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The E15 Initiative

STRENGTHENING THE GLOBAL TRADE AND INVESTMENT SYSTEM FOR SUSTAINABLE DEVELOPMENT

Competition Policy and the Trade System: Challenges and Opportunities

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April 2016

E15 Expert Group on
Competition Policy and the Trade System

Overview Paper

Co-convened with

bruegel

ACKNOWLEDGMENTS

Published by

International Centre for Trade and Sustainable Development (ICTSD)
7 Chemin de Balexert, 1219 Geneva, Switzerland
Tel: +41 22 917 8492 – E-mail: ictsd@ictsd.ch – Website: www.ictsd.org
Publisher and Chief Executive: Ricardo Meléndez-Ortiz

World Economic Forum
91-93 route de la Capite, 1223 Cologny/Geneva, Switzerland
Tel: +41 22 869 1212 – E-mail: contact@weforum.org – Website: www.weforum.org
Co-Publisher and Managing Director: Richard Samans

Acknowledgments

This paper has been produced under the E15Initiative (E15). Implemented jointly by the International Centre for Trade and Sustainable Development (ICTSD) and the World Economic Forum, the E15 convenes world-class experts and institutions to generate strategic analysis and recommendations for government, business, and civil society geared towards strengthening the global trade and investment system for sustainable development.

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The Expert Group on Competition Policy and the Trade System is co-convened with Bruegel. http://www.bruegel.org/

Eduardo Pérez Motta, Founding Partner, Agon Economics Law and Strategy, appreciates notes prepared by: Petros Mavroidis, Patrick Messerlin, Fred Jenny, Shotaro Oshima, Fujio Kawashima, Eleanor Fox, and Damien Geradin. The author is also thankful for the skillful support of Paulina Valladares.

With the support of:

Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Swiss Confederation

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

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And ICTSD's Core and Thematic Donors:

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Norwegian Ministry of Foreign Affairs

Citation: Eduardo Pérez Motta. *Competition Policy and the Trade System: Challenges and Opportunities.* E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2016. www.e15initiative.org/

ISSN 2313-3805

ABSTRACT

This paper examines the importance of competition policy in promoting free trade and allowing countries to specialise in those sectors where they have comparative advantage. It calls for better coordination among competition authorities and puts forward several proposals for discussion, including the use of already existing mechanisms to achieve convergence in competition law regimes.

CONTENTS

LIST OF ABBREVIATIONS AND ACRONYMS

AD	Anti-dumping
BRICS	Brazil, Russia, India, China, and South Africa
EC	European Commission
EFTA	European Free Trade Association
EU	European Union
FDI	Foreign direct investment
FTA	Free-Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GVC	Global value chains
HIV	Human immunodeficiency virus
ICN	International Competition Network
OECD	Organisation for Economic Co-operation and Development
OECD CC	Organisation for Economic Co-operation and Development Competition Committee
PTAs	Preferential Trade Agreements
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

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OVERVIEW OF INTERNATIONAL TRADE AND COMPETITION

To organise our discussion about international trade and competition, it is useful to find the relationship between trade and competition.

Competition policy and international trade are both sources of efficiency in the economy. It could be argued that, in an ideal world with no impediments to domestic and international trade and full mobility of inputs, products, and services, free trade would be the main source of market competition and efficiency that would allow countries to specialise in those sectors where they have comparative advantage. In this ideal world, free trade would be the main instrument of competition policy.

As soon as you introduce less than full mobility of inputs and products, market imperfections, regulatory distortions, and economies of scale, there is a need for competition policy and enforcement to complement international trade policy.

Services, for example, are important non-tradable sectors that interact with the rest of the economy, because they are key inputs with horizontal impact for the rest of economic activities. They are normally non-tradable, owing to high transportation costs or the existence of regulatory barriers of different types. Services sectors, like telecommunications, transport in different modalities, financial services, and energy normally present highly concentrated market structures, because they face important economies of scale and economies of networks, so they require a regulatory framework based on pro-competitive principles and sound competition law enforcement to avoid anticompetitive private incentives to diminish competition. In this situation, an open international trade policy is not the only instrument to promote market efficiency; there is also a need for effective domestic competition policy and enforcement. Both instruments, competition policy and international trade policy, become complementary to promote economic efficiency, growth, and economic development.

Competition law enforcement and competition policy concentrate on the elimination of private incentives to restrain competition through unilateral conduct, market cartelisation, and mergers; while international trade policy focuses mostly on the elimination of regulatory restraints to international trade flows.

Given that both policies, international trade and competition, are complementary, the question that follows is how both policies should be coordinated, especially in a world of increasing global interconnection.

International trade barriers are usually dismantled by a mercantilist exchange of commitments among nations through negotiations among governments in different settings: bilateral, regional, plurilateral, or multilateral. Those agreements normally include competition policy commitments.

The degree of liberalisation and the real injection of competition from trade in those agreements varies from the scope of the negotiation itself, the protectionist pressures that different parties face in the process, as well as the value of cards that parties have to exchange in terms of commitments. Competition policy and enforcement commitments in trade agreements are usually light and vary from exchange of information, cooperation and coordination, to the inclusion of provisions addressing anticompetitive behaviour (see more details below).

On the other side of the discussion, you have the forums where competition authorities interact and cooperate. Competition authorities interact in bilateral settings; plurilateral forums, such as the Organisation for Economic Co-operation and Development (OECD); regional groups (Latin America, Asia, Africa, and Europe); and the multilateral network — International Competition Network (ICN). The main general feature of the interaction is a high level of solidarity. This may be one of the features that distinguishes it from all mechanisms of interaction among competition authorities of different parts of the world — exchange of information and methodologies of analysis as well as the development of best international practices (more details below). International trade is not an issue on the agenda in any of the forums where competition agencies participate, although decisions of competition agencies in domestic markets may impact trade and foreign investment. Also, international trade is clearly considered by competition agencies when they define relevant markets in their analyses of mergers and unilateral conduct or the impact of some cartelisation practices.

COMPETITION IN INTERNATIONAL TRADE NEGOTIATIONS

Multilateral trade negotiations have attempted to include competition since the Havana Charter, which introduced Restrictive Business Practices in Chapter V, contemplating public or private cartelisation of markets (price fixing, market segmentation, and supply reduction); enterprise discrimination; extension of the scope of patents, trademarks, and copyrights beyond original grants; and negotiating mechanisms to define future restrictive business practices. Chapter V also included special procedures to deal with restrictive business practices in services, such as transportation, telecommunications, insurance, and commercial bank services. The International Trade Organization, proposed for the regulation of trade in the Havana Charter was never created, but the concern about the economic impact of anticompetitive behaviour was reflected in those texts by trade negotiators.

Competition policy was also introduced in the multilateral trade arena as part of the World Trade Organization (WTO) programme in the so-called Singapore Issues. In fact, the four Singapore Issues attempted to inject competition elements in the WTO agenda through pro-competitive incentives in transparency in government procurement, investment and trade, and trade facilitation. All were included and discussed in the Ministerial Conferences of Seattle, Doha, and Cancun and the July Package Decision of the General Council. Competition Policy was deleted from the agenda in the 2004 General Council Decision.

The WTO has effectively been a source of competition, promoting market efficiency through reduction of trade barriers in manufactured goods (see Figure 1) and the introduction of some regulatory commitments in services. The Agreement on Basic Telecommunications Services was considered a major achievement that entered into force in 1998 and included 69 countries covering almost 90 percent of basic telecoms. The reference paper, which is the regulatory component of the agreement, deals with six principles: competitive safeguards, interconnection, universal service, licensing, allocation and use of scarce resources, and the creation of an independent regulator.

There are major areas of the WTO where competition and pro-efficiency principles have been absent or delegated and areas where domestic vested interests have avoided greater liberalisation. Trade in agriculture is an example. Protectionist mechanisms abound, and when some opening of the agriculture sector takes place it is gradual, often case-by-case with some important exceptions and through mechanisms like tariff quotas or minimum guaranteed prices that trigger subsidies or create rents to accommodate producers' interests in an anticompetitive fashion.

Anti-dumping (AD) measures are contemplated to act against predatory price discrimination. However, the application of anti-dumping quotas has been an important source of casuistic protection. International anti-dumping has much softer rules than most domestic competition laws applied to enforce anticompetitive predatory pricing (see Table 1).

Agreement, which, in many cases, is interpreted as guaranteeing intellectual property protection that goes beyond the minimum incentives needed to promote investment in research and development efficiently. The discussion of TRIPS in the WTO has created some events of major concern among an important group of developing country members, because of the reduced impact on welfare of this Agreement in dealing with, for example, pandemics, like malaria, tuberculosis, and human immunodeficiency virus (HIV) in regions like Africa. The Doha Ministerial Declaration on TRIPS and Public Health ended with a mechanism that injected competition to reduce the price of medicines for some of those major pandemics in Africa and other regions. The TRIPS and Health Agreements were reached after complex and acrimonious discussions and division among many WTO members.

Preferential Trade Agreements (PTAs), bilateral or plurilateral, have created geographic areas of greater competition through trade than status quo conditions of trade rules given by WTO commitments (see Table 2).

PTAs generally take two approaches as the way competition rules are integrated. On the one hand, there is a group of agreements that incorporate provisions that address anticompetitive behaviour. On the other hand, there are preferential agreements where the provisions include mainly mechanisms of coordination and cooperation among national competition agencies. The first group of agreements are, in general, those signed by the European Commission (EC) or European countries non-members of the EC. The second group of agreements are normally signed by countries of the Americas. Although this general principle applies for the different groups of agreements, there are some exceptions. There are some agreements signed by the EC that include only coordination and cooperation provisions: EC-Chile, EC-Mexico, and European Free Trade Association (EFTA)-Mexico.

There are some interesting cases, like the FTA between Canada and Chile, that include provisions of cooperation and coordination among competition agencies, but the major difference with other agreements is that they eliminate the use of anti-dumping measures, and the basic arguments during the negotiations were that competition enforcement assured enough pro-competitive behaviour and that anti-dumping mechanisms were an excess of protection.

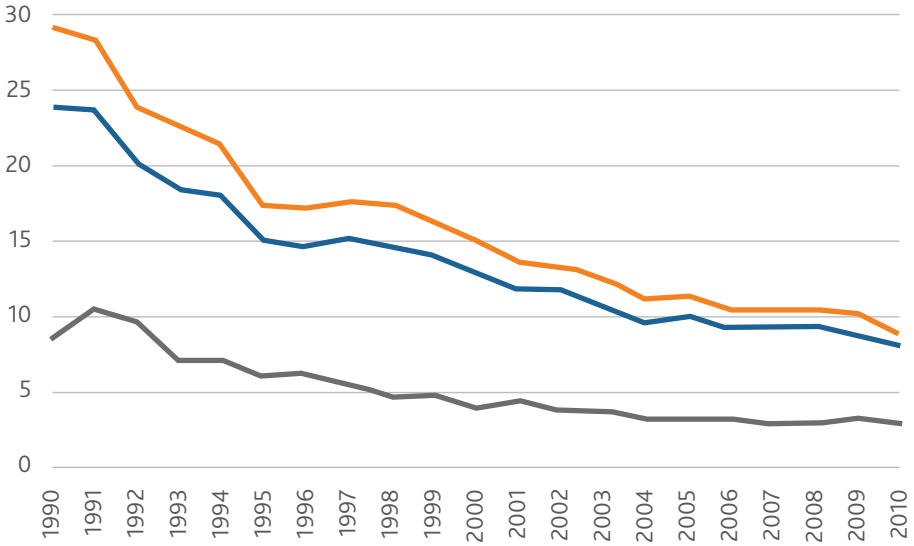


FIGURE 1:

Trends in tariff rates (%)

Source: World Bank

TABLE 1:

Anti-dumping cases by country initiator 2000-2014

Source: WTO

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	30.06.14	2000-2014
India	41	79	81	46	21	28	31	47	55	31	41	19	21	29	13	**570**
United States	47	77	35	37	26	12	8	28	16	20	3	15	11	39	13	**374**
European Union	32	28	20	7	30	24	35	9	19	15	15	17	13	4	3	**268**
Brazil	11	17	8	4	8	6	12	13	24	9	37	16	47	54	29	**266**
Argentina	41	28	10	1	12	9	10	7	19	28	14	7	12	19	4	**217**
China	11	14	30	22	27	24	10	4	14	17	8	5	9	11	4	**206**
Australia	15	24	16	8	9	7	11	2	6	9	7	18	12	20	11	**164**
Turkey	7	15	18	11	25	12	8	6	23	6	2	2	14	6	2	**155**
Canada	21	25	5	15	11	1	7	1	3	6	2	2	11	17	3	**127**
South Africa	21	6	4	8	6	23	3	5	3	3	0	4	1	10	1	**97**
Pakistan	0	0	1	3	3	13	4	0	3	26	11	7	5	6	0	**82**
Republic of Korea	2	4	9	18	3	4	7	15	5	0	3	0	2	8	4	**80**
Mexico	6	6	10	14	6	6	6	3	1	2	2	6	4	6	2	**78**
Indonesia	3	4	4	12	5	0	5	1	7	7	3	6	7	14	0	**78**
Thailand	0	3	21	3	3	0	3	2	1	1	2	13	5	0	0	**57**
Colombia	3	6	0	0	2	2	9	1	6	5	2	4	2	11	5	**53**
Peru	1	8	13	4	7	4	3	2	0	4	0	1	1	1	0	**49**
Malaysia	0	1	5	6	3	4	8	0	0	0	0	0	11	8	6	**46**
Egypt	3	7	3	1	0	12	9	2	0	2	1	2	1	2	0	**45**
Ukraine	0	2	3	2	6	2	1	5	7	2	2	6	3	2	0	**43**

It is clear that trade could be a major component of competition policy. In the history of international trade negotiations, competition policy itself has been in the work programme of the multilateral negotiations (Havana Charter and the Singapore Issues). The actual work programme of the WTO does not include competition policy as part of the multilateral negotiations. Competition policy does not have support from the majority of WTO members, especially the case BRICS (Brazil, Russia, India, China, and South Africa) and some developed country members. A sound domestic competition policy and competition enforcement programmes are a condition to generate a platform of economic productivity in general and, in particular, to increase efficiency in major network services sectors that are normally non-tradable sectors (telecoms, transport, energy, and financial services) that provide important inputs for all manufacturing tradable sectors. An efficient and strong competition programme could generate the domestic political support of governments to promote further global integration to liberalise the trade regime through the multilateral WTO framework.

TABLE 2:

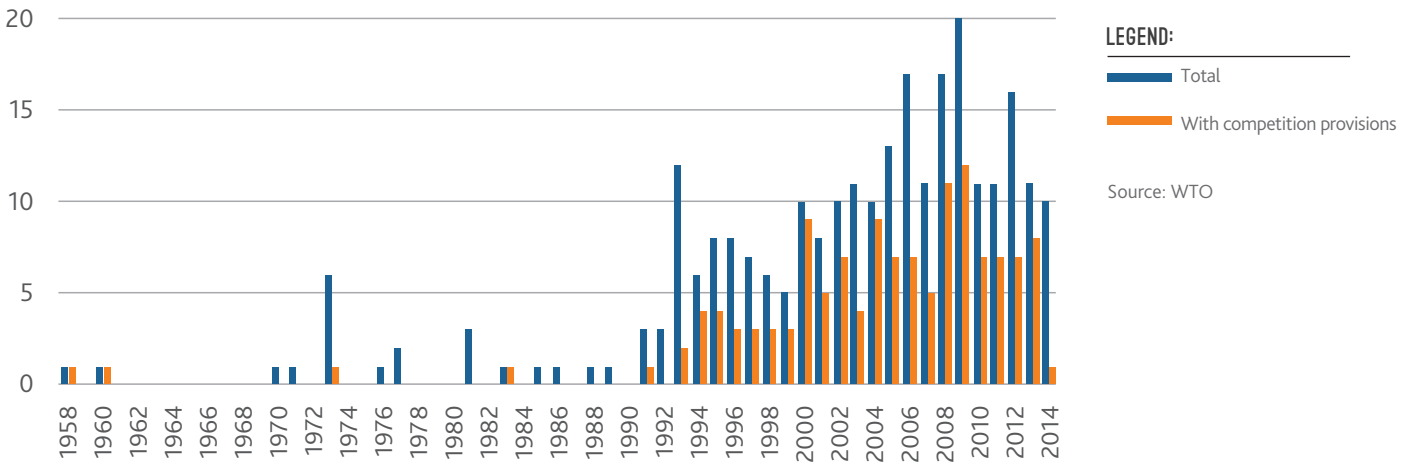
PTAs with WTO-plus commitments*

*non exhaustive

Agreement	*Coverage**
EEA	*Competition policy, Consumer protection, IPR, Investment, Movement of capital*
EU-Chile FTA	*Competition policy, IPR, Investment, Movement of capital*
EU-Korea FTA	*Competition policy, Environmental laws, IPR, Labour markets*
NAFTA	*Competition policy, Environmental laws, IPR, Investment, Labour markets, Movement of capital, Energy*
Canada-Chile FTA	*Competition policy, Investment*

FIGURE 2:

Preferential Trade Agreements notified to the WTO 1958-2014



COMPETITION POLICY COORDINATION

Trade liberalisation has led to further global expansion of international markets and companies growing beyond their national boundaries. Thus, the number of competition cases with cross-border effects has increased. Merger transactions reviewed by competition authorities more frequently have international dimensions and affect markets in different jurisdictions. The same is true of cartels; companies that participate in a cartel in many cases have presence in more than one country, and competition authorities must interact in the course of their cases and investigations.

More than 130 countries, including the most important developing and developed country members of the WTO, already have competition laws and anti-trust authorities. Coordination among competition authorities in different parts of the world is increasing and is playing a more important role. For many global companies, there is a growing need for competition authority coordination.

Global mergers are increasingly common, especially in globalised markets where mergers are required to be notified, reviewed, and authorised in many jurisdictions simultaneously. There is an efficiency cost if those operations take a longer period, with not clearly justified reasons, to be approved in some jurisdictions. When methodologies of analysis and information requirements have substantive differences among different competition agencies, business uncertainty results, deteriorating investment and employment opportunities in that jurisdiction. Legitimate and understandable different results of two agencies' decisions could normally take place when competition authorities of different countries using similar methodologies of analysis face different market structures that result in substantially different findings. The ICN has been successful developing best international practices in mergers (see Figure 3).

Unilateral conduct practices could be differently defined and treated by competition agencies of different countries. Global companies that are dominant in markets of different jurisdictions need to define trade and marketing strategies that could be applied in different countries. However, if different standards apply in the definition of commercial practices that could be illegal — such as cross subsidies, bundling and packing of selling products, exclusive dealings, etc.— that could represent important costs in the design of the global commercial strategy, which are finally translated to consumers through higher prices.

Cartel practices are often investigated with the use of leniency mechanisms. The effectiveness of leniency programmes usually rely on trust in the competition agency that applies the programme. Agencies' respect of confidentiality is crucial. If the cartel has an economic impact

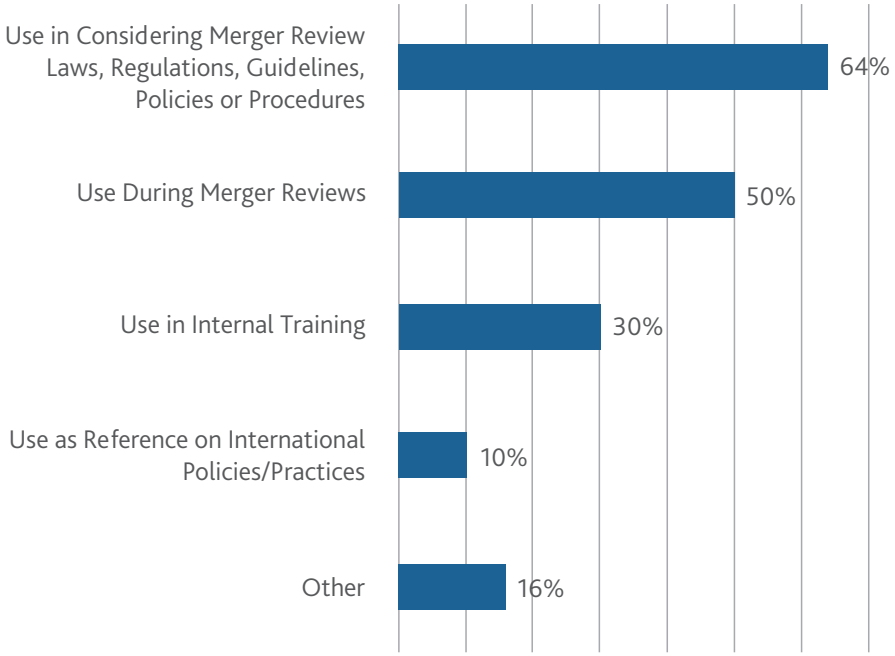


FIGURE 3

Use of ICN products: Merger recommendations within competition authorities

Source: ICN

in different jurisdictions and the agencies of those jurisdictions act differently in the application of the leniency programme, that could create major distortions and legal uncertainties in the leniency applicant. In the end, this could impact negatively on the effectiveness agencies may have in the detection of cartel behaviour.

The cases above are only some examples that clearly justify the need for international cooperation among competition agencies.

International cooperation has become a key mechanism for coordinated enforcement actions. Most competition authorities cooperate internationally to increase the effectiveness of their actions and to help reach decisions that are consistent with other jurisdictions. The latter is particularly relevant in hard-core international cartel investigations and in merger investigations where cooperation focuses on reaching better decisions and preventing consumer harm. In some cases, when there is a risk to competition, remedies are coordinated.

International cooperation has been considered critical for authorities not only for ongoing international investigations, but also for learning about anticompetitive activity affecting other jurisdictions and how this was approached.

In cartel investigations, lack of international cooperation might jeopardise the analysis or work of the competition authorities involved in an investigation. For example, if an agency decides unilaterally to carry out a dawn raid, the investigation of other agencies that are still doing undercover work could be put at risk.

Cooperation among agencies can help authorities gather evidence and information that they might not be able to obtain themselves. Also, cooperation among agencies can help authorities coordinating investigative efforts, to share experiences with respect to a specific case and even witnesses. For example, information sharing among agencies allows competition authorities to ask key questions to witnesses, include valuable evidence in a statement of objectives, decide on the opening or closing of a case, better evaluate harm in local markets, and determine sanctions.

Cooperation has been useful in merger investigations to standardise analytical criteria (for example, in relevant market determination), to understand the procedural phases of other jurisdictions and coordinate timing of the review. Cooperation has also been important to gauge possible effects of the decision of an authority in other jurisdictions.

It is also relevant for authorities to establish communication mechanisms with other agencies to strengthen the technical criteria for decisions and to align decisions with international standards.

REGIONAL AND MULTILATERAL COOPERATION

At the regional and multilateral level, continued efforts have been devoted to enhancing international cooperation between competition authorities of different jurisdictions.

On one side, there are regional organisations that provide a platform for international cooperation in competition enforcement cases and investigations. These organisations include the European Competition Network (ECN), Caribbean Community Secretariat (Caricom), West African Economic and Monetary Union (WAEMU), Nordic Alliance.

In the multilateral and plurilateral contexts, the work of the OECD Competition Committee (OECD CC) and the ICN on international cooperation, which — without diverting resources or attention from legal instruments — promote a greater international dialogue, contribute constructively to the global competition cooperation experience. Both, through different working groups in the field of competition, promote a better understanding of the benefits of international cooperation and encourage more convergence in competition laws.

These principles of cooperation and convergence in competition policy have been promoted at other forums — through capacity building activities and the development of guidelines and sector studies — including the OECD Regional Centres for Competition in Budapest and in Seoul and the Regional Competition Centre for Latin America.

A feature that typifies all international forums of coordination is the non-mandatory nature of these mechanisms. That means competition agencies' coordination is based on best endeavours. The OECD and the ICN have been important sources of convergence. As Figure 3 shows, general convergence in mergers is gradually taking place. However, back lashes could take place without the imposition of any cost for that behaviour.

Voluntary peer reviews in the context of OECD; United Nations Conference on Trade and Development (UNCTAD); and regional forums have proven to be useful mechanisms to diagnose competition legal frameworks in different jurisdictions and to evaluate performance of competition agencies in the application of competition policy and enforcement.

Competition agencies, especially in forums like the ICN and the OECD, have deployed enormous efforts to improve coordination, exchange of information, mutual assistance, and methodology sharing, as well as development of best international practices. In law enforcement, soft convergence has taken place to improve international consistency across different countries. Methodologies of investigation and competition analysis and merger control procedures have gradually been harmonised in an important group of agencies (see Figure 3).

However, there are still major challenges that need to be addressed to improve international efficiency and consistency of the ICN agencies and their legal framework. The impact of those changes on global efficiency and the international trading system would be important.

In the area of competition enforcement, domestic competition laws still have important differences in substantive concepts, like commercial practices that may constitute abuse of dominance, methodologies to define relevant markets, etc. There are also procedural differences like rights of defence (due process) that may vary among agencies. There are jurisdictions where merger control legal frameworks have public interest clauses that impose conditions on the merging parties that distort efficiency and may have negative international trade and investment effects. For a great number of agencies that are not part of the OECD or those countries with lack of resources to implement best practices developed by the ICN or to get more involved in the ICN working groups, there are still major differences in the way competition law is applied vis-à-vis best practices.

In the case of peer reviews normally accomplished in the OECD, UNCTAD and some regional forums, besides the incentives to improve generated by making public the areas of progress, future actions to solve problems that have been detected are only in the hands of the agency evaluated, and there are not additional mechanisms of public scrutiny and evaluation.

Neither the ICN nor the OECD has effective mechanisms of implementation of best international practices. Younger agencies clearly face resource restrictions to implement those practices, and there are no institutional mechanisms to implement technical assistance programmes dedicated to implement best international practices.

There is a concern of increasing use of competition instruments with political or protectionist objectives. There are still many countries where the competition authority's decisions have a direct line of mandate from political entities. In those cases, competition enforcement decisions are not necessarily based on technical merits and could have a negative impact on international trade flows, imposing efficiency costs and losses in the economic welfare of citizens in the country.

It is clear that reforms of domestic regulatory frameworks could eliminate restrictive anticompetitive instruments that impose international trade barriers.

In competition advocacy, there is not any connection between domestic efforts and proposals from agencies that represent an important source of elements and arguments to reform anticompetitive regulatory frameworks with international trade negotiations that have the purpose to eliminate regulatory impediments that directly or indirectly hamper international trade. It is common to see trade negotiators work without the support of experts from competition authorities.

According to many international experts, the most important way to promote competition globally and positively impact international trade is through the participation of competition authorities in the regulatory agendas. There are agendas in international trade that have emerged in this century — goods standards and regulations in services markets — and there is a growing role of foreign direct investment (FDI) in the economies. FDI usually has a positive impact on competition, but in some cases it could have the purpose to hamper competition. Competition policy in this context could participate in three aspects. First, it could be used for evaluating the effects of regulatory policies on global value chains (GVCs), which are increasingly important, explaining major trade flows of intermediate goods that are channelled by FDI. Second, services regulations are not correctly analysed by trade policy alone. Trade arrangements in services could be evaluated on their competition merits by competition authorities. Third, competition disciplines for smaller countries should be reinforced to avoid anticompetitive practices coming from relatively large firms from abroad. The ideal would be to develop a worldwide competition authority to enforce competition rules. Until this is viable, a group of small countries could design, adopt, and enforce a common competition law. Another option would be to have a small country negotiating with a larger one to use its competition authority to enforce the law.

In competition forums to discuss the international trade impact of competition policies and competition enforcement, there are clear cases where competition and trade interact, like international export cartels that have negative trade and welfare effects. There is a concern that many competition agencies would lose independence if they get directly involved in trade issues where there is interaction of competition and trade. It is not clear that the ICN or the OECD would be in a position to deal with those issues.

PROPOSALS FOR FURTHER DISCUSSION

1. Is the WTO the appropriate forum to agree on some basic enforcement principles that cooperation as it is now taking place will be unlikely to accomplish? Here due process could be included as well as the application of the competition law principles avoiding protectionist objectives.

2. Should a gradual approach in the WTO be pursued? This could start with General Agreement on Tariffs and Trade (GATT) articles on subsidies; the General Agreement on Trade in Services (GATS) on telecoms; and the intersection of TRIPS and competition. GVCs could represent a new opportunity to restart this discussion in the WTO.

3. Is the creation of an international global competition law regime a viable mechanism to solve the problems of international coordination? If this kind of proposal is viable, what would be the ideal forum? The implementation of such a proposal could be through a plurilateral approach with a mechanism of gradual incorporation of members.

4. Independent evaluation on a case-by-case basis could support competition and trade policies. A productivity assessment institution with advocacy powers dedicated to evaluation of instruments and policies where competition and trade interact would promote a public and serious debate.

5. Should trade policy focus on sectors where competition authorities have not had clear success liberalising and deregulating at the domestic market level? On the other hand, should competition authorities focus on non-tradable sectors like services that represent the basic platform of productivity in an economy and where international trade policies have not shown relevant results?

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