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COMPETITION COMMITTEE****Global Forum on Competition****COMPETITION POLICY, TRADE AND THE GLOBAL ECONOMY: AN
OVERVIEW OF EXISTING WTO ELEMENTS, COMMITMENTS IN
REGIONAL TRADE AGREEMENTS, SOME CURRENT CHALLENGES
AND ISSUES FOR REFLECTION**

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*Competition Policy, Trade and the Global Economy:
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**- Paper by Robert D. Anderson, William E. Kovacic,
Anna Caroline Müller and Nadezhda Sporysheva * -**

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.

To date, efforts to establish a general agreement on competition policy in the framework of the international trading system have been unsuccessful. 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. Nonetheless, provisions relating to competition policy are incorporated in the WTO General Agreement on Tariffs and Trade; the General Agreement on Trade in Services; the Agreement on Trade-Related Intellectual Property Rights (TRIPS Agreement); the Agreement on Trade-Related Investment Measures; the (plurilateral) WTO Agreement on Government Procurement and other WTO instruments. 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, more than 130 WTO Members have such laws.

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 and the TRIPS Council, which discuss related developments. Beyond this, detailed chapters on competition policy have been incorporated in numerous regional trade agreements (RTAs) linking developed and developing economies around the globe.

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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. This contribution proceeds from the premises that important synergies exist between trade and competition policy and that it is reasonable to acknowledge this. The work carried out by the WTO Working Group in the period between 1997 and 2003, in addition to very important 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. To be clear, the issues and developments examined in this paper are complex, and any related initiatives doubtless will require careful reflection.

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1. Introduction

1. 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 many facets of competition law enforcement now have an important international dimension. For example, a sizeable proportion of anti-cartel prosecutions 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 involve conduct that cuts across jurisdictions. 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. The positions taken by authorities in one jurisdiction regarding the remedies necessary in response to particular transactions can

¹ An earlier and more detailed version of this paper has been published as a WTO Working Paper, see Robert D. Anderson, William E. Kovacic, Anna Caroline Müller and Nadezhda Sporysheva, 'Competition policy, trade and the global economy: Existing WTO elements, commitments in regional trade agreements, current challenges and issues for reflection', WTO Working Paper, ERSD-2018-12, available at https://www.wto.org/english/res_e/reser_e/ersd201812_e.htm. 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. See e.g. Wendell Berge (1946), "Cartels as Barriers to International Trade," XI *Law and Contemporary Problems* 4 (Duke University Press: Durham). An important, early example concerned the International Electrical Equipment Conspiracy (see, *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 a summary of activity in diverse jurisdictions, overview reports published by various law firms, e.g. Allen & Overy, *Global Cartel Enforcement 2018* (April 2019); available at: [http://www.allenoverly.com/publications/en-gb/globalcartelenforcement/Documents/Final_Cartel_Enforcement_Report_2018_\(15_04_19\).PDF](http://www.allenoverly.com/publications/en-gb/globalcartelenforcement/Documents/Final_Cartel_Enforcement_Report_2018_(15_04_19).PDF); 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_2017_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.

easily have spillover effects on other countries' markets.⁵ 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.

2. 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 Charter set out a surprisingly comprehensive and even, in some respects, prescient framework for international cooperation in regard to anti-competitive business practices 'on the part of private or public commercial enterprises'.⁶ 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]'.⁷ While the Havana Charter never came into effect, it remained a source of inspiration for the further development of the international trading system.⁸

3. Later, provisions relating to competition policy were 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).

4. 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 2001.⁹ 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 due to the a lack of negotiating capacity and apprehensions concerning competition policy on the side of developing countries and reservations on the side of certain developed countries on the implications for their domestic independence in this area. Subsequently, the issue of competition policy was dropped from the Doha Round

⁵ See relevant discussion in Part 4, below.

⁶ 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.

⁷ *Id.*

⁸ 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).

⁹ 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'. See 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.

and the WTO Working Group on this topic has since been inactive.¹⁰ 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, 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.¹¹

5. 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. 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.¹² 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 objectives are highly congruent with the ultimate goals of competition policy.¹³

6. 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).¹⁴ 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

¹⁰ 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.

¹¹ 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>.

¹² Robert Anderson, Frédéric Jenny and Anna Caroline Müller, *Combating Anti-Competitive Practices* (International Trade Centre, 2012). Available at <http://www.intracen.org/combating-anticompetitive-practice/>.

¹³ 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/t/d/daffe/clp\(98\)98/final](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=com/t/d/daffe/clp(98)98/final).

¹⁴ See, for relevant discussion, Part 3 of this paper and references cited therein. An important current reference is François-Charles Laprévôte, 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>.

in the work of the WTO Bodies, such as the Trade Policy Review Body and the TRIPS Council, which discuss related competition policy developments.

7. Further to the above, since the cessation of work in the WTO Working Group on the Interaction between Trade and Competition Policy in 2004, 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:

- The international dimension of competition law cases and the resulting positive spillovers for economic welfare and potential for conflicts of jurisdiction;
- A mounting concern, on the part of global businesses, to ensure non-discrimination, transparency and procedural fairness in competition law enforcement worldwide;
- The broadening application of competition policy vis-à-vis intellectual property rights (IPRs) in the global economy;
- Important issues concerning the potential for monopolization and the maintenance of competition in digital markets; and
- Issues concerning SOEs, the role of industrial policy and the maintenance of competitive neutrality in emerging economies.¹⁵

8. Very significant progress has occurred in promoting better understanding of the objectives, modalities, and effects of competition policy worldwide and in addressing emerging challenges listed above, 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.¹⁶ At the same time, the foregoing developments beg the question as to what additional forms of international cooperation may be needed to ensure an appropriately transparent and non-discriminatory framework for the application of competition policy in today's global economy.

9. This paper is intended to serve as a resource for reflection on these issues. 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 on the Interaction between Trade and Competition Policy and recent developments in the WTO. 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 provides concluding remarks.

¹⁵ Many of these elements have been discussed at the OECD Global Forum on Competition, for relevant publications, see <http://www.oecd.org/competition/>.

¹⁶ 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.

2. Competition policy in the WTO: existing elements, current and past discussions

10. The interface between international trade and competition policy has been a focus of interest since the founding of the present international trading system. As noted, in the 1940s, restrictive business practices were a central element in the negotiations leading to the Havana Charter, which, however, did not come into effect.¹⁷ 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. Unlike the Havana Charter¹⁸, 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.

11. 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'.¹⁹ The Decision recognized that restrictive business practices 'may hamper the expansion of world trade and the economic development and thereby frustrate the benefits of tariff reduction and removal of quantitative restrictions',²⁰ but stopped short of creating binding rules to deal with such practices. It did establish a framework for *ad-hoc* notifications to address relevant issues.²¹

12. 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. Particularly important examples of such agreements comprise the GATS, the TRIPS Agreement, the TRIMs Agreement and the GPA. Furthermore, the WTO Working Group on the Interaction between Trade and Competition Policy was active from 1997 through 2003 and carried out a wide-ranging study of the relationship between trade and competition policy. In addition, since the creation of the WTO in 1995, competition policy has figured importantly in WTO accession packages (i.e., the sets of undertakings by new Members that join the WTO), WTO Trade Policy Reviews and other WTO forums, notably in the discussions of the TRIPS Council. These provisions and contexts, in which the role

¹⁷ See chapter V of the ITO Charter, above note 6. 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).

¹⁸ See also discussion in Part 1.

¹⁹ 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>. The 1960 Decision was referred during the WTO era in the context of the *US-Japan* dispute relating to consumer photographic film and paper. 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.

²⁰ *Id.*

²¹ 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.

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

13. The WTO Working Group on Trade and Competition Policy was engaged in a wide-ranging study of the relationship between trade and competition policy from 1997 to 2003.²² While the Working Group has since been inactive, important insights can still be drawn from the work undertaken for future work in this area.

14. 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 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; and
- the relationship between investment and competition policy; and the impact of trade policy on competition.²³

15. 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. 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.²⁴

16. 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 promoting cooperation and communication among Members, including in

²² For relevant information, see https://www.wto.org/english/tratop_e/comp_e/comp_e.htm.

²³ 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.

²⁴ 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/>; see also Anderson and Jenny, above note 4.

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.²⁵

17. 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.²⁶ The foregoing is *not* to say that all WTO Members were ready to agree on specific proposals to implement these principles, rather, the clear majority of participating Members considered the issues to be important and relevant to the future development of such policy at the national and/or international levels.²⁷

18. 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.

19. 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 with the WTO and its work. Still, concerns regarding the competition policy proposals themselves included scepticism and/or a lack of understanding and negotiating capacity on the part of developing countries regarding their potential interests in relation to the suppression of anti-competitive practices; and 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 Cancún Conference, the General Council of the WTO decided that no further work would be undertaken toward negotiations on competition policy for the duration of the Doha Round.²⁸

²⁵ 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.

²⁶ 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.

²⁷ 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>. The above-mentioned principles later were also carried forward and became a central tenet of work in the ICN and related current initiatives.

²⁸ See, Anderson and Müller, above note 24 and references cited therein.

20. In sum, the work of the WTO Working Group was broad, substantive, and multifaceted. Without yielding agreement on specific negotiating proposals, 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.²⁹ 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, building on the importance of competition policy, existing elements in several WTO instruments have been expanded in the Accession protocols of some new WTO Members and have been increasingly discussed in various WTO bodies (see relevant discussion below).

2.2. Competition Policy and existing WTO agreements

21. 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 – one of the 'cornerstone' principles of the WTO – has potential application to competition law enforcement processes and institutions.³⁰ The GATT also incorporates relevant concepts/rules in its provisions on state trading enterprise (STEs)³¹ and quantitative restrictions on exports.³²

22. With regard to services industries, historically, 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.³³ Therefore, 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 non-discrimination obligations and with that Member's specific commitments under the GATS. 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.³⁴ Article IX obliges WTO Members to enter into consultations with a view to eliminating such practices upon request by another Member –

²⁹ *Id.*

³⁰ 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. 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.

³¹ GATT Article XVII.

³² GATT Article XI.

³³ Anderson and Holmes, above note 4.

³⁴ See Bigdeli and Burri-Nenova, above note 21, p. 223.

a clear example of a WTO provision recognizing the need for international cooperation in the resolution of competition policy concerns.

23. A specific illustration of the role of competition policy in the area of services is the regulation of basic telecommunications services. The GATS incorporates the separate Annex on Telecommunications, which was designed as a competition-related safeguard in this sector.³⁵ 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'.³⁶ 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.³⁷ 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.

Box 1. Mexico Telmex Case: the role of competition policy and the regulation of telecommunications services

The 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.³⁸ 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.³⁹

³⁵ See WTO, Telecommunications services, available at https://www.wto.org/english/Tratop_e/serv_e/telecom_e/telecom_e.htm.

³⁶ Telecommunications Services: Reference Paper, 24 April 1996, available at https://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm. See also 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.

³⁷ See also Anderson and Holmes, above note 4.

³⁸ 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.

³⁹ 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.

24. The TRIPS Agreement is another important example of the express recognition within a multilateral trade agreement of the role of competition policy.⁴⁰ The Agreement's 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.⁴¹

25. At a broad level, Articles 8.2 and 40.1 (focusing on licensing practices) of the TRIPS Agreement set out that appropriate measures may be needed to prevent the abuse of IPRs or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology. Article 40.2 also contains a short non-exhaustive illustrative list of practices which may be treated as abuses.⁴² 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.⁴³ Article 40.3 as well 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. Also, competition policy considerations are also embodied in the TRIPS Agreement provisions relating to the compulsory licensing of patents.⁴⁴ As well, 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.

⁴⁰ Anderson and Holmes, above note 4; Robert D. Anderson, 'Competition Policy and Intellectual Property in the WTO: More Guidance Needed?' in Josef Drexler, *Research Handbook on Intellectual Property and Competition Law* (Edward Elgar, 2008), chapter 18.

⁴¹ See Anderson and Müller, above note 24; and Robert D. Anderson, Jianning Chen, Anna Caroline Müller, Daria Novozhilkina, Philippe Pelletier, Antonella Salgueiro, 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 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 2020), chapter 17. Preliminary version available as a WTO Staff Working Paper ERS-2018-02, 6 March 2018 (https://www.wto.org/english/res_e/reser_e/ersd201802_e.pdf).

⁴² These are exclusive grant-back conditions, conditions preventing challenges to validity and coercive package licensing.

⁴³ 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 Arbor: University of Michigan Press, December 2002), chapter 17. See, Robert D. Anderson, Anna Caroline Müller and Antony Taubman, 'Competition policy and the WTO TRIPS Agreement as a platform for application of competition policy to the contemporary knowledge economy', to be published in Anderson, Carvalho and Taubman (eds.), above note 41, chapter 3.

⁴⁴ TRIPS Agreement Article 31 sets out detailed conditions that WTO Members must respect when granting compulsory licences.

26. Furthermore, competition policy plays a very important role in the plurilateral GPA⁴⁵, even though this is only fleetingly recognized in the treaty text. 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.⁴⁶

27. Another important complementary relationship exists between competition policy and investment.⁴⁷ 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 Agreement sets out a negotiation mandate for the Council for Trade in Goods.⁴⁸ 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.⁴⁹

⁴⁵ Currently, the Agreement covers 48 WTO Members. See WTO, *Parties, observers and accessions to the Agreement on Government Procurement*, available at https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm. For an update on the membership and impact of the Agreement, see Robert D. Anderson and Nadezhda Sporysheva 'The revised WTO agreement on government procurement: evolving global footprint, economic impact and policy significance' (2019) 3 *P.P.L.R.* pp. 71-91.

⁴⁶ See also 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. 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.

⁴⁷ OECD, *A policy framework for investment: competition policy*, 25-27 October 2005, available at <https://www.oecd.org/investment/investmentfordevelopment/35488898.pdf>.

⁴⁸ 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#. 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'. In 1999, the Council for Trade in Goods initiated a review of the operation of the TRIMs Agreement. The joint study by the WTO and UNCTAD Secretariats 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.

⁴⁹ 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*

2.3. Competition policy and the current work of the WTO

28. An important emerging area in which the competition policy and trade interface is recognized is in WTO Accession Packages.⁵⁰ The role of competition policy has been increasingly addressed by working parties during the accessions of new WTO Members. By October 2019, 36 new Members had acceded to the WTO pursuant to Article XII of the Marrakesh Agreement establishing the WTO ('the Article XII Members').⁵¹ 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.⁵² Furthermore, in some accession processes, linkages between competition policy and other trade-related matters have been addressed.⁵³

29. 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.⁵⁴ 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.⁵⁵

30. 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, SOEs and privatization. Many acceding countries have undertaken commitments to prevent or

institutions and the global convergence of process norms: The GAL competition project (Oxford University Press, 2012).

⁵⁰ 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.

⁵¹ 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).

⁵² See Anderson et al, above note 50.

⁵³ 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 50.

⁵⁴ The only exception is Vanuatu.

⁵⁵ See Anderson et al, above note 50.

reduce the influence of state monopolies on trade and limited the number of STEs.⁵⁶ Furthermore, competition principles are also attached to WTO concepts, such as fair pricing practices, consumer benefits, and open, liberalized markets. Such commitments by so-called WTO Article XII Members,⁵⁷ to certain extent, expand related GATT disciplines. 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.⁵⁸

31. 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*.⁵⁹ 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.

32. Another important area of the WTO work where competition policy has been increasingly referenced is the administration of the Trade Policy Review (TPR) Mechanism.⁶⁰ Such reviews of individual Members prepared by the WTO Secretariat, 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.⁶¹ 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 WTO agreements, these reports and

⁵⁶ 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.

⁵⁷ These are WTO Members having acceded to the organization pursuant to Article XII of the Marrakesh Agreement Establishing the World Trade Organization, see https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm#articleXII.

⁵⁸ 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. 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, Andrea Mastromatteo, 'WTO and SOEs: Article XVII and Related Provisions of the GATT 1994' (2017) *World Trade Review* 16.4: 601-618.

⁵⁹ Such reforms are of high relevance for many acceding economies, notably transition economies. For a discussion of the link between economic reform and competition in procurement markets in some of these, see e.g. Robert D. Anderson and Nadezhda Sporysheva, 'WTO accession, accession to the WTO Agreement on Government Procurement (GPA) and economic reform in the Eurasian region: a tale of synergies', to be published in Alexei Kireyev and Maika Oshikawa (eds.), *Eurasian Perspectives on Integration into the WTO and the Global Economy* (Cambridge University Press and World Trade Organization, forthcoming 2020).

⁶⁰ 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)).

⁶¹ All TPRs are available at https://www.wto.org/english/tratop_e/tpr_e/tp_rep_e.htm#chronologically.

ongoing discussions in the TPR Body⁶² are a useful source of information on WTO Members' competition policy settings.

33. 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; the institutional framework; relevant enforcement experience; price control policies; international/regional cooperation etc.

34. Furthermore, over the last years, the level of detail of these subsections in TPRs 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; penalties; international/regional/bilateral cooperation initiatives on competition policy etc. As well, the TPR Body 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 and the competition policy – IP interface.⁶³ Interestingly, subsections on competition policy are also included in the TPRs of WTO Members that have not yet established comprehensive competition regimes as such.⁶⁴ In several such instances, other WTO Members have called for the adoption of relevant legislation or welcomed the initiation of relevant work.⁶⁵

35. In the context of the current mandate/existing provisions under the TRIPS Agreement (see discussions above), the TRIPS Council has from time to time considered the policy significance of competition policy safeguards, and potential role of specific

⁶² 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.

⁶³ 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. 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'.

⁶⁴ 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).

⁶⁵ 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 also, 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, Annual Report by the Director-General, *Overview of developments in the international trading environment*, WT/TPR/OV/20, 16 November 2017, p. 74, 80, 83.

measures such as are envisaged under Article 40. The TRIPS Council also discussed the possible role of measures under Article 40 to address concerns about constraining access to key biotechnologies,⁶⁶ and concerning 'competitive practices which threatened food sovereignty of people in developing countries.'⁶⁷ Recently, the Council addressed⁶⁸ the topic of 'IP and the Public Interest: Promoting Public Health Through Competition Law and Policy' during the TRIPS Council meetings of 5-6 June and 8-9 November 2018,⁶⁹ based on a submission tabled by Brazil, China, India and South Africa.⁷⁰

36. Trade-related Technical Assistance (TRTA) is another core function of the WTO. 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 capitals⁷¹ and demand has been manifested for WTO technical assistance activities relating to competition policy. For example, the WTO Secretariat has organized broader Geneva-based 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. 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.⁷² Furthermore, activities focusing principally on other areas (e.g., IP and government procurement) have touched on competition policy concerns to the extent that these are implicated by the relevant Agreements. As is hardly surprising, e.g. the issue of bid rigging in public procurement is often raised by participants⁷³ and issues concerning anti-competitive

⁶⁶ IP/C/M/280, Council for Trade-Related Aspects of Intellectual Property Rights - Minutes of Meeting - Held in the Centre William Rappard on 21 and 22 September 2000, at 153 (Australia).

⁶⁷ IP/C/M/64, (India) Council for Trade-Related Aspects of Intellectual Property Rights - Minutes of meeting - Held in the Centre William Rappard on 26 - 27 October 2010.

⁶⁸ See WTO document IP/C/M/89, Minutes of the Meeting held in the Centre William Rappard on 5-6 June 2018 and IP/C/M/90, Minutes of the Meeting held in the Centre William Rappard on 8-9 November 2018.

⁶⁹ See WTO News Item, 'Members debate IP's societal value, role with competition policy to promote public health', TRIPS Council meeting, 5-6 June 2018. Available at www.wto.org/english/news_e/news18_e/trip_08jun18_e.htm; and 'Members discuss role of IP in promoting new business, health impacts through competition,' 8-9 November 2018. Available at www.wto.org/english/news_e/news18_e/trip_09nov18_e.htm.

⁷⁰ See, e.g. WTO documents IP/C/W/643 of 25 May 2018 (joint communication by China and South Africa) and its Addendum IP/C/W/643/Add.1 of 31 May 2018 listing India and Brazil as co-sponsors. See also WTO documents IP/C/W/649 of 29 October 2018 and Addenda thereto.

⁷¹ 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.

⁷² These events are strictly and uniformly without prejudice to the views and interests of WTO Members in these areas.

⁷³ For an example of a recent technical assistance activity, see the 2019 Advanced Global Workshop on Government Procurement, held at the WTO from 13 to 17 May 2019, available at https://www.wto.org/english/news_e/news19_e/gpro_17may19_e.htm.

practices and their appropriate treatment have arisen in the context of workshops/seminars on the TRIPS Agreement.⁷⁴

37. Overall, while the WTO Working Group on this topic has long been inactive, the foregoing shows that the relevance of competition policy to trade is recognized both in WTO Agreements and the work of WTO Bodies in a cross-cutting manner. This recognition is further cemented by the increasing inclusion, by WTO Members, of competition policy provisions and chapters in RTAs.

3. The treatment of competition policy in regional trade agreements: a further manifestation of policy complementarity

38. Indeed, the inclusion of (often detailed) chapters on competition policy in RTAs 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 296 RTAs notified to the WTO and available in the WTO's Regional Trade Agreements Information System,⁷⁵ around 80% contain either dedicated chapters or provisions on competition policy (55%) or less detailed provisions recognizing the importance of competition policy for trade (21%). 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 competition policy in the modern global economy. While providing a new empirical analysis, it also builds importantly on earlier studies.⁷⁶

39. 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,⁷⁷ and did not include fully-fledged chapters on competition policy. This began to change in the 2000s (see Figure 1 below) and in particular after 2004. RTAs adopted since then increasingly incorporate comprehensive coverage of issues pertaining to competition policy, such as obligations to

⁷⁴ 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, see the 11th WTO-WIPO advanced course on intellectual property for policymakers, 11-22 March 2019, available at https://www.wto.org/english/news_e/news19_e/trip_29mar19_e.htm.

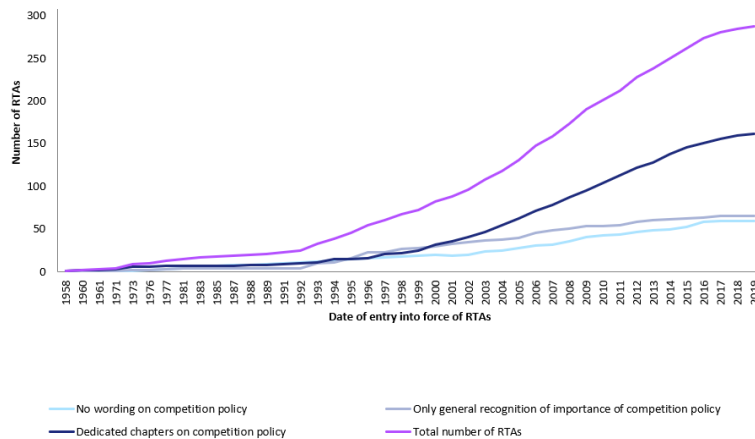
⁷⁵ See the WTO Regional Trade Agreements Information System (WTO RTA Database), available at <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>. By October 2019, there have been 302 RTAs in force notified through the WTO RTA Database pursuant to various WTO obligations (Enabling Clause; GATT Art. XXIV 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.

⁷⁶ See, in particular, Laprévotte et al, above note 14; 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.

⁷⁷ 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.

promote competition, legislation and institutional requirements, principles for competition law enforcement, specific anti-competitive practices, SOEs and designated monopolies and cooperation/coordination in competition law enforcement.

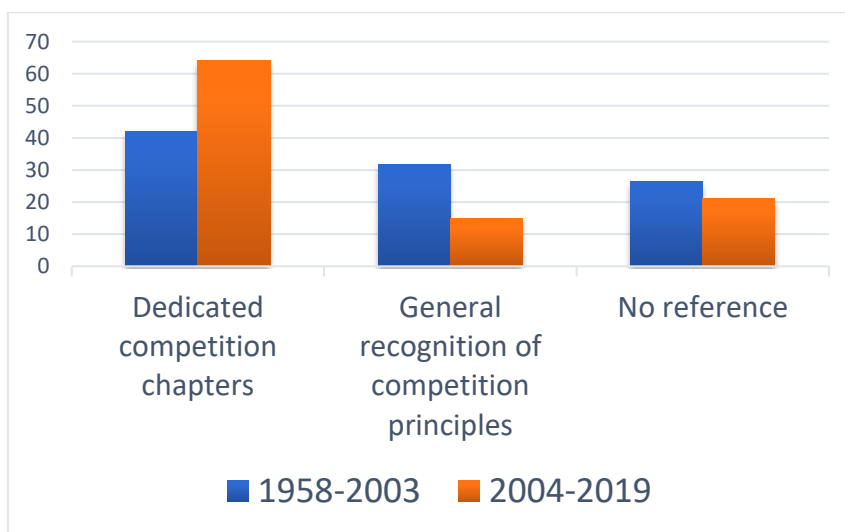
Figure 1. Treatment of competition policy in RTAs (1958 – 2019)



Source: WTO RTA Database.

40. To be more precise, if looking at RTAs notified since 2004 (when WTO Working Group on this issue became inactive) as compared to RTAs before then, the share of RTAs with dedicated competition policy chapters significantly increased (64%, as compared to 42%), while the share of RTAs with limited general recognition provisions or without reference to competition policy have decreased accordingly (see Figure 1). This is partly explained by the fact that some WTO Members which tended to include only general recognition of competition policy principles before the 2000s (in particular, Latin American, Asian countries and the CIS members), recently also include dedicated competition provisions.

Figure 2. Inclusion of competition policy chapters in the XXth and XXIst centuries (percent)



Source: WTO RTA Database

3.1. Objectives of competition policy provisions in RTAs

41. 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:⁷⁸

- ensuring that the potential gains from trade liberalization are not undermined by anti-competitive practices. If left unchecked, anti-competitive practices such as cartels and abuses of a dominant position (that reduce competition, limit output and raise prices) might 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'⁷⁹; 'economic and social development'⁸⁰; 'facilitating efficient functioning of markets'⁸¹; to '[improving] and [securing] an investment friendly climate, [and] a sustainable industrialization process'.⁸² Interestingly, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) incorporates a separate clause on consumer protection in its competition policy chapter;⁸³ 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, most of RTAs with dedicated competition chapters include horizontal provisions on transparency, non-discrimination and procedural fairness.

3.2. Regional approaches to addressing competition policy in RTAs

42. 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).⁸⁴ Over time, however, other

⁷⁸ See also Lapr votte et al, above note 14.

⁷⁹ 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; Article 2 of the Competition chapter in Hong Kong, China – Georgia RTA; and article 16.1 of the CPTPP.

⁸⁰ See, for example, article 259 of the EU-Colombia-Peru RTA.

⁸¹ Article 116 of the India-Japan RTA.

⁸² Article 47.1 of the EU-Overseas Countries and Territories.

⁸³ See article 16.6 of the CPTPP. The text of the CPTPP is 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/>.

⁸⁴ These regional approaches were also defined in Lapr votte et al, above 14; and in O. Solano and A. Sennekamp, 'Competition Provisions in Regional Trade Agreements', *OECD Trade Policy Paper Series, No. 31*, 2006.

regions, including Asian and Latin American countries and Commonwealth of Independent States (CIS) have increasingly integrated competition provisions in their RTAs. Furthermore, a degree of convergence has become evident across the relevant approaches.

43. 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. Generally, such provisions correspond to relevant articles of the Treaty on the Functioning of the European Union (TFEU)⁸⁵ or (where relevant) the EFTA Agreement.⁸⁶ Previously, EU and EFTA RTAs have not dealt extensively with cooperation and coordination in competition law enforcement. Rather, RTA provisions have been complemented with more specific agreements between participating competition agencies. Recently, however, EU and EFTA RTAs increasingly include clauses related to cooperation (see e.g. Box 2).

44. In contrast, RTAs influenced by the NAFTA approach (mainly those involving the US and Canada)⁸⁷ 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 horizontal principles. Competition provisions in these agreements typically are excluded from dispute settlement, with the exception of provisions relating to SOEs and designated monopolies.⁸⁸

45. 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.⁸⁹ In the framework of ANZCERTA, Australia and New Zealand committed

⁸⁵ 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.

⁸⁶ The EFTA Agreement, available at <http://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAagreement.pdf>.

⁸⁷ 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>. 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.

⁸⁸ See, for example, the Canada-Chile RTA, the US-Singapore RTA, and the Japan-Mexico RTA.

⁸⁹ The ANZCERTA limits an application of traditional trade defense measures (i.e. anti-dumping and countervailing measures).

to extensively coordinate their competition policies, for instance, in investigations, research and unnecessary duplication.⁹⁰

46. 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 for competition law enforcement and include detailed provisions on cooperation, including technical assistance.⁹¹ RTAs among Latin American countries often include 'rendez-vous clauses' regarding future negotiations, including endeavours to harmonize competition laws,⁹² and provisions on monopolies. Most recently, Latin American countries have followed the EU and NAFTA approaches while signing RTAs with these jurisdictions.

Box 2. The EU – Mercosur RTA: an example of convergence of approaches

On 28 June 2019, the EU and Mercosur reached an agreement in principle for an ambitious, balanced and comprehensive trade agreement. The text of the agreement is still subject to the legal revision and signature of the parties. The published text of the agreement includes a comprehensive chapter on competition.⁹³ In addition to core horizontal principles, references to existing competition laws; the prohibition of anti-competitive practices; regulation of SOEs and designated monopolies; the chapter includes detailed cooperation and technical assistance clauses, which envisage as well cooperation with respect to enforcement activities.

47. As for the members of the CIS, contrary to RTAs concluded in the 1990s⁹⁴ (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

⁹⁰ 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>.

⁹¹ See, for example, the Japan-Indonesia RTA and the Korea-Singapore RTA.

⁹² 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'.

⁹³ The text of the chapter on competition in the EU-Mercosur RTA is available at https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_158162.%20Competition.pdf.

⁹⁴ 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.

dedicated chapter on competition policy.⁹⁵ 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.⁹⁶

48. Middle Eastern and African countries, when signing RTAs with the EU, EFTA, and NAFTA countries generally follow the approach of their counterpart.⁹⁷ 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.⁹⁸ Further developments in relation to an African approach may emerge in the framework of the African Continental Free Trade Area (AfCFTA).

Box 3. The AfCFTA: prospects for a continental competition framework

In March 2018, African Union (AU) leaders signed 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.⁹⁹ 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.¹⁰⁰

As suggested by Luke and MacLeod, a regional approach in Africa could help address anti-competitive practices in dealing with cross-border cartels, mergers, acquisitions, and abuses of dominant market positions. They argue that the AfCFTA can be used as a vehicle to address such cross-border competition issues and can also help countries with no competition laws to enact some in conformity to an agreed approach as envisaged in a continental competition framework.¹⁰¹

⁹⁵ 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 75.

⁹⁶ 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; and for additional detail, Yury Rovnov and Nadezhda Sporysheva, 'The Court of the Eurasian Economic Union: Some Initial Jurisprudence' (2018) *Trade Policy* 4/16.

⁹⁷ See, for example, the EU-South Africa RTA and the EFTA-Morocco RTA.

⁹⁸ See Articles 88-89 of the WAEMU.

⁹⁹ 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.

¹⁰⁰ 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>.

¹⁰¹ See Luke, D. and Macleod, J., 'Bringing the CFTA About: Key Factors for Success' (2017) *Bridges Africa*, 6(6), 7–11 as cited in ITC, *A Business Guide to the African Continental Free Trade*

49. As for one of the most novel approaches, which also shows a significant level of convergence between different regional approaches, Chapter 16 of the CPTPP contains enhanced disciplines on procedural fairness in competition law enforcement (Article 16.2).¹⁰² Importantly, the agreement incorporates novel provisions on private enforcement.¹⁰³ 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 Part 3.3.5 below).

3.3. Overview of specific competition policy provisions in RTAs

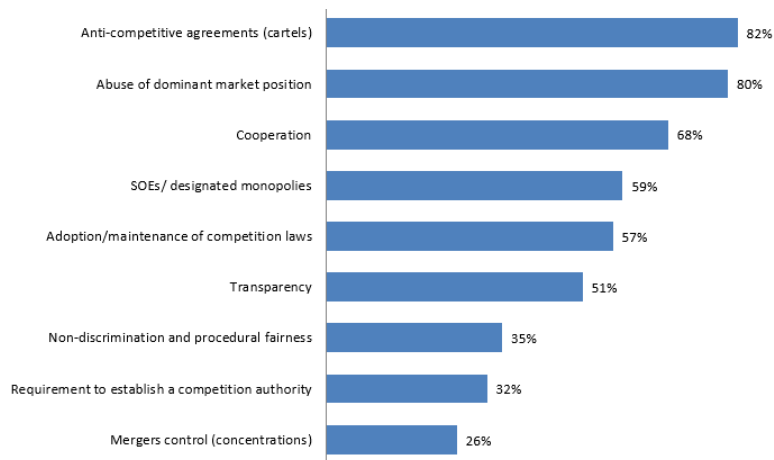
50. As mentioned earlier, 164 RTAs (around 55% of the total 296 RTAs notified to the WTO and analysed by the WTO Secretariat) have dedicated chapters or provisions on competition policy. Figure 3 below illustrates the range of issues addressed in RTAs with dedicated competition policy chapters.

51. 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 (82% of such RTAs include provisions on anti-competitive agreements and abuse of dominance, while the issue of merger control is included in around 26% of such RTAs, increasingly in recent ones). Most of the RTAs with dedicated competition chapters (68%) 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 (57%) and the establishment of competition authorities (around 32%) are often required in competition chapters and further contribute to the abovementioned objectives. Recently concluded RTAs increasingly include 'horizontal principles' such as transparency (51%), non-discrimination and procedural fairness (35%). Most RTAs address the regulation of SOEs and designated monopolies (59% of the RTAs with dedicated competition chapters).

Area Agreement, 2018, available at http://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/AfCFTA%20Business%20Guide_final_Low-res.pdf.

¹⁰² See above note 83.

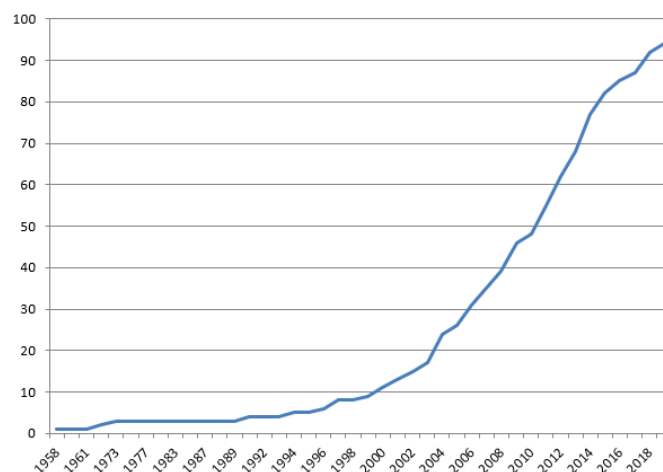
¹⁰³ Prior to the CPTPP, the issue had not been broadly addressed in RTAs (see relevant discussion in Part 3.3.4 and Box 4, below).

Figure 3. 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

52. 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 2.1 above). In the period between 2004 and 2019, such provisions increased almost four-fold (from 24 RTAs in 2004 to 94 in 2019). This may be seen as a sign that regional integration has contributed to the proliferation of competition policy regimes worldwide.

Figure 4. Incorporation of a requirement on the adoption or maintenance of competition laws in the RTAs with dedicated competition chapters

Source: WTO RTA Database

53. 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'.¹⁰⁴ Most RTAs involving the EU or EFTA countries¹⁰⁵ incorporate an obligation to adopt or maintain competition laws. In addition to the 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'.¹⁰⁶ 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.¹⁰⁷

54. 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 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.¹⁰⁸ 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.¹⁰⁹

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

55. 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 26% 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)¹¹⁰; and the EU and EFTA countries (45%). Australia and New Zealand have adopted 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.

¹⁰⁴ 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 general 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.

¹⁰⁵ Around 65% RTAs with dedicated involving the EU or EFTA countries.

¹⁰⁶ See, for example, the EU-Central America RTA.

¹⁰⁷ See, for example, the EU-Moldova RTA and the EU-Ukraine RTA.

¹⁰⁸ See, for example, the EU-Montenegro RTA and the EU-Albania.

¹⁰⁹ Notably, the CPTPP, in its provision on adoption 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. 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'.

¹¹⁰ Such as ASEAN, Japan, Korea and Singapore.

56. 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. Furthermore, some of these RTAs explicitly refer to transparency in relation to the application of competition laws and exclusions from of competition law.¹¹¹ 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.¹¹²

3.3.3. Regional cooperation on competition policy issues

57. 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 and refer to information sharing and consultation (including both consultations in the implementation of the competition provisions or chapters of the agreements and consultations 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 assistance 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.¹¹³

3.3.4. Enforceability of competition policy chapters in RTAs

58. 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 consultations. This is the case for more than half of RTAs with detailed competition chapters (60%).

59. Few RTAs with a dedicated competition chapter (only 3% 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.¹¹⁴ 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

¹¹¹ For example, the EU-Canada RTA.

¹¹² 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 Gadbow, 'Competition Policy', in Cathleen Cimino-Isaacs and Jeffrey J. Schott (eds.), *Trans-Pacific Partnership: An Assessment* (Peterson Institute for International Economics, 2016), p. 329.

¹¹³ See article 16.5 of the CPTPP, above note 83.

¹¹⁴ 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.

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'.¹¹⁵

Box 4. CPTPP approach to the private rights of enforcement

A 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'.¹¹⁶ 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'.¹¹⁷

3.3.5. Regulating designated monopolies/state-owned enterprises

60. Around 74% of all RTAs with dedicated provisions on competition policy make reference to SOEs and designated monopolies either in their competition chapters (around 60% of RTAs with dedicated chapters) or in separate provisions outside the chapter on competition. In many cases, separate chapters on SOEs contain more enforceable language as compared to SOEs provisions in chapters on competition policy.¹¹⁸ 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.

61. Notably, the CPTPP's chapter on SOEs (Chapter 17)¹¹⁹ establishes ambitious comprehensive standards on SOE management, aimed at disciplining SOEs policies. 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. 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.¹²⁰ Importantly, the SOEs chapters in the USMCA and in the CPTPP are subject to the RTA's dispute settlement mechanism.

¹¹⁵ Article 5 of the New Zealand-Chinese Taipei RTA.

¹¹⁶ See Article 16.3 of the CPTPP, above note 83.

¹¹⁷ See Gadbow, above note 112.

¹¹⁸ This is, for instance, the case in the CPTPP, see above note 8375 and the discussion below.

¹¹⁹ See above note 75.

¹²⁰ 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 indirectly 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

62. What becomes evident overall is that competition policy is routinely addressed and its importance for trade is recognized in RTAs concluded by economies across the world. Furthermore, a trend towards dedicated chapters and some areas of convergence between regional approaches can be observed in recent years. These trends may cautiously point towards a growing perceived need for basic common rules in that regard, which in turn may result from the challenges faced by WTO Members in today's globalized economy.

4. Current competition policy challenges in the global economy and way forward

63. 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.¹²¹ 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 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.¹²²

64. Cross-border competition law enforcement often entails significant and sometimes very positive spillovers. For example, major anti-cartel investigations/prosecutions by developed and developing 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.¹²³

65. At the same time, cross-border competition enforcement can also, potentially, result in negative externalities. While national authorities interested in cases with an international dimension may strive to and often have taken similar views of business arrangements; 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 have sometimes resulted in conflicting decisions taken by various jurisdictions worldwide.¹²⁴

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 87.

¹²¹ 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 24. 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.

¹²² Richard Whish and David Bailey, *Competition Law* (Oxford, 8TH Edition, 2015), p. 4.

¹²³ WTO, above note 4; Anderson and Jenny, above note 4; and Anderson and Holmes, above note 4.

¹²⁴ See for example Eleanor Fox and D. A. Crane, *Antitrust Stories* (Foundation Press, 2007).

66. Cooperation in the enforcement of competition law has expanded significantly since the 1990s, and an impressive degree of convergence of competition policies with regard to mergers have been achieved through the advocacy work of the ICN. 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.

67. Furthermore, 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.¹²⁵ 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.

68. As first attempts to address these issues, certain standards with regard to relevant principles in competition policy enforcement are referenced in RTAs. Further to the above, procedural fairness has been discussed across international fora such as the OECD¹²⁶, UNCTAD¹²⁷ and the ICN.¹²⁸ 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.¹²⁹ Furthermore, in April 2019, the Steering Group of the ICN unanimously approved a multilateral framework on procedures among antitrust enforcement agencies globally to promote fundamental due process in competition law investigation and enforcement. Most recently, in July 2019, the UNCTAD Intergovernmental Group of Experts on Competition Law and Policy agreed on "Guiding Policies and Procedures under Section F of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices" (Guiding Policies), aimed at providing practical guidance on enforcement cooperation related to potential anticompetitive practices and mergers having cross-border effects.¹³⁰ All these important

¹²⁵ 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>.

¹²⁶ OECD, *Procedural Fairness and Transparency* (2012), available at <http://www.oecd.org/competition/abuse/proceduralfairnessandtransparency-2012.htm>.

¹²⁷ UNCTAD, Review of chapters IX and X of the Model Law on Competition, 1 May 2019, available at https://unctad.org/meetings/en/SessionalDocuments/ciclpL12_en.pdf.

¹²⁸ ICN, *Competition Agency Transparency Practices* (2013), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc892.pdf>.

¹²⁹ 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.

¹³⁰ See UNCTAD, *Trade and Development Board Trade and Development Commission Intergovernmental Group of Experts on Competition Law and Policy Eighteenth session Geneva*,

developments point to the emergence of an international consensus on the importance of fundamental principles of transparency and procedural fairness in antitrust enforcement.

69. 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).¹³¹ This interest is clearly manifested by relevant guidelines and advocacy efforts across a wide array of countries. 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.¹³²

70. 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.¹³³

71. In a related vein, 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.¹³⁴ 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.¹³⁵ These tend to result in market concentration, first-

10–12 July 2019: *Agreed conclusions*, 12 July 2019, available at https://unctad.org/meetings/en/SessionalDocuments/ciclpd2019_agreedconclusions_en.pdf. The Guiding Policies will further be considered by the 8th United Nations Conference to Review the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices to be held in 2020. For the text of Guiding Policies see https://unctad.org/meetings/en/SessionalDocuments/ccpb_comp1_%20Guiding_Policies_Procedures.pdf.

¹³¹ Article 40 of the TRIPS Agreement presumes the need for at least a degree of enforcement cooperation between jurisdictions regarding competition issues. For pertinent analysis see Anderson et al, above note 41.

¹³² See Anderson et al, above note 41.

¹³³ See, for pertinent background, Anderson, Müller and Taubman, above note 49.

¹³⁴ 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.

¹³⁵ 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

mover advantages for incumbent firms and barriers to entry into the relevant markets. 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.¹³⁶

72. 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. In addition, various jurisdictions are addressing concerns related to anti-competitive outcomes in the digital economy in the competition advocacy activities of relevant agencies. In these and other cases, some competition agencies have 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,¹³⁷ potentially also impacting on the exercise of IPRs.¹³⁸ This carries the potential for coordination failures and even outright conflict.¹³⁹

73. 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.¹⁴⁰

driving competition or market monopolization?' (2014) *International Economics and Economic Policy* 11.1-2: 49-61. See also 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>.

¹³⁶ OECD, above note 135.

¹³⁷ 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>.

¹³⁸ 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 to be published in Anderson, Carvalho and Taubman (eds.), above note 41, chapter 2. Preliminary text available at https://www.wto.org/english/res_e/reser_e/wpaps_e.htm.

¹³⁹ 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>.

¹⁴⁰ 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

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.¹⁴¹ Most recently, competition issues in the digital economy have been an important focus of the UNCTAD's Intergovernmental Group of Experts on Competition Law and Policy in July 2019¹⁴² and the BRICS Competition Conference in September 2019.¹⁴³

74. As discussed earlier, the impact of SOEs on international trade relations is a long-standing issue of interest for WTO Members. Today, some contemporary SOEs are among the largest and fastest expanding multinational companies¹⁴⁴, ranging over a wide set of industries.¹⁴⁵ In many instances, SOEs may enjoy government-granted advantages.¹⁴⁶ Furthermore, 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.¹⁴⁷

75. 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). Another relevant tool is embodied by competitive neutrality arrangements¹⁴⁸ introduced by some OECD

law enforcement (e.g., anti-cartel enforcement in one jurisdiction also benefitting consumers in other jurisdictions in which the same cartels have been active).

¹⁴¹ For specific examples, see Anderson et al, above note 1. 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>.

¹⁴² UNCTAD, *Competition Issues in the Digital Economy*, Note by the UNCTAD Secretariat, 1 May 2019, available at https://unctad.org/meetings/en/SessionalDocuments/ciclpd54_en.pdf.

¹⁴³ See FAS, VI BRICS International Competition Conference, available at <https://en.fas.gov.ru/press-center/news/detail.html?id=54054>.

¹⁴⁴ 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>.

¹⁴⁵ Such as finance, public utilities (electricity, gas, transport, distribution, and communication), manufacturing, metals and mining, and petroleum. *Id.*, p. 21.

¹⁴⁶ 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>.

¹⁴⁷ Kowalski et al, above note 146.

¹⁴⁸ See definition of competitive neutrality in 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 Antonio Capobianco and Hans Christiansen, *Competitive neutrality and State-Owned Enterprises. Challenges and Policy Options* (2011) OECD Corporate Governance Working Papers

jurisdictions, built on the OECD Guidelines on Corporate Governance of SOEs.¹⁴⁹ 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.¹⁵⁰ In addition, related WTO disputes¹⁵¹ and countervailing duty investigations by national investigation authorities¹⁵² involving SOEs operation can be seen as an indication of the increasing importance of ensuring competitive neutrality on the part of SOEs.

76. Overall, notwithstanding the clear and significant progress that is being made in important respects with regard to related issues, 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. Three broad observations are salient. First, building on, reinforcing and carrying forward the path-breaking work done by the OECD and UNCTAD in promoting better understanding of competition policy worldwide, 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, and be synergetic with the work in other fora.¹⁵³ Third, organizationally, it is entirely feasible for work in the WTO to draw and build upon work in these fora.

No. 1, available at <https://www.oecd-ilibrary.org/docserver/5kg9xfjgdhg6-en.pdf?expires=1524408615&id=id&accname=guest&checksum=60909921FBD2E60270817089608BE993>.

¹⁴⁹ OECD, *OECD Guidelines on Corporate Governance of State-Owned Enterprises*, 2015, available at <http://www.oecd.org/corporate/guidelines-corporate-governance-SOEs.htm>.

¹⁵⁰ See ICPEG Report, above note 129.

¹⁵¹ 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.

¹⁵² 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.

¹⁵³ See also related discussions in 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).

5. Concluding remarks

77. 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.

78. 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 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 several WTO bodies, such as TPR Body and the TRIPS Council. 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.

79. Beyond the above, since 2004, competition policy chapters have been incorporated in an extensive set of RTAs linking developed, developing and least-developed economies around the globe. 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.

80. 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;
- A growing concern, on the part of global businesses, to ensure non-discrimination, transparency and procedural fairness in competition law enforcement worldwide;
- 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; and

- Issues concerning SOEs, the role of industrial policy and the maintenance of competitive neutrality in emerging economies.

81. 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.

82. 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 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.

83. 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.¹⁵⁴ 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.¹⁵⁵

84. 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 an increased need for coordination 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.

¹⁵⁴ 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 GPA is to require each participating government to put in place independent and impartial domestic review (supplier complaint) bodies (Article XVIII of the GPA).

¹⁵⁵ 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 2.3, above.