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STRENGTHENING THE GLOBAL TRADE AND INVESTMENT SYSTEM FOR SUSTAINABLE DEVELOPMENT

Competition Policy within the Context of Free Trade Agreements

François-Charles Laprévote, Sven Frisch, and Burcu Can

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ABSTRACT

This think-piece reports the findings of a mapping exercise of the competition-related provisions of 216 free trade agreements (FTAs) included in the World Trade Organization's (WTO) Regional Trade Agreements (RTA) database. This represents by far the largest sample of FTAs analyzed to date in this type of mapping exercise. Where available, it also reviews official proposals for and accounts of the negotiations of a competition policy chapter in the Transatlantic Trade and Investment Partnership (TTIP) and the Trans-Pacific Partnership (TPP). But it does not review provisions that are not competition-specific but arguably also impact competition policy and enforcement (for example, non-discrimination and transparency). With a view to identifying both common ground and significant discrepancies between different approaches to addressing competition-related issues in FTAs, it pays close attention to differences in language, terminology, and scope. To begin with, it establishes a typology of competition-related provisions in FTAs, and provides the basis for devising a comprehensive database summarizing these provisions. It then identifies distinct model approaches to addressing competition-related issues in FTAs, and provides a summary of the economic and political economy rationales for including competition-related provisions in FTAs. Drawing lessons from this mapping exercise, it formulates tentative policy recommendations, exploring the appropriate fora and methodologies for harmonizing competition provisions within the international trade system. The paper proposes to draft a model competition chapter that could serve as a basis for tackling competition-related issues in future FTAs.

Setting up a comprehensive, user-friendly database summarizing competition provisions in the FTAs will provide stakeholders with easily accessible guidance for negotiating competition-related FTA provisions. Such a database could ideally be maintained by the WTO Secretariat and/or the International Competition Network (ICN). In light of the repeated failures to include a set of comprehensive competition policy principles in "hard law" multilateral trade instruments and continued opposition from a number of developing countries, a "soft law" approach appears to be the only realistic perspective in the near future at the multilateral level. The ICN stands out as the only international platform that has both the needed flexibility and ability to influence policymakers. Given the medium- and long-term shortcomings of a soft law approach, the paper proposes devising a step-by-step approach, with a gradual movement from voluntary participation in a soft law convergence process to the adoption of more binding instruments at the bi- and plurilateral levels, including by emphasizing the multiplication of competition-related provisions in FTAs. To garner sufficient support for such an initiative, it will be crucial to devise ways to either decrease the cost or increase the benefits of including competition-related provisions in FTAs. The first step for soft convergence would be to identify areas of competition policy that a model chapter should include and the parties could rather easily agree upon. To facilitate adoption by countries with less experience in competition law enforcement and/or ensure special and differential treatment for developing countries or least-developed countries, it envisages following a multi-tiered approach inspired by the WTO Trade Facilitation Agreement.

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LIST OF ABBREVIATIONS

ANZCERTA	Australia New Zealand Closer Economic Relations-Trade Agreement
ASEAN	Association of Southeast Asian Nations
CARICOM	Caribbean Community and Common Market
CEFTA	Central European Free Trade Agreement
ECJ	European Court of Justice
EEA	European Economic Area
EFTA	European Free Trade Association
EU	European Union
FTAs	free trade agreements
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICN	International Competition Network
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
PAFTA	Pan Arab Free Trade Area
RCEP	Regional Comprehensive Economic Partnership
RTA	regional trade agreement
SACU	Southern African Customs Union
SCM	Subsidies and Countervailing Measures
SoEs	state-owned enterprises
TFEU	Treaty on the Functioning of the European Union
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
TTP	Trans-Pacific Partnership
UN	United Nations
US	United States
WTO	World Trade Organization

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INTRODUCTION

From the stillborn Havana Charter to the Doha Round, attempts to incorporate competition policy into the multilateral trade system have rarely been successful. The 1996 Singapore Ministerial Declaration revived hopes that the time might finally be ripe for a multilateral competition framework. On 1 August 2004, however, the General Council of the World Trade Organization (WTO) decided to exclude the interaction between trade and competition policy from the Doha Work Programme. Since then, no work towards negotiations on this issue has taken place at the multilateral level.

Yet, competition law and policy have never figured so prominently in the international trade system.[1] The dramatic rise in the number and importance of bi- and plurilateral free trade agreements (FTAs) (Solano and Sennekamp 2006) has indeed provided developed and emerging nations alike with an increasingly popular route for promoting competition in the international trade arena. Of all the FTAs we have reviewed, a substantial majority (88 percent) addresses competition-related issues in one form or another. The recent shift towards mega-regional agreements such as the Transatlantic Trade and Investment Partnership (TTIP), the Trans-Pacific Partnership (TTP), and the Regional Comprehensive Economic Partnership (RCEP) may provide additional opportunities to extend the geographic scope of such provisions and perhaps even bolster a renewed effort to put competition policy back on the multilateral—or at least plurilateral—trade agenda.

Against this background, this think-piece reports the findings of our mapping exercise of the competition-related provisions of 216 FTAs included in the WTO's Regional Trade Agreements (RTA) database.[2] This represents by far the largest sample of FTAs analyzed to date in this type of mapping exercise (Bradford and Büthe 2015).[3] Where available, we also review official proposals for and accounts of the negotiations of a competition policy chapter in the TTIP and the TPP.

Our study draws upon earlier mapping exercises, including a seminal 2006 paper commissioned by the Organisation for Economic Co-operation and Development (OECD) Joint Group on Trade and Competition (Solano and Sennekamp 2006, Silva 2004; Sokol 2008; Teh 2009; Bradford and Büthe 2015: 254). Mindful of the methodological criticism levelled against this paper's approach (Teh 2009; Anderson and Evenett Unpublished), we do not limit our inquiry to competition-specific chapters, but also review standalone competition provisions, sector-specific provisions, and provisions that are closely intertwined with competition policy, most importantly those concerning state aid, subsidies, and state-owned enterprises (SoEs). In agreement with the theme leader and group managers, we have not, however, reviewed provisions that are not competition-specific but arguably also impact competition policy and enforcement (for example, non-discrimination and transparency).[4] With a view to identifying both common ground and significant discrepancies between different approaches to addressing competition-related issues in FTAs, we have endeavoured to pay particularly close attention to differences in language, terminology, and scope.

In light of the foregoing, Section 2 establishes a typology of competition-related provisions in FTAs, and provides the basis for devising a comprehensive database summarizing these provisions. Section 3 identifies distinct model approaches to addressing competition-related issues in FTAs. Section 4 provides a summary of the economic and political economy rationales for including competition-related provisions in FTAs. Finally, Section 5 seeks to draw lessons from this mapping exercise and formulates tentative policy recommendations. In particular, this section explores appropriate fora and methodologies for harmonizing competition provisions within the international trade system, and proposes to draft a model competition chapter that could serve as a basis for tackling competition-related issues in future FTAs.

1 See, for example, Evenett (2005: 37–38), describing this situation as "something of a paradox."

2 This database references the 232 FTAs (excluding agreements setting up customs unions or genuine regional organizations such as MERCOSUR or the Caribbean Community and Common Market [CARICOM]) that have either been notified, or for which an early announcement has been made, to the WTO as of 1 July 2015. Our sample includes 216 of these 232 FTAs referenced in the WTO's Regional Trade Agreements Database. The reasons for this discrepancy are two-fold. First, our sample excludes three FTAs that we could not retrieve online (Chile-Vietnam; Iceland-Faroe Islands; and the Pan Arab Free Trade Area [PAFTA]). Second, we have counted the FTAs between the Central American countries (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua) on the one hand and Panama and Chile on the other hand as two (rather than ten) agreements. Likewise, we have counted together separate agreements for trades in goods and trades in services between the same parties.

3 To the best of our knowledge, the largest sample analyzed in previous mapping exercises covered 182 FTAs.

4 We share the concern expressed in Bradford and Büthe (2015: 255) that this "risks going too far in broadening the notion of 'competition[-related] provisions to the point where the concept of competition policy loses its analytical usefulness." But we also believe that an analysis of competition-related provisions in the sectoral sections of trade agreements can be of interest (see our analysis of some of these provisions in Section 2.1.2) .

ADDRESSING COMPETITION-RELATED ISSUES IN FTAS

TYPOLOGY OF COMPETITION-RELATED PROVISIONS IN FTAS

A wide array of horizontal or sectoral FTA provisions, including those concerning market access, non-discrimination, or import/export restrictions, may have a direct or indirect impact on competition policy. Nevertheless, an increasing number of FTAs—88 percent of the agreements currently in force (from ~60 percent before 1990)—devote specific provisions or even entire chapters to competition-related matters (Figure 1).

This trend extends to FTAs concluded by developing countries,[5] 87 percent of which included competition-specific chapters or provisions. By contrast, such provisions or chapters can be found in only around half of the few FTAs to which one or more of the least developed countries identified by the United Nations (UN) are party.[6] This may be due to that at least some of these countries (for example, Bhutan) have opted against adopting competition laws.[7]

Our mapping exercise shows that competition-related chapters and provisions cover a range of issues, from obligations to (i) promote competition; (ii) adopt or maintain competition laws; (iii) regulate designated monopolies, SoEs, and enterprises entrusted with special or exclusive rights; (iv) regulate state aid and subsidies to provisions; (v) lay down competition-specific exemptions; (vi) abolish trade defenses; or set forth (vii) competition enforcement principles; (viii) cooperation and coordination mechanisms; and (ix) principles governing the settlement of competition-related disputes (Figure 2).

The 190 FTAs that refer to competition policy in one way or other display numerous combinations of these provisions, with only one (European Union [EU]-Republic of Korea) including all of them.[8] Thus, the provisions listed above are not cumulatively perceived by the contracting parties as indispensable components of a pro-competitive FTA.

That being said, it is worth noting that nearly 30 percent of the FTAs of our sample include a combination of provisions relating at least to (i) anti-competitive agreements, (ii) abuse of market power, and (iii) designated monopolies and SoEs.

5 We have used the International Monetary Fund's (IMF) classification for the purposes of identifying developing countries. One or more developing countries were party to 86percent of the FTAs included in our sample, http://www.imf.org/external/pubs/ft/weo/2015/01/weodata/groups.htm.

6 The 48 least developed countries identified by the UN are also under-represented among FTA signatories. One or more of these countries were party to only 3.7 percent of the FTAs included in our sample, http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_list.pdf.

7 See the reference to Bhutan's "decision to adopt the National Competition Policy, instead of a competition law," http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=912.

8 It should be noted that the Trans-Pacific Strategic Economic Partnership agreement also includes all of these provisions with the exception of merger control.

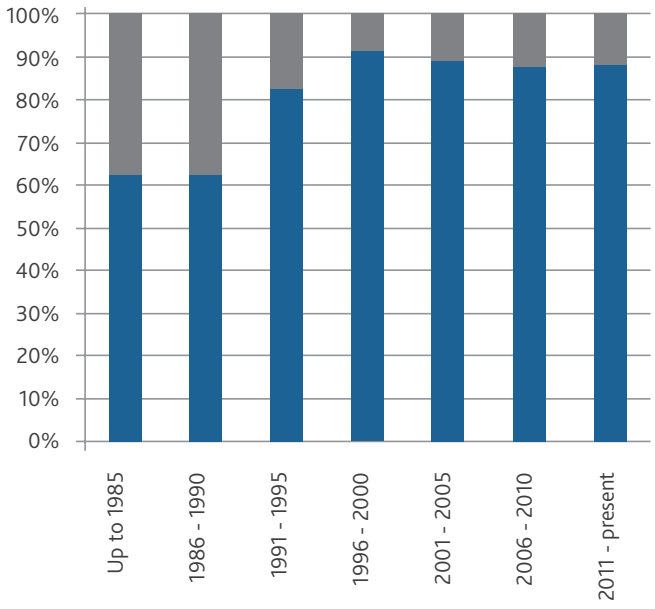

FIGURE 1:

Percentage of FTAs with Competition-specific Chapters/Provisions

LEGEND:

Percentage of FTAs without a Competition Chapter or Provision

Percentage of FTAs with a Competition Chapter or Provision

Source: Calculations based on the FTAs in the WTO database.

Promoting competition

Almost 21 percent of the FTAs contained in our sample include an undertaking by the parties to promote competition in one form or another. Some, especially those to which the European Free Trade Association (EFTA) is party, broadly refer to an agreement between parties merely to "promote competition in their economies" without further explanation as to how to interpret this concept.[9]

Other FTAs go into greater detail, requiring the parties to promote competition by (i) adopting or maintaining competition laws (see Section 2.1.2.);[10] (ii) "addressing anti-competitive practices in [their] territory and adopting and enforcing such measures as [they] deem appropriate and effective to counter such practices;"[11] (iii) "establish[ing] mechanisms to facilitate and promote the development of competition policy and ensure the application of rules on free competition;"[12] (iv) "maintaining a high-level government commitment to promote competition;"[13] or even (v) considering the potential impact on competition in designing trade and competition policies and implementing domestic laws.[14]

An even more limited number of FTAs (approximately 2 percent) specifically refer to competition advocacy as a means of promoting competition,[15] and stipulate that the parties may coordinate to organize the "participation of officials [in] advocacy programmes,"[16] and "promote initiatives with a view to developing a competition culture."[17]

9 EFTA-Singapore, art. 1.2; EFTA-Peru, art. 1.2(e); EFTA-Colombia, art. 1.2(e); EFTA-Central America, art. 1.2(d); EFTA-Hong Kong, art. 1.1(g); EFTA-Canada, art. 1.2(b). See too Singapore-Republic of Korea, art. 15.2; Japan-Australia, art. 15.1; EU-CARIFORUM, art. 32(d); Chile-Republic of Korea, art. 1.2(c); Japan-Indonesia, art. 126; Japan-Philippines, art. 135; Japan-Vietnam, art. 100; Transpacific Strategic Economic Partnership, art. 1.1.4(c); Korea-Turkey, art. 1.2(c); Japan-Thailand, art. 1(h).

10 See, for example, Costa Rica-Singapore, art. 9.2; Malaysia-Australia, art. 14.4.1; Costa Rica-Peru, art. 11.2.

11 *Thailand-Australia, art. 1202; Thailand-New Zealand, art. 11.03. See too Colombia-Northern Triangle, art. 1.2(c) and 16.10 (agreeing to promote competition and, in particular, actions they deem necessary to have an adequate framework to identify and sanction anti-competitive practices).*

12 Chile-Nicaragua, art. 15.01.02; Chile-Costa Rica; art. 15.01; Nicaragua-Chinese Taipei, art. 16.01.03; Panama-Costa Rica, art. 15.01.02; EU-Central America, art. 52. See too EU-Colombia and Peru, art. 264 (acknowledging importance of developing a "competition culture").

13 Dominican Republic-Central America, art. 13.02; Chile-Nicaragua, art. 15.01.02, Chile-Costa Rica, art. 15.01; Singapore-Australia, ch. 12, art. 2.

14 Hong Kong, China-Chile art. 13.2; Hong Kong, China-New Zealand ch. 9, art. 2; New Zealand-Malaysia, art. 12.2.1; New Zealand-Chinese Taipei, ch. 8, art. 2.1.

15 China-Costa Rica, art. 126; Association of Southeast Asian Nations (ASEAN)-Australia-New Zealand, ch. 14, art. 2(f); EU-Central America, art. 52.

16 ASEAN-Australia-New Zealand, ch. 14, Art. 2(f). See too EU-Colombia and Peru, art. 264.

17 EU-Colombia and Peru, art. 264.

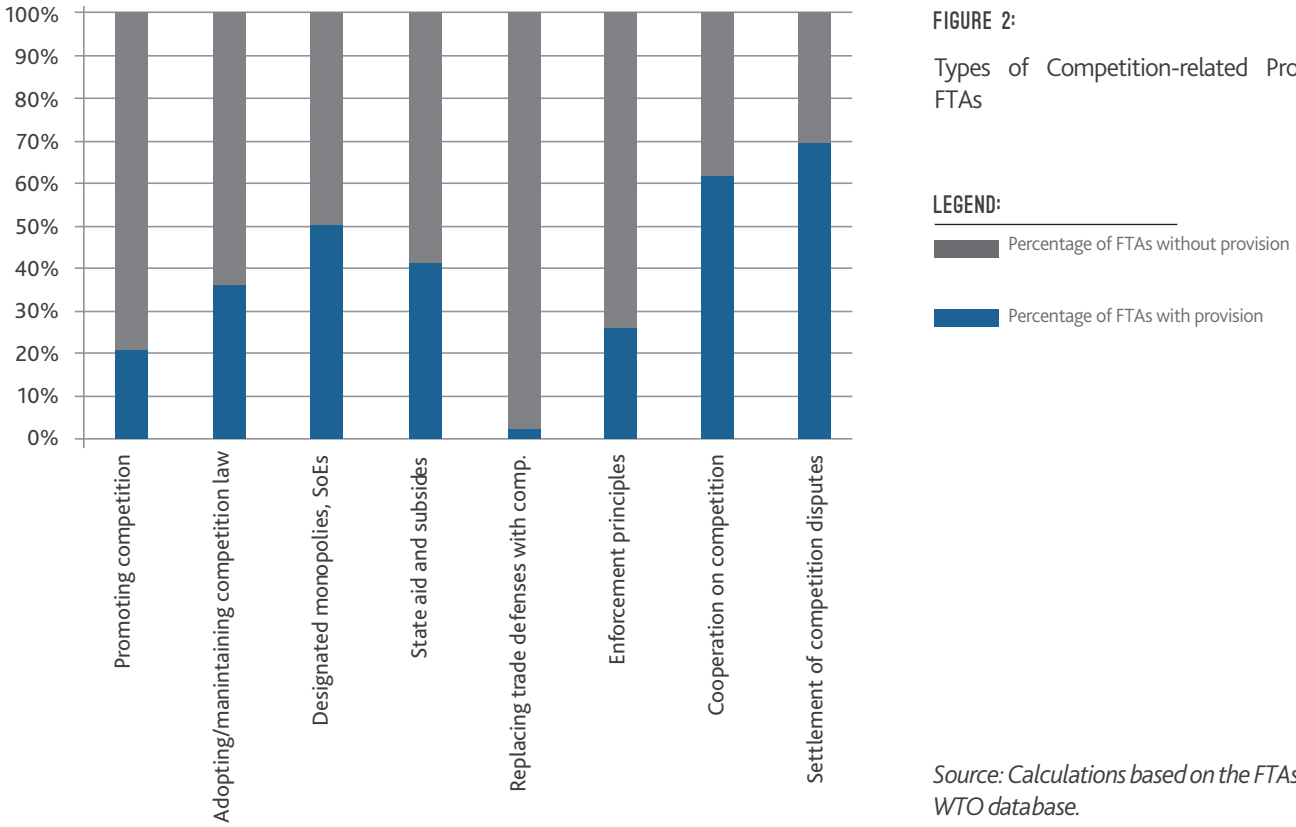

FIGURE 2:

Types of Competition-related Provisions in FTAs

Source: Calculations based on the FTAs in the WTO database.

Adopting and maintaining competition laws

Of all FTAs that we have reviewed, 37 percent[18] include provisions requiring the parties to adopt, maintain, or apply laws, legislation, or measures regulating anti-competitive conduct.[19] The North American Free Trade Agreement (NAFTA)-inspired FTAs also generally require the parties to "take appropriate action with respect thereto."[20] While FTAs between the EU and potential accession candidates often include an obligation upon the latter to ensure the compatibility of their legislation with EU competition law,[21] other FTAs go to great lengths to preserve the parties' sovereignty, expressly stating that each party "maintain[s] its autonomy in developing and enforcing its competition laws."[22]

By contrast, agreements between certain Eastern European, Central Asian, and/or Caucasian countries generally stop short of expressly requiring the parties to adopt competition laws and merely provide that "unfair business practices" are incompatible with the agreement's objectives.[23]

Overall, this category of provisions is particularly broad and diverse. On the one hand, some FTAs contain rather vague obligations to adopt "measures" or "laws" against anti-competitive practices without further defining the content of such laws or measures or the practices to be regulated. For example, Article 166 of the 2007 Chile-Japan FTA simply requires the parties to "take measures which [they] deem appropriate against anticompetitive activities."[24] In the same vein, the FTA between Japan and Indonesia defers to the parties' respective national laws, noting that "the term 'anti-competitive activities' means any conduct or transaction that may be subject to penalties or relief under the competition laws and regulations of either Party."[25]

On the other hand, numerous FTAs specifically define the anti-competitive practices to be regulated and/or the measures to be implemented to that effect, although the level of detail may vary. These practices cover (i) anti-competitive agreements, (ii) abuses of market power, and (iii) anti-competitive mergers.

These provisions are generally horizontal in scope, but may also be sector-specific. For example, 27 percent of the FTAs included in our sample—especially though not exclusively those to which North, Central, or South American countries are party—contain provisions that largely replicate Article 1 of the WTO's Basic Telecommunications Reference Paper and accordingly require the parties to implement competitive safeguards in the telecommunications sector.[26] A limited number of FTAs to which the EU and/or one of its neighbors are party also lay down specific competitive safeguards for the postal and courier sector, in line with Article 1 of the EU's 2005 proposal for a WTO Postal/Courier Reference Paper.[27] We have also identified a number of other sector-specific provisions, covering sectors as diverse as tourism,[28] dry and liquid bulk trade,[29] or international maritime transport.[30]

Prior experience with liberalization appears to feature prominently among the underlying motivations for negotiating such sector-specific provisions. For example, in all the agreements containing provisions on telecommunications, at least one of the parties is a signatory of the WTO's Basic Telecommunications Reference Paper, which includes similar provisions under the General Agreement on Trade in Services (GATS). Other reasons for including such sector-specific provisions may range from market access rationales (for example, in international maritime transport) to the more defensive objective of

18 This reflects the percentage of agreements that specifically require parties to adopt competition laws. Numerous FTAs do not include such a provision but otherwise oblige the parties to prohibit certain anti-competitive conduct.

19 See, for example, EU-Republic of Korea, art. 11.1 (requiring the parties to maintain "comprehensive competition laws" in their territories); NAFTA, art. 1501 (referring to the parties' obligation to "adopt and maintain measures to proscribe anti-competitive business conduct"). See too Nicaragua-Chinese Taipei, art. 16.01.3 ("ensure the implementation of free competition standards between and within the parties"); EU-Overseas Countries and Territories, art. 47.2 (requiring the parties to "implement local, national or regional rules and policies including the control and, under certain conditions, the prohibition of" certain anti-competitive practices).

20 NAFTA, art. 1501; Canada-Costa Rica, art. XI.2; Canada-Honduras, art. 15.2; Canada-Colombia, art. 1302; Canada-Panama, art. 14.02; United States (US)-Australia, art. 14.2.1; US-Chile, art. 16.1.2; US-Colombia, art. 13.2.1; US-Peru, art. 13.2; Peru-Chile, art. 8.2.1; Panama-Singapore, art. 7.1.; US-Singapore, art. 12.2; Mexico-Uruguay, art. 14.02.01. See too EU-Republic of Korea, art. 11.1; EFTA-Mexico, art. 51.1.

21 See, for example, EU-Albania, art. 70.1; EU-Ukraine, art. 256; EU-Serbia, art. 72.

22 Peru-Singapore, art. 14.2; US-Chile, art. 16.1.2; Korea-Australia, art. 14.3.2.

23 See, for example,, Georgia-Turkmenistan, art. 6; Georgia-Russia, art. 8; Georgia-Ukraine, art. 7; Kyrgyz Republic-Kazakhstan, art. 8; Kyrgyz Republic-Armenia, art. 6. See too Ukraine-Republic of Moldova, art. 16.

24 Chile-Japan, art. 177; India-Japan, art. 116; Costa Rica-Singapore, art. 9.2.

25 Japan-Indonesia, ch. 11. See too Hong Kong-Chile, art. 13.1.2 (requiring the parties to "give particular attention to anti-competitive activities" for the purposes of "preventing distortions or restrictions of competition which may affect trade in goods or services between them").

26 See, for example, US-Bahrain, Annex V, art. 2; US-Oman, art. 13.3.2; Mexico-Central America, art. 13.5; Republic of Korea-Chile, art. 12.6; EU-Central America, art. 188; EU-CARIFORUM, art. 97; ASEAN-Australia-New Zealand, Annex on Telecommunications, art. 4

27 EU-Ukraine, art. 110; EU-Republic of Moldova, art. 226; EU-Central America, art. 182; EU-Colombia and Peru, art. 135; Ukraine-Montenegro, Annex 3: 32.

28 EU-CARIFORUM, art. 110.

29 EU-Jordan, art. 39.1(b) (referring to the parties' commitment to "a freely competitive environment as being an essential feature of the dry and liquid bulk trade"). While this type of provision does not expressly impose an obligation upon the parties to adopt specific measures against anti-competitive practices in the relevant sector, it "certainly may be interpreted as a commitment, in principle, to take action against anti-competitive practices in the transport industry" (Bradford and Büthe 2015: 254).

30 EU-Montenegro, art. 61.2.

protecting a sector against the perceived misconduct by certain multinational corporations (for example, in tourism).

(i) Anti-competitive agreements

Of the FTAs we have reviewed, 51 percent include a provision that requires the parties to prohibit anti-competitive agreements and concerted practices. Some of these provisions are relatively generic, referring only to "anticompetitive horizontal arrangements between competitors,"[31] "unlawful agreements between enterprises,"[32] or "anti-competitive agreements [and] concerted practices."[33]

Other FTAs go into greater detail, often replicating Articles 101 of the Treaty on the Functioning of the European Union (TFEU) or 53 of the European Economic Area (EEA) verbatim. For example, FTAs to which the EU or EFTA are party typically (though not uniformly) refer to "agreements and concerted practices between undertakings, decisions and practices by associations of undertakings, which have as their object or effect the prevention, restriction or distortion of competition in the territory of either Party."[34] FTAs between the EU and accession candidates may even expressly stipulate that such provisions are to be interpreted in line with Article 101 TFEU.[35] Reflecting the global influence of EU competition law, FTAs to which Turkey is party[36] and FTAs between Caucasian, Central Asian, and Eastern European countries[37] consistently use the same or similar wording.

A few FTAs go into greater detail as to the specific agreements that might qualify as anti-competitive. For example, the Canada-Costa Rica FTA requires the parties to enact legislation prohibiting price-fixing, bid-rigging, and output restriction cartels,[38] whereas FTAs to which Australia or New Zealand are party generally specify that both horizontal and vertical anti-competitive agreements are prohibited.[39]

(ii) Abuse of market power

As many as 59 percent of the FTAs we have reviewed impose obligations upon the parties to prohibit abuses of market power. Provisions banning the abuse of market power are typically horizontal in scope and display a great degree of substantive convergence, with linguistic dissimilarities merely reflecting differences in the parties' respective legal background. For example, FTAs to which the EU or EFTA are party overwhelmingly reflect the language of or expressly refer to Articles 102 TFEU and 54 EEA, defining

31 Australia-Chile, art. 14.3; Singapore-Chinese Taipei, art. 10.1.2; Costa Rica-Singapore, art. 9.1.2 (a).

32 Japan-Switzerland, art. 103.

33 See, for example,, Peru-Chile, art. 8.1.3; EU-Georgia, art. 204; EFTA-Singapore, art. 50(1); Trans-Pacific Strategic Economic Partnership, art. 9.2; Republic of Korea-Chile, art. 14.2.

34 See, for example,, EFTA-Central America (Costa Rica and Panama), art. 8.1.1(a); EU-Central America, art. 278; EU-Ukraine, art. 254; EU-Tunisia, art. 36.1(a); EU-Bosnia, art. 36.1(a).

35 See, for example,, EU-Montenegro, art. 73.2. One FTA signed by the EU (the EU-Ukraine FTA) expressly refers to the European Court of Justice (ECJ) case law on state aid.

36 See, for example,, Republic of Korea-Turkey, Ch. 3; Turkey-Israel, art. 25.1(a); Turkey-Montenegro, art. 24.1(a); Turkey-Albania, art. 24.1(a).

37 See, for example, Armenia-Kazakhstan, art. 8 ("agreements between enterprises and their associations for the purposes of hindering or limiting competition or to disrupt the competitive environment"); Armenia-Republic of Moldova, art. 8; Armenia-Russia, art. 7; Armenia-Ukraine, art. 5; Georgia-Ukraine, art. 7; Russia-Turkmenistan, art. 7. See too the Central European Free Trade Agreement (CEFTA), art. 20.

38 Canada-Costa Rica, art. XI.2.

39 Malaysia-Australia, art. 14.2; Thailand-Australia, art. 1201.2; Singapore-Australia, ch. 12, art. 1.2; Australia-Chile, art. 14.3; Thailand-New Zealand, art. 11.1.2.

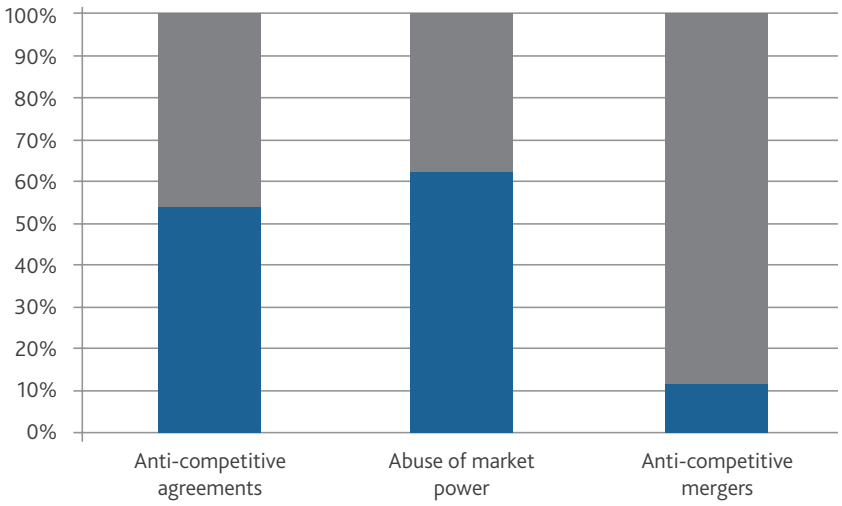

FIGURE 3:

Types of Provisions Concerning Anti-competitive Practices in FTAs

LEGEND:

Percentage of FTAs without provision

Percentage of FTAs with provision

Source: Calculations based on the FTAs in the WTO database.

anti-competitive business conduct as including "abuses of dominant positions,"[40] or "abuse by one or more undertakings of a dominant position."[41] With one notable exception,[42] these FTAs do not, however, define the notions of "abuse" or "dominance." Neither do they list practices that may amount to an abuse of dominance.[43] Again, a host of other nations have more or less closely replicated this approach.[44]

By contrast, FTAs to which Canada is party tend to refer to "anti-competitive practices" of one or more enterprises that are dominant[45] or have market power in a given market.[46] Yet other FTAs simply refer to anti-competitive[47] "unilateral conduct" or the "abuse" or "misuse of market power."[48]

Only in exceptional cases are such provisions limited to a specific sector or a certain type of abuse. For example, certain FTAs replicate the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement[49] in that they allow the parties to "prevent practices which constitute an abuse of intellectual property rights by rights holders, or unreasonably restrain competition."[50] In a different spirit, 28 percent of the FTAs included in our sample complement their horizontal competition-related provisions (if any) with detailed, sector-specific competition provisions for the telecommunications sector. Closely replicating the WTO's Basic Telecommunications Reference Paper, these FTAs typically require the parties to "prevent suppliers of public telecommunications transport networks or services who are major suppliers from engaging in or continuing anti-competitive practices."[51] Such practices may include anti-competitive cross-subsidization, refusals to supply, and the anti-competitive use of information obtained from competitors.

(iii) Anti-competitive mergers

Only 11 percent of the FTAs included in our sample address anti-competitive mergers. With one exception,[52] those are all FTAs to which highly advanced economies with significant merger control experience such as Australia, the EU, EFTA (or one of its Member States), Canada, Korea, New Zealand, or Singapore are party.

In general, these FTAs only summarily list "anti-competitive mergers and acquisitions" or "merger and acquisitions with substantial anti-competitive effects" as one of several potentially anti-competitive activities banned under the agreement.[53] While these provisions may arguably be construed as implicitly requiring the parties to set up a merger control regime, only four FTAs included in our sample, which are relatively recent,[54] expressly require the parties to adopt and maintain laws that provide for "the effective control of concentrations."[55]

Only a handful of FTAs also provide for a substantive merger control test. For example, the EU-Colombia and Peru FTA replicates word for word the test set out in the EU Merger Control Regulation, referring to "concentrations which significantly impede effective competition, particularly as a result of the creation or strengthening of a dominant position, in accordance with [the Parties'] respective competition laws."[56] Similarly, the EU-Montenegro FTA prohibits "concentrations between undertakings which result

40 EFTA-Southern African Customs Union (SACU), art. 15.1; EU-Peru, art. 8.1.1 and 8.2.1(b).

41 EU-Algeria, art. 41.1(b); EU-Albania, art. 71.1(ii); EU-Serbia; art. 19.1(b); EFTA-Montenegro, art. 17.1(b); EFTA-Chile, ch. VI; EFTA-Singapore, art. 60; EFTA-Lebanon, art. 17.1(b); EFTA-Republic of Korea, art. 5.1.1 and 5.1.2(a); EFTA-Egypt, art. 31.1(a); EFTA-Colombia, art. 8.1 and 8.2.1(b); EFTA-Central America (Costa Rica and Panama), art. 8.1.1(a); EU-Ukraine, art. 254; EU-Republic of Korea, art. 11.1. But see EU-CARIFORUM, art. 126 (referring to "abuse by one or more undertakings of market power"); and EU-Georgia, art. 205, and EU-Republic of Moldova, art. 226 (both referring to "unilateral conduct of enterprises with dominant market power").

42 See EFTA-Central America (Costa Rica and Panama), art. 8.1.1(b) ("The term 'dominant position' may be referred to as an undertaking able to operate independently from its competitors or customers, or alternatively as a substantial market power or as a notable market participation, as specified in the Central American States' respective competition laws").

43 We have identified only four FTAs that do so. Those FTAs consistently refer to "predatory pricing" as one of several forms of abuse of market power. See Panama-Singapore, art. 7.1.1(b); Thailand-Australia, art. 1201-2; Thailand-New Zealand, art. 11.1.2; Singapore-Australia, ch. 12, art. 1.2(b).

44 See, for example, Peru-Chile, art. 8.1.3; Costa Rica-Singapore, art. 9.2.1(b); Turkey-Morocco, art. 25.1(b); Ukraine-FYROM (Macedonia), art. 24.1(b); CEFTA, art. 20. Kyrgyz Republic-Armenia, art. 6; Kyrgyz Republic-Kazakhstan, art. 8; Georgia-Ukraine, art. 7; Georgia-Russian Federation, art. 8; Armenia-Kazakhstan, art. 8; Armenia-Moldova, art. 8; Armenia-Russia, art. 7; Armenia-Ukraine, art. 5.

45 EU-Canada, art. X-01(5); EFTA-Canada, art. 14(3).

46 Canada-Costa Rica, art. XI.2.

47 Australia-Chile, art. 14.3.

48 Panama-Singapore, art. 7.1.1(b); Singapore-Chinese Taipei, art. 10.1.20; Thailand-Australia, Thailand-New Zealand, art. 11.1.2; Singapore

49 TRIPS Agreement, art. 40.

50 China-Costa Rica, art. 110; US-Chile, art. 17.1.13; Mexico-Chile, art. 15-06.2; Mexico-Uruguay, art. 15-06.

51 ASEAN-Australia-New Zealand, Annex on Telecommunications, art. 4; EU-Chile, art. 112; Canada-Republic of Korea, art. 11.4.

52 Turkey-Montenegro, art. 21.1(c).

53 Canada-Costa Rica, art. XI.2; EFTA-Canada, art. 14(3); EFTA-Chile, art. 72; EFTA-Mexico, art. 51.2; EU-Mexico, art. 11; EU-Central America, art. 126; Australia-Chile, art. 14.3; Australia-Singapore, ch. 12, art. 1; Australia-Thailand, art. 1201; Australia-Republic of Korea, art. 14.10 (also referring to "other anticompetitive structural combinations or enterprises"); New Zealand-Thailand, art. 11.1.2; Singapore-Republic of Korea, art. 15; Panama-Singapore, art. 7.1.1(d); Singapore-Chinese Taipei, art. 10.1.2(b); Switzerland-China, art. 10.1.

54 These agreements were concluded between 2011 and 2014.

55 EU-Republic of Korea, art. 11.1; EU-Georgia, art. 204; EU-Moldova, art. 335; Korea-Turkey, art. 3.2.

56 See too EU-Colombia and Peru, art. 253.

in monopolization or a substantial restriction of competition in the market in the territory of either Party."[57]

Regulating designated monopolies and state-owned enterprises

One of the most common competition-related provisions in FTAs is an obligation upon the parties to regulate designated monopolies (50 percent), SoEs, or undertakings otherwise entrusted with special or exclusive rights.[58] While recognizing the parties' prerogative to establish and maintain such enterprises,[59] these provisions aim to level the playing field to the extent practicable. They display substantial variations in scope and language and broadly fall into four categories.

First, the NAFTA[60] and other NAFTA-inspired FTAs[61] contain provisions that are reminiscent of but go beyond GATT Article XVII and Article XVIII as applied to state trading enterprises.[62] These FTAs require that private or government monopolies and SoEs (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. By the same token, some FTAs to which Australia is party recognize the importance of "not provid[ing] competitive advantages to state-owned enterprises simply because they are state owned."[63]

The US has been advocating a NAFTA-style approach for the TPP's SoEs chapter since 2011 (Congressional Research 2015: 43–44). To that effect, US negotiators have tabled a set of principles designed to ensure competitive neutrality. According to these principles SoEs are to "receive no competitive advantages beyond those enjoyed by private companies" (Congressional Research 2015: 43–44; OECD 2012: 17-18) whether in the form of subsidies, favorable tax treatment, preferential access to markets, or other regulatory benefits. As explained in Section 2.1.5, several TPP parties with a significant state-owned sector have insisted on excluding their SoEs from the scope of TPP provisions. In response to these demands, the TPP parties have recently adopted seven principles to ensure that such exemptions will be devised in accordance with competitive neutrality principle (Inside US Trade 2014a).

Second, a number of other FTAs appear to draw inspiration from the NAFTA, but either (i) exclusively focus on a specific aspect thereof, or (ii) go into even greater detail than the NAFTA:

- As regards (i), FTAs to which Japan[64] or China[65] are party tend to require the parties to ensure that designated monopolies do not abuse their monopoly power, whereas certain FTAs between Latin American countries focus on non-discrimination.[66]

- As regards (ii), FTAs to which Canada is party tend to replicate the NAFTA approach, but specify that the anti-competitive use of monopoly, special, or exclusive rights by designated monopolies and other enterprises entrusted with such rights is prohibited to the extent it amounts to leveraging, that is, the anti-competitive practices must occur in a non-monopoly market.[67] In a limited number of cases, these FTAs may also provide a non-exhaustive list of specific anti-competitive practices in which monopolies or SoEs may not engage, including anti-competitive cross-subsidization, discrimination, or predatory conduct.[68]

Third, FTAs to which the EU or EFTA are party simply require that public and private enterprises entrusted with special or exclusive rights be subject to competition law,[69] extend

57 EU-Ukraine, art. 254. See too Turkey-Montenegro, art. 21.1(c) (referring to concentrations "that would create a dominant position and prevent fair competition").

58 The relationship between trade and competition policy in the context of SoEs is analyzed in detail by Sauvé and Soprana in the think-piece on SoEs, Investment, Competition Policy.

59 See, for example, the US-Singapore, art. 12.3; the US-Australia, art. 14.3; Israel-Mexico, art. 8.5 (also requiring each party to notify the other party when establishing such enterprises); Republic of Korea-Chile, ch. 14.

60 NAFTA, art. 1502.

61 See, for example, Canada-Chile, ch. J; Israel-Mexico, ch. 8; Chile-Republic of Korea, art. 14.8; US-Australia, 14.3 (whereby the US undertakes to "ensure that anticompetitive activities by sub-federal state enterprises are not excluded from the reach of its national antitrust laws solely by reason of their status as sub-federal state enterprises, to the extent that their activities are not protected by the State Action Doctrine"); Republic of Korea-US, ch. 16.

62 See Appellate Body Report, *Canada-Wheat Exports and Grain Imports,* WT/DS276/AB/R, 30 Aug. 2004.

63 Japan-Australia FTA, art. 15.4. See too Republic of Korea-Australia, art.14.4; Australia-Chile, 14.5; the US-Australia, art. 14.4; Singapore-Australia, ch.12 art. 4.

64 Brunei Darussalam-Japan, art. 83; India-Japan, art. 67; Japan-Indonesia, art? 86; Japan-Malaysia, art. 105; Japan-Philippines, art. 80; Japan-Singapore, art. 65; Japan-Switzerland, art. 51. See too US-Republic of Korea, ch. 18.

65 China-New Zealand, art. 123; China-Singapore, art. 69; ASEAN-China (Services), art. 7.

66 See, for example, Chile-Costa Rica, art. 15.02; Chile-El Salvador, art. 15.02.

67 See, for example, Canada-Jordan, art. 9.1; Canada-Peru, art. 1305 and 1306; Canada-Republic of Korea, art. 15.2 and 15.3; Canada-Colombia, art. 1305 and 1306; Canada-Honduras, art. 15.3 and 15.4; Canada-Panama, 14.3 and 14.4. See too EFTA-Central America, art. 4.12.2 and 4.12.3; Chile-Mexico, art. 14.03 and 14.04; Australia-Chile, art. 14.4 and 14.5; ASEAN-Australia-New Zealand, ch. 8, art. 14; Colombia-Mexico, art. 16.02.2(b); the US-Singapore, art. 12.3.

68 Canada-Israel, art. 72. See too Chile-Mexico, art. 14.03. It is noteworthy that these practices are also the ones listed in the WTO's Basic Telecommunications Reference Paper.

69 EFTA-Chile, art. 77; EFTA-Colombia, art. 8.5; EFTA-Montenegro, art. 17.2; EFTA-Peru, art. 8.5; EFTA-Serbia, art. 19.2; EFTA-Ukraine, art. 7.2; EU-CARIFORUM, art; 129; EU-Republic of Korea, art. 11.4; EU-Moldova, art. 336; EU Georgia, art. 205. See too Iceland-China, ch. 5; EU-Central America, art. 280; Peru-Republic of Korea, art. 15.9; Singapore-Chinese Taipei, art. 10.6; New Zealand-Chinese Taipei, ch. 8, art. 2.1.b; Transpacific Strategic Economic Partnership, art. 9.6; Republic of Korea-Turkey, ch.3.

general abuse of dominance provisions to such enterprises,[70] or even expressly refer to Article 106 TFEU.[71] Interestingly, the recently negotiated EU-Canada FTA also appears to opt for this type of approach.[72]

Fourth, a very limited number of FTAs to which countries with a significant SoE presence are party include provisions aiming to neutralize and reduce government intervention in the markets.[73] For example, the US-Singapore FTA imposes on Singapore an obligation to refrain from using direct or indirect decisive influence over government enterprises, and limits the involvement of the government in these enterprises to using its voting rights as a shareholder.[74]

Regulating subsidies/state aid

Around 41 percent of the FTAs we have reviewed contain provisions concerning the regulation of subsidies or state aid. Such provisions typically vary in respect of (i) their scope; and (ii) the type of obligation they impose upon the parties.

FTAs between the EU or Turkey on the one hand and their neighboring countries on the other hand tend to impose upon the parties broad and stringent state-aid related obligations, which are directly derived from EU law.[75] These FTAs generally prohibit "any public aid which distorts or threatens to distort competition by favoring certain undertakings or products,"[76] with some even containing an explicit reference to the definition of state aid set forth in Article 107 TFEU.[77]

Some FTAs between Eastern European, Caucasian and/or Central Asian countries have more or less closely replicated this approach.[78] FTAs to which China is party tend to include similarly stringent yet less broad provisions, only requiring the parties to refrain from "introduc[ing] or maintain[ing] any form of export subsidy on any good destined for the territory of the other Party."[79] Subsidies provisions in FTAs to which Japan is party are typically even narrower in that they only require the parties to refrain from introducing or maintaining export subsidies on agricultural goods.[80]

More rarely, FTAs may impose less rigid obligations on the parties as regards subsidies and state aid. The parties to the ASEAN-Australia-New Zealand FTA, for example, merely "recognize that subsidies may have a distortive effect on trade in services."[81] Similarly, the parties to the EU-Korea FTA commit to "use their best endeavours to remedy or remove through the application of their competition laws or otherwise, distortions of competition caused by subsidies in so far as they affect international trade, and to prevent the occurrence of such situations."[82] Yet other FTAs simply reaffirm the parties' commitment to the WTO Agreement on Subsidies and Countervailing Measures, General Agreement on Tariffs and Trade (GATT) Article XVI, GATS, and/or the WTO Agreement on Agriculture.[83]

Competition-specific exemptions

Some of the FTAs that we have reviewed contain exemptions that are specific to the competition chapter. Such exemptions may be open-ended or strictly limited in scope. As regards open-ended exemptions, FTAs to which Asian nations are party often allow the parties to "exempt

70 EFTA-Albania, art. 18.2; EFTA-Morocco art. 17.2; EFTA-Palestinian Authority, art. 16.2; EFTA-Turkey, art. 17.2; EFTA-Tunisia art.17.2; EFTA-Former Yugoslav Republic of Macedonia, art. 17.2; EFTA-Serbia, art. 19.2; EFTA-Bosnia and Herzegovina, art. 19.2. See too Hong Kong, China-New Zealand, ch.13, art. 13; Pakistan-Malaysia, art.79; Turkey-Bosnia and Herzegovina, art. 17.2.

71 EU-FYROM, art. 34, EU-Montenegro, art. 39; EU-Serbia, art. 74; EU-Bosnia, art. 37. Article 106 of the Treaty on the Functioning of the European Union (TFEU) prohibits Member States from enacting or maintaining in force "any measure contrary to the rules contained in the Treaties," in particular to those rules on non-discrimination and competition "in the case of public undertakings and undertakings to which Member States grant special or exclusive rights." This article further provides that "Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union."

72 EU-Canada, art. X-02.

73 See, for example, the US-Singapore, art. 12.3.

74 The US-Singapore, art. 12.3. This provision further requires Singapore to publicly report the percentage of the government's shares and voting rights in government enterprises, names and titles of government officials serving as an officer or member of the board of directors and the annual revenue or total assets of these enterprises.

75 One explanation for Turkey's motivation to follow the EU's approach could be its obligation due to the accession process to align its laws with that of the EU.

76 EU-FYROM, art. 33; EU-Montenegro, art. 38; EU-Serbia, art. 73; EU-Bosnia, art. 36.1(c); EU-Ukraine, art. 262; EU-Morocco, art. 36.1(c); EU-Iceland, art. 24.1.iii; EU-Norway, art. 23.1.iii; Turkey-Israel, art. 25.1(c); Turkey-Montenegro, art. 24.1(d); Turkey-Serbia, art. 25.1(c). See too EU-South Africa, art. 41 (only public aid "which does not support a specific public policy objective or objectives of either Party, is incompatible" with the agreement).

77 EU-Moldova, art. 340.

78 CEFTA, art. 21; Ukraine-FYROM, art. 24.1(c); Russia-Armenia, art. 7.

79 China-New Zealand, art. 63; China-Singapore, art. 41. But see Iceland-China, art. 10 (covering only agricultural goods).

80 Japan-Switzerland, art. 19; Trans-Pacific Strategic Economic Partnership, art. 3.11; India-Japan, art. 21; Japan-Peru, art. 27; Japan-Thailand, art. 20; Japan-Indonesia, art. 22; Japan-Malaysia, art. 21. See too Hong Kong-Chile, art. 3.9. But see Japan-Vietnam, art. 18 (covering export subsidies in general).

81 ASEAN-Australia-New Zealand, ch. 8, art. 14.

82 EU-Republic of Korea, art. 11.9.

83 EFTA-Singapore, art. 15; EFTA-Chile, art. 81; India-Singapore, art. 2.8.

specific measures or sectors from [the competition policy chapter], provided that such exemptions are transparent and are undertaken on the grounds of public policy or public interest"[84] or are "no broader than necessary" to achieve "legitimate policy objectives" and are "implemented in a transparent way that minimises distortions to fair and free competition."[85] A few FTAs take a somewhat different approach, allowing the parties to either (i) implement competition-specific exceptions and exemptions provided they are non-discriminatory or transparent,[86] or (ii) to carve out specific sectors that are already exempted from their domestic competition laws.[87]

Limited competition-specific exemptions typically (though not exclusively) feature in FTAs to which the EU is party. First, certain FTAs contain sector-specific exemptions. For example, FTAs that contain telecommunications-specific competition provisions tend to include a limited exemption authorizing the parties to "define the kind of universal service obligation [they wish] to maintain," provided such obligation "is administered in a transparent, non-discriminatory, and competitively neutral manner and is not more burdensome than necessary."[88] In a somewhat different spirit, EU-style FTAs typically exempt agricultural and fisheries subsidies from the general prohibition on state aid.[89] FTAs to which North or South American countries are party often exempt self-regulatory organizations in the financial sector from the provisions governing designated monopolies,[90] and carve out government procurement from competition rules governing designated monopolies.[91] Other carved-out sectors include the coal industry[92] and "arrangements for collective bargaining for employment conditions."[93]

Public accounts of the ongoing negotiation process suggest that limited competition-specific exemptions will also feature prominently in the TPP. In response to demands for exemptions from the agreement's SoE provisions by countries with a high degree of state intervention in the economy (Vietnam, Malaysia, Singapore, and Brunei), negotiators have adopted seven principles designed to ensure that such exemptions are competitively neutral (Inside US Trade 2014a). These principles only allow the parties to list the SoEs to be excluded, rather than carve out a particular industry or category of enterprises. The parties will only agree to an exemption covering an entire sector or category if all parties propose to exclude SoEs carrying out the same activity, in which case the exemption will encompass both existing and future enterprises (Inside US Trade 2014a).

Second, a number of FTAs—especially though not exclusively EU-style agreements—contain public service exemptions. These exemptions allow the parties to exclude from the scope of the competition rules public enterprises and enterprises entrusted with special or exclusive rights,[94] or with the "operation of services of general economic interest or having the character of a revenue-producing monopoly,"[95] to the extent that the application of the competition rules would hamper the performance of that service.

Replacing traditional trade defenses with competition law instruments

The overwhelming majority of FTAs we have reviewed allow the parties to resort to trade defenses in one form or another (that is, anti-dumping, anti-subsidy, and safeguard instruments), either by means of specific provisions or by reference to the corresponding GATT rules.[96] A very small minority of FTAs, namely the ANZCERTA, EFTA-Chile, EFTA-Singapore, EFTA-Serbia, and Canada-Chile preclude the

84 Australia-Thailand, art. 1204. See too Australia-Republic of Korea, art. 8.20; Australia-Chile, art. 14.3.2; South Asian Free Trade Agreement, ch. 12, art. 5; Singapore-Australia, ch. 9, art. 5; Trans-Pacific Free Trade Agreement, art. 9.2(3); New Zealand-Thailand, art. 11.5; New Zealand-Malaysia, art. 12.2.3.

85 New Zealand-Chinese Taipei, ch. 8, art. 4; New Zealand-Hong Kong, ch. 9, art. 3.

86 Peru-Chile, art. 8.2.6; Malaysia-Australia, art. 14.5.

87 Canada Jordan, art. 9-3; EFTA-Canada, art. 14.3; CEFTA, art. 168.

88 Canada-Republic of Korea, art. 11.5; EU-Chile, art. 115.

89 EU-Palestinian Authority, art. 30.6; EU-Morocco, art. 36.5; EU-Bosnia, art. 36.8; EU-Egypt, art. 34.4; EU-Jordan, art. 53.5; EU-Israel, art. 36.4; Ukraine-FYROM, art. 26.3; EU-Ukraine, art. 266; EU-Serbia, art. 73.9; EU-Montenegro, art. 38.9; Turkey-Israel, art. 25.4. The Turkey-Bosnia FTA goes so far as to exempt from the prohibition of anti-competitive agreements all "agreements, decisions and practices which form an integral part of a national market organisation" in the agricultural sector. See Turkey-Bosnia, art. 17.3.

90 Panama-Peru, art. 14.9; US-Singapore, art. 10.20; Peru-Republic of Korea, art. 12.20; US-Australia, art. 13.19; US-Colombia, art. 12.20; US-Peru, art. 12.20; Canada-Colombia, art. 1118; EU-Colombia and Peru, art. 182; Canada-Peru, art. 1118; Canada-Republic of Korea, art. 10.20; Chile-Nicaragua, art. 15.02; Panama-Chinese Taipei, art. 15.03.4. See too Australia-Republic of Korea, art. 8.20.

91 NAFTA, art. 1502; Chile-Mexico, art. 14.03.5; Canada-Chile, art. J-02.4; Canada-Colombia, art. 1305.4; Israel-Mexico, art. 8.05.4; Mexico-Uruguay, art. 14.03; Republic of Korea-US, art. 13.20. See too EFTA-Peru, art. 8.5; EFTA-Colombia, art. 8.5.

92 EU-Republic of Korea, art. 11.11. The EU-Tunisia FTA also contains a presumably obsolete exemption for "cases in which a derogation [was] allowed under the Treaty establishing the European Coal and Steel Community," as the Treaty has expired. See EU-Tunisia, art. 36.1(c).

93 CEFTA, art. 168.

94 EU-Republic of Korea, art. 11.4.1(b); EU-Chile, art. 179; EU-CARIFORUM, art. 129; EFTA-Albania, art. 18.2; EFTA-Central America (Costa Rica and Panama, art. 8.1.2); Chile-Republic of Korea, ch. 15; Trans-Pacific Strategic Economic Partnership, art. 9.6.

95 EU-Canada, art. X-02(2)(b). See too, EU-Republic of Korea, art. 11.11 (referring to "subsidies granted as compensation for carrying out public service obligations").

96 See, for example, Hong Kong, China-New Zealand, art. 4; Iceland-China, art. 7(5); Israel-Mexico, art. 2.04; Japan-Australia, art. 2.12 and section 2; Japan-Malaysia, art. 19; Canada's FTAs with Colombia, Costa Rica, Honduras, Israel, Jordan, Panama, Peru and Republic of Korea, art. 3 and ch. 6; Guatemala-Chinese Taipei, art. 7.01; Hong Kong, China-Chile, art. 36.

parties from resorting to trade defenses and replace them with competition provisions.[97]

Competition enforcement principles

While a substantial majority of the FTAs included in our sample contain provisions concerning general obligations for non-discrimination, transparency, and procedural fairness, which apply to the entirety of trade-related matters in the scope of the agreement, only around 26 percent of these introduce competition-specific enforcement principles. With limited exceptions,[98] all of these FTAs impose a general obligation upon the parties to ensure the transparent and/or non-discriminatory enforcement of their competition rules.[99] In the overwhelming majority of cases (91 percent), these two requirements are supplemented by principles of procedural fairness,[100] respect for the rights of defense,[101] or, more rarely, timeliness[102] and comprehensiveness[103](Figure 4).

A limited number of NAFTA-inspired FTAs go even further in defining due process standards for enforcing competition laws. Two FTAs to which Canada is party require the parties to ensure that their "judicial and quasi-judicial proceedings to address anti-competitive activities are fair and equitable,"[104] while seven FTAs to which Singapore and/or the US are party impose an obligation upon the parties to afford any person subject to the imposition of a sanction or remedy for a breach of competition law "the opportunity to be heard and to present evidence, and to seek review of such sanction or remedy in a domestic court or independent tribunal."[105]

A number of FTAs to which the US (and to a lesser extent the EU) is party contain provisions regarding the institutional design of the parties' competition regimes. Such provisions are mostly concerned with ensuring that the parties maintain an authority entrusted with enforcing competition laws.[106] However, only very few such agreements require that these government agencies be independent or adequately funded. For example the Canada-Costa Rica FTA requires the parties to "establish or maintain an impartial competition authority that is … independent from political interference in carrying out enforcement actions and advocacy activities."[107] Similarly, FTAs between the EU and potential accession candidates may contain provisions obliging the parties to entrust competition enforcement to "an operationally independent authority."[108] On a different note, the New Zealand-Chinese Taipei FTA is unique in that it requires the parties to "adopt or maintain laws or other measures that provide for a private right of action."[109]

Cooperation and coordination on competition

Almost half of the FTAs that we have reviewed contain competition-specific cooperation and coordination provisions. FTAs which contain such provisions typically emphasize the "importance of coordination and cooperation on matters of competition law enforcement"[110] and require the parties to cooperate through their respective competition authorities to eliminate anti-competitive practices affecting inter-party trade.[111] A limited number of FTAs further authorize the parties to request another party's cooperation to eliminate a specific anti-competitive practice which originates from that party's territory.[112]

Cooperation and coordination provisions encompass a wide array of mechanisms, ranging from mutual legal and technical assistance, to communication, consultation, and exchange of information requirements. Notification

97 Australia-New Zealand Closer Economic Relations Trade Agreement (14 Dec. 1982), the Protocol to the Australia New Zealand Closer Economic Relations-Trade Agreement (ANZCERTA) on Acceleration of Free Trade in Goods (18 Aug 1988) and art. 4. of the Protocol; Canada-Chile, ch. M; EFTA-Chile, art. 18; EFTA-Singapore, art. 9 and 16 (2); EFTA-Serbia, art. 18.

98 EU-Central America; New Zealand-Chinese Taipei.

99 See, for example, Iceland-Faroe Islands, art. 5.F.i (non-discrimination); Republic of Korea-US, art. 16.5 (transparency); EU-Montenegro, art. 38 (limiting the competition-specific transparency requirement to the field of State aid). See too Australia-Chile, art. 14.3 (providing that "each Party's competition authority will treat nationals of the other Party no less favorably than its own nationals in like circumstances").

100 Canada-Honduras, Article 15.2 (4). US-Australia, ch. 14; Singapore-Australia, ch.12, art. 3; Chile-US, ch. 16, Japan-Mexico, art. 133-134; US-Singapore, art. 12.5.

101 EU-Georgia, art. 204; EU-Republic of Moldova, art. 335; EFTA-Chile, art. 72; EU-Colombia and Peru, art. 260.

102 EU-Colombia and Peru, art. 260; Korea-Australia, art. 14.3.1; Korea-Turkey, art. 3.3.2; Singapore-Australia, ch. 12, art. 3; Thailand-Australia, art. 1203.

103 Korea-Australia, art. 14.3.1; Thailand-Australia, art. 1203.

104 Canada-Costa Rica, Article XI (2) and (6); Canada-Colombia Article 1302.

105 US-Singapore, art. 12.2.2. *See too* US-Peru, art. 13.8.1; US-Chile, art. 16.1.2; US-Australia, art. 14.2.2; US-Colombia, art. 13.2.3 (also allowing for the possibility of providing a person subject to an interim sanction or remedy with the opportunity to be heard and present evidence within a reasonable time after imposition of such sanction or remedy); Panama-Singapore, art. 7.1.2.

106 Panama-Peru, art. 11.2.2, Panama-Singapore, art. 7.1.2; US-Singapore, art. 12.; Peru-Republic of Korea, art. 15.2.2; Peru-Singapore, art. 14.2; US-Chile, art. 16.1.2; US-Colombia, art. 13.2.2; US-Peru, art. 13.2; EFTA-Central America, art. 8.1.4.

107 Canada-Costa Rica, art. XI.2 (5). The competition policy chapter of the second draft agreement of the Free Trade Area of the Americas would have contained provisions to the same effect. See too EU-Central America, art. 279 (referring to "Competition Authorities designated and appropriately equipped for the transparent and effective implementation of the competition law").

108 EU-Serbia, art. 38(3); EU-Montenegro, art. 73(3); EU-Albania, art. 71(3).

109 New Zealand-Chinese Taipei, ch. 8, art. 5.2.

110 Mexico-Uruguay, art. 14-16.

111 EFTA-Central America (Costa Rica and Panama), art. 8.2.1. and 4.13; EFTA-Hong Kong, China art. 7.1.; EFTA-The Republic of Korea, art. 5.1.5.

112 *See*, for example, EFTA-SACU, art. 15.2; ASEAN-China, art. 8.

requirements usually contain a duty to inform the other party of relevant enforcement activities in the field of competition law.[113] Exchange of information requirements are typically limited to non-confidential and/or public information, or only apply to the extent permitted by the parties' respective domestic laws.[114] Mutual legal and technical assistance between the parties are also mentioned in several FTAs.[115] Such assistance may extend to a wide range of issues, including assistance for "the provision of independent experts" and for "training for key personnel," and help "in drafting guidelines, manuals and, where necessary, legislation."[116] A number of FTAs even create an option for each party to request the other party's cooperation in investigations against an undertaking domiciled in that other party's territory.[117]

A small minority of FTAs include ambitious cooperation mechanisms designed to pave the way for bilateral convergence of competition laws of the parties. For example, Chile-Costa Rica[118], Chile-El Salvador[119] and Republic of Korea-Australia[120] FTAs require the parties to cooperate towards the adoption of common rules to avoid anti-competitive practices.

Based on either their obligations under FTAs or separate initiatives of respective governments, a number of competition agencies have concluded cooperation agreements to provide mutual technical assistance, notify enforcement proceedings that may have an impact on a party's territory, exchange information, locate and secure evidence and witnesses, and ensure positive and negative comity to a certain extent.[121] Australia and New Zealand signed extensive cooperation agreements regarding general

113 EFTA-the Republic of Korea, art. 5.1.4; EU-Albania art. 7.5 (requiring the notification on the subject of state aid to be made via "a regular annual report, or equivalent, following the methodology and the presentation of the Community survey on State aid, and information on particular individual cases of public aid"); Australia-Chile, art. 14.6; Canada-Costa Rica, Article X.3; Canada-Panama, art. 14.02; Canada- the Republic of Korea, art.15.2; China-Costa Rica, art. 126.

114 See Mexico-Uruguay, art. 15; EFTA-Central America (Costa Rica and Panama), art. 8.2.2; EFTA-The Republic of Korea, art. 5.1.4; EFTA-SACU 15.2; EU-Algeria, art. 41.2; ASEAN-Australia-New Zealand, art. 14, art. 2; Australia-Chile, art. 14.2. and 14.8. Additionally, a number of FTAs include requirements to exchange information upon request on state aid schemes and particular state aid cases. See, for example, Turkey-Georgia, art. 20.3; Turkey-Israel, art. 25.3.

115 See, for example, Mexico-Uruguay, art. 14.02.2; Canada-Colombia, art, 1304; Canada-Costa Rica, Article X.3; Canada-Israel, art. 7.1; Canada-Panama, art. 14.02; Canada Peru, art. 1304; Canada- the Republic of Korea, art.15.2; Chile-Mexico, art. 14-0; China-Costa Rica, art. 1262

116 EU-CARIFORUM, art. 130; EU-OCT art. 14.3.

117 Turkey-Montenegro, art. 24.5; Turkey-Serbia, 25.5

118 Chile-Costa Rica, art. 15.1.

119 Chile-El Salvador, art. 15.1.

120 Republic of Korea-Australia, art. 14.5.

121 See, for example, Agreement between the Government of the United States of America and the Commission of the European Communities regarding the Application of their Competition Laws (EU-US Competition Cooperation Agreement) (23 Sep. 1991); the US-Canada Agreement Regarding the Application of Their Competition and Deceptive Marketing Practices Laws (1 Aug 1995); the US-Australian Mutual Antitrust Enforcement Assistance Agreement (27 April 1999); Agreement Between the Government of the United States Of America and the Government Of Japan Concerning Cooperation On Anticompetitive Activities (7 Oct. 1999).

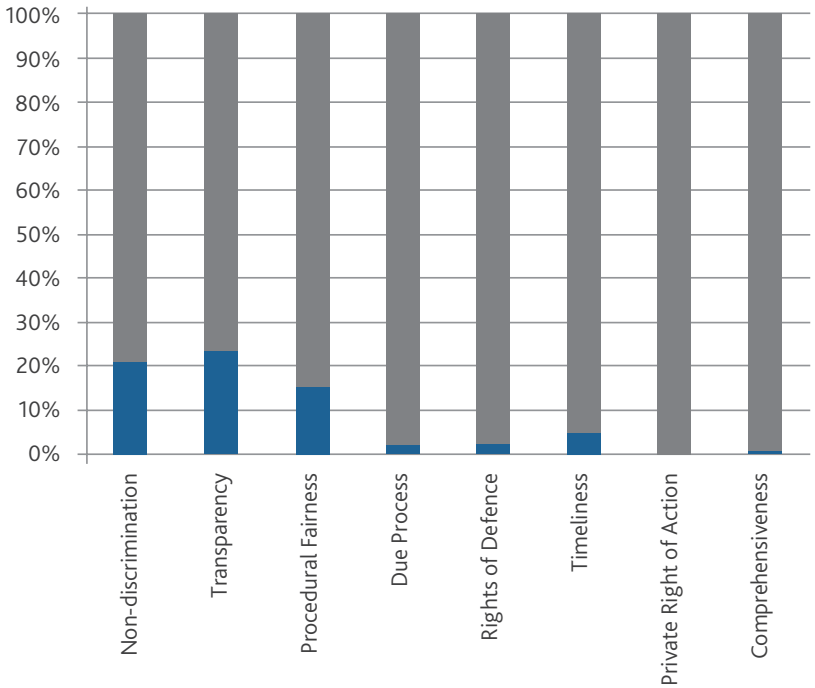

FIGURE 4:

Types of Competition Enforcement Principles

LEGEND:

Percentage of FTAs without principle

Percentage of FTAs with principle

Source: Calculations based on the FTAs in the WTO database.

enforcement and merger review issues, and the cooperation mechanisms adopted by these agreements include facilitating compatibility of remedies imposed in merger proceedings and sharing evidence during investigations. The EU-US Cooperation Agreement further authorizes administrative arrangements between competition agencies to reciprocally participate in formal proceedings.[122] A number of cooperation agreements even include investigative assistance or an option to "request that other Party's competition authorities initiate appropriate enforcement activities" if an anti-competitive conduct taking place in this party's territory adversely affects the other's interest.[123]

While certain jurisdictions such as the EU and Canada have viewed the conclusion of an FTA as an opportunity to reaffirm and strengthen their prior commitment to inter-agency cooperation,[124] others such as the US appear to believe that extensive inter-agency cooperation reduces the need for competition provisions in FTAs (Bradford and Büthe (2015: 270). For instance, the competition provisions of the TTIP (to the extent there would be any such provisions) are not expected to go beyond the existing cooperation agreements between the US and the EU competition agencies.[125]

Dispute settlement mechanisms for conflicts on competition

General dispute settlement mechanism of the FTA

A significant number of FTAs contain ad hoc dispute settlement mechanisms that typically involve consultation and negotiation procedures, permanent or ad hoc arbitration tribunals,[126] or, more rarely, special committees or bodies entrusted with administering implementation of the FTA.[127] By contrast, 59 percent of the FTAs we have reviewed expressly exclude competition matters from the general dispute settlement mechanism.[128] This exclusion is typically limited to the competition-specific sections or chapters of the agreement. This means that provisions which directly or indirectly impact competition policy or competition law enforcement (for example, non-discrimination) but appear elsewhere in the agreement are not carved out from the general dispute settlement mechanism.

Moreover, the exclusion of competition-related matters from the general dispute settlement mechanism is sometimes only partial. Some FTAs merely limit the exclusion to disputes concerning designated monopolies and SoEs.[129] Other agreements extend the general dispute settlement mechanism to competition-related issues. For example, the EU-Republic of Moldova FTA limits the use of the general mechanism to state aid-related disputes and explicitly excludes antitrust and merger control issues.[130] In the same vein, the EU-Ukraine FTA excludes all competition-specific matters from the general mechanism, except for state aid-related matters and disputes relating to Ukraine's obligation to approximate its competition laws and enforcement practices to the EU law.[131]

Specific dispute settlement mechanism designed by the FTA for the competition disputes

Of the FTAs included in our sample, 47 percent set up competition-specific dispute settlement mechanisms, which usually take the form of consultation procedures. These procedures oblige the parties, either by default or upon another party's request, to consult with each other to settle competition-related disputes,[132] sometimes within a specific committee[133] or in an inter-agency setting.[134] Several FTAs to which the EFTA and the EU are party include an additional mechanism, whereby the parties can refer the matter to the administrative committee that oversees enforcement of the agreement.[135] However, it is noteworthy that several of the

122 Administrative Arrangement on Attendance to apply the EU-US Competition Cooperation Agreement..

123 EU-US Competition Cooperation Agreement, art. V.2.

124 EU-Canada, art. X-01.2 ("The Parties shall cooperate on matters relating to proscribing anti-competitive business conduct in the free trade area in accordance with the Agreement between the European Communities and the Government of Canada Regarding the Application of their Competition Laws, entered into force on 17 June 1999, or any successor Agreement").

125 See Bruegel workshop "A Fresh Start for T-TIP: Strategies for Moving Forward," Brussels (12 March 2015), http://www.bruegel.org/nc/events/event-detail/event/508-a-fresh-start-for-t-tip-strategies-for-moving-forward/.

126 Armenia-Russian Federation, art. 16; Armenia-Turkmenistan, art. 16; Armenia-Ukraine, art. 11; ASEAN-Australia-New Zealand, ch. 3, art. 11; Japan-Brunei Darussalam, ch. 10. Although these dispute settlement mechanisms concern conflicts between the parties, article 67 of Japan-Brunei Agreement adopted a separate mechanism to resolve investment disputes between a party and an investor of the other party.

127 See, for example, ASEAN-Australia-New Zealand, ch. 8, art. 14; CEFTA, art. 43; EU-Former Yugoslav Republic of Macedonia, art. 39.

128 See, for example, EFTA-Colombia, art. 8.6; EFTA-Peru, art. 8.4. This includes both partial and total exclusions.

129 See Canada-Colombia, art. 1307; Canada-Honduras, art. 21.6; Canada-Israel, art. 7.1; Canada-Panama, art. 14.05; Canada-Peru, art. 7.1, Canada-the Republic of Korea, art.15.1; Chile-Mexico, art. 14-02. See also China-Costa Rica, art. 110 and 118 (providing that general dispute settlement mechanism applies to abuse of intellectual property but does not apply to provision related to cooperation.)

130 EU-Republic of Moldova, art. 338.

131 EU-Ukraine, art. 261. However, this agreement also establishes a specific consultation mechanism for the disputes arising from competition provisions; see art. 260.

132 EFTA-Singapore, art. 50 (3); Canada-Colombia, art. 1303; Canada-Costa Rica, art. XI.6; Canada-Honduras, art. 15.5; Canada-Panama, art. 14.02; Canada-Peru, art.1303; EU-the Republic of Korea, art.11.7; EFTA-Colombia, art. 8.4.

133 EFTA-Mexico, art. 54 and 55.

134 Republic of Korea-Chile, art. 14.5.

135 See, for example, EFTA-Albania, art. 18.3; EFTA-Bosnia and Herzegovina, art.18.4; EFTA-Colombia, art. 8.4; EFTA-the Republic of Korea, art. 5.1.6; EFTA-Lebanon, art. 17.5; EFTA-Montenegro, art. 17.4, EFTA-Peru, art. 8.4; EU-Algeria, art. 41.3; EU-Bosnia Herzegovina, art.36.10.

FTAs creating such mechanisms also emphasize that they are to be operated without prejudice to the authority of the parties' respective competition agencies.[136]

MODEL APPROACHES TO ADDRESSING COMPETITION LAW IN FTAS

In this sub-section we do not claim to identify "families" of agreements, as the significant differences there may be even between agreements that have one party in common make any such attempt subject to the risk of over-simplification.[137] We do, however, draw inspiration from the 2006 OECD paper and attempt to take stock of the above categorization exercise by distinguishing between ideal types or model approaches for addressing competition-related issues in FTAs.[138] We view this as an important step in our endeavour to identify generally accepted principles that we can draw upon in devising policy recommendations.

THE EUROPEAN APPROACH

The EU, and to a lesser extent EFTA, appear to favor relatively detailed provisions requiring the parties to prohibit specific anti-competitive practices to the extent they affect trade between the parties, as well as regulate state aid and enterprises entrusted with special or exclusive rights. More often than not, these provisions replicate Articles 101, 102, 106, and 107 TFEU and equivalent provisions in the EEA Agreement. Moreover, these FTAs increasingly tend to include competition-specific public service exemptions.

By contrast, provisions relating to competition enforcement principles or coordination and cooperation tend to be somewhat unsystematic and generic in such FTAs. This may, however, be partly attributable to the growing web of highly detailed competition-specific cooperation agreements the European Commission has entered into with the competition authorities of other jurisdictions.[139]

As for competition-specific exemptions included in these FTAs, they tend to focus on sensitive policy areas or economic sectors, including agriculture and fisheries or public services.

THE NAFTA APPROACH

The NAFTA and NAFTA-inspired FTAs typically include relatively extensive provisions on cooperation and coordination as well as SoEs and designated monopolies. By contrast, they tend to only contain a generic reference to the "anti-competitive business conduct" against which the parties ought to take measures. Some NAFTA-inspired FTAs also impose extensive competition-specific due process provisions.

While markedly different from those found in European-type FTAs, competition-specific exemptions in NAFTA-style FTAs also reflect the sensitivity of certain policy issues to the parties. In the case of the NAFTA-inspired agreements, sensitive areas generally include public procurement and financial services.

THE OCEANIAN APPROACH

Though certainly isolated, the FTA between Australia and New Zealand, the ANZCERTA, can be considered as a "model approach" of its own as it perhaps represents the most advanced model for addressing competition-related issues in an FTA. The objective of "unconditional free trade" (Hoekman 2002: 9)[140] pursued by the parties to this agreement is based on two pillars. First, the ANZCERTA requires Australia and New Zealand to harmonize their respective competition legislations and align them with

136 See, for example, EFTA-Colombia, art. 8.4; EFTA-Ukraine, art. 7.6.

137 See, for example, Silva (2004: 19) ("a single country may establish different types or models of agreements, according to the participating partners").

138 See too Teh (2009: 483) ("The analysis undertaken in this paper suggests … there are discernible differences between the European (EU and EFTA) agreements and the US agreements. Further, there is a great deal of similarity between the US, Canadian and Mexican competition provisions in RTAs").

139 See, for example, the 1998 Agreement between the Government of the United States of America and the Commission of the European Communities on the application of positive comity principles in the enforcement of their competition laws. Some of the FTAs that we have reviewed expressly refer to these agreements and may even contain an undertaking by the parties to comply with them. See, for example, EU-Canada, art. X-01 ("The Parties shall cooperate on matters relating to proscribing anti-competitive business conduct in the free trade area in accordance with the Agreement between the European Communities and the Government of Canada Regarding the Application of their Competition Laws, entered into force on 17 June 1999, or any successor Agreement"). To date, the European Commission has signed cooperation agreements with the following ten countries—Bosnia and Herzegovina, Brazil, Canada, China, India, Japan, Republic of Korea, Russian Federation, Switzerland, and the US.

140 This approach received a further boost in 2009, the two countries' governments even launched a "Single Economic Market" initiative.

objectives of the ANZCERTA.[141] As a result, New Zealand largely adopted Australia's antitrust regime.[142] The parties' respective competition authorities also entered into a cooperation and coordination agreement in 1994 to eliminate any remaining discrepancies in the application of their respective anti-trust legislations (Ahdar 1991: 329).[143] Finally, in 2006, the parties' competition authorities extended this approach to merger review with a view to "promoting fully informed decision-making on the part of both agencies; and to lessen[ing] the possibility of differences between the agencies in the application of their competition laws where these differences are not the result of statutory provisions or case law."[144]

Second, and as importantly, the ANZCERTA approach is based on the removal of trade defenses between the parties.[145] As early as 1988, the parties acknowledged that "anti-dumping measures in respect of goods originating in the territory of the other Member State are not appropriate from the time of achievement of both free trade in goods between the Member States … and the application of their competition laws to relevant anti-competitive conduct affecting trans-Tasman trade in goods."[146] The 1988 Protocol to the ANZCERTA also eliminates all types of quantitative import restrictions and tariffs on goods originating in the territory of the other party, but does not explicitly link this to competition law.[147]

TOWARDS THE EMERGENCE OF HYBRID APPROACHES?

Our mapping exercise confirms Solano's and Sennekamp's finding that agreements between countries or jurisdictions that typically favor different model approaches do not necessarily "reflect the lowest common denominator between" these different approaches (2006). Where there is no significant imbalance in the parties' bargaining power,[148] these FTAs may actually combine and cumulate the respective model approaches' most advanced provisions. For example, the recently negotiated EU-Canada FTA defines the content of the notion of "anti-competitive business conduct," and contains provisions concerning enterprises entrusted with special or exclusive rights and a competition-specific public service exemption while emphasizing inter-agency cooperation and due process. Public reports suggest that the TPP may also include extensive enforcement provisions concerning issues as diverse as procedural fairness, private rights of action, and institutional design.[149]

By contrast, the ANZCERTA approach has to the best of our knowledge not been replicated or even imitated anywhere, including in the FTAs to which Australia or New Zealand is party. This is likely because the conditions that facilitated the pursuit of "unconditional free trade" between Australia and New Zealand (for example, a high level of economic integration) in the ANZCERTA are not necessarily present elsewhere.

RATIONALES FOR INCLUDING COMPETITION-RELATED PROVISIONS IN FTAS

PRESERVING THE GAINS OF TRADE LIBERALIZATION

A substantial proportion (28 percent) of the FTAs that contain competition-related provisions explicitly or implicitly describe them as a means to an end—furthering trade

141 Article (12)(1)(a) of the ANZCERTA provides that the parties "shall examine the scope for taking action to harmonise requirements relating to such matters as standards, technical specifications and testing procedures, domestic labeling and restrictive trade practices." Further, article 4 (4) of the Protocol provides that "each Member State shall take such actions as are appropriate to achieve the application of its competition law by 1 July 1990 to conduct referred to in paragraph 1 of this Article in a manner consistent with the principles and objectives of the Agreement."

142 Australia's anti-trust regime modeled the US approach whereas New Zealand's competition legislation was closer to that of the United Kingdom (UK). See Ahdar (1991: 321–22).

143 Co-operation and Co-ordination Agreement between the Australian Trade Practices Commission and New Zealand Commerce Commission, July 1994.

144 Australian Competition and Consumer Commission and New Zealand Commerce Commission, Cooperation Protocol for Merger Review (Aug. 2006: para.1). Despite the similarities between the merger control rules (the Trade Practices Act 174 of Australia and the Commerce Act 1986 of New Zealand) of the parties as to non-mandatory merger notification proceedings and the authority of both agencies to analyze mergers on public benefit grounds, this Protocol highlighted the differences between two regimes regarding the level of formality of merger review. In order to overcome discrepant proceedings in practice, the Protocol imposes obligation on parties to notify mergers that may affect competition in the other jurisdiction and cooperate on reviewing transactions affecting markets in both countries. Examples of such cooperation include close coordination on the divestment remedies in the 2010 Scandinavian Tobacco Group AS/Swedish Match AB case.

145 Trade defenses thus remained applicable to third-country imports.

146 Article 4 (1) of the Protocol, Appellate Body Report, *Canada-Wheat Exports and Grain Imports,* WT/DS276/AB/R, 30 Aug. 2004..

147 Protocol to the ANZCERTA, art. 1, 2. These provisions eliminated tariffs and import restrictions with a reservation as to parties' obligations due to prior international agreements.

148 We refer, in particular, to FTAs between the EU and Eastern European accession candidates.

149 Congressional Research Services (2015: 36).

liberalization or preserving the gains thereof.[150] As explained by Evenett, the underlying rationale is that "anti-competitive acts, orchestrated by both the state and the private sector, could frustrate the broad liberalizing objectives of the [FTA] in question" (2005: 40). Competition-related provisions were thus "included not for their own sake, or because of their own intrinsic value or merit to signatories, but rather as an important measure to support the barrier-reducing objectives of the RTA" (Evenett 2005: 40). As such, they are primarily market access measures.

For example, the EU-Chile FTA requires the parties "to apply their respective competition laws … so as to avoid the benefits of the liberalisation process on goods and services being diminished or cancelled out by anti-competitive business conduct."[151] Article 1501 of the NAFTA likewise recognizes that measures prohibiting anticompetitive business conduct "will enhance the fulfillment of the objectives of this Agreement."[152] Other FTAs, especially those that follow the European approach, recognize this rationale in a more implicit fashion, in that they require the parties to prohibit anti-competitive practices only "in so far as they may affect trade."[153]

The widespread prevalence of provisions banning abuses of market power in the FTAs we have reviewed provides further support for this theory. Although rules regulating unilateral conduct are conceptually controversial, they represent one of the most pervasive competition-related provisions in FTAs, surpassing even the far less controversial cartel bans. One explanation for this apparent paradox may be that exclusionary practices by dominant firms generally carry a closer link to market access than anti-competitive agreements. Unlike the typical price-fixing or market-sharing cartel, such practices carry the risk of "block[ing] the entry into, or … directly impair[ing] the competitive position of those firms attempting to enter, overseas markets" (Evenett 2005: 53).[154]

BROADER ECONOMIC OBJECTIVES

A far more limited proportion of the FTAs that contain competition-related provisions (6 percent) expressly describe the goal of these provisions in terms of broader economic objectives.[155] Such objectives may range from "economic efficiency and consumer welfare,"[156] and "economic and social development"[157] in NAFTA-style FTAs, "protecting the competitive process rather than competitors"[158] in FTAs to which Australia is party, to "improv[ing] and secur[ing] an investment friendly climate, [and] a sustainable industrialization process",[159] "facilitating efficient functioning of markets",[160] and "supporting economic development measures"[161] in FTAs with certain developing jurisdictions.

One potential explanation for articulating this type of rationale in an FTA is that it may serve as a signal. First, as one author has explained, introducing competition provisions in an FTA may signal "a credible commitment to potential foreign investors that a country is market-oriented and pro-investment" (Sokol 2008: 271). The fact that at least one developing country is party to most FTAs touting efficiency goals lends support to this theory. Second, such statements of principle may be a way to play to domestic constituencies. In particular, economic development or industrialization goals may help render the inclusion of competition-related provisions in FTAs more palatable to the public in developing countries (Evenett 2005: 54–59). Conversely, "the symbolic inclusion of competition policy within [F]TAs may create domestic legitimacy and assist anti-trust agencies to pursue their competition enhancing missions" (Sokol 2008: 272).

PREVENTING STRATEGIC ANTI-TRUST ENFORCEMENT

Practitioners and academics alike have voiced concerns about the selective enforcement of competition laws for strategic (that is, protectionist) purposes. Competition policy, in other words, may be used "as a substitute for trade restrictions" (Bradford and Büthe 2015: 260–62). One school of thought, based on public choice theory, posits that

150 See Solano and Sennekamp (2006: 9), arguing that "trade is the overriding principle.".

151 See, for example, EU-Chile, art. 172. See too EFTA-Mexico, art. 51.2; Iceland-China, ch. 5; Canada-Costa Rica, art. XI.1; Iceland-China, art. 62.1; Trans-Pacific Strategic Economic Partnership, art. 9.2; EU-Canada, art. X-01; Panama-Chinese Taipei, art. 15.02.2; Dominican Republic-Central America, art. 15.02; Republic of Korea-Chile, art. 14.2.

152 See too EU-Canada, art. X-01.

153 See, for example., EU-Egypt, art. 34.1.i; EU-Iceland, art. 24.1.i; EU-Iceland, art. 23.1.i; EU-South Africa, art. 35(a); EU-Israel, art. 36.1(a); EFTA-Peru, art. 8.1.1; EFTA-Ukraine, art. 7.1(a); EFTA-Central America, art. 8.1.1(a); EFTA-Morocco, art. 17.1(a); EFTA-Turkey, art. 17.1(a). See too Turkey-Jordan, art. 25.1(a); Turkey-Serbia, art. 25.1(a); Turkey-Morocco, art. 25.1(a).

154 Other forms of horizontal collusion such as collective predatory pricing may, however, serve to achieve the same goals. See Trebilcock and Howse (2013: 759).

155 Taking issue with the OECD study's finding that trade was the overriding objective, Anderson and Evenett first pointed to such FTAs. See Anderson and Evenett (Unpublished manuscript).

156 See, for example, Panama-Peru, art. 11.2.1; Panama-Singapore, art. 7.1.1; US-Singapore, art. 12.2; Peru-Republic of Korea, art. 15.2.1; Peru-Singapore, art. 14.2; Peru-Chile, art. 8.2.1; US-Colombia, art. 13.2.1; US-Peru, art. 13.4; EU-Colombia and Peru, art. 259; Hong Kong, China-Chile, art. 13.1; Hong Kong, China-New Zealand, ch. 9 art. 1; Japan-Australia, art. 15.1.

157 See, for example, EU-Colombia and Peru, art. 259.

158 New Zealand-Singapore, art. 3.1; Thailand-New Zealand, art. 11.2.

159 EU-Overseas Countries and Territories, art. 47.1.

160 India-Japan, art. 116.

161 Guatemala-Chinese Taipei, art. 20.08(2).

domestic "firms will seek alternative ways to protect their market share or profits when faced with increased foreign competition resulting from trade liberalization" (Bradford and Büthe 2015: 260) and may thus lobby for aggressive antitrust enforcement against foreign firms to "effectively lock … competing imports or foreign investors out of their domestic market" (Trebilcock and Howse 2013: 759). Against this background, including competition-related provisions in FTAs may help reduce the risk of discriminatory anti-trust enforcement by imposing rigorous substantive tests on competition authorities or subjecting them to certain procedural safeguards.

This theory finds somewhat weaker support in our review of existing FTAs. Generic provisions requiring the parties to enforce their competition laws in a transparent and non-discriminatory way and/or to ensure procedural fairness are included in approximately 27 percent of FTAs, as are positive comity requirements obliging each party to notify the other party prior to taking enforcement action against one of its firms. By contrast, provisions requiring that the parties' competition authority be independent are rare (2 percent). This also holds true for negative comity provisions, which require each party to take into account the other party's interests in taking enforcement action against one of its firms (2 percent).

Moreover, the FTAs we have reviewed only very rarely include a substantive test for applying those competition law concepts that are most frequently perceived to be at risk of discriminatory enforcement, namely abuse of market power and merger control. As explained, we have only identified one and two FTAs articulating a substantive test for abuses of market power and anti-competitive mergers, respectively.

This, however, may also be explained by that issues related to the strategic use of competition policy are relatively recent and linked to the exponential growth of competition regimes, and may therefore not yet have been translated into international agreements. Some of the agreements including enforcement principles such as non-discrimination, transparency, and procedural fairness are indeed quite recent.

ABOLISHING TRADE DEFENSES

As explained above, only five FTAs, namely the ANZCERTA, EFTA-Chile, EFTA-Singapore, EFTA-Serbia and Canada-Chile, preclude the parties from implementing trade defense mechanisms against each other and replace them with competition provisions. The ANZCERTA, EFTA-Chile, EFTA-Serbia and EFTA-Singapore expressly link the elimination of trade defense mechanisms with the application of competition laws. While the Canada-Chile FTA does not expressly do so, it is understood that "linkage between competition policy and anti-dumping measures was an issue addressed during the negotiations" (Solano and Sennekamp 2006: 17).

The underlying rationale is that "the effective implementation of competition rules may address economic causes leading to [trade defenses]."[162] Specifically, dumping may result from the abuse of market power by protected firms that use their monopoly profits at home to dump products abroad. FTAs that facilitate cross-border enforcement of competition laws allow such practices to be eliminated through the use of predatory pricing or anti-discrimination rules (Cunningham and La Rocca 1996). This line of reasoning is expressly reflected in EFTA-Chile, which provides that "the effective implementation of competition rules may address economic causes leading to dumping."[163] Likewise, Australia and New Zealand modified their competition legislations following the adoption of the ANZCERTA so that practices which amount to dumping would be caught by an anti-trust test requiring abuse of a substantial degree of market power with the purpose of restricting market entry.

This, however, begs the question of why only four FTAs have replaced trade defenses with a commitment to maintain and robustly enforce competition laws. The answer may well lie in the political economy underpinnings of anti-dumping measures. While anti-dumping and competition laws sometimes share similar origins,[164] in practice they pursue distinct and potentially conflicting goals in that the former are designed to protect producer welfare whereas the latter aim to promote consumer welfare (Douglas 2006: 554–55; Laprévote forthcoming). In the 1988 case of *USX Corp. v. United States*, for example, the US Court of International Trade scolded Susan Liebeler of the US International Trade Commission for "assum[ing] that the purpose of the antidumping statute is to prevent a particular type of 'injury to competition' rather than merely 'material injury' to industry."[165] As such, anti-dumping may be "part of the bargain" a government may strike "with industry to win its support for opening the economy to international competition" (Finger and Nogués 2008: 21). The implication is that "without anti-dumping, certain key sectors might not support trade deals that benefit the economy overall" (Sokol 2008: note 278).

In three of the four FTAs that have linked the elimination of trade defenses with competition law enforcement, circumstances were such that the economic impact of abolishing anti-dumping duties was very limited. As such, there was little reason for industry to expend resources fighting the elimination of trade defense mechanisms. First,

162 EFTA-Chile, Article 18(2).

163 EFTA-Chile, art. 18.2; EFTA-Singapore, art. 16.2 ("in order to prevent dumping, the Parties shall undertake the necessary measures as provided for under [the agreement's competition policy chapter]").

164 For instance, in the US the first anti-dumping legislation was adopted shortly after the Sherman Act. See Viner (1923); Messerlin (1995: 48–53).

165 USX Corp v. United States, 682 F. Supp. 60 at 68 (CIT 1988).

these FTAs were concluded between jurisdictions with very limited bilateral trade flows (Farha 2013). For example, trade flows between Chile and Canada at the time the Chile-Canada FTA was signed represented a mere 0.1 percent of Chile's total trade volume and 1.5 percent of Canada's. The figures are similarly low in the case of EFTA-Singapore and EFTA-Chile.

Second, in each of these cases, the prospect of resorting to trade defense measures against the other party was, at most, remote (Sokol 2008: 245–46). None of the EFTA Member States have ever resorted to such measures and most have expressly rejected them as antithetical to the purpose of FTAs (Sokol 2008: 245–46).[166] Likewise, when the Chile-Canada FTA was signed, Chile had never initiated an anti-dumping action against Canada and did not expect it would need to do so in the future. Conversely, Canada had only once brought an anti-dumping action against Chile more than a decade earlier.

While based on the same economic rationale, the elimination of trade defenses in the ANZCERTA follows a somewhat different political economy logic. Unlike the parties to the three aforementioned agreements, the relationship between Australia and New Zealand was characterized by geographic proximity, substantial levels of economic integration, and a long-standing cultural, economic, and political connection prior to the entry into force of the ANZCERTA. In that sense, it is reminiscent of economic integration agreements designed to create a single market (such as the initial EC agreements, or agreements between the EU and countries candidates for accession) rather than mere FTAs. As mentioned by Hoekman, "if members of a PTA aim at the creation of a single market, there can be no role for antidumping" (1998: 36).

By contrast, jurisdictions such as the US and the EU have a long history of resorting to anti-dumping measures. The NAFTA provides an illustrative example. According to several accounts, Canada tried but was unable to convince the US to eliminate anti-dumping in the NAFTA. Commentators such as Hoekman have pointed out that "the major factor underlying this failure appears to have been the strength of the US lobby that strongly supports the continued existence of antidumping" (2002: 15). But for the preservation of anti-dumping mechanisms, the US government might not have been able to garner the necessary domestic support to obtain ratification of the NAFTA. By the same token, it is clear that the mega-regional agreements currently negotiated by the US will not provide for the removal of anti-dumping or other trade defense measures.

POLICY RECOMMENDATIONS

We now seek to draw lessons from our mapping exercise to formulate concrete policy recommendations.

FORMAL RECOMMENDATION

In the course of our analysis, we have observed significant formal and linguistic differences between various approaches to addressing competition-related issues. This inconsistency tends to make it difficult and time-consuming to locate and analyze competition-related provisions included in FTAs. We therefore propose to set up a comprehensive, user-friendly database summarizing competition provisions in the FTAs to provide stakeholders with easily accessible guidance for negotiating competition-related FTA provisions. Such a database could ideally be maintained by the WTO Secretariat (which already keeps an exhaustive database of existing FTAs) and/or the International Competition Network (ICN).

SUBSTANTIVE RECOMMENDATIONS

Choosing an appropriate forum

In our view, introducing competition provisions in FTAs undoubtedly serves a useful purpose—if only to promote trade and global welfare, as mentioned in most of these agreements. Competition policies can (and should) also be promoted or coordinated through other means, such as the WTO, the ICN, or through bilateral relations between the competition agencies. But competition provisions in FTAs may provide some added value, in particular if they are effectively implemented through a binding dispute mechanism. In light of the repeated failures to include a set of comprehensive competition policy principles in "hard law" multilateral trade instruments,and continued opposition from a number of developing countries, a "soft law" approach appears to be the only realistic perspective in the near future at multilateral level (Sokol 2008: 259).[167] That 59 percent of the FTAs included in our sample exclude competition matters from their general dispute settlement

166 Quoting information received from the EFTA Secretariat according to which anti-dumping "measures are arguably not in line with the aims of a Free Trade Agreement and the objectives of Article XXIV GATT, that is, the opening of markets through the elimination of trade barriers."

167 Other jurisdictions such as the US equally appear to favor a non-binding option.

mechanism further illustrates the difficulties of agreeing to a binding multilateral framework (Sokol 2008: 263).

However, the increasingly frequent inclusion of competition policy provisions in FTAs and their overall substantive convergence as regards the most basic principles suggest that there may be fertile ground for international harmonization in the form of a model FTA competition chapter.

Among the various possible fora for carrying out such an undertaking, the ICN stands out as the only international platform that has both the needed flexibility and ability to influence policymakers. With more than 130 members representing nearly all the jurisdictions that have adopted competition law regimes, the ICN has a track record of "facilitat[ing] convergence on superior approaches concerning the substance, procedure, and administration of competition law" (Hollman and Kovacic 2011: 275–76). In particular, "the nature of ICN membership … may allow agencies to sign on to recommendations that do not necessarily reflect current national government policies" and only subsequently "secure home state support for such recommendations" (Abbott and Singham 2013: 234). The non-binding and flexible nature of ICN work products may further render this approach agreeable to even the staunchest opponents of a binding multilateral framework.

Given the medium- and long-term shortcomings of a soft law approach, we propose to devise a step-by-step approach, with a gradual movement from voluntary participation in a soft law convergence process to the adoption of more binding instruments at the bi- and plurilateral levels, including by emphasizing the multiplication of competition-related provisions in FTAs. Reaching a consensus at the bi- or plurilateral level should indeed be easier than at the multilateral level. One way to achieve a smooth transition from this stage to multilateral agreements might be an intermediary step combining soft laws with binding legal instruments. To this end, a model competition chapter—ideally backed by a robust dispute settlement mechanism—and relevant ICN work products such as the new merger guidelines could be incorporated by reference in bi- or plurilateral FTAs.

To garner sufficient support for such an initiative, it will be crucial to devise ways to either decrease the cost or increase the benefits of including competition-related provisions in FTAs. First, it will be necessary to continue working on identifying areas of convergence based on existing FTAs so as to reconcile potential differences between competing approaches and compile best practices.

Second, reducing the political cost of including competition-related provisions in FTAs may require substantial and well-targeted advocacy efforts to overcome the opposition of domestic constituencies in certain developing countries, especially those that have yet to include competition provisions in the FTAs to which they are party (or have not yet entered into any FTA). To that end, it may be necessary to emphasize the importance of competition policy to achieving economic development goals (Evenett 2005: 54–55). The example of the EU-Overseas Countries and Territories FTA, which emphasizes the importance of competition to development and industrialization, indicates that this may make the inclusion of competition-related provisions in FTAs more acceptable to developing countries. Conversely, continuing to frame international competition policy as a pure market access issue may risk antagonizing domestic constituencies in developing countries.

Ensuring the widest possible stakeholder participation in the development of a soft law instrument may also be helpful in securing domestic support. The ICN experience shows that stakeholders are typically sympathetic to the "best practices" approach.

Third, there is also a financial aspect to reducing the cost of including competition-related provisions in FTAs. Specifically, developed nations may wish to systematize programs designed to offset the financial burden that comes with setting up a competition enforcement regime. This may involve technical assistance or capacity-building schemes and can even be formalized in FTAs.

A fourth step would be to consider ways of increasing the benefits. This could involve identifying other concessions that could be exchanged for the inclusion of competition-related provisions in FTAs—including trade defense mechanisms or other areas of interest to one of the parties, such as specific sectors or political advantages.

Designing a model competition chapter for FTAs

In light of the approach outlined above, the first step for soft convergence would be to identify areas of competition policy that a model chapter should include and the parties could rather easily agree upon. To facilitate adoption by countries with less experience in competition law enforcement and/or ensure special and differential treatment for developing countries or least-developed countries, one could imagine following a multi-tiered approach inspired from the WTO Trade Facilitation Agreement. Under the approach, commitments of developing/least-developed countries could fall into three categories, that is, Category A, to be implemented immediately; Category B, calling for extra time; and Category C, requiring technical assistance.

Commonly prohibited practices

Given their prevalence in the FTAs we have reviewed, provisions concerning abuses of market power and anti-competitive agreements may represent a form of least common denominator. While the Doha Round focused on the latter to the exclusion of the former, accounts from the negotiations suggest that developing countries attach great weight to the prohibition of abuses of market power. Including provisions banning unilateral anti-competitive practices may thus be helpful in garnering support from

developing countries—provided such unilateral practices are consistently identified and disciplines are introduced to avoid a strategic use of competition policy in this area.

Based on the experience of the TPP, SoEs and designated monopolies may be more difficult to address in a "one-size-fits all" competition chapter. Nevertheless, designing an optional template section would help harmonize the provisions of present and future FTAs on these topics. Similarly, a template section on subsidies would be useful, in particular if it is accompanied with provisions limiting or removing entirely the use of trade defense anti-subsidy measures—thus taking one step further the logic behind the current WTO's Agreement on Subsidies and Countervailing Measures (SCM).

Merger provisions

Our mapping exercise shows that provisions relating to anti-competitive mergers are significantly less frequent in FTAs than provisions covering cartels or abuses of market power. Even those FTAs that include such provisions overwhelmingly do not require the parties to adopt an ex ante merger control regime. This may reflect that a number of countries have adopted an anti-trust regime but do not yet have specific merger control rules in place.

Against this background, substantive harmonization of the rules governing market definition and theories of harm may be practically unachievable at this stage. However, as the number of jurisdictions with merger control regimes continues to rise, limited procedural convergence appears increasingly realistic—and increasingly necessary for parties facing complex multi-jurisdictional filings even for mid-size mergers. Such principles could include a commitment to a speedy review process based on a pre-determined timetable, transparency in the review process, clear, well-defined procedures for tabling remedies,[168] and greater coordination between competition authorities for complex international mergers raising similar issues in several jurisdictions.

The Merger Guidelines that the ICN has recently issued at its 14th Annual Conference could constitute an auspicious starting point to frame the set of merger control principles that could be included in a model FTA competition chapter. With an emphasis on "the risk of divergent outcomes" of parallel investigations, these guidelines comprise a set of rules aiming to align the timing of investigations in multi-jurisdictional transactions, determine the scope of information that competition agencies can exchange without a waiver, and facilitate effective cooperation between agencies to avoid conflicting decisions (ICN Merger Group 2015; Knox 2015). Given the content and the purpose of this instrument, the Merger Guidelines could set an outstanding example to illustrate our proposal for incorporating soft laws in FTAs by reference.

Competition advocacy

Given the importance of building support for competition policy to achieving greater harmonization, one could envision FTA provisions incentivizing the parties to actively promote the benefits of competition policy and develop a "competition culture." Such provisions would presumably not entail a significant financial or political cost but could help bolster domestic support for competition policy.

Competition enforcement principles

Including basic provisions on procedural standards for competition law enforcement in a model competition chapter should not be excessively controversial in a forum such as ICN and might provide a way to address rising concerns about selective enforcement of competition laws. Such provisions could cover procedural fairness, transparency, and non-discrimination, as a host of existing FTAs already do. However, due process is one of the most intractable areas in multilateral negotiations, and the current international landscape may not be ripe to reach a consensus on the precise procedural safeguards this principle entails.

Alternatively, it might be worthwhile to devise ways in which general due process and non-discrimination provisions already present in FTAs could be mobilized to avert selective antitrust enforcement. This approach may be advantageous in that such provisions are subject to the general dispute settlement mechanism laid down in FTAs.

Improved dispute settlement mechanisms for competition-related conflicts

The exclusion of competition-related matters from the general dispute settlement mechanism in numerous FTAs is a crucial weakness and raises concerns about the potentially purely symbolic nature of these provisions. On this point we consider two alternative approaches.

First, the existing FTAs could be revised to extend the scope of general dispute settlement mechanisms to competition provisions or chapters. This method would allow the parties to settle competition-related disputes via consultation, negotiation, or arbitration. To the extent that even those jurisdictions most committed to competition and free trade routinely exclude competition-related matters from their FTAs' general dispute settlement mechanism, this option—which is by far preferable to ensure that competition chapters in FTAs do provide some form of added-value over

168 Cooperation in this area could go as far agreeing that merger remedies tabled in one jurisdiction might in certain cases suffice to address competition concerns in another jurisdiction. A senior official at the Canadian Competition Bureau was recently reported to have said that the Competition Bureau was willing to forego a consent agreement in Canada in favor of remedies tabled in another jurisdiction, if the divested assets or remedial conduct were primarily located in another jurisdiction and it trusted the other jurisdiction would fulfill the terms of an effective, viable settlement. This requires "deep and trusting relationships" with the relevant counterpart agencies. See Global Competition Review (2015).

"soft law" approaches—appears difficult to achieve in the current circumstances. One possible way of encouraging this option and overcoming the fear of having non-specialized officials second-guess complex prosecutorial decisions could be to include recognized competition specialists in the dispute settlement mechanisms related to the FTA's competition chapter. Another solution could be to exclude from the scope of the dispute settlement mechanism certain provisions regarding enforcement of competition law.[169]

Alternatively, although this would be a second-best solution, a model chapter could include an enhanced consultation mechanism that could apply specifically to disputes arising from competition provisions. This option may comply with the soft convergence approach, and enable the parties to resolve cross-jurisdictional competition matters via inter-agency consultations rather than a binding remedy (Sokol 2008: 256, 265). To preserve the soft law aspect or our approach and avoid the second-guessing issue described above, a specific inter-agency consultation mechanism might be appropriate.

Impact assessment

The data we have collected does not allow for a solid assessment of the practical effects of competition-related FTA provisions. While several countries (for example, South Africa, Mexico, Canada) have reported that their FTAs including competition-related provisions contributed to "the institutional development and resulting capacity of their [competition] agencies" (Mathis 2011: 291, 293),[170] further research is required to assess whether such provisions have stimulated the adoption or modernization of competition laws and enforcement. Given the relative uncertainty concerning the actual benefits of competition-specific provisions, it could be worthwhile to include an impact assessment in a model competition chapter.

The interaction between trade defenses and competition provisions within the FTAs

The low prevalence of this approach and staunch opposition of certain countries to abolishing trade defenses in prior FTA negotiations means that such a proposal would likely be incapable of garnering the necessary consensus. We would therefore be reluctant to include a provision to this effect in a potential model competition chapter.

170 Suggesting that the positive impact of these FTAs does not result from the legal effect of the provisions but rather from "their softer impact in raising the profile of a regulatory subject as a domestic priority."

169 See, for example, APEC Model Measures for RTAs/FTAs: Competition Policy.

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