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# Competition Policy and Trade in the Global Economy: Towards an Integrated Approach

Policy Options Paper



# Acknowledgements

The E15 Expert Group on Competition Policy and the Trade System is co-convened with:



## With the support of



Schweizerische Eidgenossenschaft  
Confédération suisse  
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Confederaziun svizra

Swiss Confederation

Federal Department of Economic Affairs,  
Education and Research EAER  
State Secretariat for Economic Affairs SECO



And ICTSD's Core and Thematic Donors:



Government of the Netherlands



## Published by

International Centre for Trade and Sustainable Development (ICTSD)

7 Chemin de Balexert, 1219 Geneva, Switzerland

Tel: +41 22 917 8492 – E-mail: [ictsd@ictsd.ch](mailto:ictsd@ictsd.ch) – Website: [www.ictsd.org](http://www.ictsd.org)

Publisher and Chief Executive: Ricardo Meléndez-Ortiz

World Economic Forum

91-93 route de la Capite, 1223 Cologny/Geneva, Switzerland

Tel: +41 22 869 1212 – E-mail: [contact@weforum.org](mailto:contact@weforum.org) –

Website: [www.weforum.org](http://www.weforum.org)

Co-Publisher and Managing Director: Richard Samans

**Citation:** Pérez Motta, Eduardo. 2016. *Competition Policy and Trade in the Global Economy: Towards an Integrated Approach*. E15 Expert Group on Competition Policy and the Trade System – Policy Options Paper. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.

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ISSN 2313-3805

REF 181215

# Competition Policy and Trade in the Global Economy: Towards an Integrated Approach

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on behalf of the E15 Expert Group on Competition Policy and the Trade System

January 2016

\* The author wishes to thank the efficient and skilled support of Paulina Valladares. Furthermore, all members of the E15 Initiative Expert Group generously shared their reflections and analysis. He would like to especially thank Jean-Yves Art, John Davis, Frederic Jenny, and Jorge Padilla for their extra mile efforts in exchanging comments and organizing an additional meeting to discuss the interrelation between international trade and competition policy.

## Note

The policy options paper is the result of a collective process involving all members of the E15 Expert Group on Competition Policy and the Trade System. It draws on the active engagement of these eminent experts in discussions over multiple meetings as well as an overview paper and think pieces commissioned by the E15 Initiative and authored by group members. Eduardo Pérez Motta was the author of the report. While a serious attempt has been made on the part of the author to take the perspectives of all group members into account, it has not been possible to do justice to the variety of views. The policy recommendations should therefore not be considered to represent full consensus and remain the responsibility of the author. The list of group members and E15 papers are referenced.

The full volume of policy options papers covering all topics examined by the E15 Initiative, jointly published by ICTSD and the World Economic Forum, is complemented with a monograph that consolidates the options into overarching recommendations for the international trade and investment system for the next decade.

The E15 Initiative is managed by Marie Chamay, E15 Senior Manager at ICTSD, in collaboration with Sean Doherty, Head, International Trade & Investment at the World Economic Forum. The E15 Editor is Fabrice Lehmann.

## E15 Initiative

Jointly implemented by the International Centre for Trade and Sustainable Development (ICTSD) and the World Economic Forum, the E15 Initiative was established to convene world-class experts and institutions to generate a credible and comprehensive set of policy options for the evolution of the global trade and investment system to 2025. In collaboration with 16 knowledge partners, the E15 Initiative brought together more than 375 leading international experts in over 80 interactive dialogues grouped into 18 themes between 2012-2015. Over 130 overview papers and think pieces were commissioned and published in the process. In a fast-changing international environment in which the ability of the global trade and investment system to respond to new dynamics and emerging challenges is being tested, the E15 Initiative was designed to stimulate a fresh and strategic look at the opportunities to improve the system's effectiveness and advance sustainable development. The second phase of the E15 Initiative in 2016-17 will see direct engagement with policy-makers and other stakeholders to consider the implementation of E15 policy recommendations.

### E15 Initiative Themes

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- Climate Change
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- Innovation
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- Services
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# Abstract

Competition law and policy are essential elements of the global framework for addressing anticompetitive arrangements that thwart development and reduce the welfare of citizens. The importance of such law and policy is now recognized across developed and developing countries alike. Competition law, in particular, deters arrangements such as cartels, abuses of dominant position, and mergers that, left unrestrained, block competition on the merits. Despite the very significant progress towards promoting international cooperation and convergence in competition policy that has been made mainly by the International Competition Network (ICN), an informal network of competition authorities, major future challenges remain as globalization goes further and deeper. This leads the present paper to reflect on the need for additional coordination mechanisms to address the challenges of an increasingly globalized and networked economy. In recognition of the fundamental complementarity of competition and trade policy, multiple initiatives have been taken at the international level to attempt to formalize their interrelationships and better harness related synergies. To date, none of these initiatives has resulted in a binding framework that ensures a better application of competition policy in relation to trade and investment. In the context

of this incomplete institutional and policy infrastructure, the paper puts forward a set of policy options with the objective of intensifying international convergence and injecting competition into international trade. Many of these recommendations can be implemented through existing mechanisms and institutions. They include: (i) multidimensional awareness raising concerning the role of competition policy; (ii) practical steps aimed at enhancing cooperation in the implementation of competition policy at the international level; (iii) the progressive introduction of international dispute resolution and appeal mechanisms; (iv) the promotion of convergence and best practices in competition regimes through peer reviews; (v) the enhanced engagement of national competition authorities in assessing and advising on the implementation of trade measures; (vi) the review of rules on competitive neutrality as a tool to address the role of state-owned enterprises; and (vii) efforts to broaden the application of innovative approaches to the trade and competition interface in free trade agreements. The paper advocates an incremental path to reform and emphasizes that the efforts to be undertaken in the international competition policy arena should build on the important work already being conducted on related issues by organizations such as the ICN, the OECD, and UNCTAD.

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Abbreviations	
FDI	foreign direct investment
FTA	free trade agreement
GATT	General Agreement on Tariffs and Trade
GVC	global value chains
ICN	International Competition Network
MNE	multinational enterprise
OECD	Organisation for Economic Co-operation and Development
SME	small and medium-sized enterprise
SOE	state-owned enterprise
SPS	sanitary and phytosanitary
TBT	technical barrier to trade
TPP	Trans-Pacific Partnership
UNCTAD	United Nations Conference on Trade and Development
USTR	United States Trade Representative
WTO	World Trade Organization

# Executive Summary

Globalization has become a reality, as manifested by ever-larger flows of transnational trade and investment. At the same time, the latest available figures reflect downward corrections of trade growth forecasts. Economists suggest that this may be due not only to the lingering effects of the 2008 financial and economic crisis, but also to structural changes that have resulted in lower elasticity of trade with respect to general economic growth. Against this background, some key questions underlying the policy options paper are the following: what can be done to renew sustained growth in world trade and to enhance the contribution of trade to economic growth and prosperity? Is the policy and institutional framework for the global economy incomplete?

Competition policy, comprising both competition (antitrust) law enforcement and competition advocacy work, is a central element of the necessary framework for inclusive liberalization. Competition enforcement provides an essential tool for countering cartels, abuses of a dominant position, and anticompetitive mergers that otherwise undermine the purchasing power of citizens, block competitive opportunities, and impede development. It is key to ensuring that state-owned or mandated enterprises operate in ways that promote welfare globally and do not place non-state affiliated enterprises at an unfair disadvantage. Finally, as elaborated in the paper, competition policy and competition analysis are essential to ensure that international trade and global value chains operate in ways that are inclusive and open with respect to participation by all competitive suppliers.

Despite very significant efforts aimed at promoting international cooperation in competition law enforcement, especially during the past two decades, competition policy is as yet only partially adapted to the challenges associated with today's globalized economy. Jurisdictional gaps remain to be filled. While much useful work has been done by organizations such as the International Competition Network (ICN), the Organisation for Economic Co-operation and Development (OECD), and United Nations Conference on Trade and Development (UNCTAD) to promote international cooperation and the voluntary adoption of sound enforcement practices at the national level, the world today lacks binding mechanisms to ensure transparent and non-discriminatory application of competition law by all countries. In the absence of such mechanisms, there is a risk that competition law enforcement can itself be employed as a tool of discrimination or market exclusion, contrary to the values it is intended to promote.

The paper outlines proposals to address these challenges. It builds on discussions that took place over a one-year period in the E15 Expert Group on Competition Policy and the Trade System, jointly convened by ICTSD and the World Economic Forum with the support of Bruegel, as well as think pieces authored by members of the Expert Group.

## Background

Globalization has specific implications for competition law and policy. The mounting cross-border fluidity of economic activity has been reflected in the growing number of competition law cases with an international dimension. The fact that individual commercial transactions or conduct may be subject to overlapping scrutiny by competition agencies in multiple jurisdictions, sometimes with conflicting results, imply a need for examination of the possibilities for greater coordination of enforcement standards and remedies in competition law cases with transnational effects.

Supranational trade frameworks have, in the past, provided an effective conduit to facilitate the growth of cross-border trade flows. In many instances, however, these frameworks still entail gaps, flexibilities, and second best approaches to trade regulation (and its enforcement) that allow for a certain degree of protectionism to resume. It is thus crucial to work on those areas of trade regulation where gaps persist. In the context of a slow post-crisis global economic recovery, renewed attempts to exploit the imperfections of the international trade regime may be expected and it will be important for policy-makers to consider competition principles (market efficiency and consumer interest) in policy design and implementation.

Moreover, state-owned enterprises (SOEs) have emerged as a new influential player on the international scene. Like many non-state-owned companies, SOEs have also grown beyond national borders and expanded their activities globally. The increasing presence of public enterprises in the world economy presents particular challenges for competition, trade, and investment policies. The establishment of a level playing field between SOEs and private businesses is a core challenge for international trade and investment policy in the 21<sup>st</sup> century. A key dimension of the framework to be developed will involve ensuring the full application of national competition laws to SOEs that compete with non-state-owned actors except as specifically justified by narrowly defined criteria.

Given the recent evolution of the global economic landscape it has become increasingly important that the competition and trade policy communities enter into a constructive strategic dialogue to ensure that anticompetitive and trade restrictive measures do not negate the growth and efficiency gains of the past decades. In order to realize the full potential of a globalized economy in promoting sustainable growth and development, a re-evaluation of the current interaction between the domains of trade and competition policy is warranted.

## Policy Options

The paper puts forward a set of proposals aiming to facilitate the use of competition law and enforcement to better harness the benefits brought about by trade liberalization.

First, to prevent that these benefits be negated by increasingly sophisticated anticompetitive practices and arrangements with an international dimension, a re-examination of the application and design of competition policy itself may be required. The paper explores reforms that should be undertaken in the competition policy community to decrease the risk of inconsistent, inappropriate, or abusive use and enforcement of competition policy that could have negative impacts on trade and investment flows. Four measures are proposed to incrementally optimize the international competition ecosystem: multidimensional awareness-raising; enhanced coordination and collaboration at the supranational level; the introduction of an international dispute resolution and appeals mechanism in the context of bilateral and regional free trade agreements (FTAs); and the promotion of convergence in competition regimes through enhanced peer reviews.

Second, the paper examines the importance of competition policy considerations in the adoption and assessment of trade rules and measures. It suggests that renewed attention directed at the interface with international trade policy is necessary. And, rather than focus on preventing anticompetitive measures that may undermine the trade agenda, the positive role the competition policy community can play in optimizing current international trade frameworks should be enhanced. To this end, it elaborates on how competition law could be used to counterbalance the negative influence of domestic interest groups on the trade and investment policies of their governments. Two essential dimensions of this strengthening of the role of competition policy are put forward: greater empowerment and engagement of national competition agencies in the decision-making and implementation of existing flexibilities in trade rules; and an assessment of the current regulatory framework for state-owned enterprises with the elaboration of key principles and rules on competitive neutrality.

Third, recommendations are put forward for harnessing the power of FTAs and dispersing more widely the most useful and innovative approaches to the interface between trade and competition policy. In addition to fostering further cooperation and convergence in enforcement matters, future or presently negotiated trade and investment arrangements could act as a vehicle for incremental harmonization of competition laws and practices in the absence of an international agreement on these issues. Particular attention is paid to approaches reflected in the recently concluded Trans-Pacific Partnership Agreement. In addition, the development of a model competition chapter, developed by the ICN with technical advice provided by the OECD and UNCTAD, for inclusion in FTAs would greatly facilitate the process of formally strengthening the interface between trade and competition policy.

## Next Steps

It is advisable that competition authorities strategically prioritize the implementation of the proposals outlined in the paper. Given their limited resources, they should place particular emphasis on choosing those options that maximize the impact of their interventions and help enhance the effectiveness and efficiency of their actions.

The efforts to be undertaken in the international competition policy arena should build on the very important work already being conducted on related issues by organizations such as the ICN, OECD and UNCTAD. A practical and incremental approach to the optimization of competition law and policy vis-à-vis the global trading system is envisioned. The willing participation of leading competition agencies and other advocates of progressive competition policy is vital. In this way, it is believed that the framework to emerge would make an essential contribution to a more inclusive and balanced globalization underpinning world prosperity and development in the decades to come.

# 1. Introduction

The world economy today faces an imposing array of challenges—challenges differing, in many ways, from those that shaped the prevailing architecture of the global trading system. Globalization has become a reality, as manifested by ever-larger flows of transnational trade and investment. Digital communication networks that span the world underpin global trade and investment. And, increasingly, participation in global value chains (GVCs) has become a fulcrum of success for businesses in developing, emerging, and developed economies alike.

At the same time, the latest available figures reflect downward corrections of trade growth forecasts. Economists suggest that this may be due not only to the lingering effects of the 2008 financial and economic crisis, but also to structural changes that have resulted in lower elasticity of trade with respect to general economic growth.<sup>1</sup> In this context, some key questions underlying this paper are the following: what can be done to renew sustained growth in world trade and to enhance the contribution of trade to economic growth and prosperity? Is the policy and institutional framework for the global economy incomplete?

Without denying that the answers to these questions may be complex and multifold, this paper starts from the premise that, to date, the institutional and policy infrastructure to support and ensure the success and inclusiveness of a truly global economy is incomplete. Traditional trade barriers (tariffs and quotas) have been substantially reduced through the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO), and the WTO's Dispute Settlement Understanding has established a robust mechanism for resolving many types of transnational trade conflicts that previously could fester indefinitely. Bilateral/regional trade agreements—including, most recently, the Trans-Pacific Partnership (TPP)—and a plethora of bilateral investment treaties have promoted further liberalization and have charted pathways that the global economy and multilateral institutions could eventually follow. Plurilateral liberalization efforts relating to issues and sectors such as government procurement and information technology are gathering steam. Yet, sustained efforts to implement enforceable multilateral frameworks for investment and competition policy covering more than select groups of individual economies have foundered, and currently are not being actively pursued in relevant institutions. Many national

economies have yet to recover their pre-crisis dynamism, and the possibility of renewed protectionism cannot be ruled out. At the very least, renewed efforts are needed to ensure market openness and inclusivity that will benefit all members of the global community.

Competition policy, comprising both competition (antitrust) law enforcement and competition advocacy work, is a central element of the necessary framework for inclusive liberalization and growth.<sup>2</sup> Competition enforcement provides an essential tool for countering cartels, abuses of a dominant position, and anticompetitive mergers that otherwise undermine the purchasing power of citizens, block competitive opportunities on the merits, and impede development. It is key to ensuring that state-owned or mandated enterprises operate in ways that promote welfare globally and do not place non-state affiliated enterprises at an unfair disadvantage. Finally, as will be elaborated in this paper, competition policy and competition analysis are essential to ensure that international trade and global value chains operate in ways that are inclusive and open with respect to participation by all competitive suppliers.

Despite very significant efforts aimed at promoting international cooperation in competition law enforcement, especially during the past two decades, competition policy, which initially emerged as a national (domestic) economic policy, is as yet only partially adapted to the scope, reach, and challenges associated with today's globalized economy. Jurisdictional gaps relating to practices such as export cartels remain to be filled. Additionally, while there has been a proliferation of competition laws across the developing world during the past fifteen years—to the extent that more than 120 WTO member governments now implement such laws—the strength of competition policy institutions is far from even across countries. And, while much useful work has been done by organizations such as the International Competition Network (ICN), the Organisation for Economic Co-operation and Development (OECD), and United Nations Conference on Trade and Development (UNCTAD) to promote international cooperation and the voluntary adoption of sound enforcement practices at the national level, the world today lacks binding mechanisms to ensure transparent and non-discriminatory application of competition law by all countries. In the absence of such mechanisms, there is a risk that competition

<sup>1</sup> For a useful summary, see for example Rajadhyaksha (2015).

<sup>2</sup> The policy options paper produced by the E15 Task Force on Investment Policy provides in-depth analysis and recommendations concerning the governance of international investment. The paper can be referred to in the present series.



law enforcement can itself be employed as a tool of discrimination or market exclusion, contrary to the values it is intended to promote.

The present policy options paper explores and outlines proposals to address these challenges. It builds on formal and informal discussions that took place over a one-year period in the E15 Expert Group on Competition Policy and the Trade System, jointly convened by ICTSD and the World Economic Forum with the support of Bruegel, as well as on an overview paper and think pieces that were authored by members of the Group.<sup>3</sup> The policy options paper recognizes that the work to be done in the international competition policy arena can and should build on the important efforts already being undertaken on related issues by organizations such as the ICN, the OECD, and UNCTAD. Moreover, not all elements needed to optimize the current international competition policy landscape will necessarily be developed in a particular sequence. A practical and incremental approach to the optimization of competition law and policy vis-à-vis the global trading system is envisioned. The willing participation of national competition authorities and other advocates in the refining of relevant proposals is essential. It is only through such an inclusive and open-ended approach that a global competition policy framework appropriate to the needs and challenges of today's economy can be developed.

<sup>3</sup> The papers commissioned for the E15 Expert Group on Competition Policy are all referenced below.

# 2. A Trade and Competition Agenda for the Global Economy: Scoping the Need

## 2.1. A Truly Globalized Economy

Today, companies and policy-makers alike find themselves in a truly global economy. Trade flows have grown in an unprecedented way alongside a sharp increase in foreign investment. Since the 1990s, world merchandise trade has risen more than 500%. According to OECD (2014) estimates, total foreign direct investment (FDI) expanded more than four times between 1990 and 2012.

The expansion of trade and investment flows demonstrates that countries around the world have embraced trade liberalization, opening up their borders to foreign competitors—albeit to different degrees. Barriers to trade and foreign investment have declined in developed and developing economies alike. A large number of companies have embraced GVCs as their core mode of product and service delivery. This has facilitated a process of production which is unbundled into different steps located across various countries, intensifying the interconnection of national economies and rendering ineffective certain traditional approaches to the regulation of markets.

According to the OECD, the top 300 global companies—with sales over US\$1 billion—have 51% of component manufacturing, 47% of final assembly, 46% of warehousing, 43% of customer service, and 39% of product development taking place outside of their home country. Multinational enterprises (MNEs) have become global players and in their search for the best possible conditions, they have distributed their production and distribution activities worldwide (Eden 2015). In that process, small and medium-sized enterprises (SMEs) all over the world have integrated into global chains when serving MNEs as suppliers, distributors, and retailers, and are now important competitors at a global level.

Globalization of the world economy has resulted in enhanced competition and significant improvements in consumer welfare across many countries. Growing trade flows have imposed competitive pressures on domestic product and service markets in most developed and emerging economies, resulting in lower prices, to the benefit of local consumers, and the stimulation of efficiency and innovation among local enterprises.<sup>4</sup> Still, globalization has not negated the need for governance mechanisms to ensure market openness and address market failures, including those resulting from anticompetitive conduct.

Indeed, globalization has specific implications for competition law and policy.<sup>5</sup> The mounting cross-border fluidity of economic activity has been reflected in the growing number of competition law cases with an international dimension. In the recent past, over 90% of fines secured by the US competition enforcement authorities in relation to cartels have concerned arrangements that are international in scope. Similarly, in the European Union, the number of antitrust cases involving a participant from outside of the Union has grown by more than 450% since 1990. Simultaneously, the number of mergers and acquisitions entailing a cross-border dimension has increased by about 250-350% (Capobianco et al. 2015). These developments, and the fact that individual commercial transactions or conduct may be subject to overlapping scrutiny by competition agencies in multiple jurisdictions, sometimes with conflicting results, imply a need for examination of the possibilities for greater coordination of enforcement standards and remedies in competition law cases with transnational effects.

<sup>4</sup> There are different approaches to innovation. From the competition perspective, there is evidence that greater competition can drive innovation and enhance productivity. The protection of intellectual property is another mechanism to promote innovation. For further development on this approach, the tensions and similarities that might exist between intellectual property and competition, see Santa Cruz Scantlebury and Trivelli (2015).

<sup>5</sup> Competition law, in particular, provides a vital safeguard against anticompetitive arrangements and practices such as cartels, abuses of dominant position and mergers that limit competition and thereby reduce economic welfare in developed and developing economies alike. The broader term “competition policy” encompasses, in addition to competition law, other measures that governments take to promote healthy competition in markets. These include pro-competitive regulatory regimes governing essential facilities and “competition advocacy” work by competition agencies aimed at removing unnecessary structural or regulatory barriers to competition.

## 2.2. The Lingering Effects of the Economic Crisis

The global economic crisis has had a profound impact on the trade, economic, and policy environment firms operate in today. We have already noted a sharp cyclical decline in trade. Recent trade data show that international trade flows are recovering from the crisis, albeit more slowly than many would desire. An October 2015 update to the Financial Times/Brookings Institute TIGER (Tracking Indexes for the Global Economic Recovery) reports as follows. “The world economy is beset by a dangerous combination of divergent growth patterns, deficient demand, and deflationary risks. While growth prospects for the advanced economies have improved, emerging market economies are now leading the world economy into a slump” (Prasad and Foda 2015). The latest figures indicate that trade growth is expected to reach only about half of its pre-crisis levels in 2015, and, as indicated in introduction, economists suggest that this may partly be due to more structural changes that have resulted in lower elasticity of trade with respect to general economic growth.

The slow and unequal recovery from the crisis, especially combined with the lower elasticity of trade, has heightened the importance of the global frameworks for trade, investment, and competition. On the one hand, it will be crucial for countries to adopt necessary trade policy measures in order for trade to reach higher growth levels, as trade would assuredly serve to promote renewed economic growth for many countries and businesses worldwide. This may well, and should, include investment and competition frameworks. Current supranational trade frameworks have, in the past, provided an effective conduit to facilitate the growth of cross-border trade flows. On the other hand, in many instances, these frameworks and associated regulations still entail gaps, flexibilities, and second best approaches to trade regulation (and its enforcement) that allow for a certain degree of protectionism to resume and prevent trade flows from reaching maximum levels. Research has shown that existing trade rules have not fully prevented WTO members from taking trade-protectionist measures as a reaction to the economic crisis (Aggarwal and Evenett 2014).

It will thus be crucial to work on those areas of trade regulation where gaps, flexibilities, and second best approaches persist. Indeed, in the context of a slow post-crisis global economic recovery as well as heightened geopolitical tensions, renewed attempts to exploit the imperfections of the international trade regime may be expected.

A further issue of concern is that when making such policy decisions with a profound impact on international trade and investment, governments tend not to consider competition principles in the evaluation of their decisions and the impact these might have. In other words, market efficiency and consumer interest are not part of the evaluation that authorities usually consider. Among the areas where protectionist actions may be taken without regard to competition policy considerations—facilitated by

flexibilities in the international trading system—are the use of sanitary and phytosanitary (SPS) standards and technical barriers to trade (TBTs); FDI restrictions; barriers to external competitors in government procurement; anticompetitive services regulation; trade defence mechanisms; and the use of margins between applied and bound tariffs. These may therefore be important areas to look at in order to ensure sustainable trade growth.

## 2.3. The Role of State-Owned Enterprises in the Global Economy

State-owned enterprises have been part of the landscape of a number of nations for many years. Only recently have nations come to understand that these enterprises, with their many inherited privileges, are blocking competition and harming their own markets (Fox and Healey 2014). In recent years, state-owned enterprises (SOEs) have emerged as a new influential player on the international scene to be reckoned with. Like many non-state-owned companies, SOEs have also grown beyond national borders and expanded their activities globally. Currently, the value of their sales represents about 19% of the value of global flows of goods and services (Kowalski et al. 2013). According to the OECD, 14% of the largest companies in the world are SOEs distributed across 37 countries. China, India, Russia, the United Arab Emirates, and Malaysia are the countries where the largest SOEs continue to be located.

Additionally, it is noteworthy that many SOEs are involved in the provision of services or in extractive industries and are found in strategic sectors such as telecommunications, financial services, and public utilities. For example, SOEs operating in the sectors of land transport, transport via pipelines, and air transport generate 21% of world services trade (OECD Secretariat 2015). In the manufacturing sectors, SOEs account for more than 60% of world merchandise trade.

The increasing presence of public enterprises in the world economy presents particular challenges for competition, trade, and investment policies. Private businesses, and even public companies from third countries, often experience an uneven playing field given the advantages that domestic SOEs may have in tax treatment, financing, and regulatory application (Capobianco and Christiansen 2011). This discrimination disadvantages meritorious competition, creates market uncertainty, and can adversely affect international flows of trade and investment.

Furthermore, SOEs may have greater ability and/or incentives than private businesses to engage in anticompetitive conduct, as they usually have an important market share, allowing them to behave abusively or more easily engage in anticompetitive mergers and acquisitions. In addition, in many jurisdictions they enjoy competition-law exceptions that further distort the ability of domestic and international firms to effectively compete with these enterprises on their domestic and, increasingly, international markets. As such, the establishment of a level playing field between SOEs and private businesses is a core

challenge for international trade and investment policy in the 21<sup>st</sup> century.<sup>6</sup> A key dimension of the framework to be developed will involve ensuring the full application of national competition laws to SOEs that compete with non-state-owned actors except as specifically justified by narrowly defined criteria.

#### **2.4. Trade and Competition Policies as Vehicles of Inclusive Globalization**

Given the recent evolution of the global economic landscape it has become increasingly important that the competition and trade policy communities enter into a constructive strategic dialogue to ensure that anticompetitive and trade restrictive measures do not negate the growth and efficiency gains of the past decades. At the same time, it is crucial that the expertise gained by the competition policy community in many countries over the past decade or so contributes even more powerfully to sustainable trade growth. It is imperative that the benefits of globalization and profound technological change are not inappropriately captured by narrow economic interests but shared as inclusively as possible. An inclusive globalization is one where competitive markets spread the benefits across all stakeholders in developed and emerging countries alike. Competition policy is the tool designed to achieve this goal.

In order to realize the full potential of a globalized economy in promoting sustainable growth, development, and broad-based advances in welfare, a re-evaluation of the current interaction between the domains of trade and competition policy is warranted. In the following section, the paper puts forward a set of proposals aiming to facilitate the use of competition law and enforcement to better harness the benefits brought about by trade liberalization.

First, to prevent that these benefits be negated by increasingly sophisticated anticompetitive practices and arrangements with an international dimension, a re-examination of the application and design of competition policy itself may be required. The paper will explore reforms that should be undertaken in the competition policy community to decrease the risk of inconsistent, inappropriate, or abusive use and enforcement of competition policy that could have negative impacts on trade and investment flows. Four related measures are proposed to incrementally optimize the international competition ecosystem: multidimensional awareness-raising; enhanced coordination and collaboration at the supranational level; the introduction of an international dispute resolution and appeals mechanism—when countries and national competition authorities are ready in the context of bilateral and regional free trade agreements (FTAs); and the promotion of convergence in competition regimes through enhanced peer reviews.

The paper will further examine the importance of competition policy considerations in the adoption and assessment of trade rules and measures. To this end, it will elaborate on how competition law could be used to counterbalance, with consumer interest in mind, the negative influence of domestic interest groups on the trade and investment policies of their governments. Two essential dimensions of this strengthening of the role of competition policy are put forward: greater empowerment and engagement of national competition agencies in both the decision-making and the implementation of existing flexibilities in trade rules; and the development of rules on competitive neutrality. Additionally, proposals are made for harnessing the power of FTAs and dispersing more widely the most useful and innovative approaches to the interface between trade and competition policy. Particular attention is paid to approaches reflected in the recently concluded Trans-Pacific Partnership Agreement.

<sup>6</sup> The Trans-Pacific Partnership Agreement will reportedly contain important disciplines on the role of SOEs among member countries (see discussion below).

# 3. Policy Options for a More Integrated Approach

## 3.1. Improving the International Competition Ecosystem to Reinforce the International Trade Agenda

Competition law and policy are essential elements of the global framework for addressing anticompetitive arrangements that thwart development and reduce the welfare of citizens. The importance of such law and policy is now recognized across developed and developing countries alike. Competition law, in particular, deters arrangements such as cartels, abuses of dominant position, and mergers that, left unrestrained, reduce output and raise substantially the prices of goods and services, and otherwise block competition on the merits. Much evidence shows that the harmful effects of these practices may be even greater in developing and transition economies than they are in developed economies, due to the general thinness of markets and resultant lack of consumer choice (Levenstein and Suslow 2006).

Competition law—also referred to in some jurisdictions as “antitrust”—is not the only tool that governments have at their disposal to mitigate the impact of anticompetitive practices. Many or most jurisdictions also employ pro-competitive sectoral regulatory regimes to ensure access to essential facilities. Moreover, competition agencies and other advisory bodies may undertake “advocacy” work aimed at removing unnecessary structural or regulatory barriers to competition. These additional tools—sometimes referred to under the wider rubric of “competition policy”—comprise a further dimension of the measures available to governments to ensure that markets function competitively, in the interest of citizens. As will be seen, both competition law and competition policy can be employed in ways that complement international trade policy to better ensure that globalization works to the advantage of citizens.

The number of national competition agencies has grown significantly over the past two decades, just as the economic interconnectedness of countries worldwide has risen. By 2013, the number of jurisdictions with competition law reached 127, with the number of enforcing competition authorities growing to 120 (Capobianco et al. 2015). Global value chains mean that businesses often operate across borders. Consequently, many competition cases today have an international dimension, in which multiple authorities investigate the same matter. At the same time, a harmonized multilateral framework for competition policy is lacking.

Overall, this means that the risk of inconsistency of antitrust decisions with a negative impact on trade and investment flows has also risen. The mere fact of having more competition authorities in different countries, even if they were to have identical laws and procedures, escalates the risk of inconsistent decisions. This risk has been significantly reduced by the impressive and growing convergence of competition laws, as well as major cooperation between national competition authorities, to which the ICN has greatly contributed. However, the potential for conflicting outcomes of two (or more) competition authorities reached in investigating the same antitrust case remains latent due to a variety of reasons. These include:

1. The objectives—or other provisions—of the laws the two authorities are enforcing differ;<sup>7</sup> or
2. The two sets of decision-makers simply come to different views on the case, even when the legal framework and the market are the same.

Such a system imposes large costs on companies and the public sector alike. Firstly, there is the additional expense involved for firms in complying with multiple parallel investigations, and for competition authorities in running them. Secondly, heterogeneity of competition laws potentially creates significant costs, either from complexity, as businesses must adopt different practices in different jurisdictions, or from spillovers when businesses adopt practices globally in response to concerns from only one jurisdiction. Finally, businesses will seek to avoid competition enforcement actions. In a world with many competition authorities they might tailor their activities to comply with the most restrictive regime.

Costs could emerge even if all jurisdictions are applying the same principles, or even the same procedures, sometimes as a simple coordination failure. However, the costs will be significantly greater if some major jurisdictions apply competition law to pursue goals other than consumer welfare, market efficiency, or are prepared to accommodate protectionist lobbying from their own businesses or governments.

Nowadays, some competition law frameworks entail goals and mandates stretching beyond unambiguous competition purposes (e.g. protection of domestic SMEs, promotion of

<sup>7</sup> It is desirable that competition laws have simple and clear competition objectives, so that authorities are more effective. This also encourages international convergence and reduces risks. When the political, economic, or institutional conditions that prevail allow only for competition laws with non-competition objectives, then these elements should be taken into account in any proposal for convergence.

specific local employment or domestic production activities, etc.). This is not limited to emerging competition law regimes. Some examples of strategic use of competition law are to be found in developed market economies (Mariniello et al. 2015). Authority decisions that are not strictly based on non-competition criteria can increase the uncertainties faced by foreign producers and affect their incentives to invest, export, and innovate (ibid). Hence, strategic use of competition policy at a national level to further competition-unrelated national goals can significantly impair trade and investment flows, compromising the economic growth potential in the country in question (Neven and Röller 2005).

In order to minimize the distortive effects of competition law and enforcement on trade flows, several enhancements in the competition policy related ecosystem might be required. The following section proposes specific steps to be taken to facilitate the development of a more effective competition policy ecosystem, which will reinforce the international rules-based trade agenda and its associated benefits.

### 3.1.1. Multidimensional awareness raising

The first area concerns intensified awareness raising regarding: (i) the type and impact of current anticompetitive practices; and (ii) the mutually reinforcing objectives and interconnections of the trade and competition policy agendas. Competition policy should cease to solely exist as a stand-alone island isolated from the mainland of the global political economy as it is “deeply intertwined with trade, foreign investment, free movement of goods, services and capital, the law of intellectual property, sectorial regulation, and the wide variety of proposed and actual industrial policies” (Fox 2015).

The proposed socialization should be advanced at an international, regional, as well as national level through diverse mechanisms and in a multitude of relevant fora such as the ICN, UNCTAD, OECD, and, when feasible, the WTO. For instance, when the international community is ready, work should resume in the Working Group on Trade and Competition Policy at the WTO, which is still extant and could serve (as it did in the past) as a powerful vehicle for the promulgation of competition policy principles and approaches in a multilateral setting (Anderson and Müller 2015). Such work might also point to the cost of abusive usage of competition policy that furthers non-competitive goals.

In addition, to better inform the debate among policy-makers and in academic circles, the development of an independent data and information platform to collect, organize, and disseminate information about government and private actions that affect the well-functioning of markets with an international dimension would be of essence.<sup>8</sup> Such a platform could also empower civil society, the media, and other relevant stakeholders by providing them with data and analyses, enabling them to scrutinize the decisions of national and international authorities and businesses.

In order to fill the current void and need for the neutral and systematic provision of competition-related data of international relevance, the main database underpinning such a platform would contain documentation of actions including:

- Competition law enforcement cases that discriminate against foreign firms;
- Proposals or decisions in trade policies and trade laws, specifically anti-dumping and safeguards, that not only affect competition but can induce anticompetitive practices like cartelization or abuse of dominance;
- Government decisions that affect competitive neutrality principles, specifically in relation to regulations that benefit SOEs;
- Decisions that affect competition such as discriminatory subsidies, industrial policies, and tax exemptions;
- Abuse of buying power in international supply chains; and
- Changes in national competition laws that intentionally handicap foreign firms.

This multidimensional awareness raising would be an important step in preparing further work suggested in this paper, and the related platform would serve as a source of information for policy-makers and interested stakeholders to engender further thinking.

The above list is indicative and could be enriched with reference to additional developments and actions. The database should be publically available on a dedicated website. The website would include a search engine that could organize information in a way that is efficiently and simply interpreted by interested parties.

### 3.1.2. Enhanced competition policy coordination and collaboration at the international level

Second, a globalized economy driven by international and deeply interconnected commercial activities requires an effective, coordinated, and collaborative approach not only to trade and investment but also to competition policy. International cooperation and coordination in the field of competition policy have never been more important than today, as competition agencies increasingly review multi-jurisdictional mergers and investigate conduct that spills across borders. The most complete way to minimize inconsistency in competition decisions in a multi-jurisdictional world would be to have one global supranational authority applying one competition law—a proposal that can only be deemed unrealistic in today’s world. Even if there were global political will, the implementation of this proposal would take a long time. Nevertheless, to at least reduce the risk and cost of potentially inconsistent antitrust decisions and to increase the benefits brought about by the opening of international

<sup>8</sup> This section is based on a proposal put forward by Simon Evenett for the E15 Expert Group on Competition Policy and the Trade System.

markets, a more realistic and practical method to improve coordination mechanisms among competition authorities can and should be considered. This would mean adopting an incremental approach, mainly using the institutional structures and instruments that already exist to optimize cooperation and collaboration step by step.

*Step 1: Stronger recognition of the need for an enhanced, sustained, and consolidated approach to informal international interactions*

When the decisions of authorities are divergent and create significant costs, the first step to address this situation would be to take advantage of and reinforce a process that started a few years ago and has proved to be an effective way to improve coordination and communication among competition authorities: i.e. networking and informal interactions among authorities in a broad range of international fora. In the recent past, competition authorities have benefited from collective cross-fertilization through networking activities in organizations like the ICN, OECD, UNCTAD, and regional competition fora. More concretely, among the different fora, the ICN is truly global, informal, and efficient in nature. The OECD Competition Committee is technically sophisticated regarding concrete experience and knowledge. And UNCTAD is the most efficient middleman between technical assistance donors and the youngest competition agencies that are most in need of improving their technical staff, investigation methodologies, and procedures. It is also a voice for developing countries.

In the past, informal cooperation has been extremely useful for competition authorities in identifying enforcement issues of mutual interest, leading to better understanding and sharing of knowledge on the elements of cases (e.g. market definitions, assessment of competitive effects, and the evaluation of other relevant factors such as efficiency claims, entry, etc.). Using informal channels has been less costly and bureaucratic than formal instruments, and therefore quicker and, in some cases, more efficient than formal arrangements. For instance, in merger review, informal cooperation has helped to standardize analytical criteria (for example in relevant market definitions), understand the procedural phases of other jurisdictions, and coordinate timing of the review. This type of cooperation has also been important to gauge possible effects of a competition authority decision in other jurisdictions.

In addition, trust is essential for effective cooperation. The importance of informal frameworks lies in the fact that they have led to greater trust and have further bred subsequent cooperation and overall convergence in competition law enforcement. The variety of international meetings where members of competition authorities regularly assemble are good opportunities to get to know each other and build relationships of trust that facilitate coordination and efficient communication. Different international organizations and regional networks have contributed to the policy dialogue, by providing platforms for agency staff and heads to get to know one another at conferences and workshops.

The ICN, for example, organizes annual meetings and periodic workshops on specific enforcement and policy topics—including mergers, unilateral conduct, cartels, advocacy, and agency effectiveness. The OECD Competition Committee—its working parties, international forums, and regional centres—holds meetings throughout the year with senior competition officials from over 50 countries to discuss key issues, as well as a Global Forum with almost 100 jurisdictions. Regional networks, such as the European Competition Network or the European, Asian, and Latin American regional centres for competition, hold other meetings. This possibility for case handlers and heads of agencies to contact their international counterparts has been instrumental for effective cooperation and coordination in multi-jurisdictional cases and for improving the quality of their analysis and the alignment of their decisions with international best practices.

Such informal interactions and cooperative efforts should be supported and further synergies explored wherever possible. Moreover, informal international gatherings could serve to further coordinate and galvanize support for the development and implementation of the most effective competition practices and laws.

As discussed above, not all countries have been able to effectively integrate best practices into their legal frameworks. Competition agencies, not limited to developing countries, have encountered difficulties in advocating and implementing changes in their respective competition regimes. More work needs to be done among competition authorities to assess strategies of successful advocacy so that competition policy in these jurisdictions can move closer to international standards of best practice.

To address this concern, it is proposed to build a strategy sustained on three elements, using the aforementioned informal interactions and cooperative efforts and exploring their synergies to promote an appropriate implementation of best practices.

- First, the ICN harnesses OECD's technical capacities and its own networking capabilities to develop and strengthen recommendations and best practices in those areas that need further development.<sup>9</sup>
- Second, the ICN develops a “model” advocacy strategy aimed at assisting competition agencies, principally young authorities, to persuade lawmakers to change the existing legal frameworks as necessary to comply with best practices.<sup>10</sup> This would facilitate advocating with legislatures and other policy-makers for the amendment of competition regimes.
- Third, the ICN, drawing on the comparative advantages of UNCTAD, provides technical assistance and capacity building to competition jurisdictions to implement internationally recommended practices. The ICN and UNCTAD would collaborate in designing a worldwide strategy to consolidate these efforts in implementing recommended practices. An evaluation of the results could be presented during the ICN's annual meetings.

<sup>9</sup> Most of the recommended practices developed to date and implemented in current competition regimes are concentrated in merger reviews.

<sup>10</sup> It is clearly understood that political realities are different in every country, and as a consequence specific strategies will be different. The “model” advocacy strategy which is proposed will set out major lines and guiding principles based on positive experiences from other jurisdictions. Each authority shall define the specific actions in accordance with their own circumstances and level of development.

## *Step 2: Strengthening voluntary international joint investigation and decision-making on multi-jurisdictional mergers*

As a second step, international cooperation and coordination initiatives could focus on multi-jurisdictional mergers as the most important source of potentially conflicting decisions taken by competition authorities. While the extension of true supranational decision-making beyond some existing regional bodies is not likely in the short term, some of the more experienced competition agencies could work together more effectively by voluntarily collaborating in joint investigation and enforcement.

To advance such joint investigation and enforcement in practical terms, a single coordinating authority for the merger investigation in question could be nominated. The role of this authority would be limited to the collection of information and coordinating activities among investigating authorities in the jurisdictions of relevance to the international merger. In this case, the coordinator could mainly play a procedural role, undertaking those activities that would otherwise be duplicated between independently investigating authorities. Alternatively, the coordinating authority could take on more leadership in the case, for example by undertaking analysis of common effects. Under no circumstances, however, should this limit the ability of national competition authorities to take action on their own behalf if they so choose.

Additionally, the ICN could provide a forum for the identification of a coordinator or a lead authority in such multi-jurisdictional cases, perhaps on the basis of where the merging parties have the largest turnover. This mechanism of practical coordination could also be applied for international cartel and unilateral conduct cases that have multi-jurisdictional effects.<sup>11</sup>

A useful complement to such a system of international cooperation in enforcement would be domestic legislation allowing for recognition of foreign competition decisions. At present, competition agencies can and do cite the decisions of their counterparts as relevant evidence in support of their decisions. However, there is no explicit recognition provided in law. This could be useful, especially if a lead agency is carrying out some of the analysis. For example, a competition authority might want to be able to adopt the market definition assessed by another competition authority, subject only to checks that the market conditions in the two jurisdictions are sufficiently similar. Legislation could explicitly state that decisions of foreign competition authorities can be taken into account as relevant evidence in assessing both the substance of a given case and in determining the resources to be devoted to the investigation.

These or similar approaches could help reduce the economic costs of the lack of coordination among competition authorities. Still, it is important to recognize that all sources of inconsistencies cannot be completely eliminated, especially those originated through competition laws whose mandate is not limited to the evaluation of competition effects.<sup>12</sup> Indeed, any such approach, at least initially, would probably be limited to a group of more experienced competition authorities that share similar mandates and trust one another's reputation for analysis and procedural rigour.

### 3.1.3. Working towards bilateral or regional dispute resolution and appeal mechanisms

As a third issue, in discussing the links between trade and competition, it would be natural to consider whether countries negotiating FTAs (bilaterally or regionally) could evaluate whether dispute settlement mechanisms of any sort can be applied to cases where divergence of competition policies in different countries or competition decisions on international matters impose economic costs—either because of inconsistencies between national laws or decision-makers taking different views on a case, even when the legal framework and the market are the same. A truly multilateral dispute resolution mechanism might not be feasible in the medium term. However, the inclusion of such mechanisms in bilateral and regional FTAs could present an opportunity to experiment and then further explore multilaterally. To date, competition policy related provisions in FTAs have largely been exempt from the dispute settlement mechanism of these regional agreements. However, exploratory work towards the introduction of such mechanisms can still be considered, and dispute resolution mechanisms may also be furthered in the future through new emerging FTAs.<sup>13</sup>

Two kinds of dispute settlement mechanisms could be envisaged: (i) state-to-state dispute settlement mechanisms modelled on existing mechanisms established through FTAs for other areas of trade policy; and (ii) mechanisms allowing private companies concerned by individual decisions to seek redress at the international level. These would fulfil different functions and consequently be subject to different rules and limitations.

Further to the above, any state-to-state dispute mechanism would have to relate to challenges by one state against the competition policy of another state. Individual decisions by a state's competition authority would be outside the purview of such a mechanism. It would simply allow states concerned about any discriminatory provisions in another state's competition laws (or consistent practice or guidelines) to request a change in such policies if, for example, systemic discrimination against foreign businesses

<sup>11</sup> See Report of International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust (ICPAC) (2000), pp. 76-82.

<sup>12</sup> This discussion is nicely analyzed in the think piece prepared by Mariniello et al. (2015) for the Expert Group. Possible ways to address the problem of inconsistencies of law are considered in the next two subsections below.

<sup>13</sup> For greater detail and analysis, see the authoritative E15 think piece authored by Laprévote et al. (2015).



is found to exist as the outcome of a formalized dispute resolution process. Such a limited mechanism would seem appropriate as competition law is an important part of the business environment, and any emerging multilateral framework or regional rules containing principles of non-discrimination should include a means of settling disputes. At the same time, the limited purview of the envisaged mechanism would fully recognize that it is important that states should not get involved on behalf of an individual company that may be aggrieved about its specific treatment in a case, as that would potentially politicize competition law enforcement and risk losing this policy area's greatest strength—i.e. its focus on the consumer rather than balancing rival producer interests.

#### 3.1.4. Promoting convergence in competition regimes through peer reviews

Finally, since the first competition regime entered into force, nations have witnessed significant convergence in competition enforcement procedures and methodologies of analysis among antitrust agencies. The peer reviews undertaken within the frameworks of the OECD and UNCTAD contribute to achieve further convergence across the globe (Box 1).

Peer reviews are a powerful instrument to assess competition law and policy. The process is divided into two parts. The first involves an evaluation by an independent expert with advanced knowledge and experience regarding best international practices and recent developments in competition law and policy. These experts also have knowledge of the legal framework and decisions taken by a jurisdiction that has voluntarily submitted its competition law and policy for assessment. The second part consists of a peer review by an authority and a public discussion about the findings and recommendations with other competition authorities.

#### Box 1: OECD and UNCTAD Peer Reviews of Competition Laws and Policies

The OECD has conducted in-depth reviews of competition laws and policies in the following countries. Country reports have been peer reviewed before publication.

Australia	European Union	Italy	Russia
Argentina	Finland	Japan	Spain
Brazil	France	Korea	South Africa
Canada	Germany	Mexico	Sweden
Chile	Greece	Netherlands	Switzerland
Colombia	Honduras	Norway	Chinese Taipei
Czech Republic	Hungary	Panama	Turkey
Denmark	Ireland	Peru	Ukraine
El Salvador	Israel	Poland	United Kingdom

The reviews are available at: <http://www.oecd.org/daf/competition/countryreviewsofcompetitionpolicyframeworks.htm>

UNCTAD has carried out voluntary peer reviews of competition law and policy since 2005 in the following jurisdictions.

Albania	Jamaica	Philippines	Ukraine
Armenia	Kenya	Senegal	West African Economic and Monetary Union
Benin	Mongolia	Serbia	Zambia
Costa Rica	Namibia	Seychelles	Zimbabwe
Fiji & Papua New Guinea	Nicaragua	Tanzania	
Indonesia	Pakistan	Tunisia	

The reviews are available at: <http://unctad.org/en/Pages/DITC/CompetitionLaw/Voluntary-Peer-Review-of-Competition-Law-and-Policy.aspx>

Peer reviews represent a unique opportunity for competition authorities to receive feedback and engage in dialogue with international peers fully dedicated to competition law and policy. And, as it is well known, peer reviews have become a legitimate source of pressure on authorities to improve their competition policies and adopt best practices.

Voluntary peer reviews have substantially analysed and commented on existing enforcement frameworks and they have advanced sound recommendations in jurisdictions that are either considering adopting a new competition law, or are at an early stage of enforcing their laws, or are making changes to their existing regimes, all with a view to improving their legal and institutional frameworks.

It would be worth considering the introduction of peer reviews in FTAs as a mechanism to evaluate competition decisions in jurisdictions. Further, the conclusions and recommendations of such in-depth reviews should be public, even discussed in legislatures. It would also be advisable to make public the peer review process.

## 3.2. Applying Competition Policy to Optimize Current International Trade Frameworks

Recognizing the fundamental complementarity of competition law/policy and trade policy, multiple initiatives have been taken at the international level to attempt to formalize their interrelationships and better harness related synergies. Some of these initiatives, including those taken in the framework of the United Nations, the WTO, and the historic Havana Conference on Trade and Employment of the 1940s, are described in Appendix A. A common thrust of these past initiatives was to recognize the ability of anticompetitive practices and arrangements to undermine the benefits of international trade liberalization. It must be noted, however, that none of these initiatives has resulted in a binding framework that ensures the optimal application of competition policy in relation to trade and investment.<sup>14</sup>

Since the failure of the WTO Working Group on the Interaction between Trade and Competition Policy to yield agreement on specific policy proposals, international cooperation efforts have focused largely on competition policy *per se*, as opposed to the interface between trade and competition policy. Much useful work has been done by organizations such as the ICN, OECD, and UNCTAD in addition to non-governmental organizations like CUTS and the national competition authorities of leading jurisdictions.

While respecting entirely the core mission of national competition agencies to investigate and deter anticompetitive practices that harm their domestic consumers, as well as the focus of organizations like the ICN on competition policy *per se*, this paper suggests that renewed attention directed at the interface with international trade policy is also necessary. Rather than

focus on preventing anticompetitive measures that may undermine the trade agenda, the paper suggests that the positive role the competition policy community can play in optimizing current international trade frameworks should be enhanced. Such an approach would require the introduction of competition policy elements in the trade policy decision-making process, within each country, to improve the market efficiency effect and to inject greater competition.

Two particular areas of application for such an approach come to mind. First, the competition policy community could inform decision-making regarding flexibilities provided under existing trade rules. Second, competition policy could be relevant in rethinking the regulatory frameworks for SOEs in view of the limited rules on competitive neutrality embodied in current trade rules.

### 3.2.1. Competition policy and its role in the decision-making of trade measures

Regarding the first area of application—i.e. flexibilities and gaps in existing trade rules, the following matters (introduced in section 2.2) are of concern: the use of SPS standards and TBTs; FDI restrictions; barriers to external competitors in government procurement; anticompetitive services regulation; trade defence mechanisms; and the use of margins between applied and bound tariffs. At the multilateral level, the WTO dispute settlement mechanism has been designed to address the abusive or protectionist use of such instruments. Yet, resorting to the WTO dispute settlement mechanism takes place *ex post*, in other words, once the abuse has taken place (as opposed to preventing it from happening).

In adopting a more proactive *ex ante* approach, it would be advisable for each WTO member to invite its competition agency to evaluate on the basis of competition merits any decision related to anti-dumping, tariff modification, government procurement, SPS or TBT measures, FDI, and services regulation, and to emit a proposal in each case. Before the competition authority makes its proposal, it would have the obligation to consult with the parties affected by the decision—government, businesses, and consumers.

The proposal of the competition authority would be public and it would have a mandatory status. If the government were opposed to the proposal, as an ultimate option, the president or trade minister (or equivalent) would be able to veto the decision of the competition authority, with the requirement to make public the criteria and arguments on which the veto is based.

In concrete terms, this empowerment of national competition authorities at a country level could encompass the following.

<sup>14</sup> Chapter 5 of the Havana Charter, addressing the impact of anticompetitive practices on international trade, was never brought into effect. The UN Set of Principles on Competition, while a useful point of reference for countries implementing national legislation, is non-binding in nature. The work of the WTO Working Group on the Interaction between Trade and Competition Policy did not yield agreement on particular policy proposals, and in 2004 the work was formally placed on hold.

1. In the case of *tariffs*, the competition authority would have the mandate to evaluate the full cost-benefit analysis of the tariff movement from the perspective of domestic market efficiency.
2. In the area of *government procurement*, ongoing efforts to broaden the membership of the WTO Agreement on Government Procurement, coupled with the recent revision of the Agreement's text, hold the promise of broadening and deepening the extent to which this sector, traditionally closed in many countries, is exposed to competitive market forces. This can only help to achieve better value for money for governments in their infrastructure investments and the delivery of socially important goods and services. Competition agencies should encourage this trend, while calling attention to the harm caused by “buy national” measures and working with procurement officials to eradicate collusion among suppliers (Anderson and Müller 2015).
3. When it comes to *services and investment regulation*, the competition policy authority, through analysis, could evaluate the concrete welfare and market efficiency impact of the proposed regulatory changes to better inform *ex ante* national decision-making (before protective regulatory barriers are erected). Additionally, competition authorities could also provide opinions on services liberalization proposals such as the Telecommunications Reference Paper.
4. In a similar vein, in cases related to *TBT and SPS measures*, the competition authority could conduct an independent analysis of the market impact of the measures considered. It is not expected that the competition authority would substitute the technical analysis of the responsible specialized government agency. What should be expected, however, is to have an independent analysis with a balanced approach that evaluates producers, consumer interests, the market structure, as well as the market effect of the measure.<sup>15</sup>
5. As for *contingency trade measures* such as anti-dumping, the input of competition agencies could provide for an additional and more balanced assessment of the competitive effects of the conduct under examination. In this case, the competition agency should make a full evaluation of the impact of the alleged “dumping” or other behaviour, identifying the mechanisms by which any alleged harm will result from the low prices.<sup>16</sup>

The appeal of greater empowerment of national competition agencies is manifold. Firstly, such an approach cannot be perceived as a foreign imposition of legal frameworks onto national governments. (This was the perception that some developing countries had during the discussion of trade and competition in the WTO.) Secondly, the approach would represent a domestically integrated pro-market efficiency

mechanism that effectively reinforces the main objectives of the international trade agenda. Thirdly, the *a priori* application of such an approach is an advantage as it allows for avoiding the societal costs incurred in implementing distortive and protectionist measures (accompanied by decreases in consumer welfare and increases in market inefficiencies). Fourthly, the approach would allow national governments to proceed with any original decision to implement a particular measure but it would increase the costs for governments to proceed with an anticompetitive, distortive proposition. Lastly, this empowerment of national competition authorities would be easily implementable as most countries—that is over 120 jurisdictions—have competition policy agencies that would be able to play the role proposed above.

This proposal would imply an important use of resources for competition agencies. Each agency would have to make an assessment on the best use of their human and budgetary resources in terms of net benefits for society. A gradual approach to the incorporation of competition agencies in trade decision-making might be necessary.

### 3.2.2. Ensuring competitive neutrality

Maximizing the benefits of trade and investment flows in today's era characterized by a strong presence and impact of SOEs on the international scene would demand continued and enhanced promotion of a level playing field between private and state-owned companies. The creation of such a fair and pro-competitive environment should rest with competition policy authorities. These authorities should assess the current regulatory framework for SOEs in order to issue public recommendations on a relevant set of competitive neutrality principles. Increasingly, governments are bringing competition principles into the impact assessment of their measures.<sup>17</sup> Potential distortions regarding state ownership (and related forms of control) of, and subsidies to, companies involved in competitive, commercial activities could be brought consistently into this framework. Any such proposal would need to preserve the state's right to determine ownership regimes.

This could happen purely domestically, as an outcome of impact assessment policies. However, the growing concern over the international activities of SOEs creates scope for an international agreement that could define some key principles to ensure competitive neutrality both in cross-border and domestic regulation of SOEs. As Gestrin et al. (OECD Secretariat 2015) further elaborate: “in the absence of such an agreement, governments could increasingly resort to their bluntest policy instrument—denial of market access. It would therefore seem desirable to reach some form of mutual international agreement.”

The publicly released summary of the TPP Agreement (USTR 2015)—concluded in October 2015, subject to ratification by the parties—offers further insight on the way forward.

<sup>15</sup> Regarding TBTs, Santa Cruz Scantlebury and Trivelli (2015) provide analysis on the interaction between intellectual property and competition enforcement, and the use of standards as a legitimate instrument to promote consumer welfare.

<sup>16</sup> For an overview of the interface between trade defence instruments and competition policy, see Laprévotte (2015).

<sup>17</sup> Documented for example in the OECD's 2014 review of Experiences with Competition Assessment. <http://www.oecd.org/daf/competition/Comp-Assessment-ImplementationReport2014.pdf>.

### 17. State-Owned Enterprises (SOEs) and Designated Monopolies

*All TPP Parties have SOEs, which often play a role in providing public services and other activities, but TPP Parties recognize the benefit of agreeing on a framework of rules on SOEs. The SOE chapter covers large SOEs that are principally engaged in commercial activities. Parties agree to ensure that their SOEs make commercial purchases and sales on the basis of commercial considerations, except when doing so would be inconsistent with any mandate under which an SOE is operating that would require it to provide public services. They also agree to ensure that their SOEs or designated monopolies do not discriminate against the enterprises, goods, and services of other Parties. Parties agree to provide their courts with jurisdiction over commercial activities of foreign SOEs in their territory, and to ensure that administrative bodies regulating both SOEs and private companies do so in an impartial manner. TPP Parties [also] agree to not cause adverse effects to the interests of other TPP Parties in providing non-commercial assistance to SOEs, or injury to another Party's domestic industry by providing non-commercial assistance to an SOE that produces and sells goods in that other Party's territory...*

At a minimum, the importance given to the subject of SOEs and monopolies in the TPP has further highlighted the significance of these topics for future deliberations on governance in the global economy.

### 3.3. Harnessing the Power of Free Trade Agreements

The interface between competition and trade policy has been extensively developed in the context of bilateral and regional FTAs. The vast majority of FTAs concluded between WTO members now contain detailed provisions dealing with competition law and policy-related matters.<sup>18</sup>

While the core objective of an FTA is typically the elimination of discriminatory practices and artificial barriers to trade and investment, integrating competition policy principles and provisions has grown in importance. New and emerging FTAs increasingly include specific chapters and provisions on competition matters. The initial objective of incorporating these provisions in FTAs is to prevent the benefits of international trade from being diminished by anticompetitive practices. There is an additional benefit of competition, which is to avoid domestic anticompetitive behaviour that affects market efficiency in sectors that are not necessarily tradable but that do have an impact on tradable goods.

The competition provisions in FTAs range from ambiguous obligations through to deep commitments. At one end of the spectrum, there are provisions that lay out, in very broad terms, the obligation of promoting competition within the signatory parties, without further elaboration. As we

move to the other end of the spectrum, FTA obligations are more clearly defined and involve: adopting or maintaining competition laws; addressing anticompetitive practices; establishing mechanisms to facilitate and promote competition policy; considering the impact of regulation on competition; and promoting a competition culture (Laprévôt et al. 2015). These provisions can go further. They can define the design of competition regimes to be established in the signatory countries, or even determine which anticompetitive practices the signatory parties should address—i.e. anticompetitive agreements, abuses of market power, and anticompetitive mergers.

As has been noted *supra*, there may also be provisions in trade agreements on the treatment of SOEs and designated monopolies with related concerns over competitive neutrality. Accordingly, some FTAs are very stringent regarding competitive advantages provided to SOEs, while others establish that public enterprises should have equal treatment as private companies and should therefore be subject to competition laws. What is more, several FTAs now also contain provisions on positive and negative comity, in which the parties have agreed to cooperate on a reciprocal basis in implementing mechanisms for competition law enforcement. These can range from notifications and consultations of the enforcement activities, investigatory assistance, exchange of information, and enforcement coordination.

The inclusion of competition provisions in FTAs has developed in different ways, thus providing diverse legal frameworks (Laprévôt et al. 2015). For example, the approach taken in the North American Free Trade Agreement requires parties to adopt measures to deal with anticompetitive behaviour and the establishment of competition regimes within the signatory parties. Provisions on cooperation and coordination, SOEs, and designated monopolies are also included.

The EU has adopted by far the most comprehensive approach for consistent rules and the harmonized implementation of competition law, which is applied across EU member states. All members have delegated powers in merger control and antitrust to a supranational authority, the European Commission. Member state anticompetitive acts and measures with cross-border effects are included in the prohibitions. When it comes to trade in the internal market, all tariff and non-tariff barriers have been eliminated. Members of the EU enforce their national competition laws, which are harmonized, and have a model of regional coordination, the European Competition Network.

As a further important illustration, the relevance of competition policy for international trade policy is seen clearly in the framework of the TPP Agreement. The summary of chapter 16, released by the Office of the United States Trade Representative (USTR 2015), reads as follows.

<sup>18</sup> See the think piece produced by Laprévôt et al. (2015) for comprehensive analysis of this issue.

## 16. Competition Policy

*TPP Parties share an interest in ensuring a framework of fair competition in the region through rules that require TPP Parties to maintain legal regimes that prohibit anticompetitive business conduct, as well as fraudulent and deceptive commercial activities that harm consumers. TPP Parties agree to adopt or maintain national competition laws that proscribe anticompetitive business conduct and work to apply these laws to all commercial activities in their territories. To ensure that such laws are effectively implemented, TPP Parties agree to establish or maintain authorities responsible for the enforcement of national competition laws, and adopt or maintain laws or regulations that proscribe fraudulent and deceptive commercial activities that cause harm or potential harm to consumers. Parties also agree to cooperate, as appropriate, on matters of mutual interest related to competition activities. The 12 Parties agree to obligations on due process and procedural fairness, as well as private rights of action for injury caused by a violation of a Party's national competition law. In addition, TPP Parties agree to cooperate in the area of competition policy and competition law enforcement, including through notification, consultation and exchange of information. The chapter is not subject to the dispute settlement provisions of the TPP, but TPP Parties may consult on concerns related to the chapter.*

Overall, trade policy instruments have become important platforms for cooperation in competition enforcement. Nations throughout the world have paid special attention to incorporating competition provisions in FTAs and other economic integration arrangements (particularly the US and the EU), a trend that has started to facilitate the necessary cooperation and coordination between national competition authorities when enforcing competition law.

In addition to fostering further cooperation and convergence in enforcement matters, future or presently negotiated free trade and investment arrangements could act as a vehicle for incremental harmonization of competition laws and practices in the absence of an international agreement on these issues. To this end, the development of a model competition chapter for inclusion in FTAs would greatly facilitate the process.<sup>19</sup>

The first step towards the development of such a model chapter would be the identification of common areas of competition policy that could be included. The model chapter should include enforcement provisions that would be developed by the OECD and ICN, covering abuse of market power, cartels, and mergers. Existing ICN and OECD best practice documents already contain much of the necessary material. Regarding the treatment of SOEs and designated monopolies, the development of a model

text by the ICN<sup>20</sup> under the principles of transparency and non-discrimination could be the way forward.<sup>21</sup> The model chapter should include competition advocacy provisions aimed at raising awareness of the role of competition and promoting a competition culture.<sup>22</sup> The inclusion of provisions on procedural standards for competition law enforcement—such as procedural fairness, transparency, and non-discrimination—is also crucial to ensure that the decisions taken under the umbrella of FTAs are fair, reasonable, transparent, and effective.

Still, successful promotion of the adoption of a competition chapter among authorities and governments will largely depend on the incentives and potential costs of including competition provisions in an FTA. To highlight and enhance the benefits of such an adoption, it would be useful to: (i) precisely identify the key common areas of agreement in FTAs and reconcile the differences between approaches; (ii) increase awareness regarding the benefits of competition provisions in FTAs in order to reduce political costs; (iii) facilitate technical assistance to states that face difficulties in implementation; and (iv) assess the potential trade concessions that might be needed to incorporate competition clauses in FTAs.

<sup>19</sup> This section is derived substantially from Laprévotte et al. (2015).

<sup>20</sup> The ICN has already developed recommendations to assist agencies in the application of unilateral conduct rules regarding state created monopolies.

<sup>21</sup> For more in-depth analysis of the competition perspective on SOEs, see OECD Secretariat (2015).

<sup>22</sup> ICN has developed different products for competition advocacy that could inspire this section of the chapter.

# 4. Next Steps

As highlighted in the introduction to this paper, the world economy today faces a potentially daunting array of challenges. Globalization has become a reality and has lifted millions of citizens out of extreme poverty. Yet recovery from the global financial and economic crisis has been slow and may be faltering in important parts of the world. This brings a renewed threat of protectionist measures that could exploit gaps or flexibilities in the global trade system and that respond to the needs of particular national interest groups while further diminishing prospects for world trade and economic growth.

Without denying the complexity of the challenges involved in strengthening global growth, the analysis and proposals herein have attempted to scope one important dimension of the problem—i.e. the incompleteness of the institutional and policy infrastructure to ensure open markets and a dynamic and competitive global economy. This policy options paper elaborates on two broad proposals: (i) international convergence and (ii) injecting competition into international trade.

Both proposals encompass a number of dimensions and work programmes that could enhance the (already vital) contribution of competition policy to global prosperity and development. Many of these efforts would represent extensions of initiatives already being taken at the national level or in the context of new FTAs, including the recently concluded TPP Agreement. As such, while bold and ambitious in some respects, the policy options also build very concretely on practical steps that are underway as well as exploratory work already initiated in various relevant international organizations, NGOs, academic institutions, and think tanks. In summary, the options include:

- Multidimensional awareness raising concerning the role of competition policy in ensuring that market forces work to the benefit of all citizens and are not distorted by cartels and other anticompetitive practices;
- A series of practical and incremental steps aimed at enhancing cooperation and coordination in the implementation of competition policy at the international level;
- Progressive introduction of international dispute resolution and appeal mechanisms in ways that elicit the support and participation of national competition authorities;
- The promotion of convergence in competition regimes through enhanced peer reviews with a view to improving competition policies and adopting best practices;
- Enhanced engagement of national competition authorities in assessing and advising on the

implementation of trade measures that potentially restrict competition;

- The elaboration of new rules on competitive neutrality and state monopolies as tools to address the role of SOEs; and
- General efforts to broaden the application of recent innovative approaches to the trade and competition interface in regional and bilateral trade agreements. In this context, a model chapter on competition policy for FTAs could be developed by the ICN with technical advice provided by the OECD and UNCTAD. In addition, the migration of current approaches into the multilateral trading system itself could be considered at an appropriate stage. At a minimum, the WTO should presently be taking stock of related developments and generating databases of possible approaches.

It is advisable that competition authorities strategically prioritize the implementation of these proposals, within a framework of gradualness and sustainability. Given their limited resources, they should place particular emphasis on choosing those options that maximize the impact of their interventions and help enhance the effectiveness and efficiency of their actions.

The policy options paper emphasizes that the efforts to be undertaken in the international competition policy arena can and should build on the very important work already being conducted on related issues by organizations such as the ICN, OECD and UNCTAD. A practical and incremental approach to the optimization of competition law and policy vis-à-vis the global trading system is envisioned. The willing participation of leading competition agencies and other advocates of progressive competition policy is vital. In this way, it is believed that the framework to emerge would make an essential contribution to a more inclusive and balanced globalization underpinning world prosperity and development in the decades to come.

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# Appendix A: Competition Policy in the Multilateral Trading System: Historical Perspective and Developments

The competition policy agenda is not new to the multilateral trading system. Anticompetitive practices and policies to combat them have been considered in the deliberations of the international trade community since the early second half of the 20<sup>th</sup> century. From the days of the Havana Charter to the 2004 Decision on Singapore Issues, competition policy has been a core part of the discussions in the multilateral trade domain.

## The Havana Charter

In the late 1940s, trade liberalization was deemed critical for the recovery of the world economy, especially for the United States whose external policy advocated the opening of markets to rebuild the European countries following World War II. Accordingly, the United States promoted the inclusion of competition principles in the new world trade regime in an effort to address the international cartels harming trade<sup>23</sup> (reflecting its opposition to German cartels and Japanese zaibatsu).<sup>24</sup>

In this endeavour, under the auspices of the United Nations, member countries started negotiating the Havana Charter<sup>25</sup> as a first attempt to govern and set forth unified rules for international trade *and* competition. When the Charter was under negotiation, no more than 10 jurisdictions—all of them the developed countries—had a competition law to address anticompetitive practices.

In 1947, a draft of the Havana Charter called for the creation of an International Trade Organization (ITO). The scope of action of the Charter was far-reaching as its rules covered a wide range of disciplines including employment, commodity agreements, and many aspects of international trade—quantitative restrictions, subsidies, export taxes, discrimination, and tariff reduction. One chapter of the Charter titled “Restrictive Business Practices” was exclusively devoted to fair trade measures dealing with anticompetitive practices. In particular, Article 46 section 1 of the Charter provided that Members “*shall take appropriate measures and shall co-operate with the Organization to prevent, on the part of private or public commercial enterprises, 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 (...)*.”<sup>26</sup>

During the drafting of the Charter, the document deviated from the one envisioned by the US negotiators, and the Havana Charter was never ratified. However, the Charter was the first joint effort introducing pro-competition principles and rules in international trade instruments and its significance is hence not to be overlooked.

## General Agreement on Tariffs and Trade

At the same time as the Havana Charter discussions were taking place, the General Agreement on Tariffs and Trade (GATT) was under negotiation in Geneva. The GATT, which came into force in 1948, captured most of the commercial policy clauses developed under the Havana Charter, with the exception of those commitments expressly addressing the relationship between trade and competition policy.

In the following years, the GATT-powered multilateral negotiations mainly focused on the progressive reduction of trade barriers and the non-discriminatory treatment of imported goods. Still, through the introduction of (1) principles of non-discrimination in the form of the most-favoured nation and national treatments as well as (2) mechanisms to facilitate tariff bindings, the GATT had a significant impact on the competition landscape in the member states. At the time, competition law was in its infancy and an insufficient international consensus existed on competition-law-related issues.<sup>27</sup>

Nevertheless, during its existence, GATT deliberations included initiatives that attempted to incorporate international competition law. For example, at the Geneva Round of 1956, a commission of competition law experts was formed to analyse the extent to which the GATT was the appropriate forum to address competition policy issues. Additionally, the early negotiations of the Agreement on Trade Related Investment Measures (TRIMS) considered provisions on competition policy similarly to the negotiations regarding the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) which contemplated the introduction of competition policy as an important counterbalancing element to the intellectual property rights.<sup>28</sup>

<sup>23</sup> See Mehta, Pradeep Singh, and Udai S. Mehta. 2015. *Consequences of Cartelisation in Primary Commodities: Focus on Natural Rubber and Banana*. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.

<sup>24</sup> See Hoekman, Bernard M., and M. M. Kostecki. *The Political Economy of the World Trading System: The WTO and beyond*. 2nd ed. Oxford: Oxford University Press, 2001. Committeening. Through the datory Pricing,ng licy of the United States considered

<sup>25</sup> *Havana Charter for an International Trade Organization*, March 24, 1948 (United Nations Conference on Trade and Employment, Havana, Cuba); available at: [https://www.wto.org/english/docs\\_e/legal\\_e/havana\\_e.pdf](https://www.wto.org/english/docs_e/legal_e/havana_e.pdf)

<sup>26</sup> *Id.*

<sup>27</sup> See Taylor, Martyn D. 2006. *International Competition Law: A New Dimension for the WTO?* Cambridge University Press.

<sup>28</sup> See Santa Cruz Scantlebury, Maximiliano, and Pilar Trivelli. 2015. *Competition, Trade and Intellectual Property Rights*. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.



## World Trade Organization and the Singapore Issues

In 1995, the World Trade Organization (WTO) came into existence replacing the GATT. In December 1996, at the first WTO Ministerial Conference held in Singapore, the debate over the usefulness of competition law and policy in the international trade system was revived. Thus, competition policy—alongside investment, transparency in government procurement, and trade facilitation—was introduced into the agenda of the WTO.

By 1996, at least 50 jurisdictions in the world had adopted national competition laws. However, most of these jurisdictions did not have the necessary tools and capacity to address international anticompetitive practices and to reach consistent decisions with other jurisdictions when investigating international cartels or reviewing cross-border mergers.

The Singapore Ministerial Declaration marked the beginning of the discussions on the introduction of new agreements on competition policy in the WTO. In this regard, the Declaration mandated the creation of a Working Group on the Interaction between Trade and Competition as depicted in the following paragraph:<sup>29</sup>

*20. Having regard to the existing WTO provisions on matters related to investment and competition policy and the built-in agenda in these areas, including under the TRIMs Agreement, and on the understanding that the work undertaken shall not prejudice whether negotiations will be initiated in the future, we also agree to:*

*Establish a working group to examine the relationship between trade and investment; and establish a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework.*

## The Doha Round Negotiations and the Cancun Ministerial

In 2001, the Doha Ministerial Declaration returned to the discussion on the adoption of international competition rules in the trade agenda. The general approach was to use the disciplines of the multilateral trading system to promote convergence of competition law and some principles of enforcement like non-discrimination, transparency, and due process.

The Doha Declaration agreed to include competition policy in the new round of negotiations and to conclude a multilateral agreement on competition policy by 2015. In its work program, the Declaration established the specific

topics to be treated in the following years. To this end, paragraphs 23 to 25 on the interaction between trade and competition policy of the Doha Declaration point to the following (emphasis added):<sup>30</sup>

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

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

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

By the time of the Cancun Ministerial Meeting in 2003, two contrasting positions on the Singapore issues had been brought into the discussion. Most of the major developed WTO members were interested in launching the negotiations on the Singapore Issues. In turn, the developing countries needed further clarification of the issues before embarking on the concrete negotiations. The developing countries were concerned that issues which were technical, complex, and perceived as unrelated to trade could take prominence in the negotiations agenda. Their capacity to implement such rules was also put to question. The two opposite views and the lack of consensus on the treatment of the whole package of issues led to the collapse of the Cancun Ministerial Meeting.

<sup>29</sup> The text of the Singapore Ministerial Declaration is available at: [https://www.wto.org/english/thewto\\_e/minist\\_e/min96\\_e/wtodec\\_e.htm#investment\\_competition](https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm#investment_competition).

<sup>30</sup> The text of the Doha Ministerial Declaration is available at: [https://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm#interaction](https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#interaction).

August 2004 witnessed an adoption of a package in which all issues perceived as “not central” to the main trade agenda (among them competition policy) were removed from the WTO negotiations agenda at the time:

*Relationship between Trade and Investment, Interaction between Trade and Competition Policy and Transparency in Government Procurement: the Council agrees that these issues, mentioned in the Doha Ministerial Declaration in paragraphs 20-22, 23-25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round.”*

*“Trade Facilitation: taking note of the work done on trade facilitation by the Council for Trade in Goods under the mandate in paragraph 27 of the Doha Ministerial Declaration and the work carried out under the auspices of the General Council both prior to the Fifth Ministerial Conference and after its conclusion, the General Council decides by explicit consensus to commence negotiations on the basis of the modalities set out in Annex D to this document.”<sup>31</sup>*

In the aftermath of this decision, even though not abolished, the WTO Working Group on Trade and Competition Policy was designated “inactive” and has not resumed its work since then.

<sup>31</sup> Text of the “July package” available at: [https://www.wto.org/english/tratop\\_e/dda\\_e/draft\\_text\\_gc\\_dg\\_31july04\\_e.htm](https://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm).

# Appendix B: The Evolution of International Competition Policy: Key International Actors

The current competition law is defined, implemented, and enforced at a national level through national agencies and authorities. However, the emergence of abusive corporate behaviour with an international dimension prompted the creation of a set of institutions and working groups that have started exploring the international dimension of competition policy and the cooperation potential among the different national agencies. The key international actors in this domain are the International Competition Network, the OECD Competition Committee and UNCTAD.

## International Competition Network (ICN)

The ICN is a virtual network of national competition agencies with the objective to address cross-border issues of competition law and policy. Regarding the work and deliberations of the Network, its members participate in their individual capacity as competition agency heads and staff, as opposed to representing their governments.

The ICN was founded in 2001 by 15 member agencies.<sup>32</sup> Currently, the ICN includes 132 member competition agencies from 119 jurisdictions, a membership that spans the entire globe.

Since its inception, the ICN has developed a series of recommended practices which are consensus driven, non-binding policy recommendations created by and for the ICN members in order to inspire greater global convergence of the most effective practices. These practices have been formulated in the following areas: Merger Notification and Review Procedures, Merger Analysis and the Assessment of Dominance, Unilateral Conduct and Predatory Pricing, State-created Monopolies and on Competition Assessment.

The standards and recommended practices developed through the ICN platform have proved to greatly impact the development of national competition policy regimes. It has been estimated that approximately 25% of ICN members have undertaken a major legislative overhaul to align their antitrust regimes with the recommendations developed by the Network. More concretely, in countries like Brazil, Mexico, South Africa, Germany, Italy, and the EU, ICN's Recommended Practices inspired law reforms leading to significant resource savings.

In the development of its recommendations and analyses, the Network aspires to remain inclusive and cognizant of the different stages of development of the economies of its various members. In the areas where no consensus can be reached, the ICN focuses on fostering greater cooperative efforts accompanied by the so-called “informed divergence.”

Here, the ICN aims to identify the nature and sources of the apparent divergence, particularly by producing comparative reports. A broader dialogue on informed divergence then facilitates a consensus-building process for some of the more challenging issues.

The key element of the ICN's day-to-day work, however, is cooperation. While the ICN is not a forum for a case specific cooperation, the Network does explore overarching mechanisms for agency cooperation and interoperability to make competition systems more compatible. Currently, the ICN has a recommended practice on interagency coordination for merger reviews and is examining current practices regarding inter-agency cooperation in cartel matters.

## Organization for Economic Co-operation and Development (OECD)

From its very beginning in 1961, the OECD has addressed competition issues. After discussion in its Competition Committee, associated Working Parties<sup>33</sup> and Global Forum, the political decision-making body of OECD, the OECD Council, has issued Recommendations on Competition Law and Policy. The recommendations cover a wide variety of areas such as regulated sectors, hard core cartels and exchange of information, merger review, competition assessment, bid rigging, and international cooperation on competition law enforcement. OECD Council Recommendations are expected to be fully implemented by its member states as well as adhering non-member countries.

Still, particular attention might be merited in the case of the 2014 update of the 1995 Recommendation of the Council Concerning Co-operation between Member Countries on Anti-Competitive Practices affecting International Trade. It establishes a cooperation framework between competition authorities of the OECD members and adhering non-member countries<sup>34</sup> regarding the notification of cases and consultation related to the enforcement of competition laws. It also commits the OECD's Competition Committee to explore new avenues of international cooperation, including model agreements, and enhanced cooperation tools to avoid inconsistencies and costs created by multiple parallel investigations.

<sup>32</sup> Australia, Canada, European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, United Kingdom, United States (with two competition authorities), and Zambia.

<sup>33</sup> Working Party No. 2 on Competition and Regulation and Working Party No. 3 on Cooperation and Enforcement.

<sup>34</sup> Adhering non-member countries include Brazil, Colombia, Costa Rica, Latvia, Lithuania, Romania, and Russia.

## United Nations Conference on Trade and Development (UNCTAD)

A decade after its establishment in 1964 with the aim to assist the developing countries in implementing relevant economic policy, UNCTAD developed a set of proposals related to harmful business practices. The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of the Restrictive Business Practices on International Trade (otherwise also known as the UN Set) adopted on consensus in 1980<sup>35</sup> recognized that restrictive business practices limit access to markets and have an adverse effect on trade, particularly in the developing countries. The UN Set was not binding, but by being aspirational, these principles and rules laid the foundation for further international cooperation on competition issues.<sup>36</sup> In July 2015, the UN Set on Competition Policy was reviewed by more than 350 competition specialists from 70 countries.

In addition to the UN Set, UNCTAD has developed a Model Law which has guided developing countries in their drafting and adoption of national competition laws. The Model Law, which is periodically reviewed, establishes standards that encourage a high level of convergence on general principles and best practices when enforcing national competition laws. It also provides for cooperation when countries implement legislation against transnational restrictive business practices. The latest Model Law was reviewed in 2010.

<sup>35</sup> The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Conference on Restrictive Business Practices, U.N. Doc. TD/RBP/Conf/10/Rev.2 (Apr. 22, 1980)

<sup>36</sup> See Hollmann, Hugh M., and William E. Kovacic. 2011. "The International Competition Network: Its Past, Current and Future Role." *Minnesota Journal of Int'l Law* 20(2).

# Annex 1: Summary Table of Main Policy Options

Policy Option	The Current Situation	What Needs to Change
<b>Improving the international competition ecosystem to reinforce the international trade agenda</b>		
<b>1. Intensify multidimensional awareness raising regarding: (i) the type and impact of current anticompetitive practices; and (ii) the mutually reinforcing objectives and interconnections of the trade and competition policy agendas.</b>	<p>The number of national competition agencies has grown significantly over the past two decades, as the economic interconnectedness of countries worldwide has risen.</p>	<p>Awareness on the interface between competition and trade policy should be advanced at an international, regional, and national level and in a relevant fora such as the ICN, UNCTAD, OECD, and (when feasible) the WTO.</p>
	<p>Global value chains mean that businesses often operate across borders. Many competition cases today have an international dimension, in which multiple authorities investigate the same matter. This means that the risk of inconsistency of antitrust decisions with a negative impact on trade and investment flows has also risen.</p> <p>There is a risk that competition law can be employed as a tool of discrimination or market exclusion.</p> <p>In order to minimize the distortive effects of competition law and enforcement on trade flows, several enhancements in the competition policy related ecosystem are required.</p>	<p>To better inform the debate among policy-makers and in academic circles, develop an independent data and information platform to collect, organize, and disseminate information about government and private actions that affect the well functioning of markets with an international dimension.</p> <p>Such a platform could also empower civil society, the media, and other relevant stakeholders by providing them with data and analyses, enabling them to scrutinize the decisions of national and international authorities and businesses.</p>
<b>2. Enhance competition policy coordination and collaboration at the international level.</b>	<p>International cooperation/coordination in competition policy has become ever more important, as competition agencies increasingly review multi-jurisdictional mergers and investigate conduct that spills across borders.</p>	<p><b>Step 1:</b> Stronger recognition of the need for an enhanced, sustained, and consolidated approach to informal international interactions:</p> <p>ICN harnesses OECD's technical capacities and its own networking capabilities to develop and strengthen recommendations and best practices in those areas that need further development.</p> <p>ICN develops a "model" advocacy strategy aimed at assisting younger competition agencies to press lawmakers to change the existing legal frameworks as necessary to comply with best practices.</p> <p>ICN, drawing on the comparative advantages of UNCTAD, provides technical assistance to implement internationally recommended practices.</p>
	<p>To reduce the risk and cost of potentially inconsistent antitrust decisions improved coordination mechanisms should be considered.</p>	

Policy Option	The Current Situation	What Needs to Change
	<p>As a supranational authority is out of reach, this implies adopting an incremental approach, using the institutional structures and instruments that already exist to optimize cooperation and collaboration step by step.</p>	<p><b>Step 2:</b> Strengthen voluntary international joint investigation and decision-making on multi-jurisdictional mergers:</p> <p>International cooperation and coordination could focus on multi-jurisdictional mergers as the most important source of potentially inconsistent competition authority decisions. Experienced competition agencies could work more effectively together by voluntarily collaborating in joint investigation and enforcement.</p> <p>A single coordinating authority for certain merger investigation could be nominated. The role of this authority would be limited to the collection of information and coordinating activities among investigating authorities in the jurisdictions of relevance</p> <p>ICN could provide a forum for the identification of a coordinator or lead authority in such multi-jurisdictional cases. This mechanism of coordination could also be applied for international cartel and unilateral conduct cases that have multi-jurisdictional effects.</p> <p>A useful complement to such a system of international cooperation in enforcement would be domestic legislation allowing for recognition of foreign competition decisions.</p>
<p><b>3. Work towards bilateral and regional dispute resolution and appeal mechanisms.</b></p>	<p>Competition policy related provisions in FTAs have largely been exempt from the dispute settlement mechanism of these regional agreements.</p> <p>A multilateral dispute resolution mechanism might not be feasible in the medium term. However, the inclusion of such mechanisms in bilateral and regional FTAs could present an opportunity to experiment and then further explore multilaterally.</p>	<p>Two kinds of dispute settlement mechanisms could be envisaged:</p> <p>State-to-state dispute settlement mechanisms modelled on existing mechanisms established through FTAs for other areas of trade policy; and</p> <p>Mechanisms allowing private companies concerned by individual decisions to seek redress at the international level. These would fulfil different functions and consequently be subject to different rules and limitations.</p> <p>These dispute resolution and appeal mechanisms would enable a gradual narrowing of divergences, reducing the costs associated with the current lack of harmonization in laws and decision-making in competition matters.</p>

Policy Option	The Current Situation	What Needs to Change
<b>4. Promote convergence in competition regimes through peer reviews.</b>	<p>There is a gradual convergence in competition enforcement procedures and methodologies of analysis among antitrust agencies across countries.</p> <p>Peer reviews are a powerful instrument to assess competition law and policy. The reviews undertaken within the frameworks of the OECD and UNCTAD contribute to achieve further international convergence.</p>	<p>It would be worth considering the introduction of peer reviews in FTAs as a mechanism to evaluate competition decisions in member jurisdictions.</p> <p>The conclusions and recommendations of such in-depth reviews should be public, even discussed in legislatures. It would also be advisable to make public the peer review process.</p>

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#### Applying competition policy to optimize current international trade frameworks

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<b>5. Enhance the role of competition policy in informing trade measures.</b>	<p>Current international trade frameworks allow for a certain degree of trade protectionism.</p> <p>Attempts to create a multilateral, legally binding competition policy framework complementing current trade policy instruments at the WTO have not materialized.</p>	<p>Develop a different approach to the use of competition policy at a national level to improve the market efficiency effect of the most important trade decisions. This implies greater empowerment of competition authorities.</p> <p>Adopt a more proactive <i>ex ante</i> approach in which national competition authorities evaluate, based on competition merits, any decision related to antidumping, tariff modification, government procurement, SPS, TBT, foreign direct investment and services regulation. The authority would then emit a proposal in each case following consultation with all affected parties.</p>
<b>6. Ensure competitive neutrality.</b>	<p>The increasing presence of state-owned enterprises (SOEs) in the world economy presents particular challenges for competition, trade, and investment policies.</p> <p>The main concerns relate to ensuring a level playing field between privately and state-owned companies in view of the advantages that SOEs may have in tax treatment, financing, and regulatory application. This creates market uncertainty and affects international flows of trade and investment.</p>	<p>Competition policy authorities should assess the current regulatory framework for SOEs in order to issue a public recommendation on the set of competitive neutrality principles of relevance.</p> <p>The increasing concern about the international activities of SOEs creates scope for an international agreement that could define some key principles to ensure competitive neutrality both in cross-border and domestic regulation of SOEs.</p> <p>The TPP Agreement may offer future insights as it has a chapter covering SOEs and designated monopolies. The importance given to the subject of SOEs and monopolies in the TPP highlights the significance of these topics for future deliberations on global economic governance.</p>

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Policy Option	The Current Situation	What Needs to Change
<b>Harnessing the power of free trade agreements</b>		
<b>7. Harness the power of free trade agreements.</b>	<p>FTAs are important platforms for cooperation in competition enforcement. Nations across the world have drawn attention to incorporating competition provisions in FTAs (especially the US and EU). This trend has started to facilitate the necessary cooperation/coordination between national competition authorities when enforcing competition law.</p> <p>Competition provisions in FTAs range from ambiguous obligations (provisions that lay out in broad terms the obligation of promoting competition) through to deeper commitments on e.g.: adopting competition laws; addressing anticompetitive practices; establishing mechanisms to facilitate competition policy; and considering the impact of regulation on competition. They can also go further and define the design of competition regimes to be established in signatory countries, even determine which anticompetitive practices the signatory parties should address.</p>	<p>In addition to fostering further cooperation and convergence in enforcement matters, future or presently negotiated free trade and investment arrangements could act as a vehicle for incremental harmonization of competition laws and practices in the absence of an international agreement on these issues.</p> <p>To this end, the development of a model competition chapter for inclusion in FTAs would greatly facilitate the process.</p> <p>The model chapter should include enforcement provisions that would be developed by the ICN with the technical support of the OECD, covering abuse of market power, cartels, and mergers. Regarding the treatment of SOEs and designated monopolies, the development of a model text by the ICN under the principles of transparency and non-discrimination could be the way forward. The model chapter should also include competition advocacy provisions. The inclusion of provisions on procedural standards for competition law enforcement is also crucial to ensure that the decisions taken under the umbrella of the FTAs are fair, transparent, and effective.</p>



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The experts all participated in their personal capacity. The views and recommendations expressed in the policy options paper are not attributable to any institution with which members of the E15 Expert Group are associated.



## International Centre for Trade and Sustainable Development

The International Centre for Trade and Sustainable Development (ICTSD) is an independent think-and-do-tank, engaged in the provision of information, research and analysis, and policy and multistakeholder dialogue, as a not-for-profit organisation based in Geneva, Switzerland.

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