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Global Forum on Competition

COMPETITION PROVISIONS IN TRADE AGREEMENTS

Summary of Discussion

5-6 December 2019

This document is a summary of the discussion held during Session II of the 18th meeting of the Global Forum on Competition on 5 – 6 December 2019.

More documents related to this discussion can be found at oe.cd/cpta.

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Summary of Discussion

By the Secretariat

1. The **Chair**, Professor Frédéric Jenny, opened the session and introduced the topic. He set the scene for the discussion, by explaining that bilateral and regional agreements develop alongside the World Trade Organization (WTO) multi-lateral agreements. As part of the effort of reducing non-tariff barriers, many bilateral and regional agreements include competition provisions with the objective of preserving the gains from trade liberalisation. The Chair set out three groups of questions to structure the session:

- How are competition issues addressed in trade agreements? What are the types of competition provisions in bilateral and regional trade agreements?
- What is the impact of those competition provisions? Do they lead to changes in the competition framework? Do they result in greater international co-operation? What can we learn from other types of regulatory provisions in trade agreements?
- What is the role of the competition authorities? Do they play an active role in the design of competition provisions?

2. The Chair then introduced the three expert panellists:

- Ms. Anna Caroline Müller, a Legal Affairs Officer at the WTO, with research focusing on international economic law and government procurement. She submitted a paper on “Competition policy, trade and the global economy” to the GFC session.
- Mr. François-Charles Laprèvote, a Partner at Cleary Gottlieb Steen & Hamilton, and the author of a comprehensive review of competition provisions in trade agreements – a document that he updated for the session.
- Ms. Susan Stone, Head of the Emerging Policy Issues Division, at the OECD Trade Directorate. Susan leads the work on designing and delivering evidence-based policy and analysis and advice in support of the OECD Trade Committee and its Working Parties.

3. Before getting started with the presentations, the Chair informed participants that 21 contributions were submitted for the session, including those by the World Bank and by UNCTAD.

1. The types of competition provisions in trade agreements

4. The Chair gave the floor to **Ms. Anna Müller**, to talk about how the WTO has been addressing competition issues in a multi-lateral framework. Ms. Müller briefly introduced the interplay between competition and trade liberalisation: on the one hand, trade liberalisation can help competition because the additional players that enter the market through trade liberalisation will enhance competition; on the other hand, under-enforcement of competition policy or private restraints to competition can act as barriers to trade.

5. The speaker provided some historical background and described developments in the area of competition at the WTO. She noted that the synergies between trade and competition were evidenced by the objectives set out in the Marrakech agreement (the founding agreement of the WTO establishing the multilateral trading system in 1994), which are very much in line with those pursued through competition policy. Prior to that, the Havana Charter in 1947 – 1948 had recognised the importance for members to take appropriate measures to prevent business practices affecting international trade, for instance by restricting competition and limiting access to markets. However, these competition provisions from the Havana Charter had not been carried over to the General Agreement on Tariffs and Trade (GATT), which remained a centrepiece of the WTO agreements today. Despite this, other developments at multi-lateral level have taken place since, such as the adoption of the United Nations (UN) set of principles on competition agreed in 1980 and the work undertaken in the framework of the WTO Working Group on trade and competition. The Working Group was active from 1996 to 2004, when WTO members decided that no further work towards negotiations on competition policy would be undertaken for the duration of the Doha round of trade negotiations at the WTO.

6. Ms. Müller noted that while today there is no agreement on competition policy at WTO level, competition policy principles are still an underlying factor and recognised in many WTO agreements. For instance, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) permits members to take measures to deal with anti-competitive practices in the area of IP and the Agreement on Government Procurement (GPA) recognises competition as an underlying principle. Other current WTO work on competition is integrated in accession negotiations of new WTO Members and trade policy reviews, which routinely include a chapter on competition policy. In addition, regular WTO bodies may hold discussions that can have a bearing on competition policy in a specific context, such as recent discussions on public health or e-commerce. Technical assistance on the interface between trade and competition remained available to developing country WTO Members and observers.

7. Finally, Ms. Müller noted that international co-operation has continued in other *fora* outside the WTO, such as the ICN, the OECD, UNCTAD and in the regional trade agreements. In particular, the marked increase in competition chapters in regional trade agreements in the past 15 years seems to have coincided with the time when the WTO Working group on trade and competition became inactive. She also flagged the changed circumstances since 2004. In particular, most countries now have competition laws and agencies, and an increasing number of trade agreements incorporate competition provisions. Moreover, competition increasingly takes place at the international level and it is more likely that there are cross-jurisdictional spillovers requiring further international co-operation. The speaker concluded that, against this backdrop, further co-operation between the trade and the competition community could result in a helpful process of mutual learning.

8. The Chair thanked Ms. Müller for her presentation and asked **Mr. François-Charles Laprèvote** to talk about his extensive study of competition provisions in trade agreements. Mr. Laprèvote introduced his sample of regional and bilateral trade agreements and provided some general observations. The dataset includes 267 agreements, including some not yet notified to the WTO. Mr. Laprèvote highlighted the growing number of agreements that include some form of competition-specific chapters or provisions. This trend is not limited to developed economies: around 90% of all the trade agreements include competition-specific provisions or chapters, but the proportion is slightly lower for developing countries. These figures are likely to underestimate the extent of competition provisions, since they do not take into account some general principles incorporated in trade agreements, such as non-discrimination, transparency and most favoured nation principles. These horizontal provisions may have an impact on competition policy.

9. Trade agreements include a wide range of provisions related to competition. About one-third of agreements require the parties to adopt or maintain competition laws, with some variation in their wording. Some agreements not only require parties to adopt competition laws but also to adopt, for instance, due process provisions in the application of these laws. By contrast other agreements, for instance, between certain eastern-European or Central Asian countries, do not require explicitly the parties to adopt competition laws and simply provide that unfair business practices are incompatible with the objectives of the trade agreement.

10. One-third of the agreements include provisions to adopt and apply measures regulating anti-competitive behaviour. A higher share (48%) requires parties to prohibit anti-competitive agreements and concerted practices and an even higher number (50%) imposes obligations to prohibit abuses of market power. The latter is the most common provision and it is slightly more frequent than provisions about anti-competitive agreements. By contrast, provisions on merger control are included in only 12% of trade agreements, involving highly advanced economies that already have significant merger control frameworks such as Australia, the EU, Canada, Korea, New Zealand and Singapore.

11. Mr. Lapr v te moved to the description of another important group of provisions, those concerning State-owned Enterprises (SOEs) and subsidies. Almost half of trade agreements contain commitments on SOEs, even though the language can vary significantly. One group, including for instance the North American Free Trade Agreement (NAFTA), requires that SOEs and monopolies are subject to regulatory control, act in accordance with commercial considerations, act in a non-discriminatory manner and refrain from using monopoly power to engage in anti-competitive conduct. A second group, including for instance trade agreements involving Japan or China, focus only on the requirement for SOEs and monopolies not to abuse their monopoly power. A third group, specifically the trade agreements to which the EU is a party, apply general abuse of dominance provisions to these companies and sometimes refer explicitly to article 106 of the Treaty on the Functioning of the European Union (TFEU) about Services of General Economic Interest (SGEI) and about special and exclusive rights. The provisions on subsidies and state aid, which are included in almost 50% of trade agreements, equally show wide variation. Those involving the EU rely heavily on the concept of state aid from the TFEU. This is especially the case for neighbouring jurisdictions, while in other cases (such as the EU-Korea agreement) obligations are less strict and amount to a commitment to best endeavours to refrain from trade distorting subsidies.

12. Only one-fourth of the trade agreements in the sample include enforcement principles that are competition specific. These often contain a generic commitment to ensure transparent and non-discriminatory enforcement, but some define more detailed due process standards. The speaker noted that it would be interesting to see whether the recent ICN framework on competition agency procedures would lead to provisions that are more detailed. About 50% of the trade agreements include provisions on co-operation and co-ordination in competition policy. For instance, these refer to positive or negative comity, taking into account the interests of the other party either to refrain or to investigate certain practices, notification requirements, or exchange of information requirements, which are typically limited to non-confidential information provided by the investigated parties.

13. Mr. Lapr v te emphasised the importance of dispute resolution mechanisms. He noted that most trade agreements exclude the competition chapter or provisions from dispute settlement or contain an *ad hoc* dispute settlement mechanism that typically takes the form of consultations. Therefore, there is a question on the effectiveness of a number of these competition clauses.

14. The speaker outlined the main groups of agreements identified in the sample: the European approach, the NAFTA approach, the Oceanian approach (i.e. the very close integration between Australia and New Zealand) and hybrid approaches, where the trading parties have a similar bargaining power. Finally, the speaker mentioned the most frequent objectives related to competition found in trade agreements. The aim of preserving the gains of liberalisation is found in almost 30% of the agreements in the sample and a similar percentage includes the objective of preventing selective enforcement or strategic enforcement of antitrust laws for strategic purposes. Finally, only five agreements refer to the abolition of trade defences, where the rationale is that if the parties harmonise their competition regimes trade defences will no longer be necessary.

15. At this point, the **Chair** asked the European Union, which is a party to almost 40 agreements with competition provisions, to explain the considerations behind the variety of competition provisions in its agreements.

16. The **European Union** confirmed that its agreements do not follow a uniform approach but their content and depth depends on the objectives of the agreement. For instance, an agreement may focus merely on tariff and non-tariff barriers, while another bilateral agreement, with a country preparing for accession to the European Union, has different objectives that are reflected in greater alignment through competition provisions. The delegate added that in the last couple of years the provisions on antitrust and mergers have become more standardised, probably also due to the work of the OECD and ICN.

17. The provisions on subsidies show greater variation than those on antitrust and mergers. This is due to the objectives of the agreement and the extent to which the EU opens its market to the other party to the agreement. At the very minimum, the EU asks to go beyond the WTO rules on subsidies and to be transparent on the subsidies that are being granted. In the case of full access to the EU market or a customs union, the EU would ask the counterparty to have greater alignment to the EU rules, such as requiring that the other signatory has subsidy rules and that these are enforced by an independent authority with the ability to recover illegal aid. This approach is to ensure a level-playing field between the EU and the other country.

18. The **Chair** asked Turkey to describe the analysis of its competition provisions, as contained in its contribution, which suggests similar conclusions as those in previous interventions.

19. **Turkey** noted that out of the 20 trade agreements it currently has in place, 18 contain a reference to competition in their objectives. However, only 13 agreements contain a separate article on competition and these agreements vary in the extent to which they cover anti-competitive practices. While all of the 13 agreements include provisions on abuse of dominant position, 12 cover both vertical and horizontal agreement and only 4 cover merger control.

20. The **Chair** then asked UNCTAD to talk about its experience with developing countries, in particular the African Continental Free Trade Agreement and the UNCTAD-SELA (Latin American and Caribbean Economic System) working group on trade and competition.

21. After introducing **UNCTAD's** role, including as guardians of the UN Set of Principles on Competition adopted in 1980, the delegate highlighted the importance of the African Continental Free Trade Agreement, which aims to achieve regional integration between 55 economies, with a market worth USD 2.5 trillion. Most African countries have competition laws and enforcing institutions, but several are either preparing a competition law or do not even have any law at all. There are many regional economic organisations in Africa and these have already adopted competition provisions, which is a positive aspect.

Due to the relevance of anti-competitive conduct and its cross-border effects in the African continent, there was a good case to justify the adoption of a competition protocol, covering not only substantive rules but also institutional and enforcement aspects. Members of the African Union will need to deal with a three-layer institution system: national, regional and continental. While this will probably be a challenge, this can be a successful example of competition provisions in regional trade agreement between mostly developing countries.

22. Moving to the UNCTAD-SELA, this working group gathers a number of Caribbean, central and southern American competition authorities as well as trade ministries representatives. As the topic of competition and trade was left out of the WTO, this working group is an important vehicle to keep open discussions and exchanges between the trade and competition communities. UNCTAD concluded by reminding delegates that competition policy and trade policy are complementary, especially for developing countries and economies in transition.

23. Following this presentation, the **Chair** invited the World Bank delegate to introduce their recent study on competition provisions in trade agreements. In addition to horizontal competition provisions, the study drills down on sector-specific provisions on intellectual property, investment and government procurement among others.

24. The **World Bank** explained that their database covers 258 trade agreements and it contains details on many policies. Building on the standard framework used by the World Bank to define effective competition policy, the database covers competition enforcement, competitive neutrality and pro-competitive regulations. Sectoral provisions that deal with key sectors are critical tools in order to liberalise those particular sectors and for this reason they are covered in the database. Unlike other databases, this new database contains more detail on the type of competition laws and institutions required under the trade agreements. For instance, in addition to recording whether the agreement imposes the establishment of a competition authority, the database contains information on whether this authority should be independent, whether it should be functional and the resources it would have.

25. The analysis confirms the findings discussed by earlier presenters on the positive trend of competition provisions in trade agreements over time. However, there are almost no bilateral agreements that cover competition provisions between low-income countries. This shows why multilateral agreements, such as the agreement that UNCTAD presented, are so critical for less developed economies or low-income countries to benefit from competition policy as a tool to foster trade among countries.

2. The impact of competition provisions in practice

26. The **Chair** turned to the second part of the session and noted that there has not been much work on the impact of competition provisions so far. He invited Ms. Susan Stone to describe the experience of the trade community on the impact of other provisions in trade agreements.

27. **Ms. Susan Stone** explained that studying the impact of regional trade agreements on trade and in general on economic welfare has a long and established tradition in the trade economy literature.

In recent years, most of the engagement in the trade community is on regulatory practices that affect trade, i.e. so-called “behind the border issues” or “non-tariff measures”, such as competition. These include competition policy, intellectual property rights, digital transactions and investment provisions. The attention of the literature has expanded to cover so-called WTO + and WTO extra provisions. The former generally refer to provisions

that the WTO covers, but on which regional trade agreements go a step further; the latter generally refer to provisions that are not covered at the WTO level. However, the literature on competition policy is not equally well developed and the reason is two-fold: on the one hand, it is difficult to obtain data and, on the other hand, many of the traditional techniques are not suitable to address the variety of provisions and the terms of implementation.

28. Some findings of the literature on trade agreements are relevant for competition policy too. There is a positive correlation between how high barriers are before an agreement and the increase in trade after the agreement. In other words, the more countries are able to liberalise the bigger their gains. Institutional structures tend to have a positive influence on gains from trade agreements: the stronger the institutional structure, the greater a country's ability to enforce the provisions in trade agreements and the more trade is created. Moreover, differences in market power between the parties lead to concessions by one of the parties.

29. Trade agreements tend to increase domestic value-added. This effect is stronger for intermediate goods and services, while it is less pronounced for final goods. In consequence, the impact vary for countries, depending on where they are placed along Global Value Chains (GVCs). Overall, studies suggest that WTO extra provisions, such as on competition, are particularly important for GVC-related trade, especially in trade agreements between developed and developing countries.

30. Ms. Stone summarised the findings of some of the recent OECD work on the impact of provisions on sanitary and phytosanitary measures (SPS) and technical barriers to trade (TBT). The former are relevant for the agri-food sectors and the latter generally refer to technical specifications in trade agreements, such as mutual recognition provisions or harmonisation measures. These provisions have a significant positive impact on trade flows. Transparency provisions and legal enforceability are particularly important attributes that drive the positive effects. When analysing the specific elements of the SPS and TBT provisions, such as enforceability, transparency and mutual recognition, the study finds that what impacts trade in each of these provisions varies, so it is important to look at the provisions in detail.

2.1. Changes in legal framework and institutional set-up

31. The **Chair** commented on the difficulty to quantify the impact of competition provisions and noted that the call for contributions for the present session of the Global Forum on Competition asked delegations to provide examples of qualitative impacts. He asked Ukraine to talk about its association agreement with the European Union and Ukraine's progress in implementation.

32. **Ukraine** explained that the process of harmonisation with EU competition law started around 2010, even though the formal agreement between Ukraine and the EU only came into force in September 2017. The agreement contains general obligations, such as maintaining an independent and well-resourced competition authority, specific commitments to change Ukrainian legislation, such as in the areas of merger control and procedural fairness, and enforcement practices. The agreement also includes detailed provisions on State Aid, which Ukraine has implemented ahead of the schedule foreseen in the agreement. Since August 2017, the competition authority has become the authority fully in charge of monitoring State Aid. Ukraine and the competition authority are not limiting themselves to the literal compliance with the obligations listed in the association agreement but try to comply with the spirit of the agreement. In a first wave of implementation, Ukraine passed a law on State Aid, subsequently it passed a law on overall modernisation

and a review of merger control thresholds, while a bill is currently being developed to further develop prioritisation criteria for the competition authority.

33. After this example of an impact of an agreement on domestic legislation, the **Chair** turned to Thailand. Following a trade agreement, in 1999 the country passed a first competition law, which however has not led to much enforcement activity. In 2017, there have been significant changes in the law, again following a trade agreement. The Chair asked the delegation to explain the extent to which the latest changes have been instrumental in pushing the competition agenda in Thailand.

34. **Thailand** noted the main changes brought about by the 2017 amendment, namely the competition act now applies also to SOEs, which were excluded from the 1999 competition law, and criminal charges have been turned into administrative penalties, mostly fines. In addition, the competition authority is now an independent entity and since the 2017 amendments, it has already adjudicated three cases. Thailand has recently been among the signatories of the Regional Comprehensive Economic Partnership (RCEP) and more agreements including competition chapters are planned.

35. At this point, the **Chair** invited Mexico to discuss how the US, Canada and Mexico agreement (USMCA) led to procedural and rights of defence changes in the jurisdiction.

36. **Mexico** highlighted the importance of NAFTA for establishing a competition law regime in Mexico. USMCA was ratified by Mexico in June 2019 and will replace NAFTA. USMCA is a new generation agreement and one of its most important contributions in the area of competition is the recognition of the treatment of the client-attorney principle provided by each party. The Mexican competition authority started progress on the topic of client-attorney privilege since 2017 and the regulatory provisions for the qualification of client-attorney communication were published in the official gazette in September 2019. The provisions aim to provide a specific process for the recognition of information that might fall within the protection of client-attorney privilege, determine a timeframe to request protection and establish a procedure to protect information *ex officio*.

37. As an example of a competition regime that was established independently from trade agreements, the **Chair** asked Hong Kong China to intervene and comment on what could have been done in the trade agreements to have a more direct relationship with the adoption of the competition law.

38. **Hong Kong China** replied that the business community initially resisted the introduction of competition law, because the city was open to international trade and it considered that there was a low risk of anti-competitive practices. The delegate noted that competition law was established at around the same time when Hong Kong China concluded a number of trade agreements. However, the introduction of competition law was not due to the trade agreements but was the result of an emerging competition culture and the belief that it benefitted the city and consumers. In response to the question of why there was little connection between competition law and trade agreements, the delegate commented that it was better to have established a competition regime because of its benefit than because it came as a commitment in a trade agreement.

2.2. Impact on international co-operation and technical assistance

39. The **Chair** introduced the following part of the discussion and asked Australia to discuss the development of co-operation and capacity building in the context of its agreement with New Zealand and the ASEAN countries.

40. **Australia** explained that the ASEAN Australia New Zealand Free Trade Area (AANZFTA) entered into force in January 2010. At the time of its negotiation, many of the ASEAN member states did not have competition laws or they had just introduced them. The competition chapter in the AANZFTA highlights the importance of co-operation in the promotion of competition, economic efficiency, consumer welfare and the curtailment of anti-competitive practices. Capacity building was an important component of the plan that was established to implement the AANZFTA. In the competition area, the Competition Law Implementation Program (CLIP) started in October 2014. It is funded by Australia and New Zealand and managed by Australia. The delegate highlighted that the Australian agency was very keen on support for policy reform and institutional capacity building in the region. It considered these activities to be in its own interest and not only beneficial for the ASEAN countries. In particular, at the beginning of their co-operation, many of the ASEAN agencies had a particular focus on cartels and the Australian agency saw particular advantages in strengthening co-operation on that specific issue.

41. After the first five years of the programme, it is possible to identify some lessons learnt. For instance, the CLIP programme is delivered according to a long-term strategic plan and is evaluated on an ongoing basis. Moreover, it is demand-driven: the ASEAN countries submit their requests and the Australian agency respects their understanding of their needs and their specificities. In addition, the programme has the objective of developing strong relationships at an institutional level and between the officials of the authorities. In terms of fairness, over the last financial year half of the participants in the programme's activities were women. Involving ASEAN experts and co-operating with other development partners in the region have also been important, as have been good leadership and intergovernmental consultation.

42. Following Australia's presentation the **Chair** turned to Singapore, whose submission highlights that co-operation, particularly on cases, can be enhanced by competition provisions in agreements such as the AANZFTA.

43. Building on its experience within the AANFTA as an experienced jurisdiction, **Singapore** noted that capacity building has an impact on shaping the competition laws and processes of the younger competition authorities, and lead to greater harmonisation of competition regimes and procedures. In addition, capacity-building events provide opportunities to familiarise with other enforcers and this proves very important in enforcement co-operation. The latter mainly occurs in the form of sharing of information with foreign competition authorities. The value of such information exchange and discussion greatly increases as the involved competition agencies and enforcement abilities improve. Within ASEAN the authorities have experienced more productive co-operation taking place between agencies looking at the same anti-competitive conduct.

44. The **Chair** asked the Philippines to intervene, noting that according to their contribution the main impact of competition provisions has been in the area of co-operation and capacity building, but also that trade agreements play a key role in the development and mainstreaming of competition policy in the ASEAN region.

45. The **Philippines** explained that they have two trade agreements (AANZFTA and an agreement with Japan) including competition provisions and both predate the enactment of the Philippines Competition Act. Technical assistance has ensured that the young authority could become effective quickly. The Philippines' trade agreements recognise that there may be significant differences in the level of development of competition policy between the parties and the technical assistance provided by the trade partners is driven by a thorough evaluation of the authority's needs, constraints and priorities. In addition, the provision of technical assistance by the Philippines' partners also fosters working relationships that can have practical significance in the future, as we deal with cross-border competition issues.

46. The **Chair** turned to Indonesia to ask about the increase in co-operation following its trade agreement with Japan and AANZFTA.

47. **Indonesia** replied that the country's newest trade agreements incorporate competition chapters and that they have had an important impact by increasing co-operation, both formal and informal. In practice, this translates in exchanges of public information, notification of enforcement activities, discussions on competition policies and laws issues, exchange of experts and staff and capacity building. The delegate also emphasised the importance of effective international co-operation and co-ordination to prevent and mitigate risks of cross-border competition violation.

2.3. Enforceability of competition provisions

48. The **Chair** opened the discussion of the enforceability of competition provisions, inviting the World Bank to present the relevant section of its study of trade agreements.

49. The **World Bank** noted that one of the most significant contributions of their study is the analysis of the degree of enforceability of competition provisions. While abuse of dominance is the most frequently covered anti-competitive practice, the provisions on anti-collusive practices and merger control are more enforceable. In the case of merger control, the reason may be that the parties that include these provisions in their trade agreements tend to be more developed jurisdictions. As their competition regimes tend to have a high degree of convergence, the parties may feel more comfortable having enforceable provisions.

50. Another interesting finding is that provisions in bilateral agreements are less enforceable than those in multilateral agreements. This holds for the substantive provisions on antitrust and merger control, as well as for provisions on State Aid and subsidies. However, this is not the case with provisions on State-owned Enterprises (SOEs), where the degree of enforceability is more similar across the two types of agreements. Even those trade agreements that do not cover competition policy embed competition principles at the sectoral level and they make them very enforceable. In fact, 90% of the trade agreements that have sectoral provisions embedding competition principles include binding language on enforceability. The finding on sectoral provisions is another contribution of the study and suggests that it is important to incorporate competition policy principles also in these other chapters of trade agreements.

51. The **Chair** asked the US about the experience with mechanisms, such as monitoring systems, which could increase the enforceability of competition provisions.

52. The **US** noted that their most important vehicles for co-operation and convergence are competition-specific instruments, such as bilateral agreements and MoUs. With this caveat in mind, the US added that their eight trade agreements incorporating competition provisions do not include binding provisions on dispute resolution settlement. They all include consultation mechanisms, but they have hardly been used because it is common to discuss any issues informally with the counterparties. However, a formal consultation procedure is currently underway, relating to a due process provision in one of the US agreements. Only a few of the agreements provide for a monitoring mechanism. The US has limited experience with these clauses in practice and this experience dates back from a workgroup established under NAFTA. The workgroup had the objective to discuss the relation between competition law and policy and trade in the free trade area. There were ten meetings over a five-year period of trade and competition officials from the three parties. It was a useful forum to exchange views but it did not have an impact in practice.

53. At this point, the **Chair** invited BIAC to elaborate on the difficulties for businesses when one of the parties to an agreement does not meet its commitments.

54. **BIAC** emphasised that the convergence brought about by competition provisions in trade agreements benefits greatly the business community. The undertakings that operate internationally expect that the parties can rely on competition provisions included in trade agreements. If this is not the case, this creates uncertainty. To address the issue, BIAC's contribution proposes exploring comity principles to limit potential conflicts. Under comity principles, authorities are allowed and are sometimes required to notify each other of investigations that might affect each other's "important interests". Introducing comity principles for competition provisions would require defining a number of practical issues, such as the definition of "important interests" and the mechanism to assess the validity of non-compliance claims. BIAC noted that an additional challenge to the successful enforcement of competition provisions is the identification of an appropriate competition law standard. For instance, some countries follow non-competition related standards in the abuse of dominance tests. These standards are not linked to or underpinned by a substantial lessening of competition. This divergence creates a risk of deference to domestic competition enforcement and therefore prejudices the relevance of competition law provisions in trade agreements.

3. The role of competition authorities in trade negotiations and monitoring

55. The **Chair** opened the last part of the discussion giving the floor to Canada, whose competition authority is the most actively involved in the negotiation of competition provisions, to hear about the benefits of such a prominent role in trade negotiations.

56. **Canada** started the presentation by describing the structure of responsibilities for negotiating trade agreements. Global Affairs is the federal department that leads all trade negotiations on behalf of the Canadian government. Global Affairs works in close collaboration with other departments on chapters that require subject matter expertise to negotiate complex areas of the agreement, such as competition policy. In practice, this means that a competition law officer from the competition authority sits at the table as the lead negotiator for the competition policy chapters in all of Canada's trade agreements. Trade negotiations are increasingly complex and require hundreds of hours of work by civil servants. The competition authority has a model text as a starting point for negotiations. During the trade meetings a competition law officer presents Canada's proposed text, considers counter proposals and can agree to certain modifications during the meetings. When considering more substantive changes, intersessional work typically includes consulting with the authority's legal services team and other relevant government departments. In Canada's experience, the competition chapter is typically one of the first to close, because it tends to be less controversial than other areas such as market access.

57. In addition to negotiating the competition policy chapter, the Canadian competition authority also pays close attention to other areas of the agreement, to ensure that commitments made in these other chapters are consistent with Canada's competition laws. For example, the competition authority might require a divestiture to remedy competition concerns raised by merger review. In this case, the authority would work with the lead negotiator to build in exemptions within the investment chapter that allow such requirements. As a final point, Canada recognises that trade agreements can be used to advance gender equality and it therefore conducts gender-based analysis to identify new gender inclusive provisions in trade agreements. In the area of competition, this analysis led to the international work on gender and competition, in which the OECD has been involved.

58. The **Chair** commented that the significant involvement of the competition authority in the negotiation of trade agreements is apparent from Canada's agreements. He asked Malaysia to share their experience on the competition authority's role in trade agreements.

59. **Malaysia** noted that since its establishment in 2011 the competition authority has actively participated in the negotiation of almost all of the country's trade agreements, including the Regional Comprehensive Economic Partnership (RCEP) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) which are still to be signed and ratified by the country. The authority's main role is to provide technical advice on competition policy and law to the various ministries involved in the negotiations.

60. Finally, the **Chair** noted that the contribution of the Eurasian Economic Union mentioned both the competition authorities of the individual countries and the Eurasian Economic Commission are involved in developing competition provisions in trade agreements.

61. **Mr. Zhumangarin**, member of the board and the minister in charge of competition, provided an overview of the trade agreements currently in place and the type of competition provisions they include. He also provided some examples of the benefits of trade agreements for the economy. Since the signing of the agreement with Viet Nam in 2016, there has been a significant increase in trade between the union's countries and Vietnam. Exports to Vietnam increased by 60% in 2019 with respect to 2016 and imports went up by 46% over the same period.

4. Concluding remarks

62. The Chair asked **Mr Lapr  vote** to comment on the discussion. The expert noted that, in his experience as a private practitioner, competition provisions on due process are very important, as are those on subsidies. Mr Lapr  vote also emphasised the importance of enforceability of competition provisions. For provisions that do not relate to the implementation of individual cases, such as the commitment to have an independent competition authority or generic commitments regarding non-discrimination, one could envisage stronger enforceability than is currently the case. In other situations, such as individual enforcement cases, traditional dispute resolution may not be the most appropriate way of implementing competition provisions. Dispute settlement provisions might be misused, or perceived to be a way to double guess the national competition procedure. However, other mechanisms that are less intrusive, such as comity, are available.

63. The **Chair** concluded that competition provisions in trade agreements have had significant impact in practice and more than he expected before collecting the experience of GFC participants. He also highlighted that some of the competition provisions in trade agreement can go beyond what competition authorities would be able to negotiate in an MoU.