Trade Area: Challenges and Opportunities of Tariff Reductions*, UNCTAD Research Paper No. 15, February 2018. Available at http://unctad.org/en/PublicationsLibrary/ser-rp-2017d15_en.pdf.

[196] Tralac, *The legal and institutional architecture of the Agreement Establishing the African Continental Free Trade Area,* 15 March 2018, available at https://www.tralac.org/discussions/article/12838-the-legal-and-institutional-architecture-of-the-agreement-establishing-the-african-continental-free-trade-area.html.

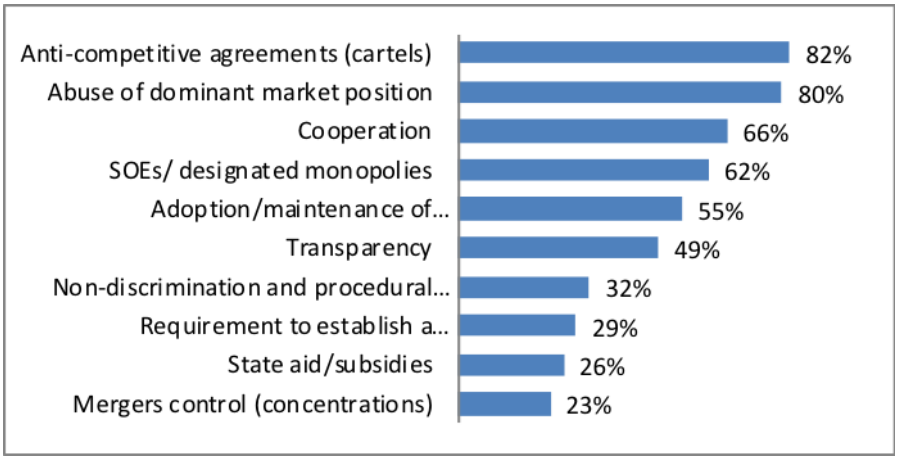
[197] See above note 166.

[198] Prior to the CPTPP, the issue had not been broadly addressed in RTAs (see relevant discussion in Part 3.3.4 , below).

[199] For the list of RTAs with dedicated chapters on competition policy see Appendix Table 1.The Treatment of Competition Policy in RTAs: Basic Coverage of Agreements with Dedicated Chapters.

RTAs with dedicated competition chapters). While equally addressed in most RTAs, desciplines on state aid and subsidies are only incorporated to a limited extent in competition chapters (mainly in the RTAs with the EU).[200]

Graph 2. Coverage of competition-related provisions in RTAs with dedicated chapters

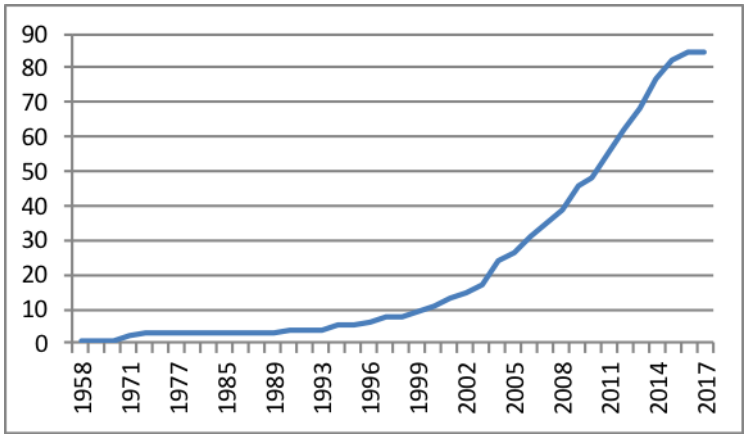


Source: WTO RTA Database

3.3.1 Importance of adopting/maintaining competition laws and establishing competition authorities

More than half of the RTAs with dedicated competition provisions include a requirement to adopt or maintain laws, legislation, or reference to parties' already established legislation. RTA parties started to actively include these provisions in the early 1990s and there is a significant increase in their number after the work of the WTO Working Group was suspended (see Part 2.6 above). In the period between 2004 and 2017, such provisions increased more than three-fold (from 24 RTAs in 2004 to 85 in 2017). This may be seen as a sign that regional integration has contributed to the proliferation of competition policy regimes worldwide.

Graph 3. Incorporation of a requirement on the adoption or maintenance of competition laws in the RTAs with dedicated competition chapters



Source: WTO RTA Database

Generally, NAFTA-inspired RTAs not only contain the requirement to 'adopt or maintain competition laws that prescribe anticompetitive business conducts', but also require the parties to 'take appropriate action with respect to such conduct'.[201] Most RTAs involving the EU or EFTA countries[202] incorporate an obligation to adopt or maintain competition laws. In addition to the

[200] Other RTAs may address them in separate chapters.

[201] This requirement is mainly incorporated in RTAs signed by the US with developing countries which either have not had competition laws or have been developing relevant laws. See, for instance, the US-Peru RTA and the US-Panama RTA. Canada, in addition to gereal requirement to adopt/maintain competition laws, has recognized that 'each Party shall maintain its independence in developing and enforcing its competition law'. See, for instance, the Canada-Panama RTA.

[202] Around 65% RTAs with dedicated involving the EU or EFTA countries.

general requirement to 'adopt or maintain in force comprehensive competition laws', these RTAs refer to the requirement that these laws 'shall effectively address anticompetitive practices' such as anti-competitive agreements, abuse of dominance and concentrations.[203] Some of the EU's RTAs, mainly with potential EU accession candidates, include an obligation for the latter to not only adopt a competition law, but also to ensure the compatibility of their legislation with EU competition law.[204]

Notably, the CPTPP, in its provision on adoptation and maintenance of competition laws, refers to the APEC Principles to Enhance Competition and Regulatory Reform of 1999, which set out comprehensive principles with regard to competition reforms.[205] In addition, the CPTPP incorporates an obligation to 'adopt or maintain consumer protection laws or other laws or regulations that proscribe fraudulent and deceptive commercial activities'.[206]

Around 30% of the RTAs include an express requirement for parties to establish competition authorities. This is inherent to RTAs following the NAFTA or EU model, as well as RTAs by Asian (mainly in RTAs involving Korea) and Latin America countries. A much lower share – only 7% - of the RTAs specify that such authorities are to be independent. Where present, such a requirement is usually included in the EU's RTAs with potential EU candidates.[207] On the other hand, cases where there is no requirement to adopt or maintain competition laws and/or a competition authority usually reflect the fact that the parties to these agreements have already adopted competition laws and established competition authorities.

3.3.2 Anti-competitive practices and 'horizontal' principles addressed in RTAs

With the exception of NAFTA-inspired RTAs and the CPTPP, most agreements surveyed address which anti-competitive practices are to be regulated and/or which measures are to be implemented to that effect. Almost all of the RTAs with dedicated competition chapters specifically mention anti-competitive agreements (82%) and abuses of market power (80%). In contrast, only around 23% of these RTAs mention anti-competitive mergers. An express reference to merger control is a particular characteristic of RTAs involving Asian countries (49% of their RTAs include provisions on mergers)[208]; and the EU and EFTA countries (45%). Australia and New Zealand have adoped advanced provisions on anti-competitive mergers in the framework of ANZCERTA by adopting a Cooperation Protocol for Merger Review in 2006, aimed at formalising relevant practices of their competition authorities.

Also, half of the RTAs with the dedicated competition provisions recognise that any measures proscribing anti-competitive business conduct should be consistent with principles of transparency. Furtermore, some of these RTAs explicitly refer to transparency in relation to the application of competition laws and exclusions from of competition law.[209] Other requirements to follow 'horizontal' principles in competition policy enforcement, such as principles of non-discrimination, along with requirements of procedural fairness are referenced in around one third of the RTAs. Such requirements are found in RTAs involving the EU, EFTA, Canada, Asian economies (Japan and Singapore), and some Latin American countries (Peru and Chile). The CPTPP is among the most progressive RTAs in that regard, including reaching and detailed provisions on procedural fairness (such as the right to counsel, and the right to offer expert analysis, among others) drawn from the work of the ICN and the OECD.[210] Notably, in addition to common transparency principles, the related CPTPP's provision goes further and states specifically that by 'recognising the value of the APEC Competition Law and Policy Database in enhancing the transparency of national competition laws, policies and enforcement activities, each Party shall endeavour to maintain and update its information on that database'.[211]

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[203] See, for example, the EU-Central America RTA.

[204] See, for example, the EU-Moldova RTA and the EU-Ukraine RTA.

[205] APEC Principles to Enhance Competition and Regulatory Reform, Auckland, New Zealand, 13 September 1999. Available at https://www.apec.org/Meeting-Papers/Leaders-Declarations/1999/1999_aelm/attachment_apec.aspx.

[206] See article 16.6.3 of the CPTPP, see above note 166.

[207] See, for example, the EU-Montenegro RTA and the EU-Albania.

[208] Such as ASEAN, Japan, Korea and Singapore.

[209] For example, the EU-Canada RTA.

[210] ICN, *ICN Guidance on Investigative Process*, 2015, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf; and OECD Competition Committee, *Procedural Fairness and Transparency,* 2012, available at http://www.oecd.org/competition/abuse/proceduralfairnessandtransparency-2012.htm, as cited in R. Michael Gadbaw, 'Competition Policy', in Cathleen Cimino-Isaacs and Jeffrey J. Schott (eds.), *Trans-Pacific Partneship: An Assessment* (Peterson Institute for International Economics, 2016), p. 329.

[211] See article 16.7 of the CPTPP, above note 166. The APEC Competition Law and Policy Database is available at http://www.apeccp.org.tw/index.do.

3.3.3 Regional cooperation on competition policy issues

Most RTAs with dedicated competition chapters include different provisions on cooperation, though the envisaged scope and extent varies. Around 70% of such RTAs explicitly mention cooperation in their texts. In addition, around 75% of them refer to information sharing and consulation (including both consulations in the implementation of the competition provisions or chapters of the agreements and consulations in specific cases of anti-competitive practices). Around half refer to notification and confidentiality requirements; and only about a third of RTAs include provisions on technical assisstance on competition policy. Interestingly, the CPTPP envisages activities such as the exchange of information and experiences on competition advocacy with a view to promote a culture of competition.[212]

3.3.4 Enforceability of competition policy chapters in RTAs

Only around 34% of RTAs with dedicated competition chapters subject competition policies to full RTA dispute settlement procedures. These often involve the EU or EFTA as well as some RTAs among CIS and MERCOSUR. Other RTAs, though exempting competition chapters from dispute settlement, still provide for consulations. This is the case for more than half of RTAs with detailed competition chapters (51%). On the other hand, 15% of the RTAs completely exclude competition policy matters from any type of dispute settlement mechanism.[213]

Few RTAs with a dedicated competition chapter (only 2% and only those involving Australia or New Zealand, Chinese Taipei, some Latin American countries and the CPTPP) include a direct reference to private rights of enforcement.[214] For instance, the New Zealand-Chinese Taipei RTA recognises that 'a private right of action is an important supplement to the public enforcement of a Party's competition laws' and sets an obligation for the RTA parties to 'ensure that a right [...] is available to persons of the other Party on terms that are no less favourable than those available to its own persons'.[215]

The most novel approach to the protection of procedural fairness in competition law enforcement from a stakeholder perspective is incorporated in Article 16.2 of the CPTPP. This agreement sets out that 'each Party should adopt or maintain laws or other measures that provide an independent private right of action', i.e. the right to seek 'injunctive, monetary and other remedies'.[216] In that regard, some scholars suggest that the inclusion of the provision on private rights of action is necessary to provide an independent means of redress, particularly in countries where the authorities enforcing competition laws may not be fully free from political influence and that the inclusion of this provision 'breaks new ground in the realm of international competition law and appears to be unprecedented in free trade agreements'.[217]

3.3.5 Regulating designated monopolies/state-owned enterprises

The degree to which an economy establishes or maintains designated monopolies and SOEs may have a significant impact on economic efficiency, innovation, competitiveness and growth rates.[218] It is therefore unsurprising that obligations to regulate designated monopolies, SOEs and/or undertakings entrusted with special or exclusive rights are among the most common competition-related elements of RTAs concluded in different regions.

Around 77% of all RTAs with dedicated provisions on competition policy make reference to SOEs and designated monopolies either in their competition chapters or in separate provisions outside the chapter on competition (the latter is true for 12% out of RTAs with dedicated competition chapters). In many cases, separate chapters on SOEs contain more enforceable language as compared to SOEs provisions in chapters on competition policy.[219]

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[212] See article 16.5, see above note 166.

[213] For example, some EU RTAs mainly with Latin American countries; CIS RTAs; and some Asian RTAs involving China, ASEAN.

[214] As defined in New Zealand-Chinese Taipei RTA (Article 5) private right of action means the right of a person to independently seek redress from a court or independent tribunal for injury to its business or property caused by a violation of RTA party's competition laws.

[215] Article 5 of the New Zealand-Chinese Taipei RTA.

[216] See Article 16.3 of the CPTPP, above note 166.

[217] See Gadbaw, above note 210.

[218] Designated monopolies mean the abuse of government powers to eliminate or restrict competition. Its treatment is fundamentally an issue of economic governance concerning the relationship between the government and the market. For the pertinent discussion see William E. Kovacic, 'Competition Policy and State-Owned Enterprises in China' (2017) 16.4 *World Trade Review* at 693-711.

[219] This is, for instance, the case in the CPTPP, see above note 166 and the discussion below.

In including such provisions, RTA parties aim to level the playing field between SOEs and privately owned competitors to the extent possible, while generally refraining from questioning the right to establish and maintain SOEs itself. NAFTA-inspired RTAs usually recognise that 'state enterprises/designated monopolies should not operate in a manner that creates obstacles to trade and investment'. In contrast, RTAs following the EU approach typically establish concrete obligations for public enterprises to follow general competition laws and not to engage in anti-competitive practices. A limited number of RTAs contain provisions intended to neutralize or reduce government intervention in relevant markets. For example, the US-Singapore FTA imposes an obligation on Singapore to refrain from using direct or indirect decisive influence over government enterprises,[220] and limits the involvement of the government in these enterprises to using its voting rights as a shareholder. Additionally, 7% RTAs (mainly involving the US and Canada) reaffirm rights for SOEs and designated monopolies to set different prices in different markets if they do so 'based on normal commercial considerations'.[221]

Notably, the CPTPP's chapter on SOEs (Chapter 17)[222] establishes ambitious comprehensive standards on SOE management, aimed at disciplining SOEs policies. As suggested by some scholars, Chapter 17 represents a revolutionary approach to rule-making in defining the rules of commercial engagement for SOEs and complementing disciplines on SOEs established under the GATT 1994 (Article XVII).[223] In particular, the SOEs chapter defines SOEs on the basis of government ownership or government control; and prohibits discriminatory behaviour by SOEs toward other buyers/suppliers within the free trade area. The CPTPP aims to ensure that SOE purchases and sales are made on the basis of commercial considerations.[224] The provision of government support programs to SOEs is also addressed (see discussion in Part 3.3.6 , below). Another important feature of the SOE chapter is its transparency provisions, which prescribe provision/publication of information on all SOEs. Importantly, all SOE provisions are subject to the CPTPP's dispute settlement resolution mechanism. Furthermore, the parties to the CPTPP committed to conduct further negotiations on extending the application of SOE disciplines.[225]

The USMCA also incorporates a new chapter on SOEs (Chapter 22 of the USMCA).[226] The USMCA text aims to ensure that: (i) the regulation of SOEs, designated monopolies, and private companies is conducted in a manner that is impartial/competition-neutral; (ii) SOEs accord non-discriminatory treatment with respect to the purchase and sale of goods and services; and that (iii) SOEs act in accordance with commercial considerations with respect to such purchases and sales.[227] While in many respects the USMCA's chapter on SOEs incorporates similar considerations as are included in the CPTPP, certain aspects of the USMCA text go even further.[228] In particular, the USMCA chapter, in addition to defining SOEs on the basis of government ownership or government control through ownership interests, also covers situations of control through minority shareholding.[229] Importantly, the SOEs chapter in the USMCA (as in the CPTPP) is subject to the RTA's dispute settlement mechanism (for additional information on the USMCA SOEs chapter, see Box 2).

[220] Article 12.8 of the Unites States-Singapore Free Trade Agreement defines 'government enterprise' as: (a) for the United States, an enterprise owned, or controlled through ownership interests, by that Party; and (b) for Singapore, an enterprise in which that Party has effective influence.

[221] See, for example, the US-Colombia RTA, the Canada-Korea RTA.

[222] See above note 166.

[223] See Gadbaw, above note 210. See also Sean Miner, 'Commitments on State-Owned Enterprises', in Cimino-Isaacs and Schott, above note 210; and discussion on Article XVII of the GATT in Part 2.1.1 .

[224] Article 17.4 of the CPTPP, above note 166.

[225] Article 17.14 of the CPTPP, above note 166.

[226] The USMCA, above note 171.

[228] See also discussion in Part 3.3.6 .

[228] See also discussion in Part 3.3.6 .

[229] The USMCA text in particular sets out the following definition of 'state-owned enterprise': an enterprise that is principally engaged in commercial activities, and in which a Party: (a) directly or indirectly7 owns more than 50 percent of the share capital; (b) controls, through direct or indirect ownership interests, the exercise of more than 50 percent of the voting rights; (c) holds the power to control the enterprise through any other ownership interest, including indirect or minority ownership; or (d) holds the power to appoint a majority of members of the board of directors or any other equivalent management body. See above note 171.

Box 2. The USMCA's SOEs chapter: perspective of the US Intergovernmental Policy Advisory Committee (IGPAC)

The US Intergovernmental Policy Advisory Committee (IGPAC) is an advisory body to the USTR, consisting of representatives of state and local governments.[230] In commenting on the USMCA's chapter on SOEs, it observed as follows: '[the IGPAC] welcomes the inclusion of a chapter establishing rules for state-owned enterprises (SOEs) as US companies are facing increasing competition from them in international markets. Frequently, US companies cannot compete against SOEs on a level-playing field as they often receive government support including discounted loans, land grants, lower input costs or other subsidies, preferential access to government procurement, trade protection, regulatory advantages including national standards, and relaxed regulatory enforcement that unbalance the playing field. The Trade Agreement between the United States and Mexico contains welcome transparency provisions that will throw light on the operation of SOEs and rules to help to ensure that US companies can compete with them on a level playing field. As of this time the Chapter currently only covers central government SOEs but calls for negotiations to determine the future coverage of sub-federal SOEs within six months after the agreement enters into force. IGPAC supports the postponement of sub-federal coverage as it is unclear how the text would impact US sub-federal SOEs, and believe that additional information and a more robust consultation process with potentially affected states is needed before further commitments are made'.[231]

3.3.6 State aid/subsidies[232]

While most of the RTAs examined incorporate general disciplines related to state aids/subsidies[233], only around 30% of RTAs specifically include provisions on this matter within the chapters dedicated to competition policy. These are mainly RTAs involving the EU and EFTA countries and often contain broad prohibitions on state aid that can distort competition by favouring particular entities, similar to the obligations established by EU law for EU member States. In a few instances, RTAs provide less rigid obligations, such as best endeavour clauses to remove distorting effects on competition, recognition of the fact that state aids may have distortive effects, and a reaffirmation of related commitments in the WTO agreements.

Another related area is incorporation of subsidy disciplines in SOEs chapters of the most recent RTAs. The CPTPP defines the concept of noncommercial assistance as 'assistance to a state-owned enterprise by virtue of that state-owned enterprise's government ownership or control' and which includes direct transfers like grants, debt forgiveness, favorable loans, guarantees, favourable equity investment, or cheaper goods or services than those commercially available. [234] The CPTPP text restricts such activities when they cause adverse effects.[235] The text of the SOEs chapter indicates specific instances where subsidies are deemed to have adverse effect. The CPTPP incorporates an exception that a service supplied a SOE within its domestic territory 'shall be deemed not to cause adverse effects'.[236] Such exemption, however, does not cover cross-border activities of SOEs:

> For the purposes of Article 17.6.1 and Article 17.6.2 (Non-commercial Assistance), adverse effects arise if the effect of the non-commercial assistance is: […] (d) that services supplied by a Party's state-owned enterprise that has received the non-commercial assistance displace or impede from the market of another Party a like service supplied by a service supplier of that other Party or any other Party.[237]

Notably, the CPTPP is the first RTA which establishes disciplines on subsidies for services delivered cross-border (a similar provision is now incorporated in the SOEs chapter of the USMCA).[238]

While the CPTPP significantly disciplined subsidies in relation to SOEs, the recently concluded text of the USMCA incorporates even stronger provisions, which go beyond the disciplines set out

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[230] See https://ustr.gov/about-us/advisory-committees/intergovernmental-policy-advisory-committee-igpac.

[231] Intergovernmental Policy Advisory Committee (IGPAC) Report, 27 September 2018. Available at https://ustr.gov/sites/default/files/files/agreements/FTA/AdvisoryCommitteeReports/Intergovernmental%20Policy%20Advisory%20Committee%20%28IGPAC%29.pdf.

[232] This Part analyses provisions related to state aid/subsidies, which are incorporated in the competition policy and SOEs chapters.

[233] The level of such regulations, however, differs. Most of RTAs refer only to the WTO disciplines on subsidies, namely the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement), other create some include additional obligations related to the provision of subsidies/state aid.

[234] Article 17.1 of the CPTPP, above note 166.

[235] Article 17.6 of the CPTPP, above note 166.

[236] Article 17.6 of the CPTPP, above note 166.

[237] Article 17.7 of the CPTPP, above note 166.

[238] See also Miner, above note 223.

in the WTO agreements. In many aspects the disciplines under the USMCA are similar to the ones established under the CPTPP. Importantly, however, in addition to subsidies which might cause adverse effects (as stated in the CPTPP), the USMCA's chapter on SOEs prohibits certain types of non-commercial activities provided to SOEs.[239]

Box 3. The USMCA: prohibited non-commercial assistance provided to SOEs

The USMCA's chapter on SOEs, referenced above, contains the following language in relation to prohibited non-commercial assistance provided to SOEs: 'The following forms of non-commercial assistance, when provided to a state-owned enterprise primarily engaged in the production or sale of goods other than electricity, shall be prohibited:

(a) loans or loan guarantees provided by a state enterprise or state-owned enterprise of a Party to an uncreditworthy state-owned enterprise of that Party;

(b) non-commercial assistance provided by a Party or a state enterprise or state-owned enterprise of a Party to a state-owned enterprise of that Party, in circumstances where the recipient is insolvent or on the brink of insolvency, without a credible restructuring plan designed to return the state-owned enterprise within a reasonable period of time to long-term viability; or

(c) conversion by a Party or a state enterprise or state-owned enterprise of a Party of the outstanding debt of a state-owned enterprise of that Party to equity, in circumstances where this would be inconsistent with the usual investment practice of a private investor'.[240]

Overall, WTO Members have clearly expressed, in relevant RTAs, the importance they attach to competition disciplines as a dimension of trade and economic policy-making in the present global environment. A key consideration underlying such disciplines is the fact that, if left unchecked, anti-competitive practices have a considerable potential to undermine the gains that accrue, or are expected to accrue, from trade liberalization. In addition to often detailed commitments on the prevention of anti-competitive practices and on enforcement cooperation, strong interest is shown in the negotiation of safeguards to ensure non-discriminatory and competition-neutral behaviour by state-owned enterprises and other entities enjoying special privileges. As well, competition chapters in RTAs routinely include basic requirements to maintain or establish a competition law and/or authority. In most cases, parties to these RTAs undertake comparatively soft obligations only, i.e. competition issues are excluded from dispute settlement (consultations are the preferred alternative option).

To summarize, the prevalence of dedicated competition provisions in WTO Members' RTAs attests clearly to the perceived relevance of competition policy to trade on the part of a broad cross-section of Members. These provisions also reflect a significant degree of convergence in thinking on the substance of how competition policy may be framed and applied in the context of international trade agreements, although they are by no means uniform in their approach. As such, the competition provisions of RTAs are an obvious reference point for stock-taking at the multilateral level. Certainly, a question worth pondering is whether such provisions offer a potential template for eventual action at the multilateral level.[241]

4 THE ROLE OF COMPETITION POLICY IN TODAY'S GLOBAL ECONOMY: CURRENT CHALLENGES FOR POLICY MAKERS

Today, competition policy is regarded by a clear plurality of WTO Members as an essential contribution to the welfare of citizens, to economic growth, and development.[242] Thus, it is no surprise that in recent times competition regimes have proliferated at a swift pace in response to related shifts in policy thinking and economic behaviour. Moreover, developments regarding the

[239] Article 22.6 of the USMCA, above note 171.

[240] Article 22.6 of the USMCA, above note 171. For in each circumstance's specific exceptions see references cited in the provision.

[241] See also Laprévote et al, above note 32.

[242] See, e.g., Nick Godfrey, *Why is Competition Important for Growth and Development?* (A Contribution to the OECD Global Forum on Investment, 27-28 March 2008, available at http://www.oecd.org/investment/globalforum/40315399.pdf); see also Anderson and Müller, above note 22. As one very pointed and specific example of the harm to economic welfare caused by anti-competitive practices in poor countries and the potential for competition law enforcement to raise living standards, the World Bank Group estimates that around 200,000 people might be lifted out of poverty (equivalent to a 0.4 percentage point fall in the poverty rate) just by tackling cartels in only four basic products (maize, wheat, poultry, and pharmaceuticals). See Jonathan Argent and Tania Begazo, 'Competition in Kenyan markets and its impact on income and poverty: a case study on sugar and maize' (2015) *World Bank Policy Research Working Paper* 7179.

demonopolisation, liberalisation and privatisation of certain sectors as well as the rapid technological changes and the opening up of international trade have unleashed unprecedented economic forces, which in turn impact across different jurisdictions in myriad ways.[243]

This Part of the paper explores a range of current challenges for competition policy in the context of today's global and information-based economy. In particular, it looks at: (i) cross-border competition cases and resulting potential conflicts of jurisdiction; (ii) heightened interest in the competition policy - IP interface; (iii) competition barriers in digital markets; (iv) growing issues concerning state-owned enterprises, industrial policy and competitive neutrality; and (v) the challenges involved in ensuring impartiality in competition law enforcement, particularly in newer enforcement regimes. These challenges, it is argued, point to an eventual need for further strengthening of international cooperation mechanisms in relation to the role of competition policy in the global economy.

4.1 The international dimension of competition law enforcement: the resulting positive spillovers and potential for conflicts of jurisdiction

Competition law enforcement, today, is a pervasively international phenomenon.[244] Mergers and acquisitions often have a bearing on multiple national markets.[245] The number of cartel investigations involving international participants has increased in the EU alone by more than 450% since 1990.[246]

Cross-border competition law enforcement often entails significant and sometimes very positive spillovers. For example, major anti-cartel investigations/prosecutions by the United States, the European Union or other important jurisdictions can result in the cessation of price fixing and related activities in other jurisdictions, even though this is not their ostensible purpose. Similarly, the blocking of a major international merger by a single jurisdiction can, depending on the circumstances, prevent harmful effects that would otherwise affect consumers worldwide.[247]

Cross-border competition enforcement can also, potentially, result in negative externalities. These may include 'chilling effects' on legitimate business activity or a 'freeing effect' on harmful business activity, much in the sense of 'false positives' or 'false negatives'.[248] While national authorities interested in cases with an international dimension may strive to and often have taken similar views of business arrangements (see Box 5); divergent or conflicting positions have also been taken, and sometimes in high-profile cases. For example, different approaches to the review of mergers between suppliers of complementary products resulted in the conflicting decisions taken by the US and EU competition authorities in the *GE-Honeywell* case (see Box 4).[249]

These situations raise concerns not only for jurisdictions which are essentially consumers of the relevant product or service but also for jurisdictions whose producers/suppliers may be adversely affected by anti-competitive behaviour or by the creation of an individual or collective position of dominance on the world or regional market. In order to shed light on potential areas of contention, concerns related to enforcement disagreements during merger review and cartel investigations, as two main areas of competition law enforcement, are discussed below.[250]

4.1.1 Cross-border mergers

Cross-border mergers create scope for conflicting decisions between competition authorities which can give rise to substantial costs to the businesses concerned. Different jurisdictions may reach different views on a global merger for at least three reasons: (i) the authorities in the relevant jurisdictions apply different rules of substantive analysis in assessing the merger; (ii) the market situation and resulting conditions of competition are materially different in relevant jurisdictions; or (iii) relevant authorities have simply come to different conclusions based on the

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[243] Richard Whish and David Bailey, *Competition Law* (Oxford, 8TH Edition, 2015), p. 4.

[244] Eleanor M. Fox, *Antitrust Without Borders: From Roots to Codes to Networks* (E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2017), p. 4. Available at http://e15initiative.org/publications/antitrust-without-borders-from-roots-to-codes-to-networks/.

[245] OECD, *International Cooperation in Competition Law Enforcement*, 6-7 May 2014, p.4. Available at https://www.oecd.org/mcm/C-MIN(2014)17-ENG.pdf.

[246] *Id.*

[247] WTO, above note 4; Anderson and Jenny, above note 4; and Anderson and Holmes, above note 4.

[248] OECD, above note 245, p. 35.

[249] See for example Eleanor Fox and D. A. Crane, *Antitrust Stories* (Foundation Press, 2007).

[250] Concerns relating to a possible lack of cooperation in investigations of abuse of dominance are not specifically addressed in this subsection. This is because there have generally been fewer such investigations with a cross-border dimension, although the number of unilateral conduct cases has increased in high technology sector and digital markets (for further discussion on relevant concerns, see parts 4.2 and 4.3).

facts available to them, for example because of differences in the evidence collected and/or in its interpretation (see, for example, Box 4).[251]

First, in some cases, substantive differences may arise directly from the law, such as when different evaluation criteria are embodied in legislation. Particularly, while some economies consider employment effects, or the protection of small sellers against buyer power as relevant to their competition analysis, whether or not and to what degree such factors will be considered differs across jurisdictions. Much evidence, however, suggests that many conflicting decisions under this category often do not stem from such outright legislative differences, but may simply reflect different precedents and practices despite similar legal standards.[252] For example, one authority might pay more attention to market shares than another, or be more concerned about vertical linkages, in line with economic policy goals set for the jurisdiction in question.

Conflicting decisions may also, at times, stem from different goals or priorities of competition law enforcement in different economies. Hence, while in the US competition policy intervention is focused more or less exclusively on the goal to ensure that competition thrives, prevent companies from achieving monopoly positions via anti-competitive means, and eventually protect consumer welfare,[253] in Europe these essential aims of competition policy have been complemented with the need to ensure market integration between EU Member States and competition policy has been given a strong role in this regard.[254] In many developing jurisdictions (perhaps most notably, China and South Africa), social and economic development goals are important factors in setting overall economic policy, and consequently, e.g. merger review decision have taken into account related considerations.[255] As Professor Gerber observes:

> Most other competition law systems [i.e., other than the U.S. and the EU] pursue several objectives, not only in the language of their statutes, but also in the decision making of competition authorities and courts. Often economic development is a central goal, but political goals such as dispersion of power and social goals such as increased access to markets are also common. In addition, fairness has been a major goal in many systems.[256]

Second, market situations and conditions of competition can be expected to vary across economies. These variations include factors such as customer behaviour, including countervailing buyer power, existence of substitutes/complements on the market, and other circumstances with an impact on competitive forces in the market. Furthermore, international mergers may affect different stages of the multinational supply chain in different jurisdictions, so that different intermediate product markets may be of relevance to the analysis. Again, differing conditions of competition can certainly provide legitimate reasons for differences in the conclusions reached by individual competition agencies carrying out a particular merger review. The remedies adopted (or not) in one jurisdiction may result in possibly adverse effects in other jurisdictions.[257]

Third, conflicting decisions can occur as the assessment, during any merger review, of facts relating to and market effects of the merger may simply be complex and a clear 'black-or-white' view cannot easily be identified. This may happen even when the substantive test applied and the conditions of competition are similar in several jurisdictions.[258] Overall, the inconsistent treatment of an international merger can result in blocking an otherwise harmless and efficient merger or permitting a merger deemed harmful by other jurisdictions.[259]

Box 4. Examples of conflicting results in national merger reviews: the remedies imposed by China as compared to other jurisdictions in two cases earlier in the present decade

Despite important advances in coordination and cooperation during merger review, competition authorities may reach different conclusions and impose inconsistent or conflicting remedies in cross-border transactions. For example, in connection with **Seagate/Samsung**, U.S. and EU authorities cleared the transaction unconditionally, whereas in China, MOFCOM required Seagate to hold separate the Samsung business while allowing Seagate to apply for waiver of the hold-separate commitments after one year.

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[251] OECD, above note 245, p. 36.

[252] OECD, above note 245.

[253] *Reiter v. Sonotone Corp.,* 442 U.S. 330 (1979). In turn, quoting Richard Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Free Press, 1978), pp. 110–112.

[254] OECD, above note 245, p. 37.

[255] OECD, *Policy Roundtables: Remedies in Cross-Border Merger Cases,* 2013. Available at http://www.oecd.org/daf/competition/Remedies_Merger_Cases_2013.pdf, p. 102.

[256] David J. Gerber, *Global Competition: Law, Markets, and Globalization* (Oxford, 2010).

[257] OECD, above note 245, p. 37.

[258] OECD, above note 245.

[259] For implications of national decisions on cross-border mergers on global commerce and conditions of competition internationally see Box 4.

Likewise, in **Western Digital/Viviti**, authorities in the U.S., EU, Japan, and Korea approved the transaction subject to Western Digital's divestiture of certain production assets to Toshiba, while MOFCOM additionally required Western Digital to hold separate the Viviti business with the opportunity to apply for waiver after two years.

Source: OECD, above note 245.

Taking into account data collected since 1995, it has been estimated that cross-border merger deals affected by the divergent decisions at the national level have reached an overall value of approximately USD 100 billion.[260] This puts in evidence the potential economic impact of diverging decisions for businesses and the growing need for coordination in this area.

A related concern is that in practice, only large jurisdictions can apply remedies or block global mergers. At the same time, in addition to jurisdictions with long-established competition regimes (such as the EU, the US, Japan etc.), the newer competition authorities from emerging economies, including those of China, Russia and India are becoming more active and impose remedies with global consequences. To be sure, the increased activity of newer competition authorities is a natural and desirable outcome in itself as competition laws apply to more economies. The side effect of such developments, however, is increasing complexity in cooperation.[261]

Cooperation in the enforcement of competition law has expanded significantly since the 1990s (see discussion in Part 5.1), and an impressive degree of convergence of competition policies with regard to mergers have been achieved through the advocacy work of the ICN (see, for an important current example of such cooperation, Box 5). Still, the question arises as to whether there is a need for the development of new methods and tools of international cooperation to assist national competition authorities in reaching optimal economic outcomes. Even if a full harmonization of approaches in different jurisdictions may be challenging to achieve, there is an increasing need to ensure that agencies work towards a more cooperative approach. Arguably, this can only be achieved if their merger reviews are not captured by exclusively national political and industrial policy considerations.[262]

Box 5. The 2018 Bayer/Monsanto merger: an example of effective coordination of remedies imposed across multiple jurisdictions

Initially filed in more than 30 jurisdictions[263], Bayer's acquisition of Monsanto was cleared in early 2018 subject to certain conditions - a 'remedy package' - including the divestment of their existing overlapping businesses, mainly in the seed and pesticide markets. Additionally, the entered commitments included the divestment of R&D pipeline projects as well as licenses on Bayer's digital agriculture product portfolio. This set of remedies, mostly structural in nature, were accepted across different jurisdictions, including the EU[264], US[265], and Brazil.[266]

One of the largest negotiated merger operation, it required the divestment of assets worth approximately $9 billion in the US and well over €6 billion in the EU.[267] While reviewing the merger, both the European Commission and the Department of Justice cooperated very closely with a number of other competition authorities, including, their Australian, Brazilian, Canadian, Chinese, Indian and South African counterparts.[268]

[260] OECD, above note 245, p. 5.

[261] This is a relevant concern also due to the fact that some active jurisdictions in competition enforcement are not involved in cooperative activities in the framework of the OECD (the membership is mainly limited to developed countries); and the ICN (China's competition agencies are not member organizations of the ICN).

[262] There are some concerns that the regulation of cross-border mergers might be used as a negotiating bargain in relation to other trade-related issues. See, for instance, the Financial Times, *China demands Qualcomm concessions over NXP deal*, 19 April 2018, available at https://www.ft.com/content/f69ce1a0-43a8-11e8-803a-295c97e6fd0b.

[263] See, above note 8.

[264] European Commission, *Press release: Mergers: Commission clears Bayer's acquisition of Monsanto, subject to conditions,* 21 March 2018, available at http://europa.eu/rapid/press-release_IP-18-2282_en.htm.

[265] DOJ Press release: Justice Department Secures Largest Negotiated Merger Divestiture Ever to Preserve Competition Threatened by Bayer's Acquisition of Monsanto, 29 May 2018, available at https://www.justice.gov/opa/pr/justice-department-secures-largest-merger-divestiture-ever-preserve-competition-threatened.

[266] Reuters, *Brazilian antitrust agency approves Bayer-Monsanto tie-up*, 7 February 2018, available at https://www.reuters.com/article/us-monsanto-m-a-bayer/brazilian-antitrust-agency-approves-bayer-monsanto-tie-up-idUSKBN1FR2S1.

[267] See, above notes 264 and 265.

[268] *Id.*

4.1.2 International cartels

International cartels and market sharing agreements between firms in two or more countries are akin in their effects to horizontal price-fixing and other collusive agreements within a single country. In both cases, competition is limited, prices are raised, output is restricted, and/or markets are allocated for the private benefits of firms.[269]

Vigorous enforcement efforts by national competition agencies relating to international cartels, coupled with voluntary cooperation among national authorities in cases where this has been permitted, has brought satisfactory results and yielded positive spillovers (in the sense of benefits felt in other jurisdictions) in many cases.[270] Concerns, however, may arise in the case of export cartels and/or arrangements with similar effects.[271] An issue arising in this regard is the practical difficulty faced by competition agencies in these importing jurisdictions when enforcing national competition law against such cartels. For example, their investigative efforts may not easily yield necessary evidence on the conducts of the producers located in exporting/other jurisdictions. Cooperation with the authorities of those jurisdictions may be hampered by the fact that those may not perceive an immediate interest in tackling the cartel if it does not create harmful effects for the national economy.[272]

Beyond this, some international cartels may simply be beyond the effective reach of the laws in the countries where their effects are most harmful. According to some scholars:

> A striking example of an international cartel that was beyond the effective reach of the national competition laws [was] provided by the beer market in Africa. In several deals, large beer producers effectively agreed to divide the continent up, with each given a near-monopoly in its own set of countries. As a spokesman for a major African beer company [pointed out, revealingly] about such a deal: 'There may be antitrust laws at the national level, but none covering the continent. I don't see what the problem is'.[273]

Some evidence suggests that such cartels are a recurring feature of markets that lack effective competition rules and institutions, and that appropriate enforcement actions by developed countries, while of vital importance, do not adequately protect the interests of developing countries in this area.[274] As estimated by Levenstein and Suslow, the overcharges to developing countries of 16 international cartels included in their study amounted to approximately USD 16 billion. [275]

In part to tackle these issues, an increasing number of jurisdictions have embraced versions of the 'effects doctrine'.[276] Under this principle, domestic competition laws are applicable to firms and arrangements based outside of the domestic market when they have effects that are felt within the domestic territory. Such applications of competition law have, beyond a doubt, yielded important benefits for consumers in many instances. Nonetheless, the extraterritorial reach of competition law is a sensitive issue and jurisdictional conflicts may arise. For example, two different countries may assert their own jurisdiction in the same case, leading to potential divergent assessments. In such circumstances, the possibility of 'positive comity' can be, where available, helpful. Positive comity allows one party (requesting) to request another party (requested) to take appropriate enforcement actions with respect to anti-competitive activities occurring in the territory of the requested party that adversely affect important interests of the requesting party, thus, allocating effectively enforcement resources by allowing the better-placed party to deal with the issue.[277]

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[269] For historical background, see WTO 1997 Annual Report, above note 4.

[270] See also Part 5.1 , below.

[271] 'Pure' export cartels are those whose efforts are directed exclusively at foreign markets. Such cartels are treated as being outside the scope of most countries' competition laws. For relevant discussion on export cartels see also discussion in Part 2.1.3 .

[272] For historical background, see WTO 1997 Annual Report, above note 4, pp. 65-67.

[273] Philippe Perdrix, *Le marché de la bière africaine monte en pression Jeune Afrique,* 10 September 2008 as cited in OECD, above note 245.

[274] Anderson and Jenny, above note 4.

[275] OECD, above note 245, p. 5, 44-45.

[276] See, for example, as relevant precedents, the European Court of Justice decision, C-89/85, Wood Pulp, Judgment of September 27, 1988, and the US case, *United States v. Aluminum Company of America*, 148 F. 2nd 416 (2nd Cir. 1945).

[277] OECD, *Competition co-operation and enforcement: Inventory of co-operation agreements*, 2015. Available at https://www.oecd.org/daf/competition/competition-inventory-provisions-positive-comity.pdf.

Even where international cartel activity can be tackled effectively by national competition laws, inefficiencies may occur with regard to the investigation of international cartels and lead to under-enforcement of competition policy and laws. In the absence of well-functioning and institutionalized cooperation mechanisms, multiple jurisdictions may repeat the same investigative steps, resulting in extra costs for businesses subject to investigations. More importantly, competition authorities will suffer from the unnecessary duplication of efforts; and might in practice be unable to obtain necessary evidence from other jurisdictions.[278] As a result, harmful cartel activity could go unpunished, additional costs could be imposed on the global economy, and consumers would be harmed.

4.2 The broadening application of competition policy vis-à-vis intellectual property rights in the global economy

Competition policy is, today, a powerful tool impacting on global commerce and conditions for innovation, technology transfer, and on the exercise of IPRs. In contrast to the situation prevailing several decades ago, interest in and concern with maintaining an appropriate balance between IP and competition law and policy certainly is no longer a preoccupation of only a few developed jurisdictions, rather, interest in this issue has migrated across developing and emerging jurisdictions (at a minimum the BRICS economies).[279] This interest is clearly manifested by relevant guidelines and advocacy efforts across a wide array of countries (see Table 1). Concurrently with such initiatives, competition agencies in developed and emerging economies have engaged in vigorous enforcement activities relating to anti-competitive abuses of dominant positions that also impact on IPRs and their exercise. In many respects, this is salutary: it reflects rapidly diffusing awareness of governments worldwide with regard to the importance of competition policy in addition to IP in promoting economic growth, development and prosperity.[280]

Table 1. Competition agency guidelines, enforcement experience and advocacy regarding intellectual property[281]

	Existing Guidelines/Laws	Practices addressed in the relevant instruments/enforcement experience/competition advocacy	Effects based (Rule of Reason)[282] Approach to Most Licensing Practices	Advocacy Initiatives
Australia	The 2010 Competition and Consumer Act	Licensing Practices Refusal to license[283] Anti-competitive Patent Settlements[284] Standard-essential patents (SEPs)[285]	Rule of Reason	Yes
Brazil	The 2011 Competition Law	Licensing Practices Refusal to licence Anti-competitive Patent Settlements[286] SEPs[287]	Rule of Reason	Yes
Canada	The 2016 Intellectual Property Enforcement Guidelines	Licensing Practices Anti-competitive Patent Settlements SEPs Patent Assertion Entities (PAEs)	Rule of Reason	Yes

[278] OECD, above note 245, p. 44.

[279] Article 40 of the TRIPS Agreement presumes the need for at least a degree of enforcement cooperation between jurisdictions regarding competition issues. For the pertinent analysis see Anderson et al, above note 92.

[280] See Anderson et al, above note 92.

[281] For further analysis, see Anderson et al, above note 92.

[282] 'Rule of Reason' approaches as identified here include approaches mixing block/general exemptions with an effects-based assessment of agreements not falling within safe-harbour provisions, such as in the EU.

[283] The refusal to license IPRs is not, by itself, prohibited by the CCA and, in some circumstances, is considered as an exercise of the right under section 51(3) of the CCA. Nonetheless, agreements between competitors not to license IPRs to third parties may constitute prohibited exclusionary practices.

[284] Anti-competitive patent settlements have not been subject to the consideration by the Australian courts. The only decision which addresses anti-competitive effects of 'pay-for delay' launch of generic pharmaceuticals is the 2015 decision in the Pfizer case.

[285] Although there have been a few examples involving SEPs, in both cases the parties reached a settlement before the Federal Court was able to hand down its decision

[286] Patent settlements have not been reviewed under the current competition framework in Brazil. It is, however, suggested that in certain circumstances, patent settlements might eventually violate Article 88 of the Competition Law establishing the prohibition of agreements between competitors which may substantially eliminate competition or strengthen a position of dominance on the relevant market.

[287] To date, *TCT v. Ericsson* was the only case analysed by CADE involving potential abuses related to SEPs.

	Existing Guidelines/Laws	Practices addressed in the relevant instruments/enforcement experience/competition advocacy	Effects based (Rule of Reason)[282] Approach to Most Licensing Practices	Advocacy Initiatives
China	Provisions on the Prohibition of the Abuse of Intellectual Property Rights to Eliminate or Restrict Competition (the SAIC Provisions)	Licensing Practices Refusal to licence SEPs	Rule of Reason	Yes
European Union	The 2014 Technology Transfer Block Exemption Regulation and a set of Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union (the EU Treaty) to technology transfer agreements (the Technology Transfer Guidelines).	Licensing Practices Refusal to license[288] Anti-competitive Patent Settlements[289] SEPs PAEs	Rule of Reason	Yes
India	The Competition Act (amended in 2017)	Licensing Practices Refusal to license[290] Anti-competitive Patent Settlements SEPs[291]	Rule of Reason / Per se	Yes
Japan	The 2016 Guidelines for the Use of Intellectual Property under the Antimonopoly Act	Licensing Practices Refusal to licence SEPs	Rule of Reason	Yes
Korea	The 2000 Guidelines on Unfair Exercise of Intellectual Property Rights	Licensing Practices Refusal to licence Anti-competitive Patent Settlements SEPs PAEs	Rule of Reason	Yes
Russia	The 2006 Competition Law	Licensing Practices	Rule of Reason / Per se	Yes
South Africa	The 1998 Competition Act	Licensing Practices Refusal to licence Anti-competitive Patent Settlements[292]	Rule of Reason / Per se	Yes

[288] The Advocacy Guidelines only address refusals to license linked to SEPs. Refusals to license not linked to SEPs continue to be assessed under the criteria established by relevant jurisprudence, which allows for compulsory licensing under certain, restrictive conditions pursuant to the essential facilities doctrine.

[289] In Guidelines, in context of licensing only; advocacy.

[290] Relevant enforcement experience.

[291] Relevant enforcement experience

[292] Relevant enforcement experience.

	Existing Guidelines/Laws	Practices addressed in the relevant instruments/enforcement experience/competition advocacy	Effects based (Rule of Reason)[282] Approach to Most Licensing Practices	Advocacy Initiatives
United States	The 2017 Antitrust Guidelines for the Licensing of Intellectual Property[293]	Licensing Practices Refusal to licence Anti-competitive Patent Settlements[294] SEPs[295] PAEs[296]	Rule of Reason	Yes

Initially, the traditional 'forerunner' jurisdictions, especially the US, Canada and the EU, focused on licensing practices as the primary area of interest with respect to the interface between IP and competition. Unsurprisingly, in the light of the geographical proximity as well as economic and cultural ties, the process of convergence occurred more quickly in the case of Canada and the US toward an economic-based 'rule-of-reason approach'. The 1994 NAFTA already, to a limited extent, recognized the competition-IP interface.[297] The differing approach that was maintained in the EU for an extended period reflected the core concern of EU competition policy to create a single European market. Undeniably, this concern shaped the first set of block exemptions for patent and know-how licences adopted in 1984, which were subsequently criticised (including by the Commission itself) for their legal formalism and intrinsic suspicion of IPRs. Relevant instruments and approaches adopted by the EU since that period, while embodying and carrying forward the economics-based approach to competition policy that originated largely in the US and Canada, continue to reflect residual differences in both policy application and legal form. In Japan and Korea, the treatment of IPR licensing arrangements under their respective competition laws has undergone and is still undergoing a gradual reorientation, from an emphasis on industrial policy objectives to a more consumer welfare-focused approach that broadly resembles the US, Canadian and the EU approaches in its effects. An interesting point of convergence in these respective approaches is the recognition that while IPRs provide the power to exclude, they do not necessarily confer market power upon its owner. [298]

In the majority of the above-mentioned jurisdictions, the treatment of licensing practices is now, to a striking degree, a settled issue. At the same time, these jurisdictions are increasingly grappling with and focused on a broader and newer set of issues including at a minimum the following: (i) anti-competitive patent settlements; (ii) SEPs; and (iii) the conduct of PAEs. Over time, these trends are impacting and seem likely to impact also on a broad range of emerging and/or developing economies.[299]

A further observation concerns the move towards clearer policy formulation and, in some cases, enforcement guidelines across new jurisdictions, particularly (though certainly not exclusively) the BRICS economies. In these jurisdictions, for the most part, there is relatively little pre-existing jurisprudence or enforcement experience to rely on in this area, and policies either emerge in an iterative process (such as in India), through the evolving practice of the competition authority (such as in Brazil, Russia, South Africa) or from a clear government mandate to formulate relevant guidelines (such as in China). Since the inception of competition policy regimes, there has been, to certain extent, a move from a *'per se*' towards a *'rule-of-reason'* approach in the BRICS countries which reflects the maturing of their competition regimes and enforcement

[293] A set of 'Antitrust Guidelines for the Licensing of Intellectual Property' was jointly issued by the Justice Department and the Federal Trade Commission (the US Guidelines) in 1995 and updated in 2017. The present (2017) Guidelines were issued just prior to the assumption of office by the current US Administration. Since the current US Administration took office, however, the revised US Guidelines have been cited favourably by the new US Assistant Attorney-General for the Antitrust Division, Makan Delrahim. Mr Delrahim, nonetheless, has also made the case for even greater emphasis to the promotion of innovation and to the dynamic aspects of competition in the US enforcement authorities' work. See Makan Delrahim, Assistant Attorney General, Antitrust Division, US Department of Justice, *Take It to the Limit: Respecting Innovation Incentives in the Application of Antitrust Law*, Remarks to the USC Gould School of Law - Application of Competition Policy to Technology and IP Licensing, Los Angeles, California, 10 November 2017, available at https://www.justice.gov/opa/speech/file/1010746/download.

[294] Relevant enforcement experience; advocacy.

[295] In advocacy initiatives.

[296] In advocacy initiatives.

[297] The Competition Chapter in the NAFTA defines monopoly as an entity, including a consortium or government agency, that in any relevant market in the territory of a Party is designated as the sole provider or purchaser of a good or service, but does not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant. Available at http://www.sice.oas.org/Trade/NAFTA/chap-15.asp#Chap.XV.

[298] See Anderson et al, above note 92.

[299] For further analysis, see Anderson et al, above note 92.

approaches.[300] Even though most of the BRICS jurisdictions have not yet issued guidelines on the competition-IP interface, their enforcement agencies, increasingly, articulate provisional interpretations on the application of competition policy in relation to IP. In addition to traditional areas of interest, the focus of competition agencies is expanding to encompass new frontiers such as abuses of SEPs.[301]

This proliferation of guidelines and policy initiatives at different stages of concretization and involving a wide range of individual jurisdictions, while manifesting a common overall concern and interest in the topic, also carries the potential for differences in the evolution of policies or even outright conflicts. Both IP and (at least arguably) competition policy are tools that demand a modicum of coordination across jurisdictions. This is because remedies imposed by particular jurisdictions in relevant cases (providing, e.g., for compulsory licensing) can have spillovers in other jurisdictions (by facilitating access to relevant technology). Minimally, they may affect the incentives for investment in what are, in an increasing number of cases, global industries and markets. The need for minimum standards to ensure due protection for the rights of innovators while incentivizing disclosure of socially valuable information and preventing free riding is, of course, a core underlying rationale for the TRIPS Agreement.[302]

The need for international coordination in the subject area of competition policy is, perhaps, less universally acknowledged than it is for IP. Still, the possibility of spillovers in the domain of competition law and policy is widely acknowledged, for example in the case of varying stances across jurisdictions towards mergers or abuses of dominant position that impact across national markets. [303] Moreover, the interplay between the international dimension of maintaining competitiveness in the technology sector finds an echo in the recognition in the TRIPS Agreement that as a remedy for anti-competitive behaviour, the compulsory licensing of patents need not be predominantly authorized for the domestic market only.[304]

Box 6. Anti-competitive abuses of dominant position that implicate IPRs: the Qualcomm case[305]

In the ***Qualcomm*** case, the European Commission fined Qualcomm €997 million for abusing its market dominance in LTE baseband chipsets by preventing rivals from competing in the market.[306] Qualcomm has faced a series of antitrust rulings and investigations from regulators across the globe.[307] In China, the investigation concluded that Qualcomm had abused its dominant position by charging excessive or unreasonably high royalties by refusing to provide the list of licensed patents and charging royalties for expired patents; requiring royalty-free grant backs of relevant patents; bundling SEPs with non-SEPs; and charging relatively high royalty rates based on the net wholesale selling price of devices. A fine of US$975 million, or 8% of Qualcomm's 2013 revenue in China, was imposed together with a corrective order. The *Qualcomm* case in China attracted worldwide attention and, in the view of some observers, put China on par with other major competition jurisdictions for taking strong action against anti-competitive conduct by dominant companies.[308] The remedy may have additional spillover effects outside China, where regulators, they warn, may re-examine Qualcomm's licensing practices.[309]

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[300] See Geeta Gouri, 'Economic Evidence in Competition Law Enforcement in India' in Frederic Jenny and Yannis Katsoulacos (eds.), *Competition Law Enforcement in the BRICS and in Developing Countries* (Springer, 2016).

[301] For further analysis, see Anderson et al, above note 92.

[302] See, for pertinent background, Part 2.3 ; and Anderson, Müller and Taubman, above note 35.

[303] See Richard A. Epstein and Michael S. Grove (eds.), *Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy* (Washington, D.C.: AEI Press, 2004). In addition to negative spillovers (e.g. one jurisdiction or its enterprises being adversely affected by enforcement decisions taken in other jurisdictions), there can of course be important positive spillovers from competition law enforcement (e.g., anti-cartel enforcement in one jurisdiction also benefitting consumers in other jurisdictions in which the same cartels have been active).

[304] See Article 31(k) of the TRIPS Agreement, above note 98; see also discussion in Part 2.3 above.

[305] See also Anderson et al, above note 92.

[306] European Commission - Press release, *Antitrust: Commission fines Qualcomm €997 million for abuse of dominant market position*, Brussels, 24 January 2018. Available at http://europa.eu/rapid/press-release_IP-18-421_en.htm.

[307] The New York Times, *Qualcomm Accused of Anticompetitive Practices by F.T.C.,* 17 January 2017. Available at https://www.nytimes.com/2017/01/17/business/qualcomm-accused-of-anticompetitive-practices-by-ftc.html.

[308] See, for background, Allen & Overy, Antitrust in China: *NDRC v. Qualcomm* – One All. Available at http://www.allenovery.com/publications/en-gb/Pages/Antitrust-in-China-NDRC-v--Qualcomm-%E2%80%93-One-All.aspx.

[309] Barron's, *Qualcomm Rising: China Overhang Removed, Say Bulls; Spillover Risk, Say Bears,* 10 February 2015, available at https://www.barrons.com/articles/qualcomm-rising-china-overhang-removed-say-bulls-spillover-risk-say-bears-1423579349.

Indeed, to an important degree, concern with such spillovers forms the rationale for the work of the ICN, the OECD, UNCTAD and, which have already promoted a significant degree of convergence in national policies through their extensive and informative analytical, policy development and advocacy work.[310] Individual WTO Members have recognized the importance of the competition policy-IP interface in the texts of their RTAs[311] and called for further discussion of relevant issues in the framework of the ICN,[312] and other international organizations active in the competition policy field (including also WIPO in the context of its Development Agenda and, in the past, the WTO).[313] Also, the TRIPS Agreement provision specifically requiring cooperation between jurisdictions in dealing with anti-competitive IP licensing practices underscores the longstanding acceptance that some form of cooperation between jurisdictions may be necessary in this field.[314]

4.3 Competition policy and anti-competitive practices in digital markets

In the context of today's global and information-based economy, competition in digital markets poses specific challenges for competition policy, and is thus a focus of debate. While digitalization can have important pro-competitive effects, it also brings with it the potential for limiting competition through exclusionary or collusive impacts.[315]

More specifically, digitalization has enabled the erosion of geographic market boundaries by facilitating the entry and growth of internet-based suppliers and retailers. This, in turn, has contributed to increased competition through expanding global value chains (GVCs), and enabling competition in the provision of new types of services and goods.[316] Nonetheless, concerns have also arisen about potential anti-competitive effects in the relevant markets.[317] The European Commission and the US Federal Trade Commission and competition agencies in other jurisdictions have investigated and are investigating the business practices of Google, Microsoft, eBay and other well-known internet-based companies.[318] According to *The Economist*, the cause of concern lies in the control of data which gives the internet companies enormous powers. Old ways of thinking about competition, devised in the era of oil, look outdated in what has come to be called the 'data economy' and, it argues, a new approach is needed.[319] Even if this is not the case, at a minimum, much attention is, appropriately, being given to the *application* of existing competition rules in the digital environment.

Competition in digital markets is influenced by three significant forces that are largely absent in conventional markets, namely network effects, 'scale without mass' and switching costs.[320] As discussed below, these tend to result in market concentration, first-mover advantages for incumbent firms and barriers to entry into the relevant markets:

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[310] See, for relevant discussion Hollman and Kovacic, above note 31; and discussion in Part 5.1 below. For diverse examples of relevant inputs, see also the websites of the ICN, OECD and UNCTAD.

[311] See, for instance, article 111 of the China-Chile RTA: 'The aim of cooperation on intellectual property rights will be: to encourage the rejection of practices or conditions pertaining to intellectual property rights which constitute abuse of rights, restrain competition or may impede transfer and dissemination of new developments'. See also the analysis of provisions and related discussion concerning IP in RTAs in Raymundo Valdés and Maegan McCann, 'Intellectual property provisions in regional trade agreements: revision and update', in Rohini Acharya (ed.) *Regional Trade Agreements and the Multilateral Trading System* (WTO and Cambridge University Press, 2016).

[312] For instance, in 2015, the Korean and U.S. competition agencies discussed measures for competition law enforcement and cooperation reinforcement between competition authorities for intellectual property rights at the ICN meeting. See the KFTC, Annual Report 2016. Available at http://www.ftc.go.kr/eng/cop/bbs/selectBoardList.do?key=517&bbsId=BBSMSTR_000000002404&bbsTyCode=BBST11.

[313] See, for the pertinent background, Nuno Pires de Carvalho, 'Competition policy in WIPO's Development Agenda', forthcoming in Anderson et al, above note 35.

[314] See Article 40.3 of the TRIPS Agreement, above note 98; see also discussion in Part 2.3 above.

[315] See also WTO, World Trade Report, 2018, pp. 141-143, available at https://www.wto.org/english/news_e/news18_e/wtr_03oct18_e.htm.

[316] OECD, *Key Issues for Digital Transformation in the G20*, 12 January 2017. Available at https://www.oecd.org/g20/key-issues-for-digital-transformation-in-the-g20.pdf.

[317] See, for instance, The Wall Street Journal, *The Woman Who Is Reining In America's Technology Giants*, 4 April 2018, available at https://www.wsj.com/articles/the-woman-who-is-reining-in-americas-technology-giants-1522856428.

[318] For the pertinent background see Anderson et al, above note 92. For examples of competition enforcement activities see Box 7.

[319] The Economist, *The world's most valuable resource is no longer oil, but data,* 6 May 2017. Available at https://www.economist.com/news/leaders/21721656-data-economy-demands-new-approach-antitrust-rules-worlds-most-valuable-resource.

[320] See David S. Evans and Richard Schmalensee, 'Markets with two-sided platforms', in *Issues in Competition Law and Policy* (ABA Section of Antitrust Law), Vol. 1, Chapter 28, 2008, pp. 667–693; Justus Haucap and Ulrich Heimeshoff, 'Google, Facebook, Amazon, eBay: Is the Internet driving competition or

- Network effects in online platform markets consist in the increase in the value of the network to all participants that accrues from each additional user. This is the 'direct network effect'. Such effects often make large digital platforms an indispensable component to achieve an efficient utilization of the platform and thus lead to market concentration. 'Indirect network effects' can also occur, whereby the increased size of the network attracts users on the other market side (potential buyers/suppliers).[321] These twin effects tend to result in winner-take-all outcomes, whereby a single network becomes dominant in each relevant market.[322]

- Additionally, the 'scale without mass' feature of digital platforms allows companies to add new users vastly, rapidly and at virtually no cost as they are not producing physical products, but simply reproducing and distributing digital bits.[323]

- High switching costs tend to produce customer lock-in, making it harder for new entrants to expand in a market. The more consumers use online services and provide their data to the service, the more costly and harder it becomes for them to switch away and transfer their data.[324] While switching costs may be not relevant to search engines as switching away does not entail major costs, they are relevant to individual users of social networks such as Facebook and auction platforms such as eBay.[325]

Building on the foregoing, the role of 'two-sided platforms' in digital markets has also come under scrutiny.[326] By its very nature, a two-sided market entails one or several platforms that enable interactions between distinct groups of customers, thus facilitating exchanges and interactions between members of different groups.[327] The value added of such platforms lies specifically in the fact that, by coordinating the offers and demands of a large number of users, mutual positive network externalities are created. At the same time, participating firms may try to maximize the advantages accruing to themselves by imposing delivery terms and user-agreement clauses with potential anti-competitive effects.

In addition, collusive effects may arise in cases of big data processing. Big data analytics can result in reactive algorithmic pricing that produces effects similar to explicit coordination (i.e., reduced outputs and higher prices) without an actual agreement to collude.[328] A recent background note by the OECD Secretariat observed that, although it is still not completely clear how machine learning algorithms may facilitate the reaching of collusive outcomes, if market conditions are prone to collusion, it is likely that algorithms learning faster than humans would also be able through high-speed trial-and-error to eventually reach a cooperative equilibrium.[329] For example, the so-called *tit-for-tat* algorithm - a strategy that starts with cooperation and then copies what the opponent did in the previous period - can often lead to cooperative behaviour. Although in terms of technology an artificial intelligence (AI) sophisticated enough to take over business decisions is arguably yet to exist, the antitrust community needs to keep an eye on AI developments in order to be pro-active and prepared to address challenges ahead.[330]

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market monopolization?' (2014) *International Economics and Economic Policy* 11.1-2: 49-61; OECD, above note 316.

[321] Taking *eBay* as an illustration, more potential buyers attract more sellers to offer goods on eBay as (a) the likelihood to sell their goods increases with the number of potential buyers; and (b) competition among buyers for the good will be more intense and, therefore, auction revenues are likely to be higher. A higher number of sellers and an increased variety of goods offered, in turn, make the trading platform more attractive for more potential buyers. See, Haucap and Heimeshoff, above note 320.

[322] Haucap and Heimeshoff, above note 320.

[323] OECD, above note 316.

[324] *Id.*

[325] Haucap and Heimeshoff, above note 320.

[326] See, for example, the investigation and commitments entered by the Dutch, French, German and Swiss competition authorities regarding clauses implemented by online booking platforms, as well as, the Report on the Monitoring Exercise carried out in the online hotel booking sector by EU Competition authorities in 2016. Available at http://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf.

[327] Jean-Charles Rochet and Jean Tirole, 'Two-Sided Markets: A Progress Report' (2006) *The RAND Journal of Economics*, Vol. 37, No. 3, pp. 645-667.

[328] OECD, above note 316.

[329] OECD Secretariat *'Algorithms and Collusion - Background Note by the Secretariat,* DAF/COMP(2017)4' (2017), p. 30. Available at https://one.oecd.org/document/DAF/COMP(2017)4/en/pdf.

[330] Ai Deng, 'What Do We Know About Algorithmic Tacit Collusion?' (2018) *Bates White Economic Consulting; Advanced Academic Programs*, Johns Hopkins University, p. 11. Available at https://ssrn.com/abstract=3171315.

Overall, the nature of competition in digital markets differs from that in traditional markets as it tends to be based first-and-foremost on innovation rather than on pricing.[331] This is sometimes referred to as Schumpeterian competition, in which new players successively replace incumbent firms through innovation and the successful deployment of new technology.[332] When competitive dynamics are framed this way, it is sometimes suggested that such anti-competitive effects are unlikely to be long-lasting. Experience indicates, though, that significant welfare losses may be involved before one platform or entrenched business model is replaced by another.[333]

The OECD identifies the following characteristics as being critical to competition law enforcement and competition advocacy in digital markets: (i) the emergence of data as a new primary competitive asset, (ii) privacy as an important component of analysis during merger reviews, and (iii) increased difficulties in defining the relevant market[334] and market power due to new relationships between commercial markets for data and nominally free end-user products.[335] A variety of competition law provisions may be relevant, including provisions relating to mergers; abuses of a dominant position; and cartels and anti-competitive agreements.[336] Further issues arise in the application of IPRs and technological protection measures to digital content, which may, for instance, lead to geo-blocking (limitations on distribution and price differentiation even in a single market such as the EU) and restrictions on downstream or secondary sales (the question of so-called 'digital exhaustion'). In this regard, IPRs may have an anti-competitive effect in markets for digital content, although this is far from being necessarily the case.[337]

Concerns regarding possible anti-competitive effects associated with digital markets have given rise to a number of very significant competition law enforcement cases in recent years, spanning a range of major jurisdictions. Several of these involving the European Commission and other competition agencies are summarized in Box 7 below. In addition, various jurisdictions are addressing concerns related to anti-competitive outcomes in the digital economy in the competition advocacy activities of relevant agencies.

Box 7. Competition enforcement activities in digital markets[338]

- The ***Microsoft Media Player*** cases, in which the European Commission required that Microsoft offer for sale a version of its Windows Operating System that did not contain the Windows Media Player, disclose certain information to competitors that was deemed necessary for competitive access purposes, and pay a fine of 497 million euros (about $613 million).[339] These remedies went beyond those that had been imposed in related US litigation, and elicited critical feedback from the US.[340]

- The ***Intel*** case, which has been going on for almost 17 years. In 2017, the Court of Justice of the European Union reversed the ruling of the General Court, which initially upheld the European's Commission's €1.06 billion fine for Intel's alleged abuse of its dominant position through a loyalty and exclusivity rebate scheme for its x86 central processing units.[341] Such practices rather than being seen as restrictive of competition by object, are now to be analysed under an effects-based approach. The case has been remitted

[331] Julian Wright, 'One-sided logic in two-sided markets' (2004) *Review of Networks Economics* 3:42–63; Haucap and Heimeshoff, above note 320.

[332] OECD, above note 316; Haucap and Heimeshoff, above note 320.

[333] See Joseph Farrell and Michael Katz, 'Competition or predation? Schumpeterian rivalry in network markets' (2001) *UC Berkeley Competition Policy Center Working Paper No. CPC01-23*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=507084.

[334] One possible alternative suggested by the OECD is to use a small but non-transitory decrease in quality (SSNQ) test. For more information, see OECD, *The Role and Measurement of Quality in Competition Analysis, Background Note for OECD Policy Roundtables*, 2013. Available at http://www.oecd.org/daf/competition/Quality-in-competition-analysis-2013.pdf.

[335] OECD, above note 316.

[336] *Id.*

[337] See European Commission, *The Report from the Commission to the Council and the European Parliament, Final report on the E-commerce Sector Inquiry Brussels*, May 2017, COM(2017) 229. Available at http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf.

[338] See Anderson et al, above note 92.

[339] See Case T-201/04 - *Microsoft v. Commission*, Judgement of 17 September 2007; available at http://curia.europa.eu/juris/showPdf.jsf?text=&docid=62940&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=175728.

[340] Robert D. Anderson, 'Systemic Implications of Deeper Trans-Atlantic Convergence in Competition/Antitrust Policy', in Simon J. Evenett and Robert M. Stern (eds.), *Systemic Implications of Transatlantic Regulatory Cooperation and Competition* (World Scientific Publishing Company, 2011), chapter 7, pp. 197-240.

[341] Ian Giles and Jay Modrall, *Major victory for Intel as CJEU sends case back to General Court for re-examination*, 12 September 2017, Kluwer Competition Law Blog. Available at http://competitionlawblog.kluwercompetitionlaw.com/2017/09/12/major-victory-intel-cjeu-sends-case-back-general-court-re-examination/.

back to the General Court, where Intel has a new chance to overturn the decision or achieve a significant reduction of the fine.[342]

- The ***Google Shopping*** case,[343] in which the European Commission found that 'Google abused its market dominance as a search engine by promoting its own comparison shopping service in its search results, and demoting those of competitors […]. It [thereby] denied other companies the chance to compete on the merits and to innovate. And most importantly, it denied European consumers a genuine choice of services and the full benefits of innovation' and imposed the fine of €2.4 billion.[344] US commentary on the decision has emphasized how difficult it would be to bring a similar case in the US, given prevailing differences of competition law doctrine and evidentiary standards: 'Pursuing a US case against Google would be more complicated than in Europe, antitrust experts said, because of a higher standard of evidence needed to prove wrongdoing by the search giant. Rather than go to court, the FTC closed a similar investigation against Google in 2013 in exchange for Google's changing some of its business practices'.[345] Google faced antitrust ruling by the Federal Antimonopoly Services in the Russia Federation, which imposed a fine of Rub 438 million (about EUR 7.3 million) in 2017.[346]

- The ***Google/Android*** case.[347] In July 2018, the Commission fined Google €4.34 billion for illegal practices after finding that the tech giant imposed illegal restrictions on Android device manufacturers and mobile network operators to cement its dominant position in general internet search. Particularly, the Commission's investigation found that Google had engaged in three separate types of practices: (1) illegal tying of Google's search and browser apps, (2) illegal payments conditional on exclusive pre-installation of Google Search, and (3) illegal obstruction of development and distribution of competing Android operating systems. A number of questions have been posed regarding the Commission's reasoning in the case.[348] On 9 October 2018, Google filed an appeal of the EU Commission's fine. While the grounds for the appeal are not publicly available at the time of the writing, Google indicated that it has no plans to ask for so-called interim measures to pause application of the decision.[349]

In these and other cases, the EU Commission has clearly shown a willingness to go beyond the degree of activism that is currently manifested in other leading jurisdictions with respect to single-firm exclusionary conduct,[350] potentially also impacting on the exercise of IPRs.[351] According to Kovacic:

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[342] Case C-413/14 P - *Intel v. Commission*, available at http://curia.europa.eu/juris/liste.jsf?num=C-413/14&language=en#. See also Laurent De Muyter and Alexandre Verheyden, *Rewarding Loyalty: ECJ Holds that Loyalty Rebates Do Not Per Se Restrict Competition*, 28 September 2017, Kluwer Competition Law Blog. Available at http://competitionlawblog.kluwercompetitionlaw.com/2017/09/28/rewarding-loyalty-ecj-holds-loyalty-rebates-not-per-se-restrict-competition/.

[343] For more details see Case AT.39740 — *Google Search (Shopping)*, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1516198535804&uri=CELEX:52018XC0112(01).

[344] European Commission - Press release, *Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service*, Brussels, 27 June 2017. Available at http://europa.eu/rapid/press-release_IP-17-1784_en.htm.

[345] Washington Post, *E.U. fines Google a record $2.7 billion in antitrust case over search results*, 27 June 2017. Available at https://www.washingtonpost.com/world/eu-announces-record-27-billion-antitrust-fine-on-google-over-search-results/2017/06/27/1f7c475e-5b20-11e7-8e2f-ef443171f6bd_story.html?utm_term=.f9322df28277.

[346] FAS, *FAS Russia Reaches Settlement with Google*, 17 April 2017. Available at http://en.fas.gov.ru/press-center/news/detail.html?id=49774.

[347] European Commission - Press release, *Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine*, 18 July 2018. Available at http://europa.eu/rapid/press-release_IP-18-4581_en.htm.

[348] See for example, Pinar Akman, *'Will the European Commission's Google Android decision benefit consumers?*' 19 July 2018. Available at https://truthonthemarket.com/2018/07/19/will-the-european-commissions-google-android-decision-benefit-consumers/. See also Friso Bostoen, *'The Commission's Android decision: Google cements its dominance in search to the benefit of consumers*?' 27 July 2018. Available at http://coreblog.lexxion.eu/google-android-decision/.

[349] Wall Street Journal, *Google Appeals $5 Billion EU Fine in Android Case*, 9 October 2018, available at https://www.wsj.com/articles/google-appeals-5-billion-eu-fine-in-android-case-1539109713.

[350] Regarding unilateral conducts in the digital markets, Makan Delrahim, the current US Assistant Attorney General for Antitrust advocates for an evidence-based approach based on existing theories. Where there is no demonstrable harm to competition and consumers, the Division is reluctant to impose special duties on digital platforms, out of the concern that such special duties might stifle the very innovation that has increased dynamic competition for the benefit of consumers. See Makan Delrahim, Assistant Attorney General, Antitrust Division, US Department of Justice, *Good Times, Bad Times, Trust Will Take Us Far: Competition Enforcement and the Relationship Between Washington and Brussels,* Remarks at the College of Europe in Brussels, 21 February 2018, available at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-college-europe-brussels.

> The European Union has not encountered the limitations faced by the US antitrust agencies in using its law enforcement powers to address claims of exclusion involving intellectual property. EU doctrine governing abuse of dominance sets more stringent limits upon companies than prevailing judicial interpretations of the Sherman, Clayton, and FTC Acts. In *Microsoft* and *Intel*, the European Commission obtained remedies notably more substantial than DOJ or the FTC attained in their cases, respectively. In *Google*, the European Commission seems poised to gain concessions related to search practices that emerged from the FTC's inquiry unscathed.[352]

In sum, the successful operation of digital markets in the interest of consumers as well as producers seems very likely to implicate significant activities on the part of national competition authorities. At the same time, the proliferation of cases and relevant policy initiatives carries the potential for coordination failures and even outright conflict.[353] The cross-border dimension of digital firms can, perhaps more than in other sectors, result in cross-jurisdictional effects of enforcement action taken in the domain of competition law and policy, for example in the case of varying stances across jurisdictions towards abuses of dominant position and merger or that impact across national markets.[354] While international coordination in this specific subject area of competition policy as it relates to digital markets is, perhaps, in a relatively early phase, some WTO Members have already recognized importance of cooperation in this area and called for forward-looking discussions in relevant international fora (see also Box 8). [355]

Box 8. Examples of competition advocacy regarding digitalisation by WTO Members

On 19 February 2018, the **Canadian Competition Bureau** published a Report on Big data and Innovation: Implications for competition policy in Canada. The report highlights that although global developments in technology have allowed firms to harness data in ways that drive innovation and quality improvements across a range of industries, the use of big data by firms may raise challenges related to competition law enforcement. Therefore, the Competition Bureau, while adopting its tools and methods to this evolving area, will continue its investigations and analysis to be guided by fundamental competition law enforcement principles.[356]

In 2017, the **European Commission** published its 'Final Report on the E-commerce Sector Inquiry' in the context of its Digital Single Market Strategy which observed that certain practices may restrict competition by unduly limiting how products are distributed throughout the EU, potentially limiting consumer choice and preventing lower prices online.[357] As noted by the DG for Competition, the inquiry's findings allow the

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[351] See also Robert D. Anderson and William E. Kovacic, 'The application of competition policy vis-à-vis intellectual property rights: the evolution of thought underlying policy change', forthcoming in Anderson et al, above note 35. Preliminary text available at https://www.wto.org/english/res_e/reser_e/wpaps_e.htm.

[352] William E. Kovacic, 'From Microsoft to Google: Intellectual Property, High Technology, and the Reorientation of US Competition Policy and Practice' (2013) 23 *Fordham Intell. Prop. Media & Ent. L.J.* 645. Available at http://ir.lawnet.fordham.edu/iplj/vol23/iss2/9.

[353] More recently, the current US Assistant Attorney General for Antitrust has called for continuing dialogue in this area, noting that 'European competition law still imposes a 'special duty' [to safeguard competition] on dominant market players, while we in the U.S. do not believe any such duty exists'. See Makan Delrahim, Assistant Attorney General, Antitrust Division, US Department of Justice, *Take It to the Limit: Respecting Innovation Incentives in the Application of Antitrust Law*, Remarks to the USC Gould School of Law - Application of Competition Policy to Technology and IP Licensing, Los Angeles, California, 10 November 2017, available at https://www.justice.gov/opa/speech/file/1010746/download.

[354] See Richard A. Epstein and Michael S. Greve, 'Chapter 1: Introduction, the Intractable Problem of Antitrust Jurisdiction', in Richard Allen Epstein and Michael S. Greve (eds.), *Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy* (AEI Press, 2004). In addition to negative spillovers (e.g. one jurisdiction or its enterprises being adversely affected by enforcement decisions taken in other jurisdictions), there can of course be important positive spillovers from competition law enforcement (e.g., anti-cartel enforcement in one jurisdiction also benefitting consumers in other jurisdictions in which the same cartels have been active).

[355] On 22-23 March 2018, during the ICN Conference representatives of several competition agencies emphasised the role of competition in the modern day economy, placing an emphasis on competition in the digital world. It was highlighted that due to digitalisation and globalisation, competition agencies increasingly have to deal with different types of markets and changing business models. All speakers agreed on the need to conduct market studies to understand digital markets better. See, ICN, *ICN Annual Conference, New Delhi, 2018 (Press Release)*, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc1142.pdf and http://internationalcompetitionnetwork.org/uploads/library/doc1143.pdf.

[356] The Canadian Competition Bureau, Big data and innovation: Competition Bureau highlights key themes for competition policy and enforcement in Canada, 19 February 2018. Available at https://www.canada.ca/en/competition-bureau/news/2018/02/big_data_and_innovationcompetitionbureauhighlightskeythemesforco.html.

[357] The European Commission, *Final report on the E-commerce Sector Inquiry*, 10 May 2017. Available at http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf.

Commission to target its enforcement of EU antitrust rules in e-commerce markets.[358] This is particularly relevant in the light of recent enforcement cases such as *Google*, *Amazon* and *Facebook*.[359]

In 2017, the **Japanese Fair Trade Commission** conducted a Study on Data and Competition Policy.[360] The Study indicates possible risks of competition being impeded and the interests of consumers being harmed as a result of concentration of big data in certain enterprises. While the Study Group highlights that the Japan's Competition Act is applicable to most competition concerns related to the collection and utilization of data, some issues such as 'digital cartels', monopolization and oligopolization of digital platforms still need to be addressed.

The Executive Order of the President of the Russian Federation No. 618 'On State Competition Policy Guidelines' accompanied by the National Plan on Competition Policy Development in **the Russian Federation** for the period of 2018 – 2020 (the 2017 Presidential Executive Order) refers to improving antimonopoly regulation in order to effectively address anti-competitive conduct on cross-border markets, in light of digitalization and globalization.[361] These reforms, it has been argued, are in line with the competition agency's recent enforcement activities in the *Google* case[362] and the *Bayer AG - Monsanto* merger.[363]

4.4 State-owned enterprises, industrial policy and competitive neutrality

As discussed earlier, the impact of SOEs on international trade relations is a long-standing issue of interest for WTO Members.[364] It is, furthermore, at the centre of important current debates relating e.g. to China's trade and commercial relations with the United States and other Western economies.[365] Today, some contemporary SOEs are among the largest and fastest expanding multinational companies[366], ranging over a wide set of industries such as finance, public utilities (electricity, gas, transport, distribution, and communication), manufacturing, metals and mining, and petroleum.[367] They increasingly compete with private firms for resources, ideas and consumers in both domestic and international markets. In many instances, moreover, SOEs may enjoy government-granted advantages, which can give them a competitive edge over other firms. These advantages can take the form of direct subsidies, concessionary financing, state-backed guarantees, preferential regulatory treatment, or exemptions from antitrust enforcement or bankruptcy rules.[368]

An important question is whether governments' objectives in this area can be pursued in a manner that does not impact adversely on competition in the market. Theoretically, this is possible

[358] Directorate-General for Competition (European Commission), *EU competition policy in action,* 2017. Available at https://publications.europa.eu/en/publication-detail/-/publication/b11a5d15-c5ca-11e7-9b01-01aa75ed71a1.

[359] For more details see Case AT.39740 — *Google Search (Shopping)*, above note 343; Case AT.40153 — *E-Book MFNS and related matters*, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2017.264.01.0007.01.ENG&toc=OJ:C:2017:264:TOC; Case M.8228 – *Facebook/Whatsapp*, available at http://ec.europa.eu/competition/mergers/cases/additional_data/m8228_494_3.pdf.

[360] The JFTC, *Report of Study Group on Data and Competition Policy,* 6 June 2017. Available at http://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170606.files/170606-4.pdf.

[361] Executive Order of the President of the Russian Federation 'On State Competition Policy Guidelines'(Order of 21 December 2017 No. 618). Available at http://en.fas.gov.ru/documents/documentdetails.html?id=15342; and (in Russian) at http://www.garant.ru/products/ipo/prime/doc/71739482/#1000.

[362] See FAS, *FAS Russia Reaches Settlement with Google*, 17 April 2017. Available at http://en.fas.gov.ru/press-center/news/detail.html?id=49774; and relevant discussion in Anderson et al, above note 183.

[363] Vassily Rudomino, Ksenia Tarkhova, and Alexander Nazarov, *'Bayer/Monsanto Transaction: Brand New Approach of FAS Russia to Merger Control'* 11 July 2018, Kluwer Competition Blog. Available at http://competitionlawblog.kluwercompetitionlaw.com/2018/07/11/bayermonsanto-transaction-brand-new-approach-fas-russia-merger-control/.

[364] See Parts 2.1.1 , 2.5 and part 3.3.5 , for related developments on SOEs in RTAs.

[365] Rory MacFarquhar, State-Owned Enterprises and U.S.-China Relations (Presentation at the Peterson Institute for International Economics, 7 February 2017, available at https://piie.com/system/files/documents/macfarquhar20170207ppt.pdf).

[366] OECD*, State-Owned Enterprises as Global Competitors, A Challenge or an Opportunity?* (OECD Publishing, Paris, 2016) p. 20. Available at http://dx.doi.org/10.1787/9789264262096-en.

[367] *Id*, p. 21.

[368] Przemyslaw Kowalski, Max Büge, Monika Sztajerowska and Matias Egeland, *State-Owned Enterprises: Trade Effects and Policy Implications*, OECD Trade Policy Papers, No. 147, 2013. Available at http://www.oecd-ilibrary.org/docserver/download/5k4869ckqk7l-en.pdf?expires=1511739357&id=id&accname=guest&checksum=D34A0353C3890E6D9AC49B4B863DCD22.

when the state intervenes in the economy with the purpose of remedying market failure.[369] In practice, this argument is most convincingly brought forward in favour of SOEs in sectors with a strong element of natural monopoly, the potential abuse of which by private operators would be difficult to address through regulation.[370] A variation of the externalities argument, which is particularly relevant in the light of the many commercially operating SOEs in emerging economies, relates to the use of SOEs as agents of developmental policies.[371] At the same time, preferential treatment of SOEs may have negative consequences even at the national level to the extent that it entrenches market power or impedes innovation.[372]

Anti-competitive cross-border effects can potentially be generated by SOEs that cause challenges both to private businesses and to the existing policies designed to foster competitive international markets.[373] In cases when significant damaging effects are difficult to discipline within current legal and policy frameworks, they may lead to commercial tensions and become a source of protectionism.[374] The OECD motes the following reasons for SOEs' cross-border activities:

- First, some countries may be using SOEs as a vehicle for pursuing non-commercial or strategic objectives and this may involve anti-competitive effects for their trading partners;

- Second, when SOEs expand to international markets, a number of issues which in a domestic context can either be contained or are not considered as problems, move to the forefront and become an international concern;

- Third, certain schemes of compensating SOEs for their public services obligations at home, which are proportional to the business volume rather than public service obligations themselves, may create a distortive and government supported incentive for commercial expansion, including to foreign markets;

- Fourth, support for SOEs in pursuit of economies of scale may be justified on general economic grounds from a domestic perspective but if this involves increasing market shares abroad it may be perceived differently in different constituencies.[375]

In order to counter such effects, national competition laws and supranational/regional competition norms can in principle be used to deal with anti-competitive practices by state-owned enterprises. Some jurisdictions have special competition-law provisions to deal with the effects of distortions in competition between government and private entities. The EU, as the first entity establishing binding and enforceable competition law principles that transcend national markets, for example, has recognized the principle of competitive neutrality for more than 50 years. Article 106 of the Treaty on the Functioning of the European Union establishes that public companies fall under the scope of competition law, and that member states of the EU are not entitled to do anything contrary to the competition principles equally established by the Treaty. Public companies are also subject to rules on monopolisation and state aids (subsidies).[376] Broadly parallel concerns were the focus of an early statement by Australia which is of continuing relevance (see Box 9).

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[369] See, for instance, Paul R. Krugman, Maurice Obstfeld and Marc Melitz, *International Economics: Theory and Policy* (Pearson Series in Economics, 10th Edition, 2014).

[370] Market failure also occurs where business activities create 'externalities' – e.g. widespread societal benefits for which no market price can be charged – which may arguably be corrected by reserving the activities for SOEs. However, in this case governments retain the alternative option of correcting the market failure through remedial payments to private operators. The use of SOEs to develop certain economic activities for which, at the outset, there is no market in order to nurture private commercial activities can also be portrayed as an effort to correct externalities. For further detail, see Antonio Capobianco and Hans Christiansen, *Competitive neutrality and State-Owned Enterprises. Challenges and Policy Options* (2011) OECD Corporate Governance Working Papers No. 1, available at https://www.oecd-ilibrary.org/docserver/5kg9xfgjdhg6-en.pdf?expires=1524408615&id=id&accname=guest&checksum=60909921FBD2E60270817089608BE993.

[371] Capobianco and Christiansen, above note 370.

[372] See e.g. Kovacic, above note 218, on inefficiencies resulting from China's administrative monopolies and state-owned enterprises.

[373] Kowalski et al, above note 368.

[374] *Id.*

[375] *Id.*

[376] Article 107 of the TFEU, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E%2FTXT.

Box 9. The idea of "competitive neutrality": an early statement of principles by Australia

Competitive neutrality requires that government business activities should not enjoy net competitive advantages over their private sector competitors simply by virtue of public sector ownership.

The implementation of competitive neutrality policy arrangements is intended to remove resource allocation distortions arising out of public ownership of significant business activities and to improve competitive processes.

Where competitive neutrality arrangements are not in place, resource allocation distortions occur because prices charged by significant government businesses need not fully reflect resource costs. Consequently, this can distort decisions on production and consumption, for example where to purchase goods and services, and the mix of goods and services provided by the government sector. It can also distort investment and other decisions of private sector competitors.

Competitive neutrality requires that governments should not use their legislative or fiscal powers to provide an advantage to their own businesses over the private sector. If governments do advantage their businesses in this way, it will distort the competitive process and reduce efficiency, in particular if the government businesses are technically less efficient than their private sector competitors.

Source: The Australian Government, Commonwealth Competitive Neutrality Policy Statement of 1996, available at https://treasury.gov.au/publication/commonwealth-competitive-neutrality-policy-statement/; as cited in Capobianco and Christiansen, above note 370.

Traditionally, antitrust standards were designed to apply to profit maximising firms and were not specifically aimed at preventing subsidies and artificially low prices – except where these are manifestly motivated by predatory strategies.[377] Related considerations are reflected, to an extent, in the approaches to the treatment of SOEs in RTAs (for the relevant discussion, see part 3.3.5 above; and Appendix Box 3). While the NAFTA-inspired RTAs usually require that SOEs and state monopolies (i) be subject to regulatory control; (ii) act in accordance with commercial considerations; (iii) act in a non-discriminatory manner; and (iv) refrain from using monopoly power to engage in anti-competitive conduct; the EU/EFTA-inspired RTAs require that SOEs to be subject to competition laws; general provisions on abuse of dominance; or even to the norms of Article 106 of the TFEU. As discussed above, the CPTPP, and the USMCA incorporates ambitious standards on the operation of SOEs, which go well beyond WTO disciplines in this area.[378]

Another relevant tool is embodied by competitive neutrality arrangements[379] introduced by some OECD jurisdictions, built on the OECD Guidelines on Corporate Governance of State-Owned Enterprises (see Box 10).[380] These aim to mitigate or eliminate competitive advantages of state-owned enterprises, including with respect to taxation, financing costs and regulation. Some of these frameworks refer specifically to state-owned businesses (e.g. in Australia) while others are ownership-neutral.[381] Furthermore, a recent Report by the International Competition Policy Expert Group calls for the establishment of an ICN working group on the continuing issue of anti-competitive harm caused by SOEs and state-supported (but not owned) enterprises.[382] In addition, related WTO disputes [383] and countervailing duty investigations by national investigation authorities[384] involving SOEs operation can be seen as an indication of the increasing importance of ensuring competitive neutrality on the part of SOEs.

[377] See Capobianco and Christiansen, above note 370.

[378] For relevant discussion, see part 2.1.1 .

[379] See definition of competitive neutrality in Box 9.

[380] OECD, *OECD Guidelines on Corporate Governance of State-Owned Enterprises,* 2015, available at http://www.oecd.org/corporate/guidelines-corporate-governance-SOEs.htm.

[381] Capobianco and Christiansen, above note 370.

[382] The ICPEG Report, above note 37. See also Box 8.

[383] See, for example, *Canada — Measures Governing the Sale of Wine* (DS537), available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds537_e.htm; and *India — Certain Taxes and Other Measures on Imported Wines and Spirits* (DS380), available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds380_e.htm.

[384] For example, *Canada - countervailing duty investigation against certain hot-rolled carbon steel plate and high-strength low-alloy steel plate originating in or exported including from Russia* (2015), which touched upon the issues of state-owned enterprises in Russia. See Canadian International Trade Tribunal, *Hot-rolled carbon steel plate and high-strength low-alloy steel plate,* available at http://www.citt.gc.ca/en/node/7451. While the disciplines on the countervailing measures are subject to the WTO Agreement on Subsidies and Countervailing Measures, which is not discussed separately in the present paper, the issue illustrates the broad scope of possible impact of SOEs operation.

Box 10. The OECD Guidelines on Corporate Governance of State-Owned Enterprises

The overarching recommendation in Chapter I of the SOE Guidelines states that:

'[t]he legal and regulatory framework for state-owned enterprises should ensure a level-playing field in markets where state-owned enterprises and privates sector companies compete in order to avoid market distortions. The framework should build on, and be fully compatible with, the OECD Principles of Corporate Governance'.

The recommendation of a 'level playing field' is fully consistent with common definitions of competitive neutrality (see Box 9). The second sentence of the citation takes on an importance of its own because the corresponding Chapter of the Principles recommends frameworks to be 'developed with a view to its impact on overall economic performance, market integrity and the incentives it creates…'.

In other words, whereas governments are free to set rules and objectives for their SOEs consistent with overall political priorities, an ultimate goal should be to enhance economic performance and market integrity.[385]

Kovacic observes that, in China, despite remarkable progress in implementing its 2008 Anti-Monopoly Law (AML), limited success in reducing the scope of state ownership and the consequent distortions have, to some extent, frustrated the attainment of the AML's other objectives.[386] He suggests, in this light, that the following issues be addressed so as to integrate SOEs more fully into the competitive market:

- First, the role and objectives of 'state ownership' should be clarified and updated so as to allow the market to play the decisive role in resource allocation.[387]
- Second, an explicit distinction should be made between public ownership of capital and government activities that interfere with the operations of such enterprises.
- Third, reformed SOEs should face competitive market forces, either by rationalising the structure and operations of SOEs to enable them to operate competitively, or by precluding the intervention in the market's resource allocation.[388]

Kovacic's analysis thus highlights the direct relevance of competition law and policy considerations to current US-China trade relations. Arguably, these proposals are directly relevant to and would go an important distance toward addressing prevailing concerns of major developed economies regarding these issues.

Along the same line, the OECD, in its related analysis, also highlights the importance of governments continuing to honour their commitments under international agreements, acting in a spirit of non-discrimination so as to ensure a level playing field and fair competition in the marketplace when SOEs undertake economic activities.[389] In sum, while the principles set out in RTAs in relation to SOEs (in particular, disciplines established in the CPTPP and the USMCA) and in the OECD Guidelines represent important efforts to address concerns related to SOEs competitive nature, some extension of harmonized principles with regard to regulation of SOEs may be necessary.

4.5 Ensuring impartiality in competition law enforcement

While the proliferation of competition regimes across the world in recent years has, no doubt, had many positive effects, concerns have nonetheless arisen that competition laws may not always be applied in a transparent and impartial manner. This is, particularly, the case where such regimes are set in environments characterized by a weak rule of law, where fundamental procedural rights may not always be guaranteed or uniformly available.[390] In this context, various jurisdictions are addressing concerns related to anti-competitive outcomes as a result of non-application of competition laws in a transparent, accurate and impartial manner in relevant competition advocacy initiatives (see, for example, the initiatives by the International Competition Policy Expert Group in Box 11).

[385] OECD, above note 380; Capobianco and Christiansen, above note 370.
[386] See Kovacic, above note 218.
[387] See the 3rd Plenum of the 18th Party Congress, March 2013, and reinforced by the 4th Plenum a year later, as cited in Kovacic, above note 218.
[388] See Kovacic, above note 218, pp. 709-710.
[389] See OECD, above note 366, p. 157.
[390] ICC, Effective procedural safeguards in competition law enforcement proceedings, discussion paper, June 2017. Available at https://cdn.iccwbo.org/content/uploads/sites/3/2017/07/ICC-Due-Process-Best-Practices-2017.pdf.

As first attempts to address these issues, certain standards with regard to relevant principles in competition policy enforcement, such as the principle of transparency, along with requirements of non-discrimination and procedural fairness are referenced in RTAs (for relevant discussion see Part 3.3.2). Further to the above, procedural fairness has been discussed across international fora such as the OECD[391] and the ICN (see also discussion in Part 5.1).[392] Recognizing the importance of related concerns, the recent Report by the International Competition Policy Expert Group recommends that the OECD and/or other multilateral bodies adopt a code enumerating minimum due process or procedural fairness guarantees and requesting other international agencies to study the economic benefits of enhanced protection of fair process and transparency rights in competition law enforcement.[393]

Box 11. Recommendations by the International Competition Policy Expert Group

In March 2017, the International Competition Policy Expert Group, a body linked to the US Chamber of Commerce, published a Report which, inter alia, calls for the following recommendations to be considered by the US/other interested governments:

- to encourage the OECD and/or other multilateral bodies to adopt a code enumerating transparent, accurate, and impartial procedures;

- to continue to work to solidify international consensus on the appropriate use of competition law and the importance of transparent, accurate, and impartial enforcement processes. The United States should consider promoting the adoption of a code by the OECD and/or other multilateral bodies enumerating transparent, accurate, and impartial procedures. Concurrently, the United States should consider the utility of requesting that other forums (for example, the World Bank) study the economic benefits of enhanced due process and transparency protections. The United States should also promote transparent, accurate, and impartial competition law enforcement processes as a topic for consideration by all ICN Working Groups, and ask that the evaluation of procedural soundness and transparency be made an ICN special project and key 'ICN Second Decade' initiative.

The Report also urges that the Working Group focus on how to effectively ensure that a country applies its competition laws in a manner that is consistent with accepted standards of process, to ensure that competition enforcement proceedings are transparent, accurate, and impartial.

In addition to the broader substantive concerns regarding the misuse of competition policy for protectionist and discriminatory purposes, the Report highlights that the Working Group should also address the need for transparent, accurate, and impartial competition enforcement processes globally, and consider options for dealing with specific procedural issues, such as targeted sanctions or a listing mechanism akin to United States Trade Representative's (USTR) annual Special 301 listing of foreign nations that have inadequate IP protection. Senior U.S. representatives should be encouraged to emphasize adherence to and enforcement of due process clauses in the competition provisions of trade agreements to which the United States is a party.

Source: International Competition Policy Expert Group (ICPEG), Report and Recommendations (March 2017), a report sponsored by the US Chamber of Commerce, available at https://www.uschamber.com/sites/default/files/icpeg_recommendations_and_report.pdf.

Most recently, a number of competition agencies from around the globe have pursued the development of a set of rules aimed at establishing fundamental due process commitments regarding non-discrimination, transparency, timely resolution, confidentiality, conflicts of interest, proper notice, opportunity to defend, access to counsel, and judicial review in the context of competition enforcement.[394] The resulting Multilateral Framework on Procedures in Competition Law Investigation and Enforcement (MFP) builds upon and complements the significant efforts of the ICN, the OECD and other organizations to promote procedural fairness in antitrust enforcement. Notably, the MFP seeks to 'bridg[e] the differences between civil and common law countries, between administrative and prosecutorial approaches, and between young and old agencies in small and large markets'.[395] At the time of writing, the initiative was supported by Australia, Brazil, Canada, the European Commission, Japan, Singapore, Mexico, New Zealand,

[391] OECD, *Procedural Fairness and Transparency* (2012), available at http://www.oecd.org/competition/abuse/proceduralfairnessandtransparency-2012.htm .

[392] ICN, *Competition Agency Transparency Practices* (2013), available at http://www.internationalcompetitionnetwork.org/uploads/library/doc892.pdf.

[393] See the ICPEG Report, above note 37.

[394] Assistant Attorney General Makan Delrahim Delivers Remarks on Global Antitrust Enforcement at the Council on Foreign Relations, The United States Department of Justice, 1June 2018). Available at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-global-antitrust-enforcement.

[395] *Id.*

Chile, South Africa, the US and the UK.[396] Interestingly, the competition chapters of relevant free trade agreements in addition to the prior work of other international organizations are among the building blocks for the framework that are cited by its proponents (see Box 12).

Box 12. Building blocks of the Multilateral Framework on Procedures in Competition Law Investigation and Enforcement

On 1 June 2018, Assistant Attorney General Makan Delrahim delivered remarks on Global Antitrust Enforcement at the Council on Foreign Relations. In his speech, he highlighted three main grounds ('building blocks') that have informed the current initiative on the Multilateral Framework on Procedures in Competition Law Investigation and Enforcement (MFP):

'First, the cornerstone of the MFP is the network of cooperation agreements between competition agencies. For decades competition authorities have entered into cooperation agreements to reflect a commitment to close collaboration. […] These cooperation agreements are the principal expression for coordinating competition enforcement, and the MFP reflects and builds on that tradition.

The second building block for the MFP is the procedural principles promulgated by international organizations. The OECD Competition Committee and the ICN are invaluable platforms for the promotion of sound competition enforcement. The work the competition community has done, and continues to do, through these organizations helps make an agreement such as the MFP possible. These organizations have routinely promulgated best practices, guidelines, and recommendations, and they will continue to do so. We welcome those efforts and have played a major role in promoting them. […]

Finally, the third building block of our proposal are commitments in competition chapters in certain free trade agreements (FTAs). The provisions in modern competition chapters vary in their scope and detail, but they all include core commitments such as transparency, non-discrimination, and procedural fairness. […]'[397]

5 TOWARDS AN AGENDA FOR FUTURE WORK[398]

Notwithstanding the clear and significant progress that is being made in important respects, the foregoing developments also beg the question as to what additional forms of international co-operation may be needed in order to ensure an appropriately transparent and non-discriminatory framework for the application of competition policy in today's global economy, while preserving appropriate scope for policy innovation and regulatory diversity at the national level. This is the focus of this Part of the paper. At the outset, three broad observations are salient: first, building on, reinforcing and carrying forward the pathbreaking work done by the OECD and UNCTAD in promoting better understanding of competition policy worldwide,[399] over the past decade the ICN has become a preeminent international forum for cooperation between national competition authorities. Any further work to be undertaken in a multilateral context should draw upon and synergize with the work of this organization in addition to the others (OECD and UNCTAD). Second, the past work of the WTO suggests that renewed dialogue in that context might provide useful input to international policy formulation, even if limited to stock-taking and exploratory work. Third, organizationally, it is entirely feasible for work in the WTO to draw and build upon work in these other fora. The following elaborates on these points.

5.1 The essential contribution of the International Competition Network (ICN): addressing outstanding gaps

Since its establishment in 2001, and building on important work done by the OECD, UNCTAD and other fora, the ICN has become the pre-eminent global force in promoting international cooperation in competition law enforcement and in shaping widely accepted international competition policy norms.[400] The organization'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, legislation and rule templates, databases, toolkits, and

[396] MLex, *Brazil, Germany, Japan, others weighed in on DOJ proposed antitrust accord,* 27 August 2018, available at https://mlexmarketinsight.com/insights-center/editors-picks/antitrust/cross-jurisdiction/brazil-germany-japan-others-weighed-in-on-doj-proposed-antitrust-accord.

[397] See above note 394.

[398] See also Anderson and Müller, above note 74.

[399] See, for pertinent examples and citations, Part 4, above.

[400] The membership of the ICN comprises 135 competition agencies from 122 jurisdictions. See ICN, *The International Competition Network approves new work on effective competition enforcement and advocacy, ICN discussions advance and advocate for sound competition policy*, Annual Conference Press Release, May 2017. Available at http://www.internationalcompetitionnetwork.org/uploads/library/doc1099.pdf.

workshops.[401] Importantly, significant progress towards more convergence of competition laws[402] – the main objective that motivated the creation of the ICN - has been achieved. Relevant projects have aimed to: (i) increase understanding of individual competition systems, including similarities and differences among them, (ii) identify and build consensus on best practices, and (iii) encourage individual jurisdictions to opt in to superior techniques.[403] Their success has resulted in the proliferation of the adoption of competition law instruments, including best practice documents and guidelines, the improved performance of individual jurisdictions and in the reduction of conflicts among jurisdictions with respect to the treatment of specific matters.[404] While some elements and procedures established in competition laws worldwide may differ to certain extent, competition regimes today share core common elements such as the clear prohibitions of cartels; a mandate for merger review based on mergers' effect on competition relevant markets; and the prohibition of abuses of dominant positions.[405]

In the coming years, the ICN's Working Groups will continue to lead projects addressing the fundamentals of sound competition enforcement as well as emerging policy issues. The ICN's 2017-2018 Work Plan includes important work on topics such as vertical mergers, merger investigative techniques, enforcement cooperation, agency organizational choices, and the role of economics in competition policy enforcement, leniency programs, and vertical restraints.[406]

These past and ongoing efforts to promote convergence in substantive approaches have contributed to a more coherent international policy environment than would have otherwise prevailed. Indeed, further important contributions can arguably be made at this level. For example, there is some practical merit in the idea of a common clearing house option for merger filings, so that one document filed in one place can provide all the necessary preliminary information and safeguards the keeping of deadlines for filings. Such developments in the convergence of procedural approaches can effectively be done at the level of the ICN, and arguably only there.[407]

There are, however, additional issues that could potentially require deliberations in a broader framework than that which the ICN is intended to provide. The reasons are the following. First, while the ICN has adopted a highly focused approach based on its constituency, which consists of highly specialised agencies, competition policy is deeply interrelated with trade; foreign investment; the free movement of goods, services, and capital; IP protection; sectoral regulation; and a wide variety of industrial policies that may be proposed or adopted by governments.

Second, in many cases, resulting cross-cutting problems stem from differences in competition policy goals and industrial policies, are truly global in nature and resistant to lower-level policy intervention. Their resolution consequently requires high-level decisions that go to the core of economic policy making.

Third, the ICN has focused on non-binding recommendations. In that regard, much evidence suggest that voluntary cooperation and voluntary acceptance of recommended practices can supply a foundation for the establishment of binding, treaty-based obligations and the ICN's role in facilitating convergence among competition law systems might thus be considered as a necessary evolutionary step from soft law to hard law. According to Hollman and Kovacic:

> The concept that soft law evolves into hard law has logical appeal. Global problems would seem to require global solutions. An agreement could reduce the risk of jurisdictional conflict and resolve conflicts that arise. In addition, without an agreement, states' interests will not align sufficiently to resolve conflicts that arise.[408]

As we have discussed, some of the specific questions most in need of discussion at an intergovernmental level would include the need for the safeguarding of the impartiality of competition law, the wider issues surrounding state monopolies, and the interface between IP and competition. In that regard, some commentators submit that many of the interfaces described in

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[401] See ICN, *ICN Work Products Catalogue,* June 2017. Available at http://www.internationalcompetitionnetwork.org/uploads/library/doc1109.pdf.

[402] Hollman and Kovacic define 'convergence' as the broad acceptance of standards concerning the substantive doctrine and analytical methods of competition law, the procedures for applying substantive commands, and the methods for administering a competition agency. See Kovacic and Hollman, above note 31.

[403] Hollman and Kovacic, above note 31 at 275-276.

[404] Hollman and Kovacic, above note 31 at 307, 311.

[405] OECD, *International Cooperation in Competition Law Enforcement*, 6-7 May 2014, p.6. Available at https://www.oecd.org/mcm/C-MIN(2014)17-ENG.pdf.

[406] ICN, above note 400.

[407] Fox, above note 244.

[408] Hollman and Kovacic, above note 31 at 312.

this paper find their natural 'home' for policy dialogue in the WTO – at least in as much as they are considered to have specific trade policy dimension - and that 'flanking principles in the WTO', such as non-discrimination, transparency and procedural fairness are relevant.[409] This is in light of the existing functions and objectives of the WTO, its historical mandate for and past work on competition policy, and the current general interest of WTO Members in advancing competition policy matters.[410]

5.2 Possible contributions of renewed discussion in the WTO[411]

This paper has explored diverse dimensions of the interface between trade and competition policy, encompassing both specific elements of the existing WTO agreements and the treatment of competition policy in RTAs. As well, the competition policy dimension of current policy issues in the global economy, including issues concerning IP, anti-competitive practices in digital markets and the role of state-owned enterprises have been highlighted. In this context, and subject to further deliberations and to the input of WTO Members and of other relevant international bodies, specific potential contributions of the WTO to greater policy coherence and to a stronger framework for the promotion of competition in global markets could address the following aspects. Work in the WTO would complement and reinforce the work of the ICN and would *not* be intended to address those issues which are effectively addressed in that organization:

- The relevance of the WTO's core principles of non-discrimination, transparency, and procedural fairness (also referred to as due process) to competition law enforcement. [412] As we have seen, this interest derives from the arising challenges related to ensuring impartiality of competition law enforcement and potential conflicts of jurisdictictions. The work of the original WTO Working Group, much subsequent work in the ICN and at the level of national competition policies, the recently-developed Multilateral Framework on Procedures in Competition Law Investigation and Enforcement and provisions in RTAs are all relevant in this regard.

- Further codification of generally agreed norms, such as the general commitments by WTO Members relating to action against hard-core cartels and international cooperation.[413] Again, this element is common to both the work of the original WTO Working Group and the subsequent developments in RTAs and in related discussions as well as in the work of the ICN. It also acknowledges the priority given to these arrangements in the work of competition agencies themselves.

- The case for common action or commitments in relation to cross-border anti-competitive practices, including in digital markets. The difficulty of detecting such practices calls for cooperative action and information sharing. In this regard, existing provisions of the TRIPS Agreement (such as Articles 40 and 67) may play a potential role (see relevant discussions in Part 2.3 , above). While significant efforts have been undertaken in the framework of the ICN and RTAs, high-level discussions on the international level could be needed in order to find effective solutions.

- Potentially, jurisdictional issues concerning the application of competition law to export cartels. Potentially, this issue unites interest from developing countries and at least some elements of the business community. Fox suggests that the cartel externality problem has a natural home in the WTO.[414]

An even broader array of issues is evident with respect to the interaction of trade and competition policy (recognizing that the distinction between law and policy is certainly not watertight). These would include, at a minimum, measures addressing the following:[415]

- The treatment of SOEs and the concept of competitive neutrality. This concern already figured importantly in the original work of the WTO Working Group. It has only been amplified in the subsequent normsetting in RTAs[416] and in the work of other international

[409] See, in particular, Fox, above note 244.
[410] For the relevant discussion, see Parts 2.5 and 2.8 .
[411] See also Anderson and Müller, above note 74.
[412] Anderson and Müller, above note 89.
[413] See, for instance, FAS, *FAS anti-cartel efforts reach the UN General Assembly*, 13 March 2018. Available at http://en.fas.gov.ru/press-center/news/detail.html?id=52832
[414] Fox, above note 244.
[415] For earlier discussion see Anderson and Müller, above note 89.
[416] For instance, the CPTPP and the USMCA incorporate hard-core disciplines on SOEs and designated monopolies (even beyond the level of WTO agreements). For relevant discussion see Part 3.3.6 .

organizations such as the OECD. The latter provides a conceptual framework for relevant discussions. As we have seen, there is also a clear link to elements of the existing WTO agreements.[417]

- The relationship between competition policy and industrial policy merits discussion/reflection. As suggested by Fox, work might be done at the WTO to narrow the bounds of permissible trade remedies laws and subsidies in view of their distortion of international trade and particular harm to developing countries.[418]

- The significance for competition policy of governmental barriers to participation in public procurement markets. This issue is ripe for consideration at the international level. As we have seen, the area of government procurement is already a dynamic and vital one in the WTO. The issues manifest important confluence between the interests of export-oriented businesses (seeking access to foreign procurement markets) and those of competition authorities (who know that closed markets both intrinsically limit competition and facilitate bid rigging).

- The potential significance of competition policy-related disciplines such as those contained in the WTO Reference Paper on Basic Telecommunications for other infrastructure sectors, and for trade in services more generally. As discussed, the Reference Paper is arguably the area of the WTO agreements in which competition policy concepts have been used most explicitly and which goes the furthest in committing Members to action against anti-competitive practices. Yet, other infrastructure sectors (for example, electrical energy) share, or arguably share, similar structural problems.[419]

- The competition policy and IP interface is arguably an area of competition law that requires additional guidelines at the multilateral level in order to balance out any differences in international regulation between the two policy areas. The TRIPS Agreement specifically invokes concerns about the impact of anti-competitive licensing practices and anticipates the application of competition rules. Still, the relevant provisions offer only very limited guidance on questions such as (i) the set of anti-competitive practices that attract particular scrutiny (beyond the three examples mentioned); (ii) the standards under which such practices are to be evaluated (*per se* or *rule of reason*); and (iii) the remedies that may be adopted in particular cases, beyond making clear that any measures adopted must be consistent with other relevant provisions of the Agreement.[420]

5.3 Possible organizational paths for discussions at the multilateral level

As discussed earlier in this paper, the environment for a possible resumption of work on the relationship of competition policy to the multilateral trading system may be more promising than was the case at the beginning of the 2000s.[421] In this context, it is worth noting that the original WTO Working Group, while currently designated as 'inactive,' still exists as a vehicle for possible work. The decision taken by the WTO General Council in 2004 concerning the status of the Working Group reads as follows:

> The Council agrees that work on [the Interaction between Trade and Competition Policy, together with the related issues of the Relationship between Trade and Investment and Transparency in Government Procurement] will not form part of the

[417] For relevant discussion, see Part 2 . Notably, in light of concerns related to overcapacity in certain sectors, there is an increasing interest among WTO Members to the issue of SOEs' financing and the ways the SCM Agreement disciplines can be complemented See, for example, WTO, G/SCM/W/575 of 13 April 2018.

[418] Fox, above note 244, p.7. Industrial subsidies and SOEs' support are the core elements of the current discussion of 'the WTO reform', see, for example, The Economist, *'How to rescue the WTO*', 19 July 2018. Available at https://www.economist.com/leaders/2018/07/19/how-to-rescue-the-wto?frsc=dg%7Ce. See also the statements of the EU and China during the EU-China summit, 16 July 2018. Available at http://www.consilium.europa.eu/en/meetings/international-summit/2018/07/16/; and the 7th annual EU-China High-level Economic and Trade Dialogue (HED), 25 June 2018, available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1873. During the HED 'the EU and China agreed to set up a working group to concretely co-operate on reform to help the WTO meet new challenges and to further develop rules in key areas relevant for the global level playing field, such as industrial subsidies'.

[419] In the context of the services negotiations which were launched under the Doha Development Agenda in 2001, WTO Members have been proposing to establish separate Reference Papers for other sectors, see above note 87, and discussions in Part 2.2.1

[420] See also discussion in Part 2.3 .

[421] See Parts 1 and 2.6 above.

> Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round.

Clearly, this formulation leaves the door open to a resumption of work on these issues following the conclusion of the Doha Round. It also does not rule out, even before that time, a resumption of exploratory work on these issues provided that such work is not directed 'towards negotiations.' Certainly, the WTO Working Group, which in its early years earned solid credit for just such an exploratory work programme, would be a logical body to contribute to further discussion. Equally, it leaves open the possibility of the Working Group undertaking a potentially wide range of work gathering updated information and practical experience from the ever growing and diversifying range of competition authorities internationally, including their interaction with trade policy and trade law questions, and building an updated information platform which could both serve a capacity building role and provide a base for continuing policy discussion, desirable outcomes in themselves which need not create expectations of negotiations as an inevitable further step.

In our submission, in any further WTO work programme on trade and competition policy, broad input should be sought from other organizations active in the competition policy field. These would include, first and foremost, the ICN but also organizations such as UNCTAD, the OECD and civil society organizations such as CUTS. There is no reason why such organizations could not be given specific, dedicated roles in the development of relevant standards. This would be broadly comparable to the roles that other organizations and policy development exercises have had in relation to the negotiation of other important WTO agreements.

To cite just two pertinent examples, the negotiation of the WTO GPA drew, importantly, on preparatory work done in the OECD.[422] Work in the WTO in the area of trade-related IPRs has ben extensively cross-fertilized by the work of the WIPO. Moreover, the TRIPS Agreement builds very deliberately upon and integrates elements of pre-existing international treaties including the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, and others. A similarly consultative approach in regard to trade and competition policy, with specific vectors for incorporating input from organizations with more specialized expertise in competition policy *per se*, could go a long way to enhance both the usefulness and the political/institutional acceptability of renewed work on trade and competition policy in the framework of the WTO.

6 CONCLUDING REMARKS

This paper has reviewed and reflected upon a wide set of issues concerning competition law enforcement and competition policy with significance for international trade and the global economy. As foreshadowed in the Introduction, in contrast to the situation prevailing twenty years ago, competition policy is today, no longer viewed mainly as a domestic matter and one, at that, of interest principally to developed economies. Rather, it has become an essential element of the legal and institutional framework for the global economy. As just one manifestation of the more prominent role that competition policy now plays in the global economy, in 1997, when the WTO Working Group on the Interaction between Trade and Competition Policy was first convened, fewer than 50 economies in the world had national competition legislation; currently, about 135 WTO Members, or over four-fifths of the membership, have such laws. These include all of the BRICS economies (Brazil, Russia, India, China and South Africa) and a large number of other developing WTO Members.

To date, efforts to establish a general agreement on competition policy in the framework of the international trading system have been unsuccessful. Nonetheless, and as elaborated in Part 2 of this paper, multiple specific provisions concerning competition policy are incorporated in the GATT, GATS, the TRIPS Agreement, the TRIMS Agreement, and in other elements of the WTO agreements. Effective national competition policies are also essential to realizing the benefits derivable from participation in the (plurilateral) WTO GPA. The important role of competition policy and its significance for global trade is also evident from the discussions carried out and notifications made on competition policy in the WTO accession process, and in the work of the WTO TPRB which, as we have seen, systematically references the role of national competition policies in developed and developing jurisdictions. These provisions and activities underscore, at least, that the framers of those agreements and initiatives considered competition policy to be directly relevant and, in important ways, complementary to the international trading system.

[422] See Annet Blank and Gabrielle Marceau, 'The History of the Government Procurement Negotiations Since 1945' (1996) 4 *Public Procurement Law Review* 77, 79.

Beyond the above, as documented and elaborated in Part 3 of this paper, since 2004, competition policy chapters have been incorporated in an extensive set of RTAs linking developed, developing and least-developed economies around the globe. As pointed out also in other studies of this issue,[423] this attests clearly to the perceived relevance of competition policy to trade on the part of a broad cross-section of the WTO's Members. These provisions also signal, at least at the level of principle, a significant degree of convergence on the substance of how competition policy may be framed in the context of international trade agreements. As such, the competition provisions of RTAs are an obvious reference point for stock-taking at the multilateral level and, arguably, provide a potential template for related action.

Concurrent with the foregoing developments, increasing attention is being given, in international policy circles, to particular issues of competition law enforcement and competition policy with significance for the global economy. As developed in Part 4 of the paper, these include:

- The international dimension of competition law cases as well as resulting spillover effects and potential for conflicts of jurisdiction;
- The broadening application of competition policy vis-à-vis IPRs in the global economy;
- Issues concerning the potential for monopolization and the maintenance of competition in digital markets;
- Issues concerning SOEs, the role of industrial policy and the maintenance of competitive neutrality in emerging economies; and
- A growing concern, on the part of global businesses, to ensure non-discrimination, transparency and procedural fairness in competition law enforcement worldwide.

Moreover, as discussed in Part 4, each of the above issues/developments, by definition, implicates the interests of multiple jurisdictions and/or impacts directly on international markets and conditions of supply. As such, they are prima facie legitimate subjects for discussion/stocktaking in the framework of the international trading system, if and when WTO Members decide the time is ripe.

Indeed, and as also discussed in this paper, the work carried out by the WTO Working Group on the Interaction between Trade and Competition Policy in the period between 1997 and 2003, in addition to very important complementary work done (then and since) in the ICN, the OECD, UNCTAD and other Organizations, arguably establishes a solid basis for examination of these issues. Although no consensus was reached at the time on the need for a more general agreement on competition policy in the WTO and the WTO Working Group is currently designated as 'inactive', it remains available as a potential vehicle for reflection on relevant issues if and when WTO Members find this useful and timely. Arguably, developments since its most recent period of activity suggest that it could still come into its own.

To be clear, the issues and developments examined in this paper are complex, and any related initiatives doubtless will require careful reflection. In our view, great care should be taken, in any relevant international arrangements, to preserve or *strengthen* the operational imperatives and independence of law enforcement in this area.[424] Perhaps, the right approach is simply to encourage continuing dialogue on relevant issues in the international fora that are or have been already active in the subject-area. A valuable, objective and relatively uncontroversial contribution to this dialogue by the WTO would comprise the systematic collection of updated information on legal and policy settings across the WTO's Membership, the sharing of practical experience with a focus on specific areas of interplay between trade and competition, and cooperation (including with other international organizations) on empirically-based capacity building.[425]

[423] Recall, in particular, Laprevote et al, above note 32, and Teh, above note 168.

[424] The idea of requiring and reinforcing the independence of law enforcement functions is certainly not foreign to the WTO. For example, a key thrust of the WTO Agreement on Government Procurement is to require each participating government to put in place independent and impartial domestic review (supplier complaint) bodies (Article XVIII of the GPA).

[425] As noted above, the WTO's technical assistance programmes in this area have shown a strong level of demand from developing countries around the world for this kind of experience-based capacity building on trade and competition. See, detailed discussion in Part 2.9 , above.

Beyond this, the identification of specific future directions will require further deliberation. At least, we believe, the analysis in this paper has shown that the issues are important ones that will have implications for trade, prosperity and development at both the national and global levels; that there is currently a risk of coordination failures if not outright policy conflicts in this area; and that there is a solid basis 'on the ground' for meaningful discussions among a broad cross-section of developed and emerging countries, if and when the time is judged to be ripe.

APPENDIX

Appendix Box 1. Examples of RTAs incorporating general recognition of competition principles

Georgia - Kazakhstan *(Article 8)*

Sides consider that unfair business practice is incompatible with agreement's objectives and undertake not to permit, in particular, but not exceptionally, the following methods:
- Agreements between enterprises, decisions of their associations and common methods of business practice that aim to prevent or restrict competition or violate its conditions at the territories of the Sides;
- Actions, through which one or several companies using their dominant condition, restrict competition on the whole areas of the Sides or on the substantial part of the Side's territory.

ASEAN – Japan *(Article 53: Fields of Economic Cooperation)*

The Parties, on the basis of mutual benefit, shall explore and undertake economic cooperation activities in the following fields: (l) Competition Policy.

Appendix Box 2. Examples of RTAs with dedicated provisions on competition policy

EFTA - Peru (Chapter 8)

Content of the chapter:
Article 8.1 - Objectives
Article 8.2 - Anti-competitive practices
Article 8.3 - Cooperation
Article 8.4 - Consultations
Article 8.5 - State enterprises and designated monopolies
Article 8.6 - Dispute settlement

India – Japan (Chapter 11)

Content of the chapter:
Article 116 - Anticompetitive Activities
Article 117 - Definitions
Article 118 - Cooperation on Controlling Anticompetitive Activities
Article 119 - Non-Discrimination
Article 120 - Procedural Fairness
Article 121 - Transparency
Article 122 - Non-Application of Chapter 14 (Dispute Settlement)

US – Australia (Chapter 14 Competition-related Matters)

Content of the chapter:
Article 14.1 - Objectives
Article 14.2 - Competition law and anticompetitive business conduct
Article 14.3 - Designated monopolies
Article 14.4 - State enterprises and related matters
Article 14.5 - Differences in pricing
Article 14.6 - Cross border consumer protection
Article 14.7 - Recognition and enforcement of monetary judgments
Article 14.8 - Transparency
Article 14.9 - Cooperation
Article 14.10 - Consultations
Article 14.11 - Dispute settlement
Article 14.12 – Definitions

EU-Ukraine (Chapter 10 - Competition)

Section 1 – Antitrust and mergers

Article 253 - Definitions
Article 254 – Principles
Article 255 – Implementation
Article 256 – Approximation of law and enforcement practice
Article 257 - Public enterprises and enterprises entrusted with special or exclusive rights
Article 258 - State monopolies
Article 259 - Exchange of information and enforcement cooperation
Article 260 – Consultations
Section 2 – State Aid
Article 262 – General Principles
Article 263 – Transparency
Article 264 – Interpretation
Article 265 - Relationship with WTO
Article 266 – Scope
Article 267 - Domestic system of state aid control

Appendix Box 3. Regulation of SOEs and designated practices in SOEs: the EU and the NAFTA-inspired approaches

The US-Colombia RTA

Article 13.6: State Enterprises

1. The Parties recognize that state enterprises should not operate in a manner that creates obstacles to trade and investment. In that light, each Party shall ensure that any state enterprise that it establishes or maintains:

(a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such enterprise exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges; and

(b) accords non-discriminatory treatment in the sale of its goods or services to covered investments.

The EU-Georgia RTA

Article 205: State monopolies, state enterprises and enterprises entrusted with special or exclusive rights

2. With regard to state monopolies of a commercial character, state enterprises and enterprises entrusted with special or exclusive rights, each Party shall ensure that such enterprises are subject to the competition laws referred to in Article 204(1), in so far as the application of those laws does not obstruct the performance, in law or in fact, of the particular tasks of public interest assigned to the enterprises in question.

Appendix Table 1.The Treatment of Competition Policy in RTAs: Basic Coverage of Agreements with Dedicated Chapters[426]

	RTA Name	Entry into force	Adoption/ maintenance of competition laws	Requirement to establish/have an authority	Anti-competitive agreements/ concerted practice (cartels)	Abuse of dominant market position	Mergers	Transparency	Non-Discrimination	Procedural fairness	SOEs and designated authorities (in comp. chapters)	Subsidies/state aid (in competition chapters)	Cooperation
1.	Andean Community (CAN)	1988	X	X	✓	✓	X	✓	✓	✓	X	X	X
2.	ASEAN - Australia - New Zealand	2010	X	X	X	X	X	X	X	X	X	X	✓
3.	Australia - Chile	2009	✓	✓	✓	✓	✓	✓	X	X	✓	X	✓
4.	Australia - China	2015	X	X	X	X	X	X	X	X	X	X	✓
5.	Australia - New Zealand (ANZCERTA)	1983	X	X	X	X	X	X	X	X	X	X	✓
6.	Canada - Chile	1997	✓	X	X	X	X	X	X	X	✓	X	✓
7.	Canada - Colombia	2011	✓	X	X	X	X	✓	✓	✓	✓	X	✓
8.	Canada - Costa Rica	2002	✓	✓	✓	✓	✓	✓	✓	✓	X	X	✓
9.	Canada - Honduras	2014	✓	X	X	X	X	✓	✓	✓	✓	X	✓
10.	Canada - Israel	1997	✓	X	X	X	X	X	X	X	✓	X	✓
11.	Canada - Korea, Republic of	2015	✓	X	X	X	X	✓	✓	✓	✓	X	✓
12.	Canada - Panama	2013	✓	X	X	X	X	✓	✓	✓	✓	X	✓
13.	Canada - Peru	2009	✓	X	X	X	X	✓	✓	✓	✓	X	✓
14.	Caribbean Community and Common Market (CARICOM)	1973	✓	✓	✓	✓	X	X	X	X	X	✓	✓
15.	Central European Free Trade Agreement (CEFTA) 2006	2007	✓	X	✓	✓	X	X	X	X	✓	✓	X
16.	Chile - Japan	2007	✓	X	X	X	X	✓	✓	✓	X	X	✓

[426] **This table was drawn up by the authors solely for the purposes of illustration and has no official status.** The exact content of the Parties' commitments, including derogations and other relevant specifications, should be verified in the light of the relevant RTAs.

	RTA Name	Entry into force	Adoption/ maintenance of competition laws	Requirement to establish/have an authority	Anti-competitive agreements/ concerted practice (cartels)	Abuse of dominant market position	Mergers	Transparency	Non-Discrimination	Procedural fairness	SOEs and designated authorities (in comp. chapters)	Subsidies/state aid (in competition chapters)	Cooperation
17.	Chile - Mexico	1999	✓	X	X	X	X	X	X	X	✓	X	✓
18.	China - Costa Rica	2011	X	X	X	X	X	X	X	X	X	X	✓
19.	China - Korea, Republic of	2015	✓	✓	✓	✓	✓	✓	✓	✓	✓	X	✓
20.	Common Market for Eastern and Southern Africa (COMESA)	1994	X	X	✓	X	X	X	X	X	X	X	X
21.	Commonwealth of Independent States (CIS)	1994	X	X	✓	✓	X	X	X	X	X	X	X
22.	Costa Rica - Colombia	2016	✓	✓	✓	✓	✓	✓	✓	✓	X	X	✓
23.	Costa Rica - Peru	2013	✓	✓	X	X	X	✓	✓	✓	X	X	✓
24.	Costa Rica - Singapore	2013	✓	✓	✓	✓	✓	✓	X	X	X	X	✓
25.	Dominican Republic - Central America	2001	✓	X	X	X	X	X	X	X	X	X	✓
26.	East African Community (EAC)	2000	X	X	✓	✓	X	X	X	X	X	✓	X
27.	EC Treaty	1958	✓	X	✓	✓	X	X	X	X	✓	✓	✓
28.	EFTA - Albania	2010	X	X	✓	✓	X	X	X	X	✓	X	X
29.	EFTA - Bosnia and Herzegovina	2015	X	X	✓	✓	X	X	X	X	✓	X	X
30.	EFTA - Canada	2009	X	X	✓	✓	✓	✓	✓	X	X	X	✓
31.	EFTA - Central America (Costa Rica and Panama)	2014	✓	✓	✓	✓	X	X	X	X	✓	X	✓
32.	EFTA - Chile	2004	✓	X	✓	✓	✓	✓	✓	✓	✓	X	✓
33.	EFTA - Colombia	2011	✓	X	✓	✓	X	✓	✓	✓	✓	X	✓
34.	EFTA - Egypt	2007	X	X	✓	✓	X	X	X	X	✓	X	X
35.	EFTA - Former Yugoslav Republic of Macedonia	2002	X	X	✓	✓	X	X	X	X	✓	X	X

	RTA Name	Entry into force	Adoption/ maintenance of competition laws	Requirement to establish/have an authority	Anti-competitive agreements/ concerted practice (cartels)	Abuse of dominant market position	Mergers	Transparency	Non-Discrimination	Procedural fairness	SOEs and designated authorities (in comp. chapters)	Subsidies/state aid (in competition chapters)	Cooperation
36.	EFTA - Hong Kong, China	2012	X	X	X	X	X	X	X	X	X	X	✓
37.	EFTA - Israel	1993	X	X	X	X	X	X	X	X	✓	X	X
38.	EFTA - Jordan	2002	X	X	✓	✓	X	X	X	X	✓	X	X
39.	EFTA - Korea, Republic of	2006	✓	X	✓	✓	X	X	X	X	X	X	X
40.	EFTA - Lebanon	2007	✓	X	✓	✓	X	X	X	X	✓	X	X
41.	EFTA - Mexico	2001	✓	X	✓	✓	✓	X	X	X	X	X	✓
42.	EFTA - Montenegro	2012	X	X	✓	✓	X	X	X	X	✓	X	X
43.	EFTA - Morocco	1999	X	X	✓	✓	X	X	X	X	✓	X	X
44.	EFTA - Palestinian Authority	1999	X	X	✓	✓	X	X	X	X	✓	X	X
45.	EFTA - Peru	2011	✓	X	✓	✓	X	✓	✓	✓	✓	X	✓
46.	EFTA - SACU	2008	X	X	✓	✓	X	X	X	X	X	X	✓
47.	EFTA - Serbia	2010	X	X	✓	✓	X	X	X	X	✓	X	X
48.	EFTA - Singapore	2003	X	X	✓	✓	X	X	X	X	X	X	✓
49.	EFTA - Tunisia	2005	X	X	✓	✓	X	X	X	X	✓	X	X
50.	EFTA - Turkey	1992	X	X	✓	✓	X	X	X	X	✓	X	X
51.	EFTA - Ukraine	2012	✓	X	✓	✓	X	X	X	X	✓	X	✓
52.	Egypt - Turkey	2007	X	X	✓	✓	X	✓	X	X	✓	✓	X
53.	EU - Albania	2006	X	✓	✓	✓	X	✓	X	X	X	✓	X
54.	EU - Algeria	2005	X	✓	✓	✓	X	X	X	X	X	X	✓
55.	EU - Bosnia and Herzegovina	2008	X	✓	✓	X	✓	✓	X	X	X	✓	X
56.	EU - CARIFORUM States EPA	2008	✓	✓	✓	✓	X	X	X	X	✓	X	✓

	RTA Name	Entry into force	Adoption/ maintenance of competition laws	Requirement to establish/have an authority	Anti-competitive agreements/ concerted practice (cartels)	Abuse of dominant market position	Mergers	Transparency	Non-Discrimination	Procedural fairness	SOEs and designated authorities (in comp. chapters)	Subsidies/state aid (in competition chapters)	Cooperation
57.	EU - Central America	2013	✓	✓	✓	✓	✓	X	X	X	✓	X	✓
58.	EU - Chile	2003	X	✓	✓	✓	X	✓	X	X	✓	X	✓
59.	EU - Colombia, Peru and Ecuador	2013	✓	✓	✓	✓	✓	✓	✓	X	✓	X	✓
60.	EU - Egypt	2004	X	X	✓	✓	X	✓	X	X	✓	✓	X
61.	EU - Faroe Islands	1997	X	X	✓	✓	X	X	X	✓	X	✓	X
62.	EU - Former Yugoslav Republic of Macedonia	2001	✓	X	✓	✓	X	✓	X	X	✓	✓	X
63.	EU - Georgia	2014	✓	X	✓	✓	✓	✓	✓	✓	✓	✓	X
64.	EU - Israel	2000	X	X	✓	✓	X	X	X	X	✓	✓	X
65.	EU - Jordan	2002	X	X	✓	✓	X	X	X	X	✓	✓	X
66.	EU - Korea, Republic of	2011	✓	✓	✓	✓	✓	✓	✓	✓	✓	X	✓
67.	EU - Lebanon	2003	✓	X	✓	✓	X	X	X	X	✓	X	X
68.	EU - Montenegro	2008	X	✓	✓	✓	X	X	X	X	X	✓	X
69.	EU - Morocco	2000	X	X	✓	✓	X	X	X	X	✓	✓	X
70.	EU - Norway	1973	X	X	✓	✓	X	X	X	✓	X	✓	X
71.	EU – Overseas Countries and Territories (OCT)	1971	✓	X	✓	✓	X	X	X	X	X	X	X
72.	EU - Palestinian Authority	1997	X	X	✓	✓	X	X	X	X	✓	✓	X
73.	EU - Rep. of Moldova	2014	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
74.	EU - Serbia	2010	X	✓	✓	✓		✓	X	X	✓	✓	X
75.	EU - South Africa	2000	✓	X	✓	✓	X	X	X	X	X	X	X
76.	EU - Switzerland - Liechtenstein	1973	X	X	✓	✓	X	X	X	X	X	✓	X

	RTA Name	Entry into force	Adoption/ maintenance of competition laws	Requirement to establish/have an authority	Anti-competitive agreements/ concerted practice (cartels)	Abuse of dominant market position	Mergers	Transparency	Non-Discrimination	Procedural fairness	SOEs and designated authorities (in comp. chapters)	Subsidies/state aid (in competition chapters)	Cooperation
77.	EU - Tunisia	1998	X	X	✓	✓	X	✓	X	X	✓	✓	X
78.	EU - Turkey	1996	✓	✓	✓	✓	X	X	X	X	✓	✓	X
79.	EU - Ukraine	2014	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
80.	Eurasian Economic Union (EAEU)	2015	X	✓	✓	✓	✓	✓	X	X	✓	X	✓
81.	European Economic Area (EEA)	1994	X	✓	✓	✓	✓	X	X	X	✓	✓	✓
82.	European Free Trade Association (EFTA)	1960	X	X	✓	✓	X	X	X	X	X	X	X
83.	Hong Kong, China - Chile	2014	✓	X	X	X	X	✓	X	X	X	X	✓
84.	Hong Kong, China - New Zealand	2011	✓	✓	X	X	X	✓	✓	X	✓	X	✓
85.	Iceland - China	2014	✓	X	X	X	X	X	X	X	✓	X	✓
86.	Iceland - Faroe Islands	2006	X	X	X	X	X	X	X	X	X	X	✓
87.	India - Japan	2011	✓	X	X	X	X	✓	✓	✓	X	X	✓
88.	Israel - Mexico	2000	✓	X	X	X	X	X	X	X	✓	X	✓
89.	Japan - Australia	2015	✓	X	X	X	X	✓	✓	✓	✓	X	✓
90.	Japan - Indonesia	2008	✓	X	X	X	X	✓	✓	✓	X	X	✓
91.	Japan - Malaysia	2006	✓	X	X	X	X	✓	X	X	X	X	✓
92.	Japan - Mexico	2005	✓	X	X	X	✓	✓	✓	✓	X	X	✓
93.	Japan - Mongolia	2016	✓	X	X	X	✓	✓	✓	✓	X	X	✓
94.	Japan - Peru	2012	✓	X	X	X	✓	✓	✓	✓	X	X	✓
95.	Japan - Philippines	2008	✓	X	X	X	X	✓	X	X	X	X	✓
96.	Japan - Singapore	2002	✓	X	X	X	✓	X	X	X	X	X	✓
97.	Japan - Switzerland	2009	✓	X	✓	✓	✓	✓	✓	✓	X	X	✓

	RTA Name	Entry into force	Adoption/ maintenance of competition laws	Requirement to establish/have an authority	Anti-competitive agreements/ concerted practice (cartels)	Abuse of dominant market position	Mergers	Transparency	Non-Discrimination	Procedural fairness	SOEs and designated authorities (in comp. chapters)	Subsidies/state aid (in competition chapters)	Cooperation
98.	Japan - Thailand	2007	✓	X	X	X	X	✓	✓	✓	X	X	✓
99.	Japan - Viet Nam	2009	✓	X	X	X	X	✓	✓	✓	X	X	✓
100.	Korea, Republic of - Australia	2014	✓	✓	X	X	X	✓	✓	✓	✓	X	✓
101.	Korea, Republic of - Chile	2004	✓	X	✓	✓	X	X	X	X	✓	X	✓
102.	Korea, Republic of - Colombia	2016	✓	✓	✓	✓	✓	✓	✓	✓	✓	X	✓
103.	Korea, Republic of - India	2010	✓	X	X	X	X	X	X	X	X	X	✓
104.	Korea, Republic of - New Zealand	2015	✓	✓	✓	✓	✓	✓	✓	✓	✓	X	✓
105.	Korea, Republic of - Singapore	2006	✓	X	✓	✓	✓	✓	✓	✓	✓	X	✓
106.	Korea, Republic of - US	2012	✓	✓	X	X	X	✓	X	X	✓	X	✓
107.	Korea, Republic of - Viet Nam	2015	✓	✓	✓	✓	✓	✓	✓	✓	✓	X	✓
108.	Malaysia - Australia	2012	✓	X	✓	✓	X	✓	✓	✓	✓	X	✓
109.	Mexico - Uruguay	2004	✓	X	X	X	X	X	X	X	✓	X	✓
110.	New Zealand - Chinese Taipei	2013	✓	✓	X	X	X	✓	✓	X	✓	X	✓
111.	New Zealand - Malaysia	2010	X	X	X	X	X	X	✓	X	✓	X	✓
112.	New Zealand - Singapore	2001	X	X	X	X	X	X	✓	X	X	X	✓
113.	Nicaragua - Chinese Taipei	2008	✓	✓	X	X	X	X	X	X	✓	X	✓
114.	North American Free Trade Agreement (NAFTA)	1994	✓	X	X	X	X	X	X	X	X	X	✓
115.	Panama - Chinese Taipei	2004	✓	✓	X	X	X	X	X	X	✓	X	✓
116.	Panama - Central America	2003	X	X	X	X	X	X	X	X	✓	X	X
117.	Panama - Peru	2012	✓	✓	X	X	X	✓	✓	✓	X	X	✓

	RTA Name	Entry into force	Adoption/ maintenance of competition laws	Requirement to establish/have an authority	Anti-competitive agreements/ concerted practice (cartels)	Abuse of dominant market position	Mergers	Transparency	Non-Discrimination	Procedural fairness	SOEs and designated authorities (in comp. chapters)	Subsidies/state aid (in competition chapters)	Cooperation
118.	Panama - Singapore	2006	✓	✓	✓	✓	✓	✓	✓	✓	X	X	✓
119.	Peru - Chile	2009	✓	✓	✓	✓	X	✓	✓	✓	✓	X	✓
120.	Peru - China	2010	X	X	X	X	X	X	X	X	X	X	✓
121.	Peru - Korea, Republic of	2011	✓	✓	X	X	X	✓	✓	✓	✓	X	✓
122.	Peru - Singapore	2009	✓	✓	X	X	X	✓	✓	✓	X	X	✓
123.	Singapore - Australia	2003	X	X	✓	✓	✓	✓	✓	✓	✓	X	✓
124.	Singapore - Chinese Taipei	2014	X	X	✓	✓	✓	✓	X	X	✓	X	✓
125.	Southern African Customs Union (SACU)	2004	✓	X	X	X	X	X	X	X	X	X	✓
126.	Southern Common Market (MERCOSUR)	1991	✓	✓	✓	✓	✓	X	X	X	✓	X	✓
127.	Switzerland - China	2014	✓	X	✓	✓	✓	X	X	X	✓	X	✓
128.	Thailand - Australia	2005	X	X	X	X	X	X	X	X	X	X	✓
129.	Thailand - New Zealand	2005	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
130.	Trans-Pacific Strategic Economic Partnership	2006	✓	X	X	X	X	✓	✓	✓	✓	X	✓
131.	Turkey - Albania	2008	X	X	✓	✓	X	X	X	X	X	✓	X
132.	Turkey - Bosnia and Herzegovina	2003	✓	X	✓	✓	X	X	X	X	✓	✓	X
133.	Turkey - Former Yugoslav Republic of Macedonia	2000	X	X	✓	✓	X	✓	X	X	✓	✓	X
134.	Turkey - Georgia	2008	X	X	✓	✓	X	X	X	X	✓	✓	X
135.	Turkey - Israel	1997	X	X	✓	✓	X	✓	X	X	X	✓	X
136.	Turkey - Jordan	2011	X	X	✓	✓	X	X	X	X	✓	✓	✓
137.	Turkey - Montenegro	2010	✓	X	✓	✓	✓	X	X	X	✓	✓	X

	RTA Name	Entry into force	Adoption/ maintenance of competition laws	Requirement to establish/have an authority	Anti-competitive agreements/ concerted practice (cartels)	Abuse of dominant market position	Mergers	Transparency	Non-Discrimination	Procedural fairness	SOEs and designated authorities (in comp. chapters)	Subsidies/state aid (in competition chapters)	Cooperation
138.	Turkey - Morocco	2006	X	X	✓	✓	X	✓	X	X	X	✓	X
139.	Turkey - Palestinian Authority	2005	X	X	✓	✓	X	✓	X	X	X	✓	X
140.	Turkey - Serbia	2010	X	X	✓	✓	X	✓	X	X	X	✓	X
141.	Turkey - Syria	2007	X	X	✓	✓	X	✓	X	X	X	✓	X
142.	Turkey - Tunisia	2005	X	X	✓	✓	X	X	X	X	✓	✓	X
143.	Ukraine - Former Yugoslav Republic of Macedonia	2001	X	X	✓	✓	X	X	X	X	X	✓	X
144.	US - Australia	2005	X	✓	X	X	X	✓	X	X	✓	X	✓
145.	US - Chile	2004	✓	✓	X	X	X	✓	X	X	✓	X	✓
146.	US - Colombia	2012	✓	✓	X	X	X	✓	X	X	✓	X	✓
147.	US - Panama	2012	✓	✓	X	X	X	✓	X	X	✓	X	✓
148.	US - Peru	2009	✓	✓	X	X	X	✓	X	X	✓	X	✓
149.	US - Singapore	2004	✓	✓	X	X	X	✓	X	X	✓	X	✓
150.	West African Economic and Monetary Union (WAEMU)	2000	X	X	✓	✓	X	X	X	X	X	✓	X
151.	EU - Canada	2017	X	X	✓	✓	✓	✓	✓	✓	✓	X	✓
152.	Canada - Ukraine	2017	X	X	✓	✓	✓	✓	✓	✓	✓	X	✓
153.	EFTA - Georgia	2017	X	X	✓	✓	X	X	X	X	✓	X	✓
154.	Eurasian Economic Union (EAEU) - Viet Nam	2016	X	X	✓	✓	X	✓	✓	✓	✓	X	✓
155.	EU - SADC	2016	X	X	✓	✓	X	X	X	X	X	X	✓

Appendix Table 2. The Treatment of Competition Policy in RTAs: Basic Coverage of Agreements with provisions, which generally recognize importance of competition policy

	RTA Name	Entry into force	Anti-competitive agreements/ concerted practice (cartels)	Abuse of dominant market position	Mergers
1.	Agadir Agreement	2007	X	X	X
2.	Armenia - Kazakhstan	2001	✓	✓	X
3.	Armenia - Moldova	1995	✓	✓	X
4.	Armenia - Turkmenistan	1996	✓	✓	X
5.	Armenia - Ukraine	1996	✓	✓	X
6.	ASEAN - Japan	2008	X	X	X
7.	ASEAN Free Trade Area (AFTA)	1993	X	X	X
8.	Canada - Jordan	2012	X	X	X
9.	Central American Common Market (CACM)	1961	X	X	X
10.	Chile - China	2006	X	X	X
11.	Chile - Colombia	2009	X	X	X
12.	Chile - Central America	2002	X	X	X
13.	Chile - India	2007	X	X	X
14.	Colombia - Mexico	1995	X	X	X
15.	Colombia - Northern Triangle (El Salvador, Guatemala, Honduras)	2009	X	X	X
16.	Common Economic Zone (CEZ)	2004	X	X	X
17.	Dominican Republic - Central America - United States Free Trade Agreement (CAFTA-DR)	2006	X	X	X
18.	El Salvador- Honduras - Chinese Taipei	2008	X	X	X
19.	EU - Cameroon	2014	X	X	X
20.	EU - Eastern and Southern Africa States Interim EPA	2012	X	X	X
21.	EU - Iceland	1973	✓	✓	X
22.	EU - Mexico	2000	X	X	X
23.	EU - Syria	1977	X	X	X
24.	Faroe Islands - Norway	1993	✓	✓	X
25.	Georgia - Armenia	1998	✓	✓	X
26.	Georgia - Azerbaijan	1996	✓	✓	X
27.	Georgia - Kazakhstan	1999	✓	✓	X
28.	Georgia - Russian Federation	1994	✓	✓	X
29.	Georgia - Turkmenistan	2000	✓	✓	X
30.	Georgia - Ukraine	1996	✓	✓	X

	RTA Name	Entry into force	Anti-competitive agreements/ concerted practice (cartels)	Abuse of dominant market position	Mergers
31.	Guatemala - Chinese Taipei	2006	X	X	X
32.	India - Afghanistan	2003	X	X	X
33.	India - Sri Lanka	2001	X	X	X
34.	Korea, Republic of - Turkey	2013	X	X	X
35.	Kyrgyz Republic - Armenia	1995	✓	✓	X
36.	Kyrgyz Republic - Kazakhstan	1995	✓	✓	X
37.	Kyrgyz Republic - Moldova	1996	✓	✓	X
38.	Kyrgyz Republic - Ukraine	1998	✓	✓	X
39.	Kyrgyz Republic - Uzbekistan	1998	✓	✓	X
40.	Latin American Integration Association (LAIA)	1981	X	X	X
41.	Mauritius - Pakistan	2007	X	X	X
42.	Mexico - Central America	2012	X	X	X
43.	Pakistan - Sri Lanka	2005	X	X	X
44.	Peru - Mexico	2012	X	X	X
45.	Russian Federation - Azerbaijan	1993	✓	✓	X
46.	Russian Federation - Serbia	2006	X	X	X
47.	Russian Federation - Tajikistan	1993	✓	X	X
48.	Russian Federation - Turkmenistan	1993	✓	✓	X
49.	Russian Federation - Uzbekistan	1993	✓	✓	X
50.	South Asian Free Trade Agreement (SAFTA)	2006	X	X	X
51.	Turkey - Chile	2011	X	X	X
52.	Turkey - Mauritius	2013	X	X	X
53.	Ukraine - Azerbaijan	1996	✓	✓	X
54.	Ukraine - Belarus	2006	✓	✓	X
55.	Ukraine - Kazakhstan	1998	✓	✓	X
56.	Ukraine - Moldova	2005	X	X	X
57.	Ukraine - Tajikistan	2002	✓	✓	X
58.	Ukraine - Uzbekistan	1996	✓	✓	X
59.	Ukraine -Turkmenistan	1995	✓	✓	X
60.	Southern Common Market (MERCOSUR) - Chile	2017	X	X	X
61.	EU - Ghana	2016	X	X	X
62.	GUAM	2003	✓	✓	X