Competition Policy and the International Trade Landscape: Assessing Recent Developments and Trends

May 4, 2020

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EXECUTIVE SUMMARY

For most countries, competition law has become a crucial component of contemporary economic policy. It also has considerable overlap with trade and investment policy, as improving economic efficiency and liberalizing markets are usually central to its objectives. Competition policy can also have a direct impact on international trade and investment patterns, as the companies most likely to be active in international markets will often – due to their size and power – draw the attention of competition authorities. However, a multilateral agreement on competition policy has never been reached, despite several past attempts to include it in the GATT/WTO framework. At the same time, through bilateral agreements, FTAs, and intergovernmental "networks", countries do cooperate with each other regarding competition policy, such that "international competition policy" does exist, albeit in a quite fragmented form.

This memorandum provides a detailed overview of this state of affairs, both by describing the current state of international competition policy, and by attempting to understand why it has the shape it has.

In section I, we provide a general description of competition law, followed by a discussion of why an international agreement might be desirable. Essentially, we live in a world with domestic competition authorities but international markets, and there is good reason to think that the under-regulation and over-regulation of anticompetitive conduct that results from this situation can give rise to gaps and shortcomings. This can be explained to some extent by the fact that countries have different approaches to competition law in order to achieve legitimate policy goals; however, countries may also have incentives to use their competition laws for protectionist reasons.

In section II, we discuss extraterritoriality and cooperation agreements. These are the primary ways in which domestic competition authorities attempt to regulate international markets, and we attempt to identify the major strengths and shortcomings of these methods. Overall, these methods do address some of the issues identified in section I, and they have improved significantly over time; however, many issues remain, and some of these may be intractable without a deeper international agreement.

In section III, we discuss both proposed and existing international regulatory strategies, and attempt to identify the strengths and shortcomings of those strategies. First, we provide a brief historical overview of efforts by international institutions to 'harmonize' domestic competition laws, including the 1927 World Economic Conference, the draft of the 1948 Havana Charter, the Munich Code proposal and the discussions in the WTO. Then, we analyze the fragmented form of "international competition policy" provided in some WTO Agreements and relatively recent Free-Trade Agreements. Finally, we discuss the efforts of national competition authorities in promoting cooperation and convergence between domestic competition laws through "competition networks" such as the Organisation for Economic Co-operation and Development Competition Committee (OECD CC) and the International Competition Network (ICN).

In section IV, we attempt to provide insight into the future trajectory of international competition policy. This section proceeds in three steps. First, we argue that competition policy should remain dominated by domestic authorities, as this allows countries to preserve important "policy space." Second, we present Anu Bradford's analysis of why modest improvements to the status quo is the most realistic option for international competition policy. Third, we present Brendan Sweeney's more ambitious proposal for a WTO-level competition policy agreement. While Sweeney's proposal is not realistic at the moment, we feel that it is worth outlining, as it: 1) attempts to preserve as much domestic policy space as possible; and 2) identifies why the current regime will always struggle to prevent the protectionist use of certain competition laws.

INTRODUCTION

In recent years, the European Union (EU) has issued a series of highly punitive fines against US tech companies for violating the EU's competition laws. For example, the EU fined Google for $5 billion (USD) in 2018, $2.3 billion in 2017, and $1.7 billion in 2019. In contrast, in each case, the US competition authority took a much more lenient approach to Google's conduct.[1] Several questions arise from this example. For one thing, given the impact that such a decision could have on international trade and investment flows, why is it not possible to address such matters at the WTO? This seems particularly relevant when we consider that a common sentiment amongst US officials was that the EU's decision was at least partly rooted in a desire to help its own tech companies – that is, it was motivated by protectionist reasons.[2] Further, how do we square the clear discord in this case with the fact that US and EU competition authorities generally have a very close collaborative relationship (as was illustrated in their investigation and clearance of the 2018 Bayer/Monsanto merger)?[3]

This memorandum provides an overview of the current state of international competition policy, and thus hopes to provide some insight into these questions. In section I, we provide a theoretical overview of competition law in general, and an explanation as to why competition regulation at the international level might be necessary. In section II, we discuss the existing ways in which domestic competition authorities deal with international markets and attempt to identify the strengths and shortcomings of these methods. In section III, we discuss both proposed and existing international regulatory strategies, and attempt to identify the strengths and shortcomings of those strategies. In section IV, we seek to provide insight into the future trajectory of international competition policy, by focusing on different proposals from two prominent competition law academics.

SECTION I: HOW DOMESTIC COMPETITION LAWS AND ENFORCEMENT IN A WORLD OF INTERNATIONAL MARKETS LEADS TO UNDER AND OVER REGULATION

It is well understood that the process of competition is an essential component of a market economy's ability to maximize wealth and promote overall economic efficiency. This is not to say that economic policy should be devoted exclusively to promoting competition. For example, industrial policies that may not be pro-competitive may be pursued if a country hopes to facilitate the growth of small and medium enterprises in the early stages of their development, or if a developing country hopes to promote a company as a 'national champion.' However, a concern with competition is not something that economic policymakers can avoid; this is because when the competitive process is functioning properly, firms will be in an existential battle with one another for customers and profits, which forces them to innovate and produce their goods as efficiently as possible.[4] As Ko Unoki argues, the competitive process comes with an almost boundless potential:

> We can… arguably expect to see: constantly better quality products and services at lower prices leading to a higher standard of living, higher productivity arising from greater efficiency in the

[1] Anu Bradford, *The Brussels Effect,* (London: Oxford, 2020) at 99. [*Bradford*]
[2] *Ibid* at 104.
[3] Robert D. Anderson, William E. Kovacic, Anna Caroline Müller and Nadezhda Sporysheva, "Competition Policy, Trade and the Global Economy: Existing WTO Elements, Commitments in Regional Trade Agreements, Current Challenges and Issues for Reflection" (2018) Staff Working Paper ERSD-2018-12 at 39. [*Anderson et al.*]
[4] Martyn Taylor, *International Competition Law: A New Dimension for the WTO?* (London: Cambridge University Press, 2007) at 15 [*Martyn Taylor*].

> allocation of resources leading to higher economic growth rates, greater equality in wealth owing to less concentration of economic power in the hands of a few enterprises, and the dispersion of economic power leading to a lesser likelihood that democratic government and social institutions will be politically hijacked by a small number of powerful enterprises and be unduly under their influence as a result.[5]

Unfortunately, there is no guarantee that this competitive process will automatically take hold, as business history is replete with examples of firms engaging in anticompetitive conduct.[6] Such conduct may allow a firm to survive, but not in a way that is linked to its ability to innovate and produce efficiently, thus undermining the various societal benefits associated with the competitive process (outlined above). The main anticompetitive practices firms engage in are cartel arrangements, monopolistic behaviour, and inefficient mergers[7], each of which we will now briefly discuss.

Cartel arrangements occur when a group of firms reach an agreement that allows them to collectively abuse their economic power and distort markets in their favour. For instance, firms might opt to avoid competing with each other through agreements to fix prices, restrict output, divide markets, or exclude the entry of firms outside the cartel (e.g. through exclusionary dealing arrangements that prevent non-cartel firms from purchasing goods or services from key suppliers). It is important to distinguish cartels from other inter-firm agreements that may have legitimate purposes. For example, joint ventures that aim to improve production capacity or research and development are generally encouraged, as they "…have the capacity to add to competition and to produce significant efficiencies and innovation gains."[8] It is also worth noting that this memorandum focuses on private cartels, which excludes state-run cartels that are just as anti-competitive, but protected by sovereign immunity or international treaties (such as the Organization of Oil Exporting Countries (OPEC)). In general, private cartel activity will raise or maintain the profits of the firms involved, but the risk is that they are only able to do so via practices that impair overall welfare, such as inflated pricing.[9] As the Organisation for Economic Co-operation and Development (OECD) puts it:

> Cartels harm consumers and have pernicious effects on economic efficiency. A successful cartel raises price above the competitive level and reduces output. Consumers (which include businesses and governments) choose either not to pay the higher price for some or all of the cartelised product that they desire, thus forgoing the product, or they pay the cartel price and thereby unknowingly transfer wealth to the cartel operators. Further, a cartel shelters its members from full exposure to market forces, reducing pressures on them to control costs and to innovate. All of these effects harm efficiency in a market economy.[10]

Monopolistic behaviour involves the anticompetitive practices of a single firm. Duopolies and oligopolies – when a market is dominated by two or a small number of firms – can also be grouped into this category. There is nothing automatically inefficient about a firm (or a small number of firms) dominating a specific market, as it is entirely possible that this power simply reflects the fact that a firm is more efficient than its rivals (because of some cost or quality advantage). As competition law scholars Einer Elhauge and

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[5] Ko Unoki, *Competition Laws, National Interests and International Relations*, (New York: Routledge, 2020) at 5 [*Unoki*].
[6] *Ibid* at 5.
[7] *Taylor Martyn*, supra note 4 at 16; *Unoki*, supra note 2 at 5
[8] Brendan Sweeney, *The Internationalisation of Competition Rules*, (New York: Routledge, 2010) at 76 [*Sweeney*].
[9] Einer Elhauge & Damien Geradin, *Global Antitrust Law and Economics*, (St Paul: Foundation Press, 2018) at 2-3.
[10] OECD Report, "Hard Core Cartels: Recent Progress and Challenges Ahead" (2003) at 8.

Damien Gerardin note, if a firm has acquired an efficiency advantage through productive investments in innovation, physical capital, or organization, then any additional profits "…might provide the right reward for that investment, especially since any price premium it charges cannot exceed its efficiency advantage over other prevailing market options."[11] However, there is a risk that a dominant firm will abuse its market power and take advantage of its ability "…to realize uncompetitive pricing and earn a higher amount of profits than would be expected if it were facing competition from other enterprises."[12] There is also the risk that dominant firms will engage in the same welfare-reducing anticompetitive practices as cartels do, such as price-fixing, output restriction, and exclusionary dealing arrangements that deter rivals from entering the market.[13]

Merger activity in this context refers to the joining of two or more businesses into a single business entity. It is possible that this type of activity will also constitute anticompetitive conduct. Like successful firms that can achieve dominant market power, there is nothing inherently problematic with merger activity. In fact, mergers are extremely common in any market-driven investment environment and are generally economically beneficial.[14] Some mergers, however, will lead to concentrated markets that come with the same risks and distortions that accompany cartels and monopolies – competition might be artificially restrained, leading to the potential for distorted markets and reduced overall welfare.[15]

Competition Policy and Competition Law: The Latter is an Essential Component of the Former

Given what has just been stated – that a healthy degree of competition is essential for a market economy, but it can be undermined by the behaviour of private firms – it should come as no surprise that regulating competition has become a major focus of contemporary economic law and policy.

While the two are often used interchangeably,[16] it is important to keep in mind that competition policy is much broader and more encompassing than competition law, as it refers to any government policy that impacts the extent and nature of competition in an economy.[17] Thus, when used in this broad sense, competition policy includes government policies on deregulation, privatisation, foreign direct investment, government procurement practices, as well as trade and industrial policy.[18] While these are generally treated as discrete policy domains, it is worth noting the significant ways in which they overlap and can influence each other. For example, Japan's competition policy has long been determined by its industrial policy, to the extent that the welfare of its national companies is generally prioritized over the welfare of its consumers.[19] As another example, consider economist Dani Rodrik's recent paper on how to update and rejuvenate contemporary industrial policy, where he specifically calls for it to complement and be thought in tandem with competition policy.[20]

[11] *Ibid*.
[12] *Unoki*, supra note 5 at 5-6.
[13] *Ibid*.
[14] *Sweeney*, supra note 8 at 140.
[15] *Martyn Taylor*, supra note 1 at 19
[16] *Sweeney*, supra note 8 at 11.
[17] Maher Dabbah, *International and Comparative Competition Law,* (London: Cambridge University Press, 2010), at 12 [*Dabbah*].
[18] *Sweeney*, supra note 8 at 14.
[19] *Ibid* at 13.
[20] Karl Aiginger and Dani Rodrik, "Rebirth of Industrial Policy and an Agenda for the Twenty-First Century," (2020) Journal of Industry, Competition and Trade. Note: this is only published online, and no page numbers are listed. Available at: https://link.springer.com/article/10.1007/s10842-019-00322-3.

While much narrower, competition *law* (also known in the United States as 'antitrust law') is instrumental to any competition policy as it includes the specific laws that apply to private anticompetitive conduct. Although there is considerable disagreement on what the specific content of these laws should be, "the vast majority of scholars, researchers and competition schools agree" that some form of competition law is necessary to prevent the negative effects that excessive market power can have on consumer welfare.[21] It should come as no surprise, then, that most national legal systems have competition laws, and that for many jurisdictions – especially the US and the EU – these laws have become an integral component of "economic, political, and legal life."[22] Indeed, in recent decades, competition law has become an important component of economic policy for many developed and emerging economies.[23]

As will be discussed in the next section, there are important variations in the specific content of domestic competition laws. However, we note two basic sources of uniformity. First, most competition law regimes will include rules and prohibitions that deal with the practices that were mentioned above: cartel arrangements, monopolistic behaviour, and merger activity.[24] Second, a central goal of all competition law regimes is to increase efficiency, which they generally measure through the objective standard of consumer welfare.[25] This means that the metric of the lowest possible prices for the highest quality products will loom large for any competition authority; while some regimes also use more holistic welfare measures (e.g. including employer interests), the goal of optimal consumer welfare will always bear considerable weight.[26]

This latter point is important, as it helps clarify how competition law is separate from other policy domains that implicate competition. To understand this, it is useful to consider trade law, and some of the later sections of this memorandum deal with interactions between the two policy domains. There is no question that trade and competition law have a great deal of overlap, as "…both policies are derived from the proposition that markets, operating where possible and without artificial constraints, have the capacity to deliver significant welfare gains and raise standards of living."[27] At the same time, the competition authority's goal of maximized welfare differs from the trade authority's[28] goal of increased market access. This compartmentalization does not always hold true – for example, section 1.1 of Canada's *Competition Act* makes explicit reference to market participation. In general, however, if a market is already competitive and maximizing welfare, competition law will likely be neutral on the issue of whether new entrants should be able to gain access. Trade law, by contrast, is primarily concerned with whether market access barriers are consistent with existing trade agreements; any consideration of the effects on competition and welfare will be secondary. Daniel Tarullo – an expert in international economic law – summarizes the similarities and differences between trade and competition law:

> "Commentators regularly point out that the two are consistent with one another, since in a general sense each promotes more open markets and gives consumers more choice. Although this is true, it is not the whole story. In practice, trade policy is substantially grounded in a government's efforts to

[21] Oliver Budzinski, "International antitrust institutions," *The Oxford Handbook of International Antitrust Economics* (London: Oxford, 2015), at 121 [*Budzinski*].
[22] David Gerber, *Global Competition: Law, Markets, and Globalization*, (London: Oxford, 2012) at p. 4 [*Gerber*].
[23] See *ibid*, chapter 7 for a good overview of recent developments and advancements.
[24] *Dabbah*, supra note 17 at 13.
[25] *Ibid* at 40.
[26] *Ibid*.
[27] *Sweeney*, supra note 8 at 42.
[28] By 'trade authority' we are referring to the government agency or ministry responsible for developing trade policy, and not parliamentary or congressional trade committees.

promote exports by its nation's industries. Whether foreign markets are workably competitive in an economic sense is essentially irrelevant. Competition policy, on the other hand, seeks to deal with industry structures and practices that give excessive market power to sellers – power to raise prices above, or reduce quantities below, the levels that would prevail in competitive markets. To adapt an old antitrust phrase for current purposes, trade policy is usually concerned with promoting the interests of specific competitors, whereas competition policy is usually concerned with promoting competitive markets."[29]

Domestic Competition Law: Considerable Variation Among Countries Across the Globe

As stated in the above section, most sets of domestic competition laws will share some broad similarities: 1) there will be provisions that address cartels, monopolies, and mergers[30]; and 2) the importance of consumer welfare (i.e. safe and quality goods at the lowest competitive price) will be a crucial analytical lens for any competition authority.[31] However, this should not cause us to overlook the significant ways in which countries' approaches to competition enforcement can vary. This section will provide an overview of some examples and sources of this variation.

First, while it will undoubtedly be important, maximizing consumer welfare may not be the only objective of a given competition policy. Competition authorities may also pursue a "total welfare" objective that also considers the impact that the anticompetitive practice – or its regulation – will have on other producers. An example is the EU approach to merger review. As Eleanor Fox writes, "…United States authorities normally approve a merger if it cannot be proven to raise prices. The European Commission normally disapproves of a merger or imposes regulatory conditions if the merger significantly enhances the market share of a dominant firm, creates joint dominance, or seriously distorts the playing field for competitors."[32] As this quote from Fox illustrates, unlike the US' narrow focus on prices (i.e. consumer welfare), the EU's approach is much broader as it factors in the impact the merger will have on other producers and competitive conditions in general.

Second, even if two competition policies have the same objective, material conditions may vary from one country to another, leading to different assessments about the optimal level of competition. For example, a small economy that exports most of its production will likely face problems of scale, which may force it to adopt a more relaxed approach to competition regulation than a larger economy would where more production is aimed at domestic markets.[33] As Trebilcock et al. put it, such small economies "…may have to live with much higher concentration levels than would be acceptable to countries with much larger markets."[34] A similar approach might apply to a developing or transitional economy, where the standard competition rules for developed economies may be inappropriate. For example, developing states may want to subordinate the traditional competition policy pursuit of consumer welfare to the more producer-oriented focus of industrial policy. As international law scholar Frederick Abbott writes, "it is difficult to see the advantage to emerging markets and other developing countries from trading away their flexibility

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[29] Daniel Tarullo, "Norms and Institutions in Global Competition Policy," (2000) 94:3 The American Journal of International Law at 483. [*Tarullo*].
[30] *Dabbah*, supra note 17.
[31] Michael Trebilcock, Robert Howse, and Antonia Eliason, *The Regulation of International Trade*, (New York: Routledge, 2013) at 709 [*Trebilcock et al.*].
[32] Eleanor Fox, "Global markets, National Law, and the Regulation of Business: A View from the Top" (2001) 383 St. John's Law Review at 394–395.
[33] Michal S. Gal, *Competition Policy for Small Market Economies* (Boston: Harvard University Press, 2003).
[34] *Trebilcock et al.*, supra note 28 at 766.

to implement and enforce competition law… Competition law is an important tool of industrial policy and should be tailored to the circumstances of each country."[35] There is in fact good evidence to suggest that having industrial policy dictate competition policy played a role in the rapid postwar development of Japan and South Korea,[36] and both India[37] and China[38] were keen to make this argument during discussions at the WTO's "Working Group on the Interaction between Trade and Competition Policy" (WGTCP; this working group will be discussed more in later sections).

Indeed, the idea that a country may legitimately subordinate its competition laws to another non-consumer welfare policy goal extends beyond the pursuit of economic development – political unification, fairness, and high employment may all be preferred.[39] The EU illustrates this well, as diverse policy goals have often inflected its approach to competition regulation, such as protecting small businesses, as well as the furthering of the single market and promoting the broader project of European integration.[40] Cultural and historical factors are also important to consider. For example, the more coordinated nature of Japanese business associations have generally made the country "more hospitable" to certain anticompetitive arrangements and practices, such as the vertical and horizontal *"keiretsu*" – a Japanese term for inter-firm alliances and linkages [41] The EU is again instructive here, as continental Europe has generally been more open to state economic intervention than has the anglophone world.[42] As Anu Bradford writes: "At the most fundamental or philosophical level, EU competition authorities are inherently suspicious of the markets' ability to deliver efficient outcomes and are therefore more inclined to intervene through a regulatory process."[43]

Third, we can also note that for certain industries there might be "at best only a loose consensus among economists on the objects that ought to guide competition law and policy."[44] In situations where there is so much uncertainty amongst experts, variation in competition law can be expected. According to Paul Stephan, this uncertainty is most common in cutting-edge, knowledge-intensive industries.[45] This can be seen with contemporary technology giants like Google and Amazon, where there has been considerable debate in the US competition law community about whether a radically new approach is required to regulate them adequately.[46] This uncertainty is also reflected in the different approaches that US and EU

[35] Frederick Abbott, *Competition Law in Emerging Markets: The Virtue of Regulatory Diversity* in International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita (London: Oxford, 2016) at 232.
[36] Alice Amsden and Ajit Singh, "The optimal degree of competition and dynamic efficiency in Japan and Korea" (1994) 38 European Economic Review at 949.
[37] *Communication from India* WTO Doc WT/WGTCP/W/149 (2000) (Communication from India).
[38] *Report of Meeting of 22-23 March 2001*, WTO Doc WT/WGTCP/M/14 (2001), at paras. 74-75 (Note by Secretariat).
[39] *Budzinski*, supra note 21 at 124.
[40] *Bradford*, supra note 1 at 102-103.
[41] *Trebilcock et al.*, supra note 31 at 767.
[42] However, this is still a generalization. Consider the EU approach to state subsidies or state aid, which is much more restrictive than the WTO or even the US: see Alan Sykes, "The Questionable Case for Subsidies Regulation: A Comparative Perspective" (2010) 2:2 Journal of Legal Analysis.
[43] *Bradford*, supra note 40 at 102.
[44] *Sweeney*, supra note 8 at 362.
[45] Paul Stephan, "The Problem with Cooperation" in *Cooperation, Comity, and Competition Policy* (London: Oxford, 2011).
[46] See Joseph Stiglitz, "Towards a Broader View of Competition Policy," in *Competition Policy for the New Era: Insights from the BRICS Countries,* edited by Tembinkosi Bonakele, Eleanor Fox, and Liberty Mncube, (London: Oxford, 2017). As Stiglitz writes at 9-10: "There are several instances of monopsony power ([a market situation where there is one or very few buyers] e.g. Amazon, Walmart), where a common test for acceptable behaviour,

competition authorities have taken to these powerful tech companies – the EU, in general, has been much more willing to penalize them.[47]

Fourth, it is also worth noting that competition authorities may differ from each other in various institutional ways. The main concern here is the relationship between the competition authority, the courts and the government. To get a sense of the main variation here, it is worth referring to the work of Iacobucci and Trebilcock, who have identified three main forms of institutional design: "'the bifurcated judicial model,' where a specialized competition agency undertakes investigative and enforcement functions and remits disputed matters to the ordinary courts of the jurisdiction for adjudication; 'the bifurcated agency model,' where a specialized competition agency performs investigative and enforcement functions, while adjudicative functions are remitted to a separate specialized competition tribunal; and the 'integrated agency model,' where a single agency performs all three functions (investigation, enforcement, and adjudication)."[48]

Finally, it is worth briefly discussing some of the different experiences that developing countries have had with competition law. Traditionally, competition law in the developing world has been notable for its ineffectiveness or complete absence. For example, in Latin America, David Gerber notes that "…prior to the 1990s, competition law…had little support anywhere. Competition law statutes were enacted in numerous countries, but they had little impact."[49] While this changed during the 1990s and 2000s as competition policy became more important in Brazil, Mexico, and Chile,[50] weak technical capacity and limited effectiveness is still a general problem.[51] This is especially true for Africa: as Eleanor fox writes,

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whether consumers are advantaged, may fail to provide an accurate assessment of the consequences of the policy for societal well-being. In the short run, these monopsonists may advantage consumers, driving down the prices they pay and passing on a fraction of those gains. Of course, these gains are at the expense of producers. The gains to consumers are less than the losses of producers. This is a general implication of the fact that market power is distorting, lowering societal welfare. In the long run, matters may be even worse. Thus, as Amazon drove down what authors received, there was, in effect, a transfer of resources from the creators of intellectual property to the merchants. While intellectual property is designed to encourage such creative activity, the impact of Amazon has been just the opposite… There are other reasons that competition authorities should be increasingly on guard: As we move to a knowledge economy, fixed, sunk costs become relatively more important, and even small such costs can serve as a large barrier to entry, enabling an incumbent to sustain large profits without the threat of entry (in the knowledge that should there be entry, competition will drive down prices to the point where the entrant will lose money). While it may be impossible to eradicate this natural barrier to entry, competition authorities should do what they can to make sure that incumbents do not amplify and extend their market power."

For another interesting discussion of the new tech giants and their potential implications for US antitrust doctrine, also see the recent work of Lina Kahn. For a brief overview, see Financial Times, "Lina Khan: 'This isn't just about antitrust. It's about values,'" March 29, 2019, available online: <https://www.ft.com/content/7945c568-4fe7-11e9-9c76-bf4a0ce37d49>. For a deeper treatment, see Lina Kahn, "Amazon's Antitrust Paradox" (2017) 126 The Yale Law Journal.

[47] *Bradford*, supra note 40 at 99.

[48] Edward Iacobucci and Michael Trebilcock, "Evaluating the Performance of Competition Agencies: The Limits of Assessment Methodologies and Their Policy Implications" in *Reconciling Efficiency and Equity: A Global Challenge for Competition Policy* at 334-337 (London: Cambridge University Press, 2019).

[49] Gerber, at p. 241.

[50] Gerber, at p. 241-248.

[51] A.E. Rodriguez and Ashok Menon, "The Causes of Competition Agency Ineffectiveness in Developing Countries," *Law and Contemporary Problems* 79.37 (2016) at 64.

"some competition authorities, such as several in West Africa, are at earlier stages of development and may operate as ad hoc price control agencies when prices rise."[52]

With that said, several developing countries do have mature competition authorities,[53] some of which have tailored competition laws to their own unique circumstances in notable ways. For example, Eleanor Fox writes that because "most or many" developing countries have a history of state involvement in the economy, this has led many of them to enact competition laws concerned with "…state and local government restraints… which hamper businesses from competing on their merits."[54] This contrasts with the US, for example, as the US government's history of limited intervention in the economy has never required that its competition laws be concerned with "acts of the state."[55] South Africa's competition law provides another interesting example, as the post-Apartheid government insisted that its competition laws take the public interest into account.[56] Again, this is not included in US competition laws, "on the grounds that public interest is an amorphous concept and likely to detract from efficiency."[57] However, for South Africa, "…disregarding public interest is not an option. Without room to account for the public interest, for example in protecting jobs and empowering the formerly excluded and disadvantaged black population, there would be no competition law; the legislature would not have enacted it."[58]

It should be stressed that this is just a brief overview of the developing country experience with competition law, which continues to grow and thus provides an important area for future research. As Tembinkosi Bonakele notes, "there is… scope for the development of an entire cadre of academics and practitioners devoted to studying the application of competition laws in developing and emerging economies."[59]

The Central Problem: International Markets but Domestic Competition Law

So far, this memorandum has discussed competition law from a largely discrete, domestic perspective. However, even if domestic competition laws are effective at regulating competition in domestic markets, it is questionable how well they can do so for international markets. This is a pertinent issue, given globalization and the extent to which contemporary economic activity is organized and integrated on an international basis. While international markets may improve competitive conditions as firms become exposed to a higher number of rivals, the fact that domestic competition laws are generally applied on a territorial basis creates the potential for significant gaps and conflicts in competition regulation across the globe.[60]As the next section will discuss, these problems can be categorized as ones of either under-regulation or over-regulation.[61]

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[52] Eleanor Fox, "Competition Policy: The Comparative Advantage of Developing Countries," *Law and Contemporary Problems* 79.69 (2016) at 71.
[53] Ibid.
[54] Ibid, at 76.
[55] Ibid.
[56] Ibid.
[57] Ibid.
[58] Ibid, 76-77.
[59] Tembinkosi Bonakele, "The Case for a BRICS Competition Agenda," in *Competition Policy for the New Era: Insights from the BRICS Countries*, edited by Tembinkosi Bonakele, Eleanor Fox, and Liberty Mncube, (London: Oxford, 2017), at 50.
[60] *Martyn Taylor*, supra note 4 at 38.
[61] *Martyn Taylor*, supra note 4 at 53.

A) ***Conceptualizing Under-Regulation***

Under-regulation occurs when one jurisdiction is failing to regulate an anticompetitive practice, such that overall (i.e. global) welfare is sub-optimal. There are two primary ways in which under-regulation can occur: 1) gaps, and 2) situations where regulation would conflict with the national interest. We elaborate on each of these below.

Under-regulation I: Gaps

First, there might be gaps in the governance of international competition. These generally occur when a country simply does not have any competition laws on the books, or it may have the necessary laws but lack a competition authority capable of enforcing them.[62] As was discussed above, this is still common for many developing countries. In such a case, there would be little to stop a firm from engaging in any of the anticompetitive practices mentioned above (i.e. cartels, monopolies, or inefficient mergers). Such a situation could obviously have a negative impact on domestic welfare, but these problems could also extend to other countries if the anticompetitive firms sell their products abroad. Although the number of countries without any competition regime has plummeted in recent decades, the gap problem is still significant, as many regimes with competition laws still lack a competent authority capable of enforcing them.[63] This problem is exacerbated when we consider that firms from countries with strong competition regimes often exploit these legal gaps and engage in anticompetitive practices when they deal in jurisdictions with weak or non-existent competition regimes.[64]

A more pressing gap involves the case of truly international cartels, or what are known as "private international cartels." What distinguishes this form of cartel is the international nature of its membership composition, as private international cartels are defined as having "…at least two members with different nationalities."[65] In such cases, an adequate set of competition laws and the capacity to enforce them will still face serious "jurisdictional limitations"[66], as the international dispersion of the cartel will likely pose significant problems for "detection, prosecution and enforcement."[67] For example, if one cartel member is registered in a country, it will likely be difficult for the domestic competition authority to prosecute or even detect that cartel member if it only has access to domestic evidence. Thus, without some form of international cooperation, a successful action against the private international cartel will be extremely unlikely. It is worth noting that private international cartel arrangements appear to be very common; one study from 2016 estimates that international cartel overcharges exceeded $1.5 trillion (USD), and that over 100,000 companies participated in international price-fixing between 1990 and 2016.[68]

Under-regulation II: When regulation would conflict with the national interest

Beyond gaps, there is a second way in which the internationalisation of economic activity can lead to the under-regulation of anticompetitive activity. This occurs when anticompetitive activity is taking place

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[62] *Budzinski*, supra note 21 at 124.
[63] *Ibid*.
[64] *Ibid*.
[65] John M. Connor, The Private International Cartels (PIC) Data Set: Guide and Summary Statistics, 1990-July 2016 (Revised 2nd Edition) (August 9, 2016) [*Connor*]. Available at SSRN: https://ssrn.com/abstract=2821254 or http://dx.doi.org/10.2139/ssrn.2821254
[66] *Sweeney*, supra note 8 a 21.
[67] *Ibid* at 73.
[68] *Connor*, supra note 54 at 1.

primarily in one country (unlike truly international cartels) but is not being regulated by its domestic competition authority. This lack of regulation is not occurring because of a gap (that is, some lack of capacity); instead, the country housing the anticompetitive activity has the capacity to regulate it but is choosing not to – for some reason it lacks the "will to regulate."[69]

In general, a country will only have this "will to regulate" if it perceives that enforcement is consistent with its national interest. This means that anticompetitive conduct may be permitted, regardless of whether or not this conduct has adverse 'spillover effects' in the markets of other countries.[70] Thus, this opens up space for the proliferation of anticompetitive conduct that can harm other countries, or even the global community overall.

A country may decide to not regulate an anticompetitive practice that has negative effects abroad for legitimate reasons. For example, one country may approve of a merger taking place within its borders because it genuinely does not see any risks to consumer welfare. At the same time, another country may feel that the merger does pose risks to consumer welfare, but it will be unable to do anything as the merger takes place beyond its borders.[71] As another example, consider a developing country that may see the anticompetitive practice as being an important component of a broader industrial policy strategy to create a 'national champion' that will eventually allow the country to participate in high value-added production and compete at a global level.

However, it is also true that a country's focus on its national interest (and not global welfare) may incentivize less legitimate 'strategic competition policies', such that a country "…strategically distorts its competition laws in order to capture a larger share of the surplus in a supranational market at the expense of reducing the overall surplus."[72] Put another way, in such situations a country is manipulating its competition laws in a way that harms foreign actors, but without the intention of realizing some legitimate policy goal.

There are many examples of such strategic use of competition law, such as "…the selective non-enforcement of anti-cartel rules towards home companies, antitrust exceptions for domestic key industries or the allowance of pure export cartels."[73] For competition law scholar Brendan Sweeney, most strategic use of competition law that has a negative effect on the welfare of other countries is either through: 1) private import barriers; or 2) export cartels. Both will now be discussed.

i. <u>Private import barriers</u>

Private import barriers occur when a competition authority allows domestic firms to engage in private anticompetitive activity such that it serves as a market access barrier to foreign firms. As the WTO's WGTCP[74] has noted, there are many examples of such activity, such as: agreements among local firms to not purchase foreign imports; agreements to prevent foreign competitors from attaining any necessary inputs that are domestically-sourced; predatory pricing designed to exclude foreign competitors; industry-created standards that discriminate against foreign competitors; and exclusionary purchasing agreements

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[69] *Ibid* at 20.
[70] *Martyn Taylor*, supra note 4 at 45.
[71] *Sweeney*, supra note 8 at 139.
[72] *Trebilcock et al.*, supra note 31 at 764.
[73] *Budzinski*, supra note 21 at 5.
[74] This acronym stands for "Working Group on the Interaction between Trade and Competition Policy," as was noted above.

with domestic suppliers.[75] An early WTO dispute – *Japan – Measures Affecting Consumer Photographic Film and Paper*[76] – dealt with such a private import barrier. In this case, the Japanese film producer Fuji had constructed a network of exclusive distribution arrangements, which the Japanese government was tolerating. These arrangements meant that Japanese suppliers of key film products could only sell to Fuji, which prevented foreign firms – such as the American film giant Kodak – from gaining effective access to the Japanese film market.[77]

Other than as a mechanism for achieving legitimate policy goals, why would a state tolerate such private market access barriers? As Sweeney writes, "toleration may be rational for the importing state for two reasons. First, some of the adverse, local industry effects of tariff cuts are ameliorated. This is politically attractive to governments concerned not to alienate powerful industry lobby groups. Second, the fact that the barriers are private removes the government from direct involvement. It is more difficult for exporting states and their exporters to make a successful case that the government is failing to honour its international trade commitments."[78] As will be discussed more in the final section of this memorandum, private market access barriers may undermine a country's existing trade liberalization efforts and commitments; thus, they may work against one of the fundamental principles of the WTO.

ii. Export cartels

Export cartels occur when firms reach a cartel agreement regarding some aspect of their export activity. As with any cartel agreement, the collusion may range from subtle forms of joint production and/or joint marketing, to more blatant forms of price fixing and market allocation.[79] However, unlike the private international cartels discussed above in the 'gaps' section, members of an export cartel are exclusively or primarily from the same country. And unlike standard domestic cartels, the cartel activity targets products that are sold exclusively or primarily in foreign markets, which creates incentives for the country housing the cartel to turn a blind eye to the anticompetitive conduct. This is because the country benefits from the inflated profits of the cartel in the form of more export revenue (which can lead to more domestic jobs and tax revenue) but avoids the consequences, such as higher prices for consumer goods. Because these consequences are focused abroad, they primarily fall on foreign consumers. In contrast, the importing country (i.e. the country with the negatively affected foreign consumers) obviously has incentives to discipline the export cartel. However, because it does not have territorial jurisdiction over the anticompetitive conduct, this will be very difficult without some form of international cooperation or use of international law.[80]

It is unclear just how detrimental export cartels are in terms of their impact on overall consumer welfare.[81] While the final section of the memorandum will weigh their effects more comprehensively, we can note

[75] *Report (1998) of the Working Group on the Interaction between Trade and Competition Policy*, WTO Doc WT/WGTCP/2 (1998) at 84–86 (Report to the General Council).
[76] *Japan – Measures Affecting Consumer Photographic Film and Paper*, WTO Doc WT/DS44/R (1998) (Report of the Panel).
[77] The US ultimately failed in its claim, which did not hinge on issues related to competition law. However, the panel did rule that none of Japan's impugned practices significantly affected Kodak's competitive position. The US failed to prove that any of the Japanese practices facilitated a system of industrial organisation in the Japanese film industry that impaired Kodak's legitimate market access expectations.
[78] *Sweeney*, supra note 8 at 24.
[79] *Ibid* at 56.
[80] *Trebilcock et al.*, supra note 31 at 764.
[81] This was a hotly contested issue during the WTO's 'Working Group on the Interaction between Trade and Competition Policy' (WGTCP). For an anti-export cartel view, see, for example, Japan's position: *Submission from*

at this point that they are widely tolerated under domestic competition laws,[82] and thus present countries with a clear opportunity to tolerate anticompetitive activity at the expense of foreign countries. As such, like private import barriers, the promotion of export cartels can easily run "…contrary to the fundamental principles of international trade"[83] and the general ethos of the WTO.

B) ***Conceptualizing over-regulation***

The potential asymmetry between domestic competition laws and international markets can also result in over-regulation. In general, a country will regulate any anticompetitive conduct that it deems to be inconsistent with its national interest. Importantly, it will do so regardless of the effects this regulation has on other countries, or whether the regulation is consistent with the competition law regimes of affected countries. This demonstrates over-regulation: one country is regulating competition irrespective of the negative impacts this is having elsewhere. For example, a cross-border merger that adversely affected a country may be blocked, even if this merger would result in a net benefit to other countries, or global welfare overall.[84]

As this example would suggest, most examples of over-regulation stem from merger activity. This is because as foreign direct investment has grown significantly in past decades, there has been a substantial increase in the incidence of transnational mergers.[85] Moreover, the growth in international trade means that even domestic mergers can have a significant transnational impact.[86] Merger over-regulation is rooted in the fact that a multinational merger (or a domestic merger with multi-jurisdictional effects) may impact countries differently, or will be assessed differently by the various competition authorities.

Take, for example, a proposed merger of two or more firms over which both the US and the EU have jurisdiction. This means that if the merger is to proceed, it must be approved by both competition authorities. Because of their focus on national interests, when they assess the merger, the competition authorities are only focused on the domestic costs and benefits of the merger and what their specific competition laws dictate. Moreover, even if interests are aligned and the laws are the same, "…there is no promise that both sets of authorities will reach the same decision. Innumerable factors – including differences in culture, politics, guiding assumptions, and biases – can yield different results despite substantive agreements in the rules."[87]

As Anu Bradford notes, this situation can result in a "race to the strictest", where the most stringent competition jurisdiction always prevails. Continuing with the previous example, if the United States wants to approve of the merger but the EU wants to prohibit it, the EU's approach will prevail, unless the merging company is willing to accept the EU's penalty, or withdraw from the EU market entirely.[88] Given that the EU generally issues significant fines for anticompetitive activity, the former is quite unlikely; the latter option is even less likely because of the difficulty of withdrawing from the EU market

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Japan, WTO Doc WT/WGTCP/W/156 (2000) 4 (Communication from Japan to WGTCP); for a pro-export cartel view, see, for example, the US position in *Report on the meeting of the WGTCP of 20-21 February 2003*, WTO Doc WT/WGTCP/M/21 (2003) [37] (Report by Secretariat).
[82] *Trebilcock et al.*, supra note 31 at 767.
[83] *Sweeney*, supra note 11 at 72.
[84] *Martyn Taylor*, supra note 4, at 46.
[85] *Anderson et al.*, supra note 3 at 37.
[86] *Sweeney*, supra note 8 at 141.
[87] Andrew Guzman, *Competition, Comity, and International Cooperation* (London: Oxford, 2011) at 350. [*Guzman*]
[88] Anu Bradford, "International Antitrust Cooperation and the Preference for Nonbinding Regimes", in *Competition, Comity, and International Cooperation* (London: Oxford, 2011), at p. 320. [*Bradford 2011*]

given its size and power. Bradford cites several examples of this situation playing out in the real-world, such as the EU's decision to block General Electric's attempted $42 billion acquisition of Honeywell, despite that this same merger had been approved of by the US.[89] In fact, Bradford argues that the size of the EU market and the stringent nature of its competition regulations has led to something of a "Brussels Effect", where there has been an entrenching of "EU competition rules as the global norm."[90] While this is not necessarily a problem – the EU's more stringent approach to digital companies might be good policy, for example – we simply want to point out that this can lead to a situation where countries are forced to abide by EU competition standards, even if they feel that they are too strict.

C) ***Further Problems for Domestic Competition Law Regulating International Markets***

As outlined above, there are many benefits to countries having their own autonomous competition laws, as they can tailor them to their own unique circumstances. At the same time, however, the reality of economic globalization creates two central problems for an approach to competition law that is dominated by domestic regulatory authorities: over-regulation and under-regulation. This section discusses two further shortcomings of the domestically dominated regime: an overburdensome web of regulations, and the potential for competition law disputes to trigger more systemic conflicts.

For the regulatory burden problem, there is a possibility that the various domestic procedures associated with competition regulation may constitute an undue burden on international economic activity. Such burdens can result from inconsistent substantive outcomes of investigations by competition authorities in different nations, inconsistent procedures for pre-merger or other forms of review, or simply inadequate knowledge about the proliferating competition laws in each of the dozens of markets in which a typical multinational corporation does business. These burdens might range "…from nontrivial increases in transaction costs all the way to the thwarting of mergers for reasons other than the merits of competition concerns."[91]

It is worth noting that the regulatory burden problem may impact businesses differently, depending on their size. For example, it seems reasonable to suggest that large multinational corporations (MNCs) will find these regulatory costs manageable, while small and medium-sized enterprises will not. However, this memorandum will remain neutral on this issue; future research should assess these different impacts in more depth.

For the systemic conflict problem, there is a possibility that over-regulation and under-regulation will spark conflicts between states, as the varied objectives of their competition policies may clash. For example, if a country's competition laws are largely determined by industrial policy, an exporting country may find that this constitutes a form of unfair treatment against it, which could lead to a larger trade conflict. Such a scenario played out in the 1980s and 1990s between the US and Japan, where the US competition authorities – with their focus on consumer welfare – took issue with the Japanese industrial policy approach, which allowed more consideration of producer welfare.[92] This issue played into the larger trade conflict between the US and Japan, which was ultimately rooted in US concerns about Japan's rapid economic rise.[93] Indeed, the WTO case mentioned above should be seen in this context.

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[89] *Bradford*, supra note 1 at 103.
[90] *Ibid* at 128.
[91] *Budzinski*, supra note 21 at 6.
[92] *Ibid* at 27.
[93] *Gerber*, supra note 22 at 213-215.

A more recent example is the ongoing tension between the US and the EU, where the US has accused the EU of being hostile towards its technology companies.[94] The EU's more stringent approach to competition law has been an essential component of this conflict, as "…the primary concern for the US business community is the European Commission's mounting competition investigations of US high-tech companies, including Apple, Google, and Qualcomm, which critics say reflect the EU's attempt to offset the US' technological edge and tilt the market in favour of their weaker European rivals."[95] Whether this develops into a more full-blown trade conflict remains to be seen.

It is also worth noting that the current US-China conflict contains a competition law element, as US and European companies have raised serious concerns about the discriminatory enforcement of China's anti-trust laws.[96] Mark Wu points out that this is largely rooted in the fact that China's competition laws are subordinate to the state's overall economic strategy, and because the laws include "the amorphous objective of 'promoting the healthy development of a socialist market economy.'"[97] Indeed, Wu contends that China's divergent approach to competition law is a major component of what he terms "China, Inc." – a "distinctive economic structure" that combines private enterprise with pervasive state intervention. Wu argues that most WTO rules cannot adequately deal with this unique structure, and that this is a major reason why the US, the EU, and Japan have moved towards FTAs and away from "…the WTO regime altogether to craft new legal rules to address issues arising from China, Inc."[98] While this complex geopolitical issue obviously involves a lot more than competition policy, we simply want to highlight that different approaches to competition policy have played a role in the current fracturing of the world trading system. Disentangling competition policy's precise role in this conflict would be a useful area of future research.

SECTION II: THE EXISTING DOMESTIC REGIME AND THE EXTENT TO WHICH IT ADEQUATELY REGULATES INTERNATIONAL COMPETITION

Extraterritoriality and its Shortcomings

As the above analysis suggests, one of the central difficulties with domestic competition laws is that they are generally confined to the jurisdiction of domestic borders. One potential solution to this problem is the application of the extraterritoriality "effects doctrine," which was first invoked in the competition context by the United States government in the famous 1945 *Alcoa* case.[99] This doctrine allows a competition

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[94] *Bradford*, supra note 40 at 104.
[95] *Ibid.*
[96] Neil Gough, "Western Companies Appear to Push Back Against Chinese Crackdown" (2014) *New York Times* online: https://www.nytimes.com/2014/09/04/business/international/chinese-antitrust-investigations-alarm-western-companies.html
[97] Mark Wu, "The "China, Inc." Challenge to Global Trade Governance" (2016) 57 Harvard International Law Journal at 317-318.
[98] *Ibid* at 314.
[99] *United States v. Aluminum Co. of America* 148 F.2d 416 (2d Cir. 1945). In this case, the US Department of Justice alleged that a Canadian exporter conspired with various European exporters to control aluminum production, which included exports to the USA. The DOJ held that this violated §1 of the Sherman Act (the main source of US antitrust law). Although the alleged unlawful agreements were made outside the US, they would have clearly violated the Sherman Act had they been concluded in the US. The Court of Appeal for the Second Circuit held that the Sherman Act was intended to catch even foreign conduct engaged in by a foreign national *if* that conduct had intended and actual effects within the USA. The ruling in *American Banana Co. v. United Fruit Co*. 213 U.S. 347 (1909) represents the pre-*Alcoa* situation, where antitrust law was held to stop at a nation's shores.

authority to claim jurisdiction over any anticompetitive business conduct that affects its markets, even if this business conduct occurs outside the domestic jurisdiction. The United States was the principal proponent of the doctrine in the decades after World War II (and still uses it today),[100] but it has more recently been invoked by the EU[101] and other jurisdictions as well[102]; for Martyn Taylor, extraterritoriality has emerged as the *de facto* mechanism for regulating cross-border anticompetitive conduct.[103] This is unsurprising, given that such an arrangement maintains the control enjoyed by domestic regulatory authorities – the only difference is that they are not territorially confined.[104]

To what extent does extraterritoriality present a satisfactory solution to the problems identified in the above section? In theory, if all nations could invoke it in a regular and effective way, there would appear to be a basis for regulating most anticompetitive conduct, as any nation that suffered from foreign anticompetitive activity could simply apply its domestic competition laws extraterritorially to discipline that behaviour.[105] However, there is good reason to think that a strategy that is strictly reliant on extraterritoriality will have significant problems and shortcomings.

First, the extraterritoriality doctrine does little to resolve the gap or power asymmetry problems, as it will only be available to countries with well-established and effective competition authorities. Obviously, extraterritoriality will be of little use to developing countries that have weak or nonexistent competition authorities. Moreover, it is unlikely that a competent competition authority will be enough for a country to make effective use of extraterritoriality unless they also have an extremely large domestic market. In other words, full extraterritoriality is "essentially limited" to the US and EU.[106] As competition law scholar Oliver Budzinski explains:

> "…while regimes with big internal markets like the US or the EU have sufficient power to enforce their competition rules against foreign and multinational companies (by threatening to tax or block their domestic turnovers), regimes with smaller domestic markets or such from poorer countries… may face a powerless situation against [those same companies]. The attempt of extraterritorial law enforcement may in such cases be countered by threats from the respective companies to stop supplying the markets of the country in question."[107]

Thus, extraterritoriality will essentially be unavailable to most developing countries, as well as developed countries that have competent competition authorities but lack globally dominant domestic markets (e.g. Australia and Canada).

Second, extraterritoriality does not improve the regulatory burden problem. In fact, as another tier of regulation, it is likely to exacerbate the situation, for both firms and competition authorities. If an anticompetitive arrangement or practice affects several jurisdictions and each competition authority investigates and reviews it independently of each other, it is easy to see how an inefficient multiplication of resource efforts will result: each authority will have to perform the same fact-finding, scrutinize the

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[100] *Martyn Taylor*, supra note 1 at 62; also see *Re Uranium Antitrust Litigation* 617 F 2d 1248 (7th Cir 1980); *Laker Airways Ltd v. Sabena Belgian World Airlines* 731 F 2d 909 (DC Cir 1984).
[101] See *A. Ahlstrom Osakeytio v. Commission* (1988) 4 CMR 14,491 ('Woodpulp case'; also see *Guzman*, supra note 87, at p. 348; also see Oliver Budzinski, *The Governance of Global Competition: Competence Allocation in International Competition Policy* (Cheltenham: Edward Elgar Publishing Limited, 2008) at 35-36.
[102] *Martyn Taylor*, supra note 4 at 65.
[103] *Ibid* at 54.
[104] *Budzinski*, supra note 21 at 8.
[105] *Martyn Taylor*, supra note 4 at 65.
[106] *Ibid.*
[107] *Ibid* at 9.

same documents, and order the same economic analysis (just to name a few).[108] As Budzinski writes, "…the multiplication of administrative effort generates costs in terms of burdens for taxpayers or missing resources for other public tasks – or even other competition policy tasks. The particularly high effort of multijurisdictional merger control may, for instance, work at the expense of criminal cartel prosecution."[109] The transaction costs of extraterritoriality will be significant for firms as well, as they will be subject to, for example, the duplicative costs of having to file and produce multiple discovery and evidentiary documents, as well as the multitude of fees for having to pay for legal services, consulting, and translation in the various jurisdictions. Following Budzinski again, there is evidence to suggest that the transaction costs associated with multijurisdictional reviews can function as a "distortionary 'tax' on international business activities" that can block the formation of efficient business structures.[110]

Third, there is a strong possibility that various forms of jurisdictional conflict will prevent extraterritoriality from being successfully invoked (which would leave the anticompetitive conduct in place). For one thing, countries may disagree about how legitimately the effects doctrine is being applied. It is possible, for example, that a country could adopt an expansive interpretation that allowed it to claim jurisdiction over foreign anticompetitive conduct even when the effect on its markets was marginal or remote. The US used to be accused of doing this, as some of its interpretations of the doctrine in the 1970s and 80s were said to push "…the limits of international acceptability."[111] One notorious example of this is the *Swiss Watch* case,[112] where the US was able to win the case and eventually force the restructuring of the Swiss watch industry, despite the fact that the anticompetitive practices were thought by some to have had a tenuous effect on US consumer markets.[113] However, in the 1980s, US lawmakers began to reign in this expansive view of extraterritoriality.[114] The 2004 *Empagran*[115] decision has solidified this more restricted approach, such that extraterritoriality can now be invoked by US authorities only when the foreign anticompetitive activity has a clear effect on US consumers; the unilateral assertion of jurisdiction by the US should not extend, for example, to cases involving foreign conduct that only affects foreign consumers. This understanding of the extraterritoriality principle is now accepted by most jurisdictions, including the EU[116], and Trebilcock et al. are of the view that this restricted view is more legitimate.[117]

However, even if a country were to invoke extraterritoriality on reasonable grounds, jurisdictional conflict is still a strong possibility. Even if two countries have identical competition laws, the two jurisdictions may come to incompatible judgments due to something as simple as an honest deviation in how they assessed the facts or used competition economics to judge the anticompetitive impact. Conflict becomes even more likely if the two jurisdictions have genuinely different competition laws, such that "…the anticompetitive conduct in question is considered unlawful by the nation seeking to exercise territorial jurisdiction, but is considered lawful in the nation where the conduct occurred."[118] This is not a minor

[108] Oliver Budzinski, *The Governance of Global Competition: Competence Allocation in International Competition Policy* (Cheltenham: Edward Elgar Publishing Limited, 2008) at 47 [*Budzinski Book*].
[109] *Ibid* at 48.
[110] *Ibid* at 49.
[111] *Martyn Taylor*, supra note 4 at 55.
[112] United States v.Watchmakers of Switzerland Information Centre Inc 1963 Trade Cases 70,600 (SDNY, 1965).
[113] *Martyn Taylor*, supra note 4 at 62.
[114] *Ibid*.
[115] *Hoffman-La Roche Ltd. v. Empagran S.A. 542 U.S. 155* (2004).
[116] *Budzinski Book*, supra note 108 at 35.
[117] *Trebilcock et al.*, supra note 31 at 770.
[118] *Martyn Taylor*, supra note 4 at 55.

issue, given that significant differences remain between the competition law regimes of different nations.[119] For example, as was noted in the previous section, when it comes to assessing the anticompetitive impact of mergers, the US standard strictly focuses on promoting consumer welfare, while Canada's standard allows for some consideration of producer welfare.[120] The potential for conflict deepens further when we consider how other considerations (e.g. industrial policy; the use of export cartels for strategic trade) may distort how a country applies its competition laws.[121] In sum, this suggests that there are various reasons to be skeptical of how well extraterritoriality will be able to deter anticompetitive conduct in a clean and uncontested manner.

Fourth, it should be highlighted that this potential for conflict can seriously undermine the effectiveness of extraterritoriality: for the doctrine to work properly, there needs to be a degree of cooperation between the different regulatory authorities during the investigation process. If the competition authority is to evaluate the extent to which a business arrangement or practice has anticompetitive effects, it will require a good deal of evidence and information from the firm. As Budzinski puts it, the firms:

> "…can be very reluctant to offer the relevant information, wherefore competition authorities usually have a number of formal investigation rights like official requests, to search offices or headquarters of suspicious enterprises, to confiscate documents, to summon and hear witnesses or defendants, and so on. All these information-gathering instruments belong to the 'exercise of state power' which is bound to the territory of the investigating jurisdiction. If participants of anticompetitive arrangements and practices or evidence lies abroad, the investigating competition agency cannot apply these instruments. Instead, it is limited to informal requests on a voluntary basis."[122]

Thus, if extraterritoriality is to work effectively, the availability of critical information will depend on whether the two countries have their interest aligned and have the willingness and technical capacity to cooperate. As competition law scholar Andrew Guzman puts it, "without agreements to facilitate the sharing of information, firms could reside abroad and conduct meetings abroad, and store certain documents regarding prohibited activity offshore and out of the hands of prosecutors. Cooperation regarding information… is essential."[123] While the next section will discuss these cooperation agreements in more detail, we can note that the presence of any of the above-mentioned jurisdictional conflicts may undermine the depth of such agreements.

It is important to note that these same considerations apply to the enforcement of decisions. If a competition authority has found that foreign anticompetitive conduct exists, it may pursue some type of discipline (e.g. a fine or prohibition) against the violating firm. However, if the firm refuses to obey the discipline, enforcement will be very difficult without the assistance of the other competition authority (or the country's courts, if the competition authority does not issue orders).[124]

Overall, it seems fair to conclude that exterritoriality alone would appear to be a fragile and inadequate basis for a "safe-and-sound"[125] system of international competition regulation. However, this analysis has assumed that competition authorities invoke extraterritoriality in a completely autonomous way – i.e. that

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[119] Eleanor Fox (below at fn 110) has a good way of framing this with legitimacy.
[120] *Trebilcock et al.*, supra note 31 at 775.
[121] Eleanor Fox, "Can we solve the antitrust problems of globalization by extraterritoriality and cooperation?" (2003) The Antitrust Bulletin.
[122] *Budzinski Book*, supra note 108 at 37.
[123] *Guzman*, supra note 87 at p. 356.
[124] *Ibid*.
[125] *Budzinski Book*, supra note 108 at 36.

there is no cooperation or coordination between them. Because conflict is at the root of many of the problems with extraterritoriality, and because the real-world does see some cooperation between competition authorities, it is necessary to assess how well cooperation can supplement extraterritoriality to provide an effective mechanism for regulating international competition.

Existing Cooperation Agreements

A) ***Existing Cooperation Agreements: Overview***

By the 1980s, it had become clear that extraterritoriality could lead to significant jurisdictional conflicts that limited the doctrine's ability to regulate global anticompetitive conduct. This was highlighted in the uranium cartel case,[126] where a US uranium producer alleged – in US courts – that some of its foreign competitors[127] had formed an anticompetitive cartel. To facilitate the litigation, US courts issued discovery demands to the foreign defendants, which the foreign courts of Australia, the UK, South Africa, and Canada refused to recognize. In fact, the countries hosting the firms the US was targeting all responded to the US discovery demands by implementing 'blocking statutes' that "…prohibited their citizens from cooperating with foreign authorities, such as through the provision of evidence or consenting to judgements."[128] These blocking statutes – which were implemented by several countries in the 1980s[129] – made it very difficult to attain information about the details of the foreign anticompetitive conduct, which rendered extraterritorial investigation and prosecution nearly impossible.

One response to these problems was to negotiate cooperation agreements between the different countries. Early examples include a 1959 agreement between the US and Canada to consult with each other in competition law matters, as well as an agreement between the US and Germany that was designed to facilitate German decartelization efforts in the postwar years.[130] The OECD was another important catalyst, as the organization detected as early as the 1960s how cooperation between competition authorities could alleviate some of the economic costs of inter-jurisdictional conflict.[131] In 1967, OECD member countries adopted a recommendation that provided a framework for how competition authorities could realistically coordinate their investigation and enforcement activities.[132] This recommendation had an important influence on the so-called "first-generation" of competition authority agreements, such as the one between the US and Australia in 1982, and the one between France and Germany in 1987.[133]

These first generation agreements called for competition authorities to coordinate some of their activities, such as obligations that required each party to notify the other before commencing a competition law proceeding, if the proceeding could have a significant impact on its interests. Information exchange obligations are another requirement of most first-generation agreements; these obligated each party to provide information on request from the other party if it pertained to a competition investigation or enforcement. It is important to note that these agreements had serious limitations – for example, parties had a lot of choice over which information they subjected to information exchange obligations. This

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[126] *Re Uranium Antitrust Litigation* 617 F 2d 1248 (7th Cir 1980).
[127] Located in Australia, the UK, South Africa, and Canada.
[128] John Parisi, "Cooperation Among Competition Authorities in Merger Regulation," (2010) Cornell Int'l L.J. at 58 [*Parisi*].
[129] *Martyn Taylor*, supra note 4 at 58.
[130] *Ibid.*
[131] *Ibid* at 108.
[132] *Parisi*, supra note 128 at 58-59.
[133] *Ibid.*

meant that these did little to address under and over-regulation, as they essentially "…permitted each ratifying nation to overlook any anticompetitive effects of particular conduct within its jurisdiction on the markets of the other ratifying nation."[134] However, these first-generation agreements should not be dismissed, as they helped initiate a period of competition authority collaboration that has become much deeper and more sophisticated in recent decades.

These more recent agreements deepen cooperation in two major ways.

First, there has been an expansion in the extent of the information exchange requirements. Prior to the more recent agreements, competition authorities "…had been significantly constrained in their cross-border enforcement activities due to their inability to exchange confidential information or seize evidence for the benefit of their foreign counterpart."[135] As mentioned above, this is a major contributor to under-regulation, as a country that is being harmed by foreign anticompetitive conduct will find extraterritoriality to be of little use if it cannot access important information that is only available abroad. Although they remain rare, more recent agreements – such as those between Canada and the US[136] (1995), the EU and the US (1998),[137] and amongst the Nordic countries (2010)[138] – do much to alleviate this problem, as these competition authorities are permitted to exchange information, even if that information has been deemed confidential by the authority. There are examples of even more permissive information-sharing agreements. For example, the US-Australia agreement (1999) permits the competition authorities to exchange *private* confidential information – a major development given that "…most nations continue to guard their corporate information jealously, partly for fear of cross-border industrial espionage."[139] The Australia-New Zealand agreement likely goes the farthest: if one country requests that the other provide it with evidence for an investigation, it is an offence if a person in New Zealand does not comply with a requirement of the Australian competition authority to provide documents or information.[140]

The second way in which recent cooperation agreements deepen competition authority collaboration is through their introduction of negative and positive 'comity' principles.[141] In the competition context, if a country is enforcing its competition laws against a certain foreign business practice, a *negative* comity obligation would require it to consider how this enforcement would affect the interests of the other nations, to consult with the affected nations, and even to refrain from enforcement if the consequences for the affected nations are too severe. The cooperation implicated in *positive* comity obligations is even more extensive, as such agreements oblige a party to consider requests to enforce anticompetitive conduct that is taking place in its jurisdiction but is primarily affecting other jurisdictions. As a concrete example of an agreement containing comity requirements, consider the one between the EU and the US that was

[134] *Martyn Taylor*, supra note 4 at 110.
[135] *Ibid* at 114.
[136] Government of Canada, "International cooperation in competition law: views from above the 49th parallel" (2019) online: <https://www.canada.ca/en/competition-bureau/news/2019/03/international-cooperation-in-competition-law-views-from-above-the-49th-parallel.html>.
[137] *Parisi*, supra note 128 at 62.
[138] Marek Martyniszyn, "Inter-agency evidence sharing in competition law enforcement" (2015) 19:1 The International Journal of Evidence & Proof at 23-24 [*Martyniszyn*].
[139] *Martyn Taylor*, supra note 4 at 115.
[140] *Martyniszyn*, supra note 138 at 25-26.
[141] Comity is a general principle of international law that, as Joel Paul notes, "requires courts to balance competing public and private interests in a manner that takes into account any conflict between the public policies of the domestic and foreign sovereigns." See Joel Paul, "The Transformation of International Comity" (2008) 71:19 Law and Contemporary Problems at 19.

reached in the 1990s but is still used today. In this agreement, the party receiving an enforcement request must report back to the party making the request and state whether it intends to enforce the action. After this consultation, the requesting nation may accept the requested nation's conclusion as to whether or not it will enforce the action, seek to modify the conclusion, or pursue its own extraterritorial enforcement action.

In theory, positive and negative comity obligations can alleviate over and under-regulation. As Taylor notes, negative comity can at least partly mitigate over-regulation, as an enforcing nation is required "…to factor into its enforcement decisions any adverse impact on other nations."[142] Positive comity can be an effective strategy for addressing under-regulation, as the requirement that a country play a "deputised"[143] role and still take action against anticompetitive conduct that does not affect it can do much to eliminate anticompetitive practices that would otherwise be present. Positive comity can also promote more efficiency, as the enforcing competition authority would be the one most likely to gather the most relevant and important evidence.[144]

B) Cooperation Agreements: Successes

Some of the competition cooperation agreements referred to above have brought tangible benefits. One example is the 1995 US-Canada information-sharing agreement. In the 1990s, prior to the agreement, both nations were quite constrained in their ability to address cross-border anticompetitive activity because they often lacked the necessary evidence to do so. The information-sharing agreement changed this, however, and allowed both countries to significantly improve their ability to prosecute any cross-border cartel activity; Canada, for example, was able to issue over $100 million (USD) in fines during the 2000s.[145] The deep cooperation agreement between Australia and New Zealand has also facilitated the prosecution of cross-border anticompetitive activity, such as in the 2010 Air Ambulance cartel case where inter-agency collaboration greatly facilitated the investigation.[146]

Amongst competition scholars, it is generally agreed that the best example of effective bilateral cooperation is the arrangement between the US and the EU. Although the US-Australia agreement permits disclosure of corporate information without consent while the EU-US does not, the size of the US and EU markets, plus the fact that they have the world's most advanced and influential competition authorities, mean that their cooperation agreement has been by far the most consequential in terms of the ability to regulate anti-competitive activity.[147]

One example of a successful US-EU collaboration involves information sharing for merger reviews; in several cases, the two authorities have closely collaborated with each other when appraising the transactions.[148] In the *Oracle/PeopleSoft* merger, for example, the European Commission made extensive use of evidence gathered during the US proceedings. While collaboration like this certainly alleviates under-regulation as it increases the chances that any anticompetitive conduct will be detected, it also

[142] *Martyn Taylor*, supra note 4 at 110.
[143] *Ibid* at 111.
[144] *Ibid* at 117.
[145] *Ibid* at 114.
[146] *Martyniszyn*, supra note 138 at 25.
[147] Maher Dabbah, "Future Directions in Bilateral Cooperation," supra note 21 at p. 290 [*Dabbah*].
[148] *Dabbah*, supra note 136 cites the following cases as prominent examples: *Exxon/Mobil*, *Allied Signal/Honeywell*, *AstraZeneca/Novartis*, and *Oracle/PeopleSoft.*

improves the overall efficiency of the investigation as the parties will not have to conduct their own full investigations.

US and EU authorities have also made use of comity principles (where countries act in the interests of others) when enforcing decisions and fashioning remedies, as happened in the attempted *AstraZeneca/Novartis* merger, for example. In this case, "there were particularly helpful discussions between the US Federal Trade Commission and the European Commission concerning the issue of remedies."[149] Such collaboration alleviates over and under-regulation, as it enabled the authorities "…to focus more quickly on the enforcement issues over which they have common concerns, to determine whether the magnitude of the concerns requires enforcement action by one or both agencies, and then to consider remedial measures that will avoid subjecting the parties to conflicting obligations."[150]

Overall, the cooperation between two of the world's biggest and most important competition authorities has been successful. As Dabbah has observed, the agreement has contributed significantly to bringing the "…regimes closer to each other. Following the adoption of the agreements, the number of cases in which consultation and coordination of enforcement actions have taken place grew phenomenally. The agreements also transformed contact between officials [at the two regimes] from an infrequent occurrence to a daily routine…".[151]

C) Cooperation Agreements: Shortcomings

Despite the achievements of various cooperation agreements, there are some significant shortcomings. First, there is considerable variation in the extent of cooperation that the agreements require. While most of the examples mentioned above demand considerable collaboration between competition authorities (such as the Australia-New Zealand agreement or the US-EU agreement), it is more likely that an agreement will require a more limited form of cooperation.[152] As Dabbah notes, it is quite common for a cooperation agreement to be signed only to lead to "…virtually no instances of actual cooperation as stipulated under the relevant agreement."[153] For example, despite Ukraine's formal agreements with various competition authorities, actual cooperation between the agencies has been scarce.[154] As Taylor explains, this variation occurs because extensive cooperation agreements are "predicated on the similarity of the competition laws of each jurisdiction and mutual confidence by each nation in the enforcement activities of the other."[155] Because these conditions only exist for a small number of developed countries, a large number of agreements with diverse parties and extensive cooperation requirements will be very difficult to negotiate and sustain.

This relates to a second problem with cooperation agreements: they do little to address the gap problem. Most of the meaningful cooperation agreements that exist are between developed countries, and there is nothing in these agreements to address the weakness or non-existence of competition laws in developing jurisdictions.[156] While positive comity could be used to address these gaps as it involves a responsibility to protect competition abroad, developed countries have little incentive to devote their "scarce resources"

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[149] *Dabbah*, supra note 147 at 291.
[150] *Parisi*, supra note 128 at 63.
[151] *Dabbah*, supra note 147 at 292-293.
[152] *Budzinski*, supra note 21 at 8; *Martyn Taylor*, supra note 4 at 113.
[153] *Dabbah*, supra note 147 at 296.
[154] *Ibid.*
[155] *Martyn Taylor*, supra note 4 at 118.
[156] *Budzinski*, supra note 21 at. 8-10.

to enforcing competition laws for the benefit of developing countries. [157] This is because developing countries might lack an effective competition authority that could reciprocate the positive comity, or because companies from the developing country do not sell in the developed country market, thus making anticompetitive practices there irrelevant to the developed country.[158] As Anu Bradford puts it, "…developed countries would likely be exposed to numerous requests of enforcement assistance from developing countries, as large developed country corporations often achieve a high market share in small developing country markets. In contrast, smaller developing-country corporations rarely trigger an antitrust investigation in large developed-country markets."[159]

Third, because the vast majority of information-sharing obligations do not allow a competition authority to disclose confidential *private* information, under-regulation is not fully addressed. If a country suspects that it is being harmed by a foreign firm's anticompetitive activity, it is unlikely that its investigation or enforcement will lead to much if it has no way of accessing that firm's confidential information. According to Anu Bradford, this is why "…cooperation tends to be more successful in merger control investigations than in cartel investigations. Corporations seeking to merge often have an incentive to grant a waiver in order to ensure a swift investigation and, consequently, timely consummation of their transaction. In contrast, corporations remain reluctant to facilitate agencies' joint cartel investigations, as consenting to the exchange of confidential information would expose them to additional sanctions in another jurisdiction."[160]

Fourth, even in cases where two countries have an extensive cooperation agreement, conflict is still likely. For one thing, cooperation agreements do not directly address the coordination of substantive laws. This means that there is still a high likelihood that disagreements about the goals and priorities of competition law could prevent effective cooperation. For example, while there is no question that the US and EU cooperation agreements from recent decades have contributed to some convergence in their competition laws,[161] cases from recent decades illustrate how substantial differences persist. A prominent example of this is the European Commission's 2001 decision to block the $42 billion (USD) acquisition of Honeywell by General Electric,[162] despite the fact that the US approved the merger.[163] More recently, the EU imposed a $5 billion (USD) competition fine on Google in a case that involved the use of its Android operating system; again, this occurred despite a much different US opinion on the same issue.[164] While these cases have led to friction between the US and EU, including accusations that the EU was using its competition laws for protectionist reasons,[165] a better explanation is that the EU's laws are simply more stringent in terms of anticompetition discipline and that this exists for legitimate reasons, rooted in the EU's suspicion "…of the market's ability to deliver efficient outcomes."[166]

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[157] Philip Marsden, "The Curious Incident of Positive Comity," in *Cooperation, Comity, and Competition Policy* edited by Andrew Guzman, p. 309. [*Marsden*].
[158] Jurgita Malinauskaite, "Harmonization of Competition Law in the Context of Globalization," (2010) European Business Law Review at 381 [*Malinauskaite*].
[159] *Bradford 2011*, supra note 88 at 324.
[160] *Ibid* at 323.
[161] *Parisi,* supra note 128 at 63-66.
[162] Commission Decision in Case No. COMP/M.2220 (General Electric/Honeywell), 2004 O.J. (L 48) 1.
[163] *Bradford*, supra note 1 at 99.
[164] *Ibid* at 99 and 104.
[165] John Cassidy, "Why Did the European Commission Fine Google Five Billion Dollars?" (July 20, 2018) New Yorker, online: <https://www.newyorker.com/news/our-columnists/ why-did-the-european-commission-fine-google-five-billion-dollars>.
[166] *Bradford*, supra note 1 at 102.

Overall, it is important to note that most existing cooperation agreements leave room for a nation to disregard its cooperation obligations if they interfere with its national interests. For example, most information-sharing and positive comity obligations remain voluntary, such that there is no obligation on a nation to provide confidential information, or respond to requests to investigate or enforce an action.[167] As Guzman summarizes the situation, "…ultimately, individual states may refuse cooperation when they want to and are free to consider only their individual interests when choosing to refuse to cooperate."[168] This likely explains why the prosecution of private international cartels has seen considerably more cooperation than with export cartels.[169] As discussed in the previous section, private international cartels tend to be truly international, in the sense that many countries are suffering from their anticompetitive conduct on the consumer side, and no one country is benefitting on the producer side. Thus, it is more likely that an international consensus to prosecute the cartel will develop, which will improve the chances of constructive cooperation. These incentives are less likely with export cartels, however, as the country housing the cartel is not being harmed by the anticompetitive activity and will have little interest in facilitating its prosecution.[170]

To summarize this section, competition cooperation agreements have certainly made it easier for domestic competition authorities to prosecute anticompetitive activity that transcends their borders. For example, the US and EU authorities have successfully collaborated with each other in several recent investigations, making it more likely that the anticompetitive activity will be prosecuted, as well as streamlining the process. However, these cooperation agreements have many shortcomings. The gaps associated with developing countries are not well-addressed, and differences in both the substantive content of competition laws and national interests can do much to frustrate effective cooperation efforts.

SECTION III: INTERNATIONAL STRATEGIES TO BETTER ADDRESS INTERNATIONAL ANTICOMPETITIVE ACTIVITY

This section considers international strategies to better address international anticompetitive activity. When we refer to international strategies, we mean either efforts to 'harmonize' domestic competition laws, or to create some form of supranational review process for anticompetitive or restrictive business practices. The idea of establishing an international competition policy dates from the 1920s, when the League of Nations called for a conference in 1925 to address the struggling European economy. As part of the solution to avoid economic disaster and its political repercussions, global competition law was discussed at the 1927 World Economic Conference in Geneva among 50 participating nations.[171] Participants acknowledged the harm caused by cartels and sought cooperation among nations to promote competition and trade.[172] However, nothing concrete came of this because the focus of the international community shifted to the Great Depression and World War II.

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[167] *Martyn Taylor,* supra note 4 at 118.
[168] *Guzman*, supra note 87 at 357.
[169] *Anderson et al*., supra note 3 at 40.
[170] Marek Martyniszyn, "Export Cartels: Is it legal to target your neighbour? Analysis in light of recent case law" (2012) 15:1 JIEL at 182-184.
[171] *Gerber*, supra note 22 at 24-25.
[172] *Ibid.*

Following World War II, interest in an international competition policy was revived through the draft of the 1948 Havana Charter for an International Trade Organization.[173] The Charter sought to establish the International Trade Organization (ITO) and set forth rules governing employment, economic development, commercial policy, commodity agreements, and competition (restrictive business practices).[174] However, the beginning of the Cold War, among other things, led to US domestic political changes. The Truman administration withdrew the Charter from consideration by the US Congress on December 6, 1950.[175] As a result, other countries also failed to sign it. The ITO never came into existence and the Havana Charter never entered into force. Only the General Agreement on Tariffs and Trade (GATT), which had been negotiated alongside the Charter, survived.

Interest in competition policy was revived from time to time, including in the 1990s in the closing stages of the Uruguay Round negotiations that led to the World Trade Organization's creation and its replacement of the GATT system. In that instance, a group of antitrust experts, comprising mostly experts from Germany, issued the Draft International Antitrust Code (the Munich Code) proposing a framework for an international competition law regime.[176] The Munich Code reflected concepts included in the Havana Charter in advocating for binding competition law principles and their enforcement.[177] Specifically, the Code provided for implementation of uniform minimum domestic competition law standards and proposed the creation of an international institution with supra-national powers, which would have binding authority over national courts and national competition authorities.[178] It was ambitious in advocating for a centralized system of regulation, and this likely contributed to its failure.

The ambitious nature of the Munich Code raised institutional and substantive concerns, as it was seen to infringe on national sovereignty and did not respect national differences.[179] For instance, the US considered that a detailed rule-based framework together with a supra-national dispute resolution authority was contrary to its national interests as this framework interfered with the US's established laws and principles.[180] The restrictiveness of the proposed regime gave rise to a number of concerns including:[181] 1) the Munich Code prohibited any form of exemptions afforded to acts of state and certain industries; 2) all non-competition considerations were prohibited by the Code, which included considerations in relation to national interest; and 3) a more stringent threshold imposed by the Code than that of existing domestic competition laws in relation to the assessment of business concentration. Although the Munich Code was not adopted, it proved useful nonetheless in that it fostered eventual discussion on international competition policy in the WTO.

At the First WTO Ministerial Conference held in Singapore in 1996, Trade Ministers representing all WTO Members established three working groups to examine the following issues: 1) trade and investment; 2) trade and competition policy, and 3) transparency in government procurement.[182] In addition, Ministers instructed the WTO Goods Council to look into ways to simplify procedures for trade,

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[173] UN Doc E/CONF.2/78

[174] *Malinauskaite* supra note 158 at 384. See also Chapter V of the Havana Charter, entitled Restrictive Business Practices.

[175] *Gerber*, supra note 22 at 48.

[176] *Trebilcock*, supra note 31 at 767.

[177] *Martyn Taylor,* supra note 4 at 308.

[178] *Ibid* at 308 and 309.

[179] *Ibid.*

[180] *Ibid.*

[181] *Ibid* at 312.

[182] WTO, "Investment, competition, procurement, simpler procedures" online: <https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm>.

known as "trade facilitation".[183] These four issues became known as 'Singapore issues' and were eventually included on the Doha Development Agenda, a work program for WTO trade negotiations launched in 2001. Negotiations on the Singapore issues were to begin after the 2003 Ministerial Conference to be held in Cancún.[184] In the meantime, WTO Members would negotiate modalities for these talks for adoption in Cancún.

The WTO Working Group on the Interaction between Trade and Competition Policy (WGTCP) established at the Singapore Ministerial was tasked to "study issues raised by Members relating to the interaction between trade and competition policy, including anticompetitive practices, in order to identify any areas that may merit further consideration in the WTO Framework."[185] In the initial two years (1997-1998), the WGTCP focused on specific trade policy issues, including: [186]

i. The impact of state monopolies, exclusive rights and regulatory policies on competition and international trade;
ii. The relationship between the trade-related aspects of intellectual property rights and competition policy; and
iii. The relationship between investment and competition policy, and the impact of trade policy on competition.

In 1998, at the request of WTO Members, the WTO Secretariat prepared a "Synthesis Paper" to bring together "the issues raised and points made on the relationship of trade and competition policy to development and economic growth, based on the oral and written contributions to the Group …".[187] The paper identified seven "specific rationales for introducing competition law and policy": [188]

i. Promoting an efficient allocation of resources;
ii. Protecting the welfare of consumers;
iii. Preventing/addressing excessive concentration levels and resulting structural rigidities;
iv. Addressing anticompetitive practices of enterprises (including multinational enterprises) that have a trade dimension, and that (possibly) impact particularly on developing countries;
v. Increasing an economy's ability to attract foreign investment and to maximize the benefits of such investment;
vi. Reinforcing the benefits of privatization and regulatory reform/deregulation initiatives; and
vii. Establishing an institutional focal point for the advocacy of pro-competitive policy reforms and a competition culture.

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[183] *Ibid.*
[184] *Ibid.*
[185] WTO, "Working Group on the Interaction between Trade and Competition Policy (WGTCP) – History, Mandates and Decisions" online: <https://www.wto.org/english/tratop_e/comp_e/history_e.htm> [*WTO Working Group*].
[186] Robert D. Anderson, William E. Kovacic, Anna Caroline Müller and Nadezhda Sporysheva, "Competition Policy, Trade and the Global Economy: An Overview of Existing WTO Elements, Commitments in Regional Trade Agreements, Some Current Challenges and Issues for Reflection" (2019) OECD, DAF/COMP/GF(2019)11 at para 14 [*2019 OECD Report*].
[187] Working Group on the Interaction between Trade and Competition Policy, "Synthesis Paper on the Relationship of Trade and Competition Policy to Development and Economic Growth" (1998) WTO, WT/WGTCP/W/80 at para. 1, 9-27 *Synthesis Paper on the Relationship of Trade and Competition Policy to Development.*
[188] Working Group on the Interaction between Trade and Competition Policy, "Synthesis Paper on the Relationship of Trade and Competition Policy to Development and Economic Growth" (1998) WTO, WT/WGTCP/W/80 at paras 9-27 *Synthesis Paper on the Relationship of Trade and Competition Policy to Development*.

The Synthesis Paper also discussed the perspectives that had emerged on the relationship between trade and competition policy as it affects economic development and growth. The paper referred to the complementary relationship between trade and competition policy: it observed that trade policy fosters economic development and growth through the reduction of government-imposed barriers to international trade, while competition policy addresses anticompetitive practices that impede the efficient functioning of markets.[189]

The launch of the Doha Round negotiations in 2001 saw a shift in the overall context of international competition policy, as the 'Singapore issues' were being considered relative to a wider negotiating agenda. At the WTO Ministerial Conference in Doha, Ministers "recognized 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."[190] As a result, Ministers instructed the Working Group to focus on four specific elements of a possible multilateral framework:[191]

i. Core principles including transparency, non-discrimination and procedural fairness;
ii. Provisions on 'hard-core cartels';
iii. Modalities for voluntary cooperation (between competition agencies); and
iv. Support for progressive reinforcement of competition institutions in developing countries through capacity building.

By 2002, the Working Group had completed its analysis of these elements, all of which were the subject of Members' proposals at the next Ministerial Conference, which was held in 2003 in Cancún. However, on Day 5 of the Conference, Chairperson Luis Ernesto Derbez – Mexico's Foreign Minister – concluded that Members could not reach a consensus on modalities for negotiations on competition policy.[192] Although there were many issues precluding a successful round of negotiations, the main reason underlying the failed negotiations in Cancún was the unwillingness of developing countries to negotiate on the four 'Singapore issues' because of the lack of substantial concessions from the developed WTO Members in the area of agriculture. Specifically, a group of 20 developing country Members demanded the reduction of agricultural subsidies and lower import barriers from the developed Members before negotiations on the 'Singapore issues' could take place.[193]

Although the issue of agriculture was central to the entire Ministerial collapse in Cancún – and not just the negotiations on the 'Singapore issues' – there were also several concerns directed specifically at a multilateral agreement on competition policy. First, Members – especially developing ones – were uncertain about whether the benefits of competition policy would outweigh the costs of its implementation.[194] As leading WTO scholar Professor John H. Jackson explained, there were various constitutional and procedural constraints, including the difficulty and costs associated with the

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[189] *Ibid* at paras 30, 35 and 36.
[190] Doha Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, para. 23; WTO, "Working Group on the Interaction between Trade and Competition Policy (WGTCP) – History, Mandates and Decisions" *World Trade Organization* online <https://www.wto.org/english/tratop_e/comp_e/history_e.htm>.
[191] *2019 OECD Report,* supra note 186 at para 18.
[192] WTO, "Day 5: Conference ends without consensus" World Trade Organization online: <https://www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm#statement>.
[193] Gary R. Saxonhouse and Robert M. Stern, "Trade-Policy Issues and Policy Options for Japan and the United States: Introduction and Overview" (2006) 29:6 The World Economy at 684.
[194] Bernard Hoekman and Kamal Saggi, "International Cooperation on Domestic Policies: Lessons from the WTO Competition Policy Debate" (2004) Centre for Economic Policy Research, Discussion Paper No.4693 at 17.

harmonization of national regimes into a single standard.[195] Most developing country Members at the time did not have domestic competition laws in place, and they would have had to undertake undetermined costs to implement such regulation. Moreover, developing country Members feared that international competition rules would interfere with their preferred industrial policies and investment screening techniques.[196]

Second, some developed country Members were unenthusiastic about having a WTO-level competition policy. For example, the US opposed a binding competition policy regime because it did not consider the WTO to be the appropriate forum for developing such rules.[197] Specifically, there was a concern that the WTO system was designed to place an emphasis on the role of governments, rather than to address the conduct of private firms.

Finally, differences in the national ideologies – i.e. market-based versus more state interventionist – played a role in the lack of consensus in Cancún on negotiation modalities.[198] At the time of the Ministerial Conference, multiple developing countries used a centrally-planned system, where the government exercised control over economic activities. In such circumstances, there is little need for competition law because economic activity is already centrally controlled.

Ultimately, the WTO Members decided in 2004 not to undertake any further work on the 'Singapore issues' for the duration of the Doha Round, except for trade facilitation, which was added to the Round's negotiating agenda.[199] As part of the 'The July package' in 2004 – a package of agreements that includes the framework for completing the modalities on agriculture – the WTO General Council decided to drop the subject of competition from the Work Program set out in the Doha Ministerial Declaration.[200]

Competition Provisions in the WTO

Despite the failure to develop an international competition policy in the WTO, provisions closely related to competition are found in some of the WTO Agreements, including the General Agreement on Tariffs and Trade 1994 (GATT 1994), the General Agreement on Trade in Services (GATS), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). These agreements reduce trade barriers and promote competition through principles of national treatment, most-favoured-nation treatment, and transparency.

The principle of national treatment is the cornerstone of the WTO, which requires competitive equality between like domestic products and services and those of other Members.[201] National treatment is included in the GATT 1994 under Article III, which requires Members "to provide equality of

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[195] Gary Hufbauer and Jisun Kim, "International Competition Policy and the WTO" (2009) The Antitrust Bulletin 54:2.
[196] *Ibid.*
[197] *Ibid* at 139.
[198] *Ibid.*
[199] WTO, "The July 2004 package and August decision" World Trade Organization online: <https://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd23_julypack_e.htm>.
[200] *Ibid.*
[201] Mitsuo Matsushita, "Basic Principles of the WTO and the Role of Competition Policy" 2004 Global Studies Law Review 363 at 366 [*Mitsuo*].

competitive conditions for imported products in relation to domestic products" as per the Report of the Appellate Body in *Japan – Taxes on Alcoholic Beverages*.[202] Specifically, under Article III:4, Members are obligated to accord "no less favourable" treatment to foreign products than that accorded to like products of nations origin in respect of "all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use".[203] Domestic competition laws fall within the scope of "all laws, regulations and requirements".[204]

Similarly, the principle of national treatment is also provided for under Article 3 of the TRIPs Agreement and Article XVII of the GATS. Article XVII of the GATS states that: "…each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than it accords to its own like services and service suppliers."[205] The WTO Panel in *China – Electronic Payment Services* found that Article XVII "seeks to ensure equal competitive opportunities for like services of other Members" and that "like services" are "services that are in a competitive relationship with each other."[206] However, unlike under the GATT 1994, the application of national treatment in the GATS is limited to the specific sectoral commitments undertaken by individual Members and set forth in their respective Services Schedules.[207]

In addition to the national treatment requirement, the GATT 1994, the GATS and the TRIPs Agreement promote competition through the Most-Favoured-Nation (MFN) principle. MFN prevents a Member from affording favourable treatment for like goods and services to one Member and not to others. The principle is articulated in Article I of the GATT 1994 as follows: "…any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."[208] Similar provisions on MFN are included in Article II of the GATS and Article 4 of the TRIPs Agreement. Through these provisions, MFN promotes competition by guaranteeing equal competitive conditions for goods and services between all WTO Members.

Finally, multiple WTO Agreements impose a requirement of transparency, which promotes competition by obligating Members to disclose actions and regulations in relation to trade in goods, services, and intellectual property that have an effect on other Members. The transparency requirement has two parts: 1) make publicly available all relevant regulations, administer such regulations impartially, and provide the right to review administrative decisions; and 2) notify the WTO and the Members of new and amended government regulations imposed in relation to trade in goods, services, and intellectual property.[209] The principle of transparency can be found under Article X of the GATT 1994, Article III of the GATS and Article 69 of the TRIPs Agreement. In addition, the principle of transparency is found in other WTO Agreements such as the Agreement on Agriculture, the Anti-Dumping Agreement, the Agreement on Technical Barriers to Trade, and the Agreement on the Application of Sanitary and

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[202] Report of the Appellate Body, *Japan – Taxes on Alcoholic Beverages*, AB-1996-2, WT/DS8/AB/R, 4 October 1996.
[203] *General Agreement on Tariffs and Trade 1994,* April 15, 1994, 1867 UNTS 187, Article III:4 [*GATT 1994*].
[204] *Anderson et al.*, supra note 3 at 10.
[205] General Agreement on Trade in Services, April 15, 1994, 1869 UNTS. 183 (1994), Article XVII [*GATS*].
[206] WTO, "WTO Analytical Index: GATS – Article XVII (Jurisprudence)" (2019) at para 9 online <https://www.wto.org/english/res_e/publications_e/ai17_e/gats_art17_jur.pdf>.
[207] *Mitsuo*, supra note 201 at 366.
[208] *GATT 1994*, supra note 203 Article I.
[209] *Mitsuo*, supra note 201 at 368.

Phytosanitary Measures, where Member countries are required to notify other WTO members in relation to any measures taken within the scope of these agreements.[210]

As this section has demonstrated, a number of WTO Agreements contain provisions that could have implications for anticompetitive behavior. However, these provisions govern actions attributable to WTO Members. Hence their applicability to the conduct of private firms is unclear. The famous case *Japan – Measures Affecting Consumer Photographic Film and Paper* (mentioned above) demonstrates that the WTO is not necessarily effective in regulating the private conduct of firms. In that case, the US alleged that the anticompetitive conduct of the Japanese government and Japanese private company (Fujifilm) prevented the US company (Kodak) from entering the Japanese market and, as a result, this conduct nullified or impaired benefits accruing to the US under the WTO agreements. This type of claim, known as a non-violation claim, is considered an exceptional remedy in WTO law, which led the Panel to impose on the US a high burden of proof with respect to the following three issues:[211]

i. Whether the practices in question were government 'measures';
ii. If so, whether the measure in question related to a benefit reasonably anticipated to accrue from prior tariff concessions by upsetting the competitive relationship between imports and domestic products; and
iii. Whether the benefit accruing to the complainant state had in fact been nullified or impaired by the measures in questions (causality).

As a result of these stringent conditions, the US did not succeed in its challenge against the Japanese government, in large measure because the central issue was the conduct of a private company (Fuji).[212]

The GATS and TRIPs agreements are also limited in their application to the conduct of private firms. Under Article IX:1 of the GATS, Members "recognize that certain business practices of service suppliers … may restrain competition and thereby restrict trade in services."[213] However, Article IX:1 has never been invoked in WTO dispute settlement, so it is difficult to know how it will be interpreted in practice. The TRIPs Agreement, for its part, permits but does not require Members to treat specific practices as abuses; nor does it specify remedial measures that must be taken.[214] Thus, although there are provisions related to competition in some WTO Agreements, they appear to be limited in terms of their application to the conduct of private firms.

The State of Competition Policy in Free-Trade Agreements (FTAs)

Lack of a multilateral agreement on competition policy, together with the WTO's ineffective (at least to date) regulation of the conduct of private firms, may be less of a concern now than some years ago. This is because competition policy is now a common feature in free trade agreements (FTAs). Approximately 90 per cent of the 267 FTAs currently in force contain provisions on competition policy in one form or another; only 60 per cent of FTAs did so before 1990.[215] The scope of competition provisions included in

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[210] WTO, "Transparency" World Trade Organization online: <https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bftransparency_e.htm>.
[211] Alberto Alvarez-Jimenez, "Emerging WTO Competition Jurisprudence and its Possibilities for Future Development" (2004) 24:2 Nw J Intl L & Bus 441 at 444-445; *Japan – Measures Affecting Consumer Photographic Film and Paper*, supra note 65, para 10.37.
[212] *Mitsuo*, supra note 201 at 370
[213] *GATS*, supra note 205 at Article IX:1.
[214] *Anderson et al.*, supra note 3 at 16.
[215] *OECD Free Trade Agreements*, supra note 186 at para 6.

FTAs has also changed from the pre-1990 approach. Early agreements merely acknowledged the importance of competition policy in the promotion of trade. Recent FTAs, in contrast, provide much broader coverage of competition policy obligations between the parties, including the promotion of competition, requirements to adopt and maintain domestic competition laws, implementation of competition enforcement principles, and dispute settlement mechanisms.[216] However, there is significant variation in what FTA competition-related provisions entail: some agreements include broad recognition of the need for competition policy without elaboration, while other agreements contain substantial obligations to control and regulate anticompetitive practices.

A) ***Competition Provisions in FTAs***

Provisions in FTAs often replicate the principles found in WTO Agreements, such as the GATT 1994, the GATS and the TRIPs Agreement. Provisions on the regulation of designated monopolies and state-owned enterprises (SoEs), for example, are included in 49 per cent of FTAs. [217] In some instances, however, the scope of the FTA provisions goes beyond that found in WTO Agreements by requiring monopolies and SoEs to: "i) be subject to regulatory control; ii) act in accordance with commercial considerations; iii) act in a non-discriminatory manner; and iv) refrain from using their monopoly power to engage in anti-competitive conduct."[218] This approach is especially prevalent in NAFTA-inspired agreements such as the *Canada – Chile Free Trade Agreement* and the agreements to which China or Japan are parties, such as the *India – Japan Comprehensive Economic Partnership Agreement* and the *New Zealand – People's Republic of China Free Trade Agreement*. [219] In addition, provisions on the regulation of state subsidies and aid, which often reaffirm the parties' commitment to the GATT 1994, the GATS and the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement), are present in 43 per cent of FTAs. [220]

Provisions on specific obligations regarding domestic competition laws are less common than the provisions described above. Only 36 per cent of FTAs currently in force contain a provision requiring the FTA parties to adopt and maintain competition laws that regulate anticompetitive practices (i.e., anticompetitive agreements, abuse of market power, and anticompetitive mergers).[221] Widespread inclusion of such a provision is only apparent in FTAs where the EU is a party[222] and in NAFTA-inspired FTAs such as the *Canada – Costa Rica Free Trade Agreement* (Article XI.2) and the *Canada – Honduras Free Trade Agreement* (Article 15.2). Moreover, approximately 26 per cent of FTAs contain a general obligation to promote competition, often found in broad statements with no explanation or elaboration of its parameters.[223] For instance, Article 1.2(b) of the *Agreement between the EFTA States and Singapore* (*EFTA – Singapore FTA*) provides that one of the objectives of the agreement is to "promote competition

[216] *Anderson et al.*, supra note 1 at 26.
[217] *OECD Free Trade Agreements*, supra note 183 at para 29.
[218] *Ibid* at para 30.
[219] *Ibid* at para 30.
[220] *Ibid* at para 35.
[221] *Ibid* at para 14.
[222] *Association Agreement*, 30 August 2014, Official Journal of the European Union L 260, Article 333(2)(a) online: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0830(01)&from=EN>; International Agreements Council Decision 17 March 2014, Official Journal of the European Union L 161, Article 253(2)(a) online: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2014:161:FULL&from=EN>.
[223] *OECD Free Trade* Agreements, supra note 186 at para 11.

in their economies, particularly as it relates to economic relations between the Parties."[224] Similar provisions are found in numerous other FTAs involving EFTA countries and Asian economies (e.g., *Singapore – Republic of Korea*, *Japan – Australia*, *EFTA – Peru* and several other agreements).

Competition-specific enforcement principles are rarely included in FTAs. Only 27 per cent include competition-specific enforcement principles ensuring transparent and non-discriminatory application of competition rules. [225] For instance, Article 3(4) in Chapter 8 of the *Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation* states that: "Each Party shall endeavour to apply its competition laws to all commercial activities in its jurisdiction and shall not discriminate on the basis of nationality when enforcing these laws."[226]

In terms of dispute settlement procedures, there are a few examples of agreements that provide for the full application of the FTA's dispute settlement procedures to competition-specific provisions: these include some to which the EU is party, agreements where countries from the European Free Alliance are parties, and some to which countries from the Commonwealth of Independent States or MERCOSUR are parties.[227] However, FTA dispute settlement mechanisms are often not applicable to the competition chapters; that is the case in 27 per cent of FTAs.[228] Recent examples of the exclusion are found in the *EU – Canada Comprehensive Economic and Trade Agreement (*CETA*)*, the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (*CPTPP) and *the Agreement between the United States of America, the United Mexican States, and Canada* (USMCA). For instance, Article 21.7 of USMCA states that: "No Party shall have recourse to dispute settlement under Chapter 14 (Investment) or Chapter 31 (Dispute Settlement) for a matter arising under [the Competition Policy] Chapter."[229] Moreover, even when competition chapters are not excluded entirely from the FTA dispute settlement procedures, the application of the dispute settlement mechanism is usually limited to consultations or negotiations and does not include the litigation phase, as is the case in 40 per cent of FTAs. [230]

B) Cooperation and Coordination

The predominant focus of FTAs is on cooperation and coordination rather than on substantive obligations of the FTA parties in the area of competition law. Indeed, half of the existing FTAs include provisions on cooperation and coordination, where the scope varies from mutual legal and technical consultation to the exchange of information.[231] Cooperation and coordination mechanisms usually take the form of exchange of information, but some FTAs require the parties to cooperate in investigations (e.g., *Turkey –*

[224] *Agreement Between the EFTA States and Singapore 1 January 2003*, Article 1(2)(b) online: <https://www.efta.int/media/documents/legal-texts/free-trade-relations/singapore/EFTA-Singapore%20Free%20Trade%20Agreement.pdf>. Iceland, Liechtenstein, Norway and Switzerland.
[225] *OECD Free Trade Agreements*, supra note 186 at 44.
[226] *Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation 1 December 2013*, Article 3(4) online: < https://www.nzcio.com/assets/ANZTEC/ANZTEC-Final-Text-10-July-2013-NZ.pdf>.
[227] *Anderson et al.*, supra note 3 at 33; Commonwealth of Independent States - Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan and Uzbekistan; MERCOSUR – States Parties (Argentina, Brazil, Paraguay, Uruguay and Venezuela) and Associated States (Bolivia, Chile, Colombia, Ecuador, Guyana and Surinam).
[228] *OECD Free Trade Agreements*, supra note 186 at 53.
[229] *Agreement between the United States of America, the United Mexican States, and Canada December 13, 2019*, Article 21.7 online: < https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/21_Competition_Policy.pdf>.
[230] *OECD Free Trade Agreements*, supra note 186 at 56.
[231] *Ibid* at paras 48 and 49.

Montenegro) and to cooperate towards the harmonization of common rules on competition laws (e.g., *Chile – Costa Rica*).

This is significant because cooperation and coordination provisions have the potential to encourage convergence among domestic competition laws in at least three ways. First, cooperation and coordination mechanisms often require states to engage in dialogue that incites the exchange of information and coordination of investigation activities.[232] The increasing collaboration between states can encourage harmonization by promoting transparency and allowing states to identify best practices. Second, technical consultation allows for capacity building in developing states where, as discussed above, competition laws are often weak. States can then assist developing countries in designing their competition policies, which could promote harmonization. Third, although most FTAs include modest obligations, some FTAs include "ambitious cooperation mechanisms designed to pave the way for bilateral convergence of competition laws of the parties".[233] For example, some cooperation provisions require parties to adopt similar rules regarding the prevention of anticompetitive practices.

Despite the potential of these provisions to promote harmonization, it is pertinent to note that these effects may be more likely to materialize between states that have similar political, economic and legal regimes.[234] In addition, the weak enforcement mechanisms often found in FTAs in relation to competition-specific provisions raise the issue of protectionism.[235] More particularly, there are no real repercussions for the parties to FTAs that engage in protectionism because dispute settlement mechanisms usually do not apply to the competition chapters.

In sum, obligations in FTAs on competition policy vary significantly, as demonstrated in the following tables. Some FTAs require specific commitments from FTA parties, while others are more general and simply state that anticompetitive practices undermine the objective of the agreement. Although countries have substantially increased their obligations in disciplining competition at the international level in the fragmented framework of FTAs, the obligations remain broad with a focus on 'soft harmonization'.

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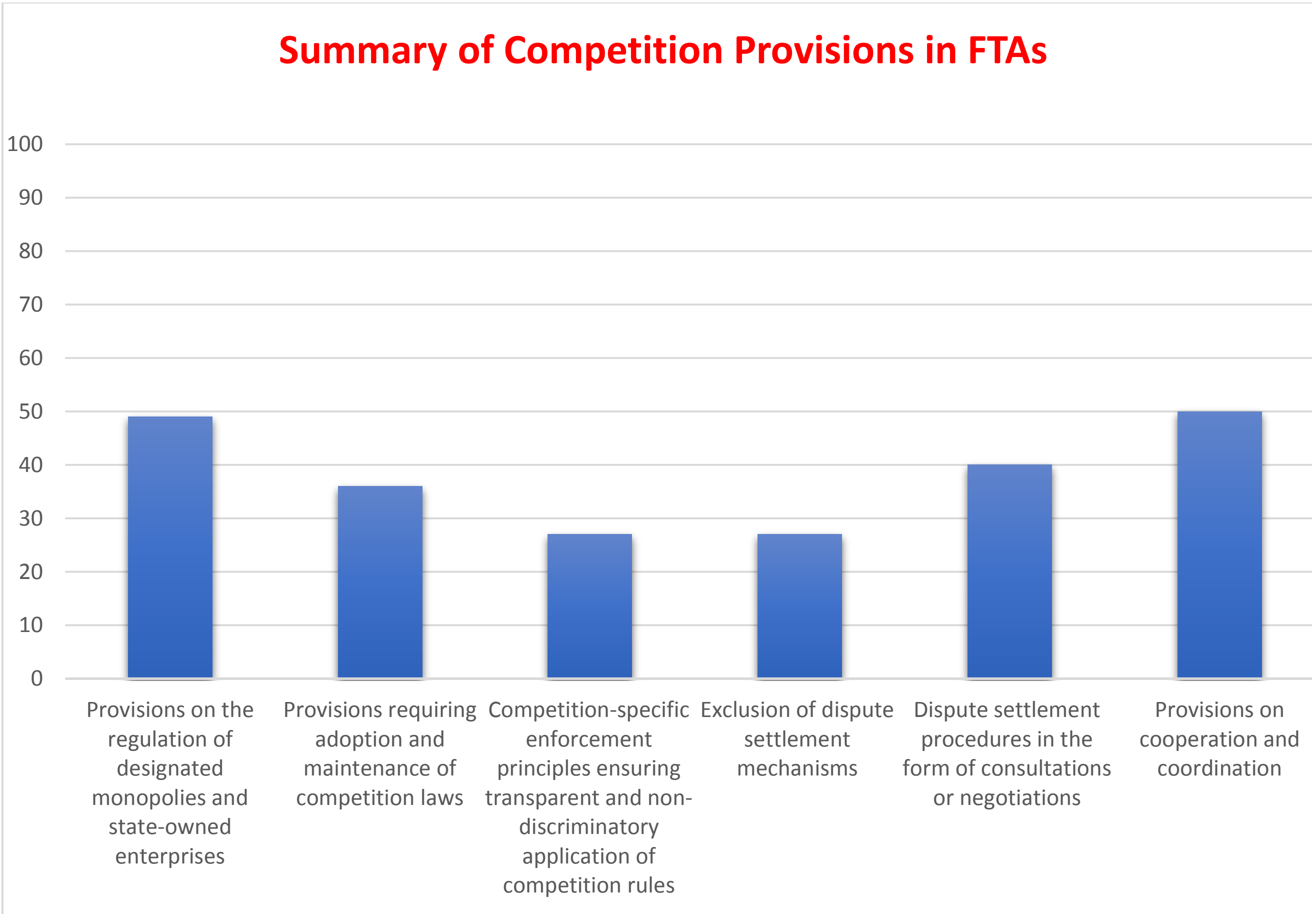
[232] *Sweeney*, supra note 8 at 282.
[233] François-Charles Laprévote, Sven Frisch & Burcu Can "Competition Policy within the Context of Free Trade Agreements" (2015) E15 Expert Group on Competition Policy and the Trade System online: <http://e15initiative.org/wp-content/uploads/2015/07/E15-Competition-Laprevote-Frisch-Can-FINAL.pdf?fbclid=IwAR0Q2sx--NbJZa_NHBnSg8BNn86tFLNERONmyDn0R5k4h0ybZwLM3n4hZ78>.
[234] *Sweeney*, supra note 8 at 294.
[235] *Ibid*.


Summary of Competition Provisions in FTAs
100
90
80
70
60
50
40
30
20
10
0
Provisions on the regulation of designated monopolies and state-owned enterprises
Provisions requiring adoption and maintenance of competition laws
Competition-specific enforcement principles ensuring transparent and non-discriminatory application of competition rules
Exclusion of dispute settlement mechanisms
Dispute settlement procedures in the form of consultations or negotiations
Provisions on cooperation and coordination

Examples of FTA provision founds in recent Agreements

FTA Provisions	CETA	CPTPP	USMCA
Regulation of designated monopolies and state-owned enterprises	**Article 17.3** extends the applicability of measures used to address anticompetitive conduct to designated monopolies and state-owned enterprises.	**Article 16.1 (1)** requires the Parties to regulate "…all commercial activities in its territory…". Exemptions may be provided if "…based on public policy or public interest grounds."	**Article 21.1 (2)** requires the Parties to regulate "…all commercial activities in its territory."
Requirement to adopt and maintain domestic competition laws	**Article 17. 2(2)** provides that "The Parties shall take appropriate measures to proscribe anti-competitive business conduct…".	**Article 16.1(1)** requires the Parties to adopt and maintain domestic competition laws.	**Article 21.1 (1)** requires the Parties to maintain domestic competition laws.
General obligation to promote competition	**Article 17.2(1)** requires the Parties to take measures against anticompetitive conduct which "…will enhance the fulfilment of the objectives of this Agreement".	**Article 16.1(1)** requires the Parties to promote the objective of "…economic and consumer welfare…". Also, the Parties are required to exchange information and experiences on competition advocacy as per **Article 16.5(b)**, including: "…ways to promote a culture of competition…".	**Article 21.1(1)** requires the Parties to promote competition as to "…increase economic efficiency and consumer welfare…".
Competition enforcement principles	**Article 17.2 (4):** includes principles of transparency, non-discrimination, and procedural fairness.	**Article 16.2** sets forth extensive requirements for procedural fairness. **Article 16.1(3)** addresses non-discrimination. **Article 16.7** addresses transparency.	Transparency and extensive requirements for procedural fairness are included in **Article 21.2** but non- discrimination is not included.
Dispute settlement procedure	The applicability of the dispute settlement procedure is excluded (**Article 17.4)** and consultation is also not provided.	The applicability of the dispute settlement procedure is excluded (**Article 16.9)**, but consultation is provided for (**Article 16.8)**.	The applicability of the dispute settlement procedure is excluded (**Article 21.7)**, but consultation is provided for (**Article 21.6)**.
Cooperation and coordination	**Article 17.2(3)** requires the Parties to cooperate in relation to anticompetitive conduct.	**Article 16.4** provides for cooperation and coordination in competition law enforcement. **Article 16.5** provides for Technical Cooperation.	**Article 21.3** provides for cooperation and coordination in competition law enforcement.

C) ***‘Competition Networks’***

As discussed in the previous section, provisions on cooperation are often included in the competition chapters of FTAs. Cooperation is both the reason for and the result of the increased convergence between domestic competition laws, especially concerning international private cartels. National competition authorities have taken the lead in promoting cooperation, in particular through ‘competition networks’ such as the Organisation for Economic Co-operation and Development Competition Committee (OECD CC) and the International Competition Network (ICN). More particularly, the OECD CC and the ICN have been promoting international cooperation by advocating for better coordination, exchange of information, mutual assistance, methodology sharing, and development of best international practices. In law enforcement, soft convergence has taken place to align decisions in conformity with international standards.

i) OECD Competition Committee

The OECD is an organization consisting of 37 Member countries focused on promoting economic growth and development.[236] It has a strong capacity to generate in-depth policy research on a variety of social, economic and environmental challenges. [237]

In 1961, the OECD formed the Competition Law and Policy Committee (CLPC). It is tasked with addressing international competition issues, provides a venue for Member countries to enhance Members’ understanding of other systems, and encourages cooperation.[238] One key aspect of the CLPC’s work is the preparation of studies on competition regimes, known as peer reviews, to build a common base of experience and to encourage adoption of superior techniques. [239] A Member country or OECD observer may request an examination of its competition system, where an expert retained by CLPC prepares a detailed study.[240]

In addition to preparing peer reviews, the Competition Committee recently focused on promoting the principles of transparency and procedural fairness in competition enforcement. The scoping note – *Draft Recommendation on Transparency and Procedural Fairness in Competition Law Enforcement* – found that these principles are “crucial for a well-functioning competition enforcement system” because they promote important goals, such as:[241]

i. Ensuring the impartial and reasonable treatment of subjects of competition investigations and provide them with legal certainty and predictability;
ii. Improving the quality, accuracy and comprehensiveness of competition agencies’ analyses and decisions by making sure that arguments are heard and assessed;
iii. Building the credibility of competition enforcement and reinforcing the legitimacy of competition law and policy; and

[236] OECD, “Who we are” Organisation for Economic Co-operation and Development online: <https://www.oecd.org/about/>.
[237] OECD, “Who we are” Organisation for Economic Co-operation and Development online: <https://www.oecd.org/about/>.
[238] Hugh M. Hollman & William E. Kovacic “The International Competition Network: Its Past, Current and Future Role” (2011) 20 Minnesota Journal of International Law 274 at 290 [*Hollman & Kovacic*].
[239] *Ibid* at 291.
[240] *Ibid*.
[241] Christopher S. Yoo “Due Process in International Antitrust Enforcement: An Idea Whose Time Has Come” 2019 Faculty Scholarship at Penn Law 2167 at 7 [*Christopher S. Yoo*].

iv. Imposing internal clarity and self-discipline on agency decision-making.

First, the scoping note explained that transparency refers to making publicly available the nation's laws, policies, guidelines, procedures and practices, as well as agency and court decisions.[242] Second, it observed that procedural fairness in investigations and decisions is promoted by:[243]

i) Establishing and following procedures that are fair and clear on the rights and limitations of affected and interested parties;
ii) Providing opportunities for parties to take part in investigative and decision-making processes;
iii) Giving states the right to seek access to the case file and request the independent judicial review of competition enforcement decisions.

Third, the Competition Committee referred to the key role of agencies in ensuring that enforcement actions and decision-making processes are transparent and perceived to be so, and in this context endorsed the separation of the investigative and decision-making teams within the competition authority and separating the investigative and legal teams using a firewall.[244] The OECD Competition Committee decided to work towards formal outputs (i.e., establishment of best practices and/or a recommendation) in relation to the principles of transparency and procedural fairness during the 2019 – 2020 period.[245]

Although OECD Members are engaged in studying some of the persistent issues in international competition policy, this work is significantly limited because of the structure of its membership. First, OECD membership is generally restricted to the more economically developed world, where the lack of input from developing countries undermines OECD recommendations in the eyes of non-members.[246] Despite the OECD recently extending its membership to seven developing countries[247] and reaching out to form partnerships with key global players among developing countries[248], the OECD still lacks input from most developing countries. Second, given the lack of legitimacy of the OECD's recommendations in the eyes of non-members, it is uncertain whether non-members will adhere to the principles of transparency and procedural fairness promoted by the OECD. Finally, the organization has faced criticism over whether its peer reviews are sufficiently stringent. For example, an examiner tasked with conducting a peer review might not disclose major issues identified, such as corruption of national courts, for fear that the Member country would withdraw its monetary contributions to the OECD.[249]

ii) *<u>International Competition Network</u>*

The concept of the International Competition Network (ICN) originated from a study carried out by the International Competition Policy Advisory Committee (ICPAC), which was formed in 1997 – the same

[242] *Ibid* at 6.
[243] *Ibid* at 7.
[244] *Christopher S. Yoo*, supra note 241 at 7.
[245] OECD Conference Centre, "Directorate for Financial and Enterprise Affairs Competition Committee" (2018) DAF/COMP/WD(2018) 6 at para 32.
[246] *Hollman & Kovacic*, supra note 238 at 294.
[247] Chile, Colombia, Estonia, Israel, Latvia, Lithuania and Slovenia. See OECD "List of OECD Member Countries – Ratification of the Convention on the OECD" Organisation for Economic Co-operation and Development online: <https://www.oecd.org/about/document/list-oecd-member-countries.htm>.
[248] Brazil, China, India, Indonesia. See Pilip Pierros & Philip Wegman "The OECD: New wings or still the same old club?" (2017) OECD Observer at 2 online: <https://www.oecd-ilibrary.org/docserver/4f89f03f-en.pdf?expires=1587681801&id=id&accname=guest&checksum=786B2839CF7BC40FE5B90AEEDA686BDF>.
[249] *Hollman & Kovacic*, supra note 238 at 292.

year the conflict between the EU and the US competition agencies arose in *McDonell Douglas/Boeing* case[250] – to address global competition issues in relation to multi-jurisdictional merger review, the interface between trade and competition, and cooperation between competition agencies.[251] In 2000, ICPAC issued a report suggesting that the US explore the creation of a new venue for competition policy issues, where government officials, private firms, and non-governmental organizations could consult on competition issues.[252] As a result, the ICN was formed in 2001. Its original membership included competition authorities from 14 jurisdictions.

Over the years, the ICN grew to include competition authorities from 126 jurisdictions.

Specifically, the ICN objectives are to:[253]

i. Increase understanding of individual competition systems, including similarities and differences among them;
ii. Identify and build consensus about superior practices; and
iii. Encourage individual jurisdictions to adopt superior techniques.

The ICN usually carries out its work in three stages. First, a steering group composed of 18 members from the ICN member agencies identify issues in need of study.[254] Second, the steering group establishes a working group to study competition problems, including their suitability for convergence.[255] Finally, the working group presents its findings and identifies a suggested path to a more effective regulatory outcome, which may then be implemented by ICN members.[256]

Unlike the OECD, the ICN engages non-government advisors (NGAs). It relies heavily on the contributions of NGAs from academia, the business community, and consumer groups.[257] Second, the ICN operates as a "virtual" network; it does not employ permanent staff nor does it own facilities to perform organizational tasks, which eliminates the need for specific funding.[258] Finally, the ICN provides a venue for cooperation between agencies on cross-border cases, which reduces the risk of suboptimal enforcement and diminishes the degree of inconsistent outcomes.[259]

Recently, the ICN has also been predominantly focused on the principles of due process and transparency in enforcement. In May 2019, the ICN adopted its *Recommended Practices for Investigative Process* and its *Framework on Competition Agency Procedures* ("CAP") at its Annual Conference in Cartagena,

[250] The US Federal Trade Commission approved a $14 billion merger deal between Boeing and McDonnell Douglas. However, the European Commission opposed the acquisition as it saw the deal as violating the European Community's Merger Regulation and undermining the market competitiveness of the European Aerospace company, Airbus; See Kathleen Luz "The Boeing-McDonnell Douglas Merger: Competition Law, Parochialism and the Need for a Globalized Antitrust System (1999-2000) 32 George Washington Journal of International Law & Economics 155 at 155-156.
[251] ICN, "About" International Competition Network online: <https://www.internationalcompetitionnetwork.org/about/>.
[252] *Ibid.*
[253] *Hollman & Kovacic*, supra note 238 at 275-276.
[254] *Ibid* at 306.
[255] *Ibid*.
[256] *Ibid.*
[257] *Ibid* at 304.
[258] *Ibid* at 305.
[259] *Ibid* at 309.

Colombia.[260] The *Recommended Practices for Investigative Process* aims to improve agency transparency and engagement between the parties in relation to investigations through good enforcement process principles, including:[261]

i. **Sufficient and appropriate investigative tools** – including sufficient resources, clear legal frameworks setting out clear criteria and procedural requirements, disclosure of internal procedures, and ability to apply tools in a tailored and reasonable manner;
ii. **Transparency about agency policies and standards** – including substantive legal standards and processes and public disclosure of reasoned decisions;
iii. **Transparency during an investigation** – including notice as soon as feasible of the existence of an investigation, its subject matter, its legal basis, the expected timing, the basic facts and evidence gathered, and theories of competitive harm, and access to evidence, subject to appropriate protections for confidential information;
iv. **Meaningful engagement during an investigation** – on significant factual, legal, economic, and procedural issues, including open discussion of investigative theories and factual evidence, the opportunity to present evidence and arguments in a timely manner, and the opportunity for third parties to submit their views;
v. **Agency safeguards** – including internal procedures and practices to ensure avoidance of conflicts of interest, consistency across investigations, periodic reassessment, conclusion of investigations within a reasonable time, periodic re-evaluation of procedures, evaluation of investigative recommendations before the agency makes a final decision based on the full record, meaningful opportunity to be heard and respond, and sufficient written decisions; and
vi. **Confidentiality protections and legal privileges** – under clear, publicly available policies.

The CAP – a reflection of the Multilateral Framework of Procedure ("MFP") initiated by the Antitrust Division of the U.S. Department of Justice – is aimed at establishing basic due process principles. The CAP's opt-in basis allowed it to gain widescale endorsement, with over 70 agencies participating (more than half of ICN's members).[262] Moreover, non-members of the ICN may participate in the CAP provided they undertake affirmative actions to join the CAP and comply with the agreed-upon normative obligations, subject to the limitation of particular laws or procedural rules preventing non-members from applying the due process principles outlined below:[263]

i. **Non-discrimination** – participating agencies will not treat persons from other jurisdictions less favourably;
ii. **Transparency and predictability** – every agency should have substantive laws, procedural rules, and any applicable guidance publicly available;
iii. **Investigative process** – agencies will inform persons under investigation of the investigation, its legal basis, and the conduct under investigation as soon as possible; provide them with meaningful and timely opportunities for engagement; and make sure that requests for information are focused and given a reasonable time for response;
iv. **Timing of investigations and enforcement proceedings** – agencies will endeavor to conclude their investigations and proceedings within a reasonable period;

[260] *Christopher S. Yoo*, supra note 241 at 4.
[261] *Ibid*.
[262] *Ibid* at 5-6.
[263] *Ibid*.

v. **Confidentiality** – agencies will have publicly-available rules, policies, or guidance regarding confidential information and protect that information from unlawful disclosure, taking into account the interests of the parties and the public;
vi. **Conflicts of interest** – officials will be objective and impartial and not have conflicts of interest in cases, with the agency being encouraged to have rules, policies, or guidance regarding such conflicts;
vii. **Notice and opportunity to defend** – agencies will give parties timely notice of alleged violations or claims against them, including facts and relevant legal and economic reasoning; and reasonable and timely access to the information necessary to prepare an adequate defence; and reasonable opportunities to defend, including the opportunity to be heard and present, respond to, and challenge evidence;
viii. **Representation by legal counsel and privilege** – agency will not deny representation by legal counsel of a person's choosing without due cause, will provide persons a reasonable opportunity to present views, and recognize applicable privileges, preferably according to available rules, policies, or guidelines;
ix. **Decisions in writing** – agencies will issue publicly-available final decisions in writing, setting out the findings of fact and conclusions of law, as well as any remedies or sanctions and commitments, along with the reasons for them;
x. **Independent review** – no agency will impose a prohibition, remedy, or sanction unless there is an opportunity for review by an independent, impartial adjudicative body (e.g. court, tribunal, or appellate body).
xi. **Additional standards** – agencies may maintain additional standards consistent with providing effective and fair procedures, such as the ICN's *Recommended Practices for Investigative Process*.

In addition, the CAP provides participants with two tools to promote the implementation of these principles. First, the CAP provides for a "cooperation process", where members may request a dialogue with other agencies regarding the issues relevant to the due process and transparency principles discussed above.[264] Second, there is a review process, where the participants are required to "submit templates to the CAP Co-Chairs detailing their procedures and explaining how they meet the CAP principles."[265] The review process also involves sessions where CAP participants review the CAP's functioning and consider possible modifications to the principles described above. [266]

Despite its laudable activities, the ICN's ability to foster convergence in competition policy is limited as it does not address the issue of protectionism. As discussed earlier, export cartels are not disciplined because of protectionist tendencies, where nations choose not to regulate anticompetitive conduct because it does not affect the national interest. The ICN does not address this issue because its focus is on voluntary cooperation rather than substantial commitments from members. Moreover, the ICN's members are competition agencies and are not the policy initiators that have a role in changing national policies.[267]

Nor does the ICN provide a solution for nations abstaining from sharing case-specific and confidential information.[268] Although the ICN promotes the sharing of experiences and exchange of information, information that is shared is often publicly available.[269] As mentioned earlier, disciplining international

[264] *Ibid.*
[265] *Ibid*.
[266] *Ibid*.
[267] *Sweeney*, supra note 8 at 329.
[268] *Ibid* at 328.
[269] *Ibid* at 323.

private cartels often requires nations to share confidential information, and the ICN has no tools for addressing this issue.

SECTION IV: NEXT STEPS FOR INTERNATIONAL COMPETITION POLICY

A prominent theme of this memorandum has been that the regulation of market competition – even when it involves international markets and business practices – remains dominated by domestic law and policy. As section II has demonstrated, agreements between domestic competition authorities remain the major source of international competition law cooperation, yet even the most developed of these agreements largely preserve a country's ability to enact and apply competition laws according to its perceived self-interest. As section III has demonstrated, existing international agreements – whether in the WTO, FTAs, or networks like the ICN – do little to alter this picture. In this final section, we offer some brief reflections on the overall merits of this domestically-focused approach to competition law, and assess whether a deeper form of international cooperation might be desirable.

Why domestic competition authorities should remain the dominant regulators

As has been mentioned throughout this memorandum, countries have many legitimate reasons for tailoring the specific content of their competition laws to their own unique circumstances. A country may want to subordinate competition to some other concern, such as development or environmental policy, and any international attempt to rebalance these objectives would likely confront objections. As Dani Rodrik writes: [270]

> …different national assessments of risk – safety, environmental, health -- and varying conceptions of how business should relate to its stakeholders – employees, suppliers, consumers, local communities – produce different standards, none obviously superior to others. In other words, regulatory standards are public goods over which different nations have different preferences. An optimal global governance scheme would trade off the benefits of expanding market integration (by reducing regulatory diversity) against the costs of excessive harmonization. But it is difficult to know where that optimal point may lie.

We should also restate a point that was made in section I: there is often no consensus about how to best measure the optimal level of competition. This is particularly true with novel, knowledge-intensive industries, which also tend to be at the forefront of international trade and investment (and thus most likely to be problematic for international competition regulation).[271] When there is little agreement between experts on how to regulate these industries, it is hard to see the merit in a single international rule. As Paul Stephan summarizes this point, "…a large portion of international transactions involve innovative, knowledge-based industries; no international consensus exists about the optimal structure of such industries; and in the absence of consensus about optimal structure, cooperation that purports to promote competition policy may instead protect incumbents and stifle innovation."[272] Indeed, in situations like this, it makes a great deal of sense to give countries the space to experiment with their competition laws and try different approaches, as such a "natural experiment" situation should give policymakers a deeper understanding of what might be effective. As Trebilcock et al. write, "…it would be the ultimate incongruity that the desire to harmonize all or some aspects of national competition laws may come at the

[270] Dani Rodrik, "Putting Global Governance in its Place," (2019) National Bureau of Economic Research Working Paper Series, Working Paper 26213 at 21 online < http://www.nber.org/papers/w26213>.
[271] *Stephan*, supra note 45 at 217.
[272] *Ibid*.

price of eliminating competitive politics and policy-making. Competition in the latter domain is important for social welfare, just as is competition in the economic domain."[273]

This "laboratory" justification for maintaining dominant domestic competition regimes extends beyond situations where there is an uncertain economic consensus about the optimal level of competition. Given the many serious regulatory issues that confront policymakers today, such as inequality, development, and climate change (just to name a few), it would not be sensible if international competition rules unduly constrained domestic policy space. This would obviously block countries from being able to tailor policies to their own unique circumstances, but it could also prevent the international community from learning about the range of effective options that are available.

Overall, then, there is considerable merit in maintaining an approach to competition law that is dominated by domestic regulatory authorities. This is not overly controversial, as substantive harmonization proposals along the lines of the Munich Code have generally been considered a "non-starter."[274] As Robert Anderson – a former WTO Secretariat official who played a large role in assisting the WGTCP with its work – has noted, most Member states were very hostile to Munich Code-type "forced harmonization" proposals, such that these ideas were never taken seriously by WTO officials.[275]

If dominant domestic competition authorities are here to stay for the justifiable reason of preserving domestic policy space, what does this imply for international competition policy? Where might enhancements in international competition regulation be considered legitimate?

Anu Bradford's proposal for modest improvements on the status quo

One answer has been offered by Anu Bradford,[276] where she essentially advocates for minor changes to the status quo: that is, dominant domestic competition regulators combined with modest improvements to the existing cooperation arrangements. This perspective holds that once we accept that countries may have legitimate reasons for having different approaches to competition law, a binding international competition agreement at the WTO level – one with substantive commitments – will be quite unrealistic. Simply put, if countries have different preferences regarding the content of competition laws, only the negotiation of a "shallow" international agreement will be possible.[277] Arguably, the later WGTCP proposals provide an example of such an agreement,[278] as they were largely focused on the "platitudinous and largely non-justiciable encomia"[279] of transparency and procedural fairness. While such a watered-down agreement would mitigate tensions concerning the content of the competition laws, Bradford points out that it would "…accomplish little in terms of fostering international convergence and would leave states with limited benefits."[280] Moreover, it is important to consider that unlike trade or competition negotiations, there is not a clear business lobby in favour of a more uniform international competition

[273] *Trebilcock et al.*, supra note 31 at 780.
[274] Bernard Hoekman and Michael M. Kostecki, *The Political Economy of the World Trading System: WTO and Beyond* (London: Oxford, 2001), at 433.
[275] Robert Anderson, "Making law in 'new' WTO subject areas," in *A History of Law and Lawyers in the GATT/WTO,* (London: Cambridge, 2015), at 282.
[276] *Bradford 2011*, supra note 88.
[277] *Ibid* at 327.
[278] *Ibid* at 328.
[279] *Trebilcock et al.*, supra note 28 at p. 779.
[280] *Bradford 2011*, supra note 88 at 328.

standard.[281] Combined, this means that countries will see little value in devoting resources to WTO-level competition negotiations, especially when the "contracting costs" associated with these negotiations can be considerable, a point that Bradford explains well: [282]

> Contracting costs are particularly high when international negotiations involve numerous states, distributional tensions, and burdensome national ratification procedures. The WTO antitrust negotiations would involve [164] governments with heterogenous preferences, multiple negotiation rounds, and extensive multi-issue bargaining. In addition, domestic ratification would presumably be necessary in most member states… [which] adds to the contracting costs due to additional negotiations, delays, and risks involved. Contracting costs are further augmented by the WTO enforcement mechanism, which enables member states to enforce potential violations of WTO commitments with sanctions. States are expected to research and negotiate each provision more cautiously when they know that they will face sanctions if they breach the agreement. This, obviously, entails higher contracting costs than the less rigorous bargaining associated with nonbinding commitments that lack enforcement.

Thus, given these burdens, Bradford contends that a WTO-level competition agreement will remain unlikely. However, from Bradford's perspective, this should not be considered a significant problem. There are two main reasons for this.

First, because competition regulation remains dominated by domestic competition authorities, this regime will maintain the benefits associated with enhanced domestic policy space discussed above.

Second, there is good reason to believe that the existing regime of cooperation arrangements between domestic authorities can adequately compensate for the lack of a binding WTO competition agreement – especially a watered-down one that could realistically emerge from the negotiating table. For bilateral cooperation agreements, Bradford sees hope in the US-EU relationship, which has become more collaborative over time.[283] As she writes, "frequent interactions between the two antitrust regimes have resulted in significant convergence in their antitrust analysis and enforcement practices."[284] Thus, as competition authorities interact more, there is good reason to believe that we will see deeper cooperation and collaboration. Bradford is even more optimistic about the informal networks of competition authorities, particularly the ICN, as its nonbinding framework means that there are limited risks to joining. A country can join the ICN and follow the network's recommendations only when it perceives that this will be in its interests; there are no penalties for not complying. As Bradford writes, "the ICN is… flexibly organized around working groups. The members of the working groups draft recommendations and guidelines, which are then approved by the Network. As the individual antitrust authorities remain free to decide whether and how to implement the recommendations domestically, the process of approving such recommendations is unlikely to involve rigorous bargaining."[285]

Overall, then, Bradford argues that policymakers should be satisfied with making modest improvements to the existing regime, as it will allow countries "…to capture some of the gains from international

[281] *Bradford 2011*, supra note 88 at 343; also see Sol Picciotto, *Regulating Global Corporate Capitalism,* (London: Cambridge, 2011), at 153-154.
[282] *Bradford 2011*, supra note 88 at 330.
[283] While the recent international environment has likely challenged this relationship, there are still several recent examples of collaboration between the US and EU competition authorities; see *Anderson et al.,* supra note 71 at 38-39.
[284] *Ibid* at 323.
[285] *Ibid* at 331.

cooperation without relinquishing control over their domestic antitrust laws, or assuming the risk of sanctions if they are ultimately unable or unwilling to comply with their obligations."[286]

<u>*Bradford's proposal is very sensible*</u>

There is considerable merit to Bradford's analysis, for three major reasons.

First, it seems to provide an insightful description of why the WTO failed to reach a successful competition agreement in the aftermath of the WGTCP. For example, As Aditya Bhattacharjea notes, developing countries originally expressed considerable interest in an international competition agreement, as the early stages of the WGTCP discussions raised issues that "were of considerable relevance" to them: export cartels, anti-dumping, and intellectual property rights.[287] However, as Bradford's analysis would predict, once these issues "fell off the table" at an early stage of the WGTCP,[288] developing countries lost interest in the negotiations, as they felt that the remaining proposals would only restrict their policy space and fail to bring them any meaningful benefits.[289]

Second, Bradford is right to argue that many issues pertaining to international competition law can be dealt with via more modest improvements to existing bilateral cooperation agreements and competition networks. As the esteemed international competition law scholar Eleanor Fox puts it: "what can be done just as well or better at a lower level should be done at a lower level."[290] Private international cartels are a prime example of an anticompetitive activity that can be dealt with at a lower level. As was described in section I, the dispersed international nature of these cartels means no country benefits from the cartel's existence, so no country will be strongly opposed to prosecuting it. As Brendan Sweeney puts it, the fight against private international cartels does not "…require a dedicated multilateral competition agreement. Unlike import and export cartels, there is no need to overcome protectionism. Unlike international mergers and monopolistic conduct, there is no inevitable jurisdictional conflict. Therefore, achieving more widespread enforcement is largely a matter of… better coordination in the collecting and sharing of evidence."[291] A 2018 report from the WTO's Economic Research and Statistics Division indicates that there are signs of progress when it comes to prosecuting private international cartels, and that enhanced cooperation among national authorities is a major reason for this.[292] The same report goes on to acknowledge the "essential contribution" of the ICN, as the network's various work products have facilitated "significant progress towards more convergence of competition laws… the improved performance of individual jurisdictions and …the reduction of conflicts among jurisdictions."[293] It would thus appear that Bradford's hopes for the ICN are well-founded. As Philip Marsden writes, perhaps this should not be surprising: "A key benefit of networks, where experience and best practice are shared, is the ability to engender "socialization" and thereby enhance trust and coordination between countries. This

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[286] *Ibid* at 333.
[287] Aditya Bhattacharjea, "The case for a multilateral agreement on competition policy: a developing country perspective," (2006) 9:2 Journal of International Economic Law at 294.
[288] *Ibid* at 299.
[289] *Ibid* at 297-299.
[290] Eleanor Fox, *Antitrust Without Borders: From Roots to Codes to Networks* (E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2017) at 4.
[291] *Sweeney*, supra note 8 at 406.
[292] *Anderson et al.*, supra note 3 at 40.
[293] *Ibid* at 55-56.

can be seen as a natural consequence of having people with common goals and interests working closely together and sharing ideas and practice."[294]

Third, we can briefly note that Bradford's point about the unlikelihood of a successful WTO competition negotiation has even more resonance in the current international environment. Writing in 2011, Bradford was likely unaware of the ascendant nationalism that was on the horizon, but its new presence lends even more support to the idea that negotiations for a WTO-level competition discipline will likely be unfruitful. A related problem is the current international leadership vacuum, given how important US initiative has been for previously successful WTO negotiations. It seems unlikely that the US will be spearheading a major international governance agreement anytime soon, and there does not appear to be another country willing or able to fill the leadership gap.

Brendan Sweeney's proposal for a deeper international agreement

Given the insight of Bradford's analysis, does it make sense to follow her lead and suspend all attempts to incorporate competition law into the WTO or some other international forum that would create a binding set of competition rules?

For Brendan Sweeney[295] and others,[296] the answer is no: a binding international competition agreement is still worth pursuing. While this memorandum will remain neutral on the question, we feel that Sweeney offers an important perspective that is at least worth presenting.

To begin, it is worth noting that Sweeney's position has much in common with Bradford's. For one thing, Sweeney holds that most regulatory authority should remain at the domestic level, as he sees considerable merit in allowing countries to preserve their legitimate policy space.[297] Moreover, like Bradford, Sweeney feels that networks and enhanced cooperation between domestic authorities can do much to tackle existing problems, and that the most "minimum measure" of international authority should always be preferred.[298]

However, Sweeney holds that an international competition agreement is still necessary, as networks and cooperation agreements will always struggle to regulate three forms of (potentially) international anticompetitive practices, each of which were discussed in section I: 1) private import barriers; 2) export cartels; and 3) international mergers. For these three practices, the reason Sweeney is skeptical of networks and cooperation agreements is because of how each presents a country with incentives to act in a self-interested and protectionist manner that would be unrelated to any legitimate policy goals. Thus, meaningful voluntary cooperation would be unrealistic. As Sweeney writes:

> Supranational oversight is always a difficult and contentious issue. Consequently, it should only be part of a solution if absolutely required. It is required where states have strong incentives to act in a protectionist manner and particularly where there is likely to be a lack of transparency. Thus, in the case of private trade barriers states have incentives to 'cheat' on their international trade obligations. In respect of export cartels states have incentives to cheat on the proposed export cartel rule. In both cases, the opportunity exists for states to enjoy the benefits of their international agreements and by 'cheating' not have to pay the price. In each case, the opportunity exists because the 'cheating' state is the primary regulator. For this reason, external oversight is

[294] *Marsden*, supra note 157 at 317.
[295] *Sweeney*, supra note 8 at chapter 9.
[296] Andrew Guzman, "The Case for International Antitrust" (2004) 22 Berkeley J. Int'l L. 355.
[297] *Ibid* at 361-362.
[298] *Ibid* at 361.

> required. In the case of international mergers… states have incentives to claim jurisdiction under the proposed allocation of jurisdiction rules because in that way they are able to impose their preferred version of regulation.[299]

This memorandum will now expand on these points and provide an overview of Sweeney's case for an international agreement for each of these three anticompetitive practices.

Private import barriers

As was discussed in section I, private import barriers occur when domestic firms are permitted to engage in some form of private anticompetitive activity that acts as a market access barrier to foreign firms (an example would be an agreement between local firms to not purchase from any foreign suppliers). The main problem with the toleration of these practices is that they allow governments to "cheat" on their existing WTO trade commitments. For example, even if a country has negotiated low tariffs and thus a certain degree of market access, these could be undermined by the presence of private import barriers. Thus, as Sweeney puts it, "…as the core problem of private trade barriers is the incentives states have to enforce their laws in a protectionist manner, an obvious solution is to find a way of forcing states to apply their laws in a non-discriminatory fashion."[300]

As discussed in section III, it does not appear that the existing WTO agreements could be easily adapted to deal with private trade barriers. For this reason, Sweeney proposes that the most productive way forward is for WTO members "…to negotiate a new enforcement agreement based on the central notion of non-discrimination."[301]

Substantively, because the purpose of Sweeney's proposal is to prevent backdoor protectionism, the substantive commitments he calls for are not very extensive. As Sweeney writes, "…the only substantive requirement is that states agree to subject their competition laws to the principles of national treatment. That is, states must agree that in framing and applying their competition laws they will not discriminate between imports and local producers."[302] Unlike the Munich Code, for example, Sweeney's proposal does not require countries to adopt specific competition laws; they are simply obligated to treat domestic and foreign producers in the same manner. For example, if a country's competition laws restrict exclusive dealing arrangements, this cannot be selectively applied in a way that favours domestic firms; it would not be permissible if *only* foreign companies had to purchase from (likely more expensive) local suppliers. Thus, by sticking to the basic non-discrimination norms of the GATT, such a proposal would likely be able to combat some forms of protectionism, while still allowing countries to maintain a significant degree of policy space. To stick with the previous example, Sweeney's proposal would not prevent a country from having a permissive approach to exclusive dealing arrangements. For this reason, Sweeney's proposal would likely avoid some of the controversy surrounding the "post-discriminatory harmonizing" and "deep integration" agreements of the Uruguay Round, such as the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS).[303]

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299 *Ibid* at 415.
300 *Sweeney*, supra note 8 at 383-384.
301 *Ibid* at 387.
302 *Ibid*.
303 Robert Howse, "The World Trade Organization 20 Years On: Global Governance by Judiciary," (2016) 27 European Journal of International Law at 54.

At the same time, however, and as acknowledged by Sweeney, this proposal could potentially restrict a country's space for industrial policy.[304] Exclusive buying agreements that favoured local companies, for example, were an important part of Japanese and South Korean industrial policy in the 20th century, and may have played a role in their rapid development.[305] While future research would have to examine this issue in more detail, for now we can simply note that because of how Sweeney's proposal could restrict industrial policy, developing countries would likely be hesitant to agree to it.[306]

Procedurally, the central idea behind Sweeney's proposal is that the WTO would have supranational oversight over the agreement, but the number of cases that went to the WTO would be restricted "so far as possible."[307] The agreement would do this by containing rules that required countries to first try to resolve any disputes through the domestic courts of both the importing and exporting states; recourse to a WTO panel would only be available as a last resort. In other words, Sweeney's proposal would involve a significant expansion of the positive comity that was discussed in section II.

Sweeney's main procedural suggestions for the agreement are listed as follows:

i. **Transparency commitments.** Competition law often relies on the use of flexible standards and not bright line rules, creating the risk that the extra discretion available to decision makers may be used to mask the illegitimate objective of protecting local industry against imports. To reduce this risk, it is important that: 1) the relevant laws be readily available; and 2) courts and competition agencies publish their reasons for the decision;
ii. **Commitments to non-discriminatory access to local processes.** It is essential that states agree to provide non-discriminatory access to their local competition law and policy processes (both administrative and judicial), and to provide adequate and fair procedural rules (e.g. right to a fair hearing);
iii. **A commitment to positive comity.** If an exporting country requests that an importing country investigate an alleged private import barrier, the importing state must, in keeping with notions of positive comity, give sympathetic consideration to the request;
iv. **Action in the exporting state.** If the importing state refuses or fails to act, the exporting state is entitled to claim personal jurisdiction over the offending firm(s) so that the law of the importing state could be enforced by an action brought in the courts of the exporting state;
v. **Review by WTO panel.** Where the action in the exporting state produces either (a) no effective remedy, or (b) a result to which the importing states objects, the matter may be brought before a WTO panel; and
vi. **Powers of the WTO panel.** The WTO panel shall have the power to order an appropriate remedy if it determines that the importing state has applied its law in a discriminatory fashion.[308]

[304] *Sweeney*, supra note 8 at 393.
[305] Servaas Storm and C.W.M. Naastepad, "Strategic Factors in Economic Development: East Asian Industrialization 1950–2003" (2005) 46:4 Development and Change at 1087-1088.
[306] *Sweeney*, supra note 8 at p. 393.
[307] *Ibid* at 387.
[308] *Ibid* at 397-404.

Export cartels

As stated in section I, the potential problem with export cartels is one of misaligned incentives. If a country is housing a cartel, but this cartel sells most of its products as exports to foreign markets, the country will likely have limited motivation to investigate whether the cartel is having negative effects on consumers, let alone prosecute it. While the countries experiencing the negative effects of the export cartel could attempt to prosecute it through extraterritoriality, this mechanism has significant limitations (e.g. developing countries lack the capacity to make effective use of extraterritoriality; states applying extraterritoriality will often lack the necessary evidence as it will be located abroad; see section I for a further elaboration).

Like his proposal for dealing with private import barriers, Sweeney's international export cartel agreement encourages the extension of positive comity obligations and thus the use of domestic courts as a first option; again, the WTO would only be used as a last resort. His export cartel proposal also includes procedural commitments to transparency and the non-discriminatory access to local processes.[309]

Sweeney's central substantive idea is that the countries housing the export cartels would agree to prosecute them if they were having *any* anticompetitive effects – even if these were primarily occurring in foreign markets. Moreover, other countries that are part of the agreement would be able to request that the country housing the export cartel launch an investigation. Indeed, this would be the primary way in which such proceedings would be initiated, as importing countries would be the parties incentivized to prevent the export cartel. One benefit of this proposal is that problems of evidence gathering are likely to be minimized, as it will be in the interest of the importing state to provide the necessary evidence of anticompetitive effects.[310] The country housing the export cartel would be required to publish public reasons for its decision; if an affected country was unsatisfied with these reasons, it would be entitled to activate the dispute resolution provisions of the WTO, which would have the power to issue remedies.[311]

This proposal certainly has flaws. For one thing, it might be naïve to expect the country housing the export cartel to conduct good faith investigations. This would likely put a lot of pressure on the WTO, and trade experts "…have expressed doubts about the practicalities of WTO panels handling large numbers of complex competition cases."[312] Related to this, it is questionable whether the trade-centred WTO would have the necessary expertise.[313]

At the same time, it is worth considering the ways in which Sweeney's proposal is a pragmatic one that aims to preserve as much domestic policy space as possible. For one thing, nothing in this agreement requires countries to ban export cartels. This is important, as the anticompetitive effects of export cartels are ambiguous; indeed, they are just as likely to be welfare-enhancing as welfare-reducing.[314] Moreover, it is important to consider that the agreement does not permit the importing country to rule on the export cartel. As Sweeney writes, "…to hand jurisdiction to the importing state would involve a considerable sovereignty sacrifice because the exporting state would be relinquishing control over activities occurring

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[309] *Ibid* at 398.
[310] *Ibid*.
[311] *Ibid* at 399-404.
[312] *Ibid* at 399.
[313] See *Tarullo*, supra note 29.
[314] *Sweeney*, supra note 8 at 396.

within its borders probably involving its citizens. There is no indication that states are prepared to make this kind of sacrifice."[315]

Finally, it is worth noting that developing countries are exempted from Sweeney's proposal, at least when they are exporting to a developed country. This means that if a developed country felt that it was being negatively affected by a developing country's export cartel, it would not be permitted to pursue an action as part of Sweeney's proposal.[316] Sweeney contends that this would give developing countries more space for industrial development, and that it would prevent them from stretching their more limited capacity constraints. As Sweeney writes, "…the problems associated with requiring developing states to dedicate resources to export cartel enforcement could be exacerbated if foreign competitors saw some strategic advantage in pursuing export cartels even where it was unlikely that the cartel would satisfy the relevant tests for illegality. Not only would this impose a significant burden on the exporting state, it may result in exporters, particularly from developing states, being dissuaded (by the threat of expensive legal proceedings) from either entering into welfare-promoting joint ventures or contesting particular markets."[317]

International mergers

Sweeney's concerns with international merger regulation are also worth discussing, particularly the way in which an international agreement could help resolve the 'race to the strictest' problem. As discussed in section I, this allows the country with the most stringent merger policies to maximize its regulatory preferences. As Sweeney notes, the consequences are that "other states lose not only the benefit of applying their own preferred rule, but also the benefit of having local effects considered. The status quo, therefore, is likely to produce overregulation and international tensions."[318] The example that was used in section I was the so-called "Brussels Effect", where the EU's stringent approach to merger regulation "…has led to a situation where the majority of global markets are covered, in practice, by a variant of EU competition law."[319] A more serious risk is that a country could adopt stringent merger rules simply for protectionist reasons: i.e. to block any mergers that would have negative competitive effects on its domestic companies.[320]

To resolve this overregulation and the possibility that countries will be forced to abide by merger laws they do not support, Sweeney proposes a form of international cooperation that allocates regulatory responsibility to the country "…that has suffered or is likely to suffer the greatest consumer effects."[321] This is known as a 'lead jurisdiction model', which has several variants, as noted by Trebilcock et al.:

> "The least intrusive is a coordinating agency model, where the lead jurisdiction would coordinate a review of the merger for all affected countries, reach a dispositive decision with respect to its own jurisdiction, and merely make findings and recommendations for other affected countries… A more intrusive model would be a lead jurisdiction with dispositive powers not only with respect to its own jurisdiction, but also with respect to other affected jurisdictions. A third variant of a lead agency model would entail some kind of supranational appeal

[315] *Ibid* at 397.
[316] *Ibid* at 402.
[317] *Ibid* at 401-402.
[318] *Ibid* at 407.
[319] *Bradford*, supra note 1 at 99-100.
[320] *Sweeney*, supra note 8 at 415.
[321] *Sweeney*, supra note 8 at 416.

mechanism, not on the merits of the merger but on the conflict of laws issue and in particular who the appropriate lead agency is for evaluating the merger."[322]

Sweeney opts for the third type of agreement, where a WTO appeal would be available to a country that disputed another country's decision to act as the lead agency.[323]

This memorandum will not be able to assess Sweeney's proposal in any detail. However, we can briefly note that any negotiation towards an international agreement along the lines of Sweeney's proposal would confront some serious problems. For example, how would the lead jurisdiction be allocated in cases where two jurisdictions were both seriously affected? If EU consumers were slightly more affected by a merger between US and EU companies, would this be a legitimate basis for entirely subjecting the merger to the stricter EU standards? Moreover, would determining the lead agency based on consumer welfare be too dismissive of countries that also factored in producer welfare into its assessment of the anticompetitive effects of a merger?

Overall assessment of the proposals from Bradford and Sweeney concerning the trajectory of international competition policy

In sum, Bradford's analysis is insightful because it: 1) identifies why a binding international competition policy agreement remains unlikely; and 2) still points to ways in which the current domestically-dominated regime can be realistically improved, particularly through the ICN and bilateral cooperation agreements. Sweeney's proposal – while unlikely to be realized anytime soon for the reasons Bradford identifies – is still laudable because it identifies three anticompetitive practices that a domestically dominated regime will always struggle with: 1) private import barriers; 2) export cartels; and 3) international mergers. Moreover, Sweeney's proposal is designed to preserve as much domestic policy space as possible; it strictly targets the protectionist use of competition law.

A fruitful area for future research would be to empirically assess how well the predictions and assumptions underlying these proposals – which were both formulated roughly a decade ago – have recently fared. For example, has the progress made by the ICN and bilateral cooperation agreements hit a saturation point, or are future improvements likely? And how serious are the problems Sweeney identifies? Has the recent rise of nationalism led to the increased use of private trade barriers? Is Sweeney still correct to say that export cartels are just as likely to be welfare enhancing,[324] or are their negative anticompetitive effects now more straightforward? A rigorous assessment of the urgency of an international agreement could only be answered through careful answers to such questions.

SECTION V: POTENTIAL AREAS FOR FURTHER RESEARCH

In this memorandum, we have provided an overview of the current state of international competition policy and assessed whether a deeper form of international cooperation is desirable. However, there are areas for further research, including the interaction between competition and industrial policies, the developments in competition law doctrine, and the experience of developing countries with competition law. Moreover, it is necessary to observe future progress of competition provisions in Free-Trade Agreements and the works of 'competition networks' to comprehensively assess the urgency of an international agreement on competition.

[322] *Trebilcock et al.*, supra note 31 at 775.
[323] *Sweeney*, supra note 8 at 416-417.
[324] *Sweeney*, supra note 8 at 395.

First, the interaction between competition and industrial policies is a prominent area for research. Karl Aiginger and Dani Rodrik in their recent work noted that "…competition policy targets mainly consumer welfare, while industrial policy is concerned with productive, dynamic industries. In the long run, the two goals ought to be consistent, but in the short run, maximizing consumer benefits may lead to different priorities than productive diversification and dynamism."[325] In the short-term, the objective of industrial policy might undermine the competitiveness of markets. Especially given the threat posed by China's manufacturing capacity and disruptive technology, nations may resort to protectionist industrial policies that impede competition and sustainable development. As a result, trends and developments of domestic industrial policies need to be studied to determine the effects industrial policy has on competition policy.

The second area for further research surrounds potential developments in competition law doctrine on the topic of inequality. The dominant US school of competition law (the "Chicago School") generally holds that income and wealth redistribution should have "no implications" for its content; the focus for competition law should be on maximizing efficiency, leaving any redistribution goals for the tax and transfer system.[326] However, as Stiglitz notes, "…recent studies have shown that distribution does matter for economic performance. Moreover, the Second Welfare Theorem (suggesting that issues of efficiency and distribution can be separated, so that economics should only focus on efficiency) does not in general hold. In addition, there is increasing evidence that significant parts of inequality are a result of market power."[327] Thus, it appears that the dominant US approach to having competition law disregard inequality is facing some attack, and it might be useful for future research to keep an eye on these developments.

For example, the traditional US antitrust system has always focused on the "consumer welfare" standard, which incentivizes markets to produce a significantly high level of output accompanied by low prices of goods and services.[328] However, Steinbaum and Stucke have recently argued that this model results in highly concentrated markets that result in: 1) less bargaining power for workers to obtain competitive compensation; and 2) barriers to entry for small and medium sized suppliers.[329] Consequently, it is argued that the consumer welfare standard benefits only a few powerful actors at the expense of the majority of the population. In response to this market power problem, Steinbaum and Stucke advocate for an "effective competition" standard that promotes competition in all aspects of the economy, including the labour market and supply chains, by deconcentrating private power.[330] This potential shift away from the "Chicago School" by the US is an important area to research due to the potential implications for harmonization and cooperation between domestic competition law regimes.

Third, the experience of developing countries in implementing domestic competition laws is an important area for further research. A brief overview provided earlier demonstrates that the developing nations (e.g. South Africa) may pursue different competition objectives in comparison to developed nations (e.g. US). Thus, the experience of developing countries in implementing competition laws is a critical area for further research to assess whether a greater form of international cooperation is attainable.

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[325] Karl Aiginger and Dani Rodrik, "Rebirth of Industrial Policy and an Agenda for the Twenty-First Century" (2020) Journal of Industry, Competition and Trade at 4 online: <https://link.springer.com/content/pdf/10.1007/s10842-019-00322-3.pdf>.
[326] Richard Posner, *Antitrust Law: Second Edition*, (Chicago: University of Chicago Press, 2001), at p. 24.
[327] at p. 7.
[328] Herbert J. Hovenkamp, "Is Antitrust's Consumer Welfare Principle Imperiled?" (2019) 45:1 The Journal of Corporation Law 101 at 102.
[329] Marshall Steinbaum and Maurice E. Stucke, "The Effective Competition Standard: A New Standard for Antitrust" (2019) 86 The University of Chicago Law Review 595 at 595.
[330] *Ibid* at 595.

Fourth, it is necessary to study the future trends of competition provisions in FTAs and the works of 'competition networks' to assess the urgency of an international agreement on competition. One of the questions identified by the previous section asks whether 'competition networks' and bilateral cooperation agreements have hit a saturation point. The focus of the parties to FTAs and members of 'competition networks' has been on cooperation and 'soft harmonization', as mentioned throughout the memorandum. However, the effect of these efforts is uncertain because these developments are recent. As a result, it can only be determined whether 'competition networks' and bilateral cooperation agreements hit a saturation point through the research of future competition chapters in FTAs and the progress of 'competition networks'.

Finally, Anne-Marie Slaughter's book *A New World Order* argues that the international political sphere is governed by a complex web of "government networks" consisting of government officials that collaborate across national jurisdictions.[331] International competition policy presents a compelling case study for this proposition, primarily because national competition authorities tend to cooperate in pursuit of common goals, such as preventing and disciplining international cartels. The idea of global world order in the context of competition law and policy can be explored in more depth, particularly concerning the implications on international cooperation and harmonization of domestic competition laws.

[331] Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004).