Competition Policy and the Global Economy: Current Developments and Issues for Reflection

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Abstract

Competition policy, today, is an essential element of the legal and institutional framework for the global economy. Increasingly, major issues of competition law enforcement and policy implicate the interests of multiple jurisdictions. This Article examines a range of related issues and developments, including the international dimensions of competition law enforcement and the resulting potential for both positive spillovers and conflicts of jurisdiction; issues concerning the role of competition policy in digital markets; issues

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concerning the application of competition law and policy in relation to intellectual property rights; issues concerning state-owned enterprises, subsidies, and the maintenance of competitive neutrality in markets; and recent progress in implementing standards to ensure procedural fairness (including transparency and nondiscrimination) in competition law enforcement worldwide. Consideration is given to the potential gains from greater international coordination with respect to aspects of these issues, while taking due account, also, of progress already made in relevant fora. Modest proposals are set out for related international dialogue, including in the context of the World Trade Organization ("WTO") and other fora.

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Introduction

Competition policy is an essential facet of the legal and institutional framework for today's global economy.[1] Decades ago, most ju-

[1] *See* Eduardo Pérez Motta, Competition Policy and Trade in the Global

risdictions with competition laws focused on anticompetitive practices that originated and operated within the domestic market.[2] Today, most aspects of competition law enforcement have an important transnational dimension. For example, a large proportion of anticartel prosecutions concern price fixing and market sharing arrangements that spill across national borders and, in important instances, span the globe.[3] Multiple recent, prominent cases of abuses of a dominant position in high-tech network industries have involved conduct that cuts across jurisdictions.[4] This is equally true of important cases involving transnational energy markets[5] as well as major corporate mergers that routinely require the notification and approval of 30 or more jurisdictions.[6] Accordingly, the actions of enforcement authorities in one ju-

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ECONOMY: TOWARDS AN INTEGRATED APPROACH 4 (2016), https://e15initiative.org/wp-content/uploads/2015/09/E15_ICTSD_Competitition_Policy_Trade_Global_Economy_Towards_Integrated_Approach_report_2016_1002.pdf [https://perma.cc/ELF9-VEJG]. In this Article, "competition policy" includes the full range of measures that governments take to suppress or deter anticompetitive behavior and to promote the efficient and competitive operation of markets, including, but not limited to, the enforcement of competition law per se.

2 *See* David P. Fidler, *Competition Law and International Relations*, 41 INT'L & COMP. L.Q. 563, 572 (1992). To be sure, anticompetitive practices have long had an international dimension. For example, the Department of Justice and the Federal Trade Commission devoted substantial resources from the late 1930s through the early 1950s to investigations and prosecutions involving international cartels in a wide range of manufacturing sectors, including chemicals and petroleum. *See* WYATT WELLS, ANTITRUST AND THE FORMATION OF THE POSTWAR WORLD 43–136 (2002) (reviewing inquiries and lawsuits undertaken by the U.S. antitrust agencies concerning international cartels).

3 *See* DLA PIPER, CARTEL ENFORCEMENT GLOBAL REVIEW (2017), https://www.dlapiper.com/~/media/Files/Insights/Publications/2017/06/3213720_Cartel_Enforcement_Global_Review_June_20177_V13.pdf [https://perma.cc/EU54-WUN5].

4 Consider, for example, the numerous cases regarding practices of the Microsoft Corporation that have been pursued in diverse jurisdictions over the past two decades, as well as the *Google* cases before the European Commission and other national competition authorities. *See infra* Box 4; discussion *infra* Section I.C. Further illustrative is the 2015 *Qualcomm* case concerning patent licensing practices in China. *See infra* Box 6; discussion *infra* Section I.D; *see also Antitrust in China: "NRDC v. Qualcomm—One All*," ALLEN & OVERY (Feb. 12, 2015), https://www.allenovery.com/en-gb/global/news-and-insights/publications/antitrust-in-china-ndrc-v-qualcomm-one-all [https://perma.cc/7WEF-BSGD] (noting that China fined Qualcomm for "abusive patent licensing practices").

5 *See, e.g.*, European Commission Press Release IP/18/3921, Antitrust: Commission Imposes Binding Obligations to Enable Free Flow of Gas at Competitive Prices in Central and Eastern European Gas Markets (May 24, 2018), http://europa.eu/rapid/press-release_IP-18-3921_en.htm [https://perma.cc/88ZR-H2UJ] (discussing the European Commission's May 2018 decision imposing on Gazprom, "the dominant gas supplier in a number of Central and Eastern European countries," a set of obligations that "address[ed] the Commission's competition concerns" and "enable[d] the free flow of gas in Central and Eastern Europe at competitive prices").

6 *See, e.g.*, Diane Bartz & Greg Roumeliotis, *Bayer's Monsanto Acquisition to Face Politically Charged Scrutiny*, REUTERS (Sept. 14, 2016), https://www.reuters.com/article/us-monsanto-

risdiction can create spillover effects—often positive but sometimes negative—in markets around the world.[7]

The significance of competition policy for international trade and the potential need for formal state-to-state arrangements is, therefore, an important topic for international discussion. As long ago as 1948, the Havana Charter for an International Trade Organization ("Havana Charter")[8] set out a surprisingly comprehensive and even, in some respects, prescient framework for international cooperation in regard to anticompetitive business practices "on the part of private or public commercial enterprises."[9] At the World Trade Organization ("WTO"), the interaction between trade and competition policy was an important element of the 2001 Doha Round of Multilateral Trade Negotiations ("Doha Round") as originally framed.[10] Despite the focus at the launch of the Doha Round, the 2003 Cancún Conference reached no consensus on required modalities or on the basic desirability of further negotiations on this topic.[11] Subsequently, work in the WTO Working Group on the Interaction between Trade and Competition Policy ("WTO Working Group") was suspended.[12]

Since the work in the WTO Working Group ceased in 2004, important contextual developments have occurred that imply a deepening need for international consensus building and, potentially, lessened resistance to the development of modest international norms in this area.[13] These include the following:

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m-a-bayer-antitrust/bayers-monsanto-acquisition-to-face-politically-charged-scrutiny-idUSKCN11K2LG [https://perma.cc/5DL3-MYPM] (discussing Bayer AG's $66 billion deal to acquire Monsanto that caught the attention of several countries).

7 *See infra* Section I.A; *see also* ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD 101 (2020) (describing cross-border spillovers arising from operation of merger control systems in individual jurisdictions).

8 *See* U.N. Conference on Trade and Employment, *Havana Charter for an International Trade Organization*, U.N. Doc. E/Conf.2/78, (Mar. 24, 1948) [hereinafter Havana Charter], https://treaties.un.org/doc/source/docs/E_CONF.2_78-E.pdf [https://perma.cc/LH8T-Q8NY].

9 *See* Havana Charter, *supra* note 8, at art. 46, ¶ 1; *see also infra* Part I.

10 *See* World Trade Organization, Ministerial Declaration of 14 November 2001, para. 23, WTO Doc. WT/MIN(01)/DEC/1, 41 ILM 746, 749 (2002) https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm [https://perma.cc/WG7X-L5VP] (mandating WTO members to develop modalities for negotiations on trade and competition policy).

11 *Working Group on the Interaction Between Trade and Competition Policy (WGTCP)—History, Mandates and Decisions*, WORLD TRADE ORG. https://www.wto.org/english/tratop_e/comp_e/history_e.htm [https://perma.cc/MD2Y-CWPB].

12 *See* World Trade Organization, *Doha Work Programme: Decision Adopted by the General Council on 1 August 2004*, WTO Doc. WT/L/579 (Aug. 2, 2004), https://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm [https://perma.cc/CKS7-4DN8].

13 *See* ROBERT D. ANDERSON & ANNA CAROLINE MÜLLER, COMPETITION LAW/POLICY AND THE MULTILATERAL TRADING SYSTEM: A POSSIBLE AGENDA FOR THE FUTURE 1–2 (2015).

- A dramatic expansion in the number of competition laws and enforcement authorities across the globe.[14] Whereas, in 1999, roughly 60 WTO Member countries had enacted competition regimes,[15] currently, over 130 countries have such regimes.[16] This figure includes important emerging economies (for instance, Brazil, China, India, the Russian Federation, South Africa, and Pakistan)[17] that previously either had no generally applicable competition laws (e.g., China)[18] or had antiquated regimes which have now been effectively modernized (e.g., India)[19];
- The widespread adoption of competition policy components in regional trade agreements ("RTAs"), highlighting the relevance of competition policy as a complement to trade liberalization and, potentially, implying possible approaches to related issues at the multilateral level;[20]
- New challenges for both competition authorities and the global community as a result of digitalization[21] and the

14 ORG. FOR ECON. CO-OPERATION & DEV., CHALLENGES OF INTERNATIONAL CO-OPERATION IN COMPETITION LAW ENFORCEMENT 28 (2014), https://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf [https://perma.cc/6X82-228A].

15 Franz Kronthaler, *Effectiveness of Competition Law: A Panel Data Analysis* 4 (IWH Discussion Papers No. 7/2007, 2007), https://www.econstor.eu/bitstream/10419/29973/1/534695396.pdf [https://perma.cc/2PML-S6C6].

16 BRADFORD, *supra* note 7, at 99; William E. Kovacic & Marianela Lopez-Galdos, *Lifecycles of Competition Systems: Explaining Variation in the Implementation of New Regimes*, 79 LAW & CONTEMP. PROBS., no. 4, 2016, at 86.

17 *See* ELEANOR M. FOX & MOR BAKHOUM, MAKING MARKETS WORK FOR AFRICA (2019) (discussing emerging antitrust and competition policy in Africa); GLOBAL COMPETITION ENFORCEMENT: NEW PLAYERS, NEW CHALLENGES (Paulo Burnier da Silveira & William Evan Kovacic eds., 2019) (discussing emerging competition policy in several countries, including Argentina, Australia, Brazil, China, Colombia, India, Japan, Mauritius, Mexico, Peru, and South Africa); Kovacic & Lopez-Galdos, *supra* note 16, at 86 (noting emerging competition law regimes in Brazil, China, and India); Joseph Wilson, *Crossing the Crossroads: Making Competition Law Effective in Pakistan*, 8 LOY. U. CHI. INT'L L. REV. 105, 109–24 (2011) (discussing Pakistan's legal framework for competition policy).

18 *See* H. STEPHEN HARRIS ET AL., ANTI-MONOPOLY LAW AND PRACTICE IN CHINA 1 (2011); XIAOYE WANG ET AL., COMPETITION LAW IN CHINA § 4 (3d ed. 2018); William E. Kovacic, *China's Competition Law Experience in Context*, 3 J. ANTITRUST ENFORCEMENT (SUPPLEMENT) i2, i2–i3 (2015).

19 *See* Richard J. Pierce, Jr., *Comparing the Competition Law Regimes of the United States and India* 13–14 (GWU Law School Public Law Research Paper No. 2017-27, 2017), https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2523&context=faculty_publications [https://perma.cc/J68R-N3S9].

20 *See* ANDERSON & MÜLLER, *supra* note 13, at 2; FRANÇOIS-CHARLES LAPRÉVOTE ET AL., COMPETITION POLICY WITHIN THE CONTEXT OF FREE TRADE AGREEMENTS, at I (2015), http://e15initiative.org/wp-content/uploads/2015/07/E15-Competition-Laprevote-Frisch-Can-FINAL.pdf [https://perma.cc/6P47-FXFG].

21 *See* ORG. FOR ECON. CO-OPERATION & DEV., THE DIGITAL ECONOMY, INNOVATION

emergence of global value chains ("GVCs"). The latter, in particular, involves potential competition policy concerns regarding vertical market restraints.[22] As such, competition policy may come to be seen as an important tool to ensure that GVCs function in ways that serve the global community efficiently and fairly;[23]

- Significant global progress toward shared understanding of the objectives and sound applications of competition policy. To a great degree, this result is attributable to the work of the International Competition Network ("ICN"), related initiatives involving international organizations such as the Organization for Economic Cooperation and Development ("OECD") and the United Nations Conference on Trade and Development ("UNCTAD"), initiatives by nongovernmental organizations ("NGOs") such as the Consumer Unity and Trust Society ("CUTS"), and the capacity building activities of leading national agencies;[24]
- Important progress in the global competition community, with support from the international business community, regarding the development of standards to ensure procedural fairness in the enforcement of competition law internationally.[25]

This Article focuses on recent and current competition law enforcement case developments with an international dimension, including in the context of the digital economy, and the importance of new forms of international cooperation in this area. Part I outlines current challenges for policy makers regarding the role of competition policy

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AND COMPETITION (2020), http://www.oecd.org/daf/competition/OECDwork-Digital-Economy-Innovation-Competition2017-web.pdf [https://perma.cc/E54X-5NUD].

22 *See* JOHN DAVIES, GLOBAL VALUE CHAIN POLICY SERIES: COMPETITION 4 (2018), http://www3.weforum.org/docs/WP_Global_Value_Chain_Policy_Series_Competition_report_2018.pdf [https://perma.cc/ZHJ2-XXQZ].

23 *See id.*

24 *See* Hugh M. Hollman & William E. Kovacic, *The International Competition Network: Its Past, Current and Future Role*, 20 MINN. J. INT'L L. 274, 301 (2011); *infra* Section IV.B.

25 *See* Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks on Global Antitrust Enforcement at the Council on Foreign Relations (June 1, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-global-antitrust-enforcement [https://perma.cc/7EAU-QWQ8]. For related perspectives from the business community, see INT'L COMPETITION POLICY EXPERT GRP., REPORT AND RECOMMENDATIONS 29 (2017), https://www.uschamber.com/sites/default/files/icpeg_recommendations_and_report.pdf [https://perma.cc/DDS2-L3QV]; and *Global Business Welcomes New Multilateral Framework on Procedures in Competition Enforcement*, U.S. COUNCIL FOR INT'L BUS. (June 27, 2018), https://www.uscib.org/global-business-welcomes-new-multilateral-framework-on-procedures-in-competition-enforcement/ [https://perma.cc/59WN-L9JS].

in the global economy including cross-border merger notifications, international cartels, perceived anticompetitive practices in the digital and high-tech sector, and the widening international application of competition law vis-à-vis intellectual property ("IP"). Part II reflects upon current concerns regarding the role of state-owned enterprises ("SOEs") and industrial subsidies in international markets and analyzes the potential contribution of competition policy in addressing these concerns. Part III reviews recent progress in the global community concerning the elaboration of standards to ensure procedural fairness in competition law enforcement. Part IV outlines the role that diverse international organizations have played in promoting a modest degree of convergence and appropriate cooperation in competition policy implementation internationally while also suggesting possible directions for future deliberations in this area.

I. The International Dimension of Competition Law Enforcement: Positive Spillovers and Potential for Conflicts of Jurisdiction

Competition law enforcement today is a pervasively international phenomenon.[26] Mergers and acquisitions often have a bearing on multiple national markets.[27] The number of cartel investigations involving international participants has increased in the European Union alone by "more than 450% since 1990."[28] Most recently, many jurisdictions have initiated complex cases that involve alleged abuses of dominant position and implicate intellectual property and digital markets.[29]

Cross-border competition enforcement often entails significant and sometimes positive spillover effects. For example, major cartel investigations and prosecutions by the United States, the European Union, or other important jurisdictions can cause firms to cease price fixing and related activities in other jurisdictions, even though this result is not the authorities' principal purpose. Similarly, the blocking of

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26 Eleanor M. Fox, Antitrust Without Borders: From Roots to Codes to Networks 1 (2017), http://e15initiative.org/publications/antitrust-without-borders-from-roots-to-codes-to-networks/ [https://perma.cc/P8WM-MA7S].

27 *See* Org. for Econ. Co-operation & Dev., International Co-operation in Competition Law Enforcement 4 (2014), https://www.oecd.org/mcm/C-MIN(2014)17-ENG.pdf [https://perma.cc/5KKN-CGSN].

28 *Id.*

29 *See, e.g.*, World Trade Org., World Trade Report 2018, at 141–43 (2018), https://www.wto.org/english/res_e/publications_e/world_trade_report18_e.pdf [https://perma.cc/TL7T-HPRK].

a major international merger by a single jurisdiction can, depending on the circumstances, prevent harm to consumers worldwide.[30]

Cross-border competition enforcement can also sometimes create negative externalities. These may include "chilling effect[s] on legitimate business activity or a freeing [legitimizing] effect on harmful business activity."[31] While national authorities interested in cases with an international dimension often take similar views of business arrangements,[32] disagreements in high-profile cases sometimes occur. For example, different approaches to the review of mergers between suppliers of complementary products yielded conflicting decisions by the U.S. and E.U. competition authorities in the *GE-Honeywell* case.[33]

These situations raise concerns not only for jurisdictions which predominantly consume the relevant product or service but also for jurisdictions whose producers or suppliers may be adversely affected by anticompetitive behavior or by the creation of an individual or collective position of dominance in regional or global markets. To shed light on potential areas of contention, this Part now turns to concerns related to enforcement disagreements in two main areas of competition law enforcement: merger review and cartel investigations.[34] This Part subsequently discusses issues concerning digital markets and intellectual property.

A. Cross-border Mergers

Cross-border mergers create scope for conflicting competition agency decisions that may entail substantial costs for the businesses involved. At least three reasons explain why different jurisdictions may reach differing views on a transnational merger: (1) the authorities apply different rules in their merger assessment; (2) the underlying market situation differs from one jurisdiction to another; or (3) the

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30 *See* ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 27, at 41; WORLD TRADE ORG., ANNUAL REPORT 1997, at 67 (1997).

31 ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 27, at 35.

32 *See, e.g.*, *infra* Box 2.

33 *See, e.g.*, Eleanor Fox, GE/Honeywell*: The U.S. Merger that Europe Stopped—A Story of the Politics of Convergence*, *in* ANTITRUST STORIES 331, 331–33 (Eleanor M. Fox & Daniel A. Crane eds., 2007). For additional examples, see *infra* Box 1.

34 Concerns relating to a possible lack of cooperation in investigations of abuse of dominance are not specifically addressed in this subsection. This is because there have generally been fewer such investigations with a cross-border dimension, although the number of unilateral conduct cases has increased in high technology sector and digital markets. For further discussion on relevant concerns, see *infra* Sections I.C–.D.

authorities may reach different conclusions based on the facts before them.[35]

First, substantive differences may be rooted in national statutes. Variations in outcomes may arise when competition laws embody different evaluation criteria. For example, while some economies consider employment effects or the protection of small sellers against buyer power as relevant to their competition analysis, the treatment of such factors differs across jurisdictions.[36] Much evidence, however, suggests that inconsistencies in competition enforcement arise not principally from legislative differences but rather from differences in the application of similar substantive prohibitions. One authority might, for example, give more weight to market shares than another, or be more concerned about vertical linkages.[37]

Conflicting decisions may also result when national laws set out different policy objectives. U.S. competition policy interventions focus mainly on the goal of protecting consumer welfare.[38] E.U. competition policy shares this aim, but also strives to facilitate market integration among the E.U. Member States.[39] In some developing jurisdictions—China and South Africa being prominent examples—social and economic development goals also receive significant weight in policy implementation.[40] As Professor David Gerber observes:

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35 Each of these possibilities is elaborated in ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 27, at 36. *See infra* Box 1.

36 *See* ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 27, at 37; Dennis M. Davis, *Public Interest, Industrial Policy and Competition Law Remedies: The South African Experience*, *in* GLOBAL COMPETITION ENFORCEMENT, *supra* note 17, at 203; Tembinkosi Bonakele, *Competition Law and State-Owned Enterprises: A South African Perspective*, *in* GLOBAL COMPETITION ENFORCEMENT, *supra* note 17, at 215; Terry Calvani & Justin Stewart-Teitelbaum, *Introduction*, 65 ANTITRUST BULL. 199, 205–206 (2020).

37 ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 27, at 37.

38 *See* Reiter v. Sonotone Corp., 442 U.S. 330, 342–43 (1979). The meaning and application of the consumer welfare standard has inspired extensive debate about the range of competitive effects to be considered in antitrust analysis. *See* A. Douglas Melamed & Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, 54 REV. INDUS. ORG. 741 (2019). This Article uses the term to encompass effects on prices, output, quality, and innovation.

39 *See* ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 27 at 37; Robert D. Anderson & Alberto Heimler, *What Has Competition Done for Europe? An Inter-Disciplinary Answer*, 62 AUSSENWIRTSCHAFT 419, 422 (2007) (pre-publication text available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1081563 [https://perma.cc/ZWD3-2938]).

40 ORG. FOR ECON. CO-OPERATION & DEV., POLICY ROUNDTABLES: REMEDIES IN CROSS-BORDER MERGER CASES 102 (2013), http://www.oecd.org/daf/competition/Remedies_Merger_Cases_2013.pdf [https://perma.cc/5V9B-KRW5]; THOMAS K. CHENG, COMPETITION LAW IN DEVELOPING COUNTRIES 70–96 (2020).

> Most other competition law systems [i.e., other than the United States and the European Union] pursue several objectives, not only in the language of their statutes, but also in the decision making of competition authorities and courts. Often economic development is a central goal, but political goals such as dispersion of power and social goals such as increased access to markets are also common. In addition, fairness has been a major goal in many systems . . . .[41]

A second reason for differences across systems is that market situations and conditions of competition often vary across economies. These variations include factors such as customer behavior, including countervailing buyer power; existence of substitutes and complements in the market; and other circumstances that affect competitive market forces.[42] They may generate different enforcement agency assessments of individual mergers across jurisdictions, even where enforcement standards are broadly similar.[43] Furthermore, international mergers can implicate different segments of the supply chain, making different product markets of interest.[44] Again, differing competitive conditions can provide legitimate reasons for agencies to diverge in their evaluations of particular mergers.[45] Thus, the remedies adopted (or foregone) in one jurisdiction may nonetheless adversely affect business activities in other jurisdictions.[46]

Third, conflicting decisions can occur simply because different authorities reasonably reach differing conclusions about complex facts, even where their underlying laws are similar.[47] Whatever the reasons, the inconsistent treatment of an international merger across jurisdictions may occur where one authority blocks a merger that another jurisdiction considers harmless or efficient or permits a merger with harmful effects in another.[48]

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41 DAVID J. GERBER, GLOBAL COMPETITION 265 (2010).

42 *See* ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 27, at 37–38.

43 *See id.*

44 *Id.* at 38.

45 *See id.* at 37–38.

46 *See id.* at 37.

47 *Id.* at 38.

48 For implications of national decisions on cross-border mergers on global commerce and conditions of competition internationally, see *infra* Box 1.

Box 1. Examples of Conflicting Results in National Merger Reviews: Remedies Imposed by China as Compared to Other Jurisdictions in Two Cases of the Last Decade

Despite important advances in coordination and cooperation during merger review, competition authorities may reach different conclusions and impose inconsistent or conflicting remedies in cross-border transactions.[49] For example, in the matter of Seagate/Samsung, the Ministry of Commerce of the People's Republic of China ("MOFCOM") (the relevant Chinese authority) initially required the holding separate of Samsung's business while the U.S. and E.U. authorities approved the transaction without conditions.[50]

Similarly, in Western Digital/Viviti, authorities in the United States, European Union, Japan, and Korea cleared the transaction subject to Western Digital's divestiture of particular production assets, while MOFCOM also required Western Digital to hold both businesses separate.[51]

Taking into account data collected since 1995, it has been estimated that cross-border mergers affected by divergent decisions at the national level have reached an overall value of approximately $100 billion.[52] This illustrates the potential consequences for businesses absent increased coordination in this area.

In practice, only jurisdictions with significant economies and well-functioning enforcement authorities can apply remedies or block global mergers.[53] The number of such jurisdictions, however, is growing. In addition to jurisdictions with long-established competition regimes (such as the European Union, the United States, and Japan), the newer competition authorities from emerging economies, including China, Russia, and India, are becoming more active and have imposed remedies with global consequences.[54] To be sure, the increased activity of newer competition authorities is a natural and desirable outcome in itself, as competition laws apply to more economies. A side effect of this development, however, is increasing complexity in cooperation and potential uncertainty for business.[55]

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49 *See* Org. for Econ. Co-operation & Dev., *supra* note 40, at 101.

50 *Id.*

51 *Id.* at 101–02.

52 Org. for Econ. Co-operation & Dev., *supra* note 27, at 5.

53 *Id.* at 40.

54 *See id.*

55 This is a relevant concern also because some active jurisdictions in competition enforcement are not involved in cooperative activities in the framework of the OECD (the membership is mainly limited to developed countries) and the ICN (China's competition agencies are not member organizations of the ICN). *See Members*, Int'l Competition Network, https://www.internationalcompetitionnetwork.org/members/ [https://perma.cc/7VWZ-K643]; *Where:*

Cooperation in the enforcement of competition law has expanded significantly since the 1990s.[56] The advocacy work of bodies such as the ICN has achieved an impressive degree of convergence of competition policies regarding merger control.[57] A full harmonization of approaches in different jurisdictions may be unattainable and, because it can stifle useful decentralized experimentation, undesirable. Yet more cooperation among agencies has great potential to achieve superior regulatory outcomes and reduce unnecessary costs. Arguably, this can be achieved only if merger reviews are not based exclusively on national competition policy concerns or (even more so) broader policy or political considerations.[58]

Box 2. The 2018 Bayer/Monsanto Merger: An Example of Effective Coordination of Remedies Imposed Across Multiple Jurisdictions.

Initially filed in more than 30 jurisdictions,[59] Bayer's acquisition of Monsanto was cleared in early 2018 subject to certain conditions—a "remedy package"—including the divestment of their existing overlapping businesses, mainly in the seed and pesticide markets.[60] Additionally, the entered commitments included the divestment of research and development pipeline projects as well as licenses on Bayer's digital agriculture product portfolio.[61] This set of remedies, mostly structural in nature, was accepted across different jurisdictions, including the European Union,[62] United States,[63] and Brazil.[64]

One of the largest negotiated merger settlements, the resolution of the competition reviews required the divestment of assets worth approximately $9

Global Reach, Org. for Econ. Co-operation & Dev., https://www.oecd.org/about/members-and-partners/ [https://perma.cc/GMW8-LB2N].

56 *See infra* Part IV.

57 *See infra* Box 2.

58 There are some concerns that the regulation of cross-border mergers might be used as a negotiating bargain in relation to other trade-related issues. *See, e.g.*, Tom Hancock & Nic Fildes, *China Demands Qualcomm Concessions Over NXP Deal*, Fin. Times (Apr. 19, 2018), https://www.ft.com/content/f69ce1a0-43a8-11e8-803a-295c97e6fd0b [https://perma.cc/87BS-7DW8].

59 *See* Bartz & Roumeliotis, *supra* note 6.

60 *See, e.g.*, European Commission Press Release IP/18/2282, Mergers: Commission Clears Bayer's Acquisition of Monsanto, Subject to Conditions (Mar. 21, 2018), http://europa.eu/rapid/press-release_IP-18-2282_en.htm [https://perma.cc/DJT9-QKXW].

61 *See id.*

62 *Id.*

63 Press Release, U.S. Dep't of Justice, Justice Department Secures Largest Negotiated Merger Divestiture Ever to Preserve Competition Threatened by Bayer's Acquisition of Monsanto (May 29, 2018), https://www.justice.gov/opa/pr/justice-department-secures-largest-merger-divestiture-ever-preserve-competition-threatened [https://perma.cc/6B4J-PY5L].

64 Bruno Federowski & Leonardo Goy, *Brazilian Antitrust Agency Approves Bayer-Monsanto Tie-up*, Reuters (Feb. 7, 2018, 1:25 PM), https://www.reuters.com/article/us-monsanto-m-a-bayer/brazilian-antitrust-agency-approves-bayer-monsanto-tie-up-idUSKBN1FR2S1 [https://perma.cc/8DC2-ESLD].

billion in the United States and almost €6 billion in the European Union.[65] While reviewing the merger, both the European Commission and the Department of Justice cooperated closely with competition authorities in other nations, including Australia, Brazil, Canada, China, India, and South Africa.[66]

B. International Cartels

International cartels, including price fixing and market sharing arrangements that transcend national borders, have effects similar to those of horizontal price fixing and other collusive agreements within a single country.[67] In both cases, collusion limits competition, raises prices, restricts output, curbs quality, depresses innovation, and otherwise manipulates markets for the private benefit of the colluding firms.[68] Vigorous national anticartel enforcement efforts, coupled with voluntary cooperation among national authorities in cases to the extent the law permits, have brought satisfactory results and yielded positive spillovers in many cases.[69] Modern improvements in the successful detection and prosecution of international cartels constitute an important success story for global competition policy, and government enforcement officials rightly herald this development as a major achievement.[70]

Yet much work remains to be done if competition agencies are to prevail in the unending contest between businesses which seek to collude and the prosecutors who seek to detect, punish, and deter them. Competition agencies may face, for example, practical difficulties in enforcing national competition laws against export cartels in importing jurisdictions.[71] Their investigative efforts may not easily yield necessary evidence on the conduct of the producers located in exporting

65 *See* European Commission Press Release IP/18/2282, *supra* note 60; Press Release, U.S. Dep't of Justice, *supra* note 63.

66 *See* European Commission Press Release IP/18/2282, *supra* note 60.

67 WORLD TRADE ORG., *supra* note 30, at 65.

68 *See id.*

69 *See infra* Section IV.B.

70 *See, e.g.*, Richard A. Powers, Deputy Assistant Att'y Gen., Dep't of Justice, A Matter of Trust: Enduring Leniency Lessons for the Future of Cartel Enforcement (Feb. 19, 2020), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-13th-international [https://perma.cc/3QA6-82AJ]; Margrethe Vestager, European Union Comm'r, Keeping the EU Competitive in a Green and Digital World (Mar. 2, 2020), https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/keeping-eu-competitive-green-and-digital-world_en [https://perma.cc/S9ZJ-EQJ4].

71 *See* Florian Becker, *The Case of Export Cartel Exemptions: Between Competition and Protectionism*, 3 J. COMPETITION L. & ECON. 97, 98 (2007). "Pure" export cartels are those whose efforts are directed exclusively at foreign markets. WORLD TRADE ORG., *supra* note 30, at 64. Such cartels "are treated as being outside the scope of most countries' competition laws." *Id.*

or other jurisdictions.[72] Cooperation with the authorities of those jurisdictions may be hampered by the fact that the authorities may not perceive an immediate interest in tackling the cartel if it does not create harmful effects in their national economy.

Beyond this, some international cartels appear to elude the effective reach of the laws in the countries where their effects are most harmful. A distinctive example of such a cartel can be found in the African beer market.[73] Large beer producers divided the continent amongst themselves, giving each company a near-monopoly in certain countries.[74] Revealingly, "[a] spokesman for a major African beer company said about such a deal: '*There may be antitrust laws at the national level, but none covering the continent. I don't see what the problem is.*'"[75]

Some evidence suggests that such cartels are a recurring feature of markets that lack effective competition rules and institutions and that appropriate enforcement actions by developed countries, although vitally important, do not adequately protect the interests of developing countries in this area.[76] An early study by Professors Margaret Levenstein and Valerie Suslow found that 16 international cartels operating in developing countries, resulted in substantial overcharges to those countries.[77]

In part to tackle these issues, an increasing number of jurisdictions have embraced versions of the "effects doctrine."[78] Under this principle, domestic competition laws apply to firms and arrangements based outside of the domestic market when they have effects within the domestic territory.[79] Such applications of competition law have, beyond a doubt, yielded important benefits for consumers in many instances.[80] Nonetheless, the extraterritorial reach of competition law

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For relevant discussion on export cartels, see i*nfra* Section IV.B; and WORLD TRADE ORG., *supra* note 30, at 66.

72 WORLD TRADE ORG., *supra* note 30, at 64, 66.

73 *See* ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 27, at 44.

74 *Id.*

75 *Id.*

76 *See* D. Daniel Sokol, *What Do We Really Know About Export Cartels and What Is the Appropriate Solution?*, 4 J. COMPETITION L. & ECON. 967, 972 (2008).

77 *See* Margaret Levenstein & Valerie Y. Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 ANTITRUST L.J. 801, 806 (2004).

78 *See, e.g.*, United States v. Aluminum Co. of Am., 148 F.2d 416, 445 (2d Cir. 1945); Case 89/85, Ahlström v. Comm'n, 1988 E.C.R. 5233, 5340 para. 3.

79 Marek Martyniszyn, *Export Cartels: Is it Legal to Target Your Neighbour? Analysis in Light of Recent Case Law*, 15 J. INT'L ECON. L. 181, 194 (2012).

80 An important example concerns the famous vitamins case of 1999. *See* Harry First, *The*

is a sensitive issue, and jurisdictional conflicts may arise. For example, multiple countries may assert their own jurisdiction in the same case, leading to potential divergent assessments. In such circumstances, the possibility of "positive comity" can be, where available, helpful.[81] Positive comity allows one party to request another party to take appropriate enforcement actions against anticompetitive activities occurring in the territory of the requested party that adversely affect important interests of the requesting party.[82] This practice effectively allocates enforcement resources by allowing the better-positioned party to deal with the anticompetitive behavior.[83]

Even where international cartel activity can be tackled effectively by national competition laws, inefficiencies may occur with regard to the investigation of international cartels, leading to the underenforcement of competition law and policy.[84] Unless well-functioning cooperation mechanisms are in place, multiple jurisdictions may carry out similar investigative steps, needlessly duplicating costs for both businesses and governments.[85] More importantly, absent effective cooperation, competition authorities might fail to obtain necessary evidence from other jurisdictions.[86] As a result, costly cartel activity may go undeterred.

C. Competition Policy and Anticompetitive Practices in Digital Markets

In today's global and information-based economy, competition in digital markets poses specific challenges for competition policy and is thus a focus of debate. To be sure, digitalization can have important procompetitive effects, for example, by reducing transaction costs and enabling additional suppliers to access markets. It also, however, entails the potential for limiting competition through exclusionary or collusive conduct.[87]

More specifically, digitalization has "facilitate[ed] the entry and growth of internet-based suppliers and retailers" in consumer product

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Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law, 68 ANTITRUST L.J. 711 (2001).

81 *See* WORLD TRADE ORG., *supra* note 30, at 76.

82 *Id.* at 81.

83 ORG. FOR ECON. CO-OPERATION & DEV., PROVISIONS ON POSITIVE COMITY 1 (2015), https://www.oecd.org/daf/competition/competition-inventory-provisions-positive-comity.pdf [https://perma.cc/84CH-2ETQ].

84 ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 27, at 44.

85 *Id.*

86 *Id.*

87 *See* WORLD TRADE ORG., *supra* note 29, at 141–43.

markets.[88] This, in turn, has enabled competition in the provision of new types of goods and services, also increasing reliance on GVCs.[89] Nonetheless, concerns have also arisen about potential anticompetitive effects in the relevant markets.[90] Competition authorities in the European Union, the United States, and in other jurisdictions have investigated and are investigating the business practices of Facebook, Google, Microsoft, eBay, and other well-known internet-based companies.[91] According to *The Economist*, "there is cause for concern. Internet companies' control of data gives them enormous power. Old ways of thinking about competition, devised in the era of oil, look outdated in what has come to be called the 'data economy.'"[92] Even if this is, to a degree, apocryphal, much attention is rightly being given to the *application* of existing competition rules in the digital environment.[93]

Three significant forces that appear less frequently in conventional markets affect competition in digital markets: network effects, "scale without mass," and switching costs.[94] These factors tend to re-

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88 ORG. FOR ECON. CO-OPERATION & DEV., KEY ISSUES FOR DIGITAL TRANSFORMATION IN THE G20 134 (2017), https://www.oecd.org/g20/key-issues-for-digital-transformation-in-the-g20.pdf [https://perma.cc/7XY7-8JVS].

89 *Id.*

90 *See, e.g.*, Sam Schechner & Natalia Drozdiak, *The Woman Who Is Reining In America's Technology Giants*, WALL STREET J. (Apr. 4, 2018, 11:40 AM), https://www.wsj.com/articles/the-woman-who-is-reining-in-americas-technology-giants-1522856428 [https://perma.cc/5KV5-3DFS].

91 See *infra* Box 4 for additional details concerning specific examples. Background on national enforcement guidelines and policy initiatives concerning the application of competition policy to intellectual property is provided in Robert D. Anderson et al., *Competition Agency Guidelines and Policy Initiatives Regarding the Application of Competition Law Vis-a-vis Intellectual Property: An Analysis of Jurisdictional Approaches and Emerging Directions* (World Trade Org., Staff Working Paper ERSD-2018-02, 2018), https://www.wto.org/english/res_e/reser_e/ersd201802_e.pdf [https://perma.cc/MJ43-B3RN].

92 *The World's Most Valuable Resource Is No Longer Oil, but Data*, ECONOMIST (May 6, 2017), https://www.economist.com/news/leaders/21721656-data-economy-demands-new-approach-antitrust-rules-worlds-most-valuable-resource [https://perma.cc/5WJ4-G3DD].

93 *See*, *e.g.*, COMMITTEE FOR THE STUDY OF DIGITAL PLATFORMS, MARKET STRUCTURE AND ANTITRUST SUBCOMMITTEE, GEORGE J. STIGLER CTR. FOR THE STUDY OF THE ECON. AND THE STATE, UNIV. CHI. BOOTH SCH. OF BUS., REPORT 98–99 (2019), https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf?la=EN&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C [https://perma.cc/GZL6-NC3N]; DIG. COMPETITION EXPERT PANEL, UNLOCKING DIGITAL COMPETITION 8 (2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf [https://perma.cc/9VUT-QTCJ].

94 *See* David S. Evans & Richard Schmalensee, *Markets with Two-Sided Platforms*, 1 ISSUES COMPETITION L. & POL'Y 667, 667–93 (2008); Justus Haucap & Ulrich Heimeshoff, *Google, Facebook, Amazon, eBay: Is the Internet Driving Competition or Market Monopolization?*, 11

sult in market concentration, first-mover advantages for incumbent firms, and barriers to entry into the relevant markets.[95]

More specifically, network effects in online platform markets consist of the increase in the value of the network to all participants that accrues from each additional user.[96] These are "direct network effects."[97] Such effects often make access to the digital platforms essential to market penetration and result in high levels of market concentration.[98] "Indirect network effects" can also occur, whereby the increased size of the network attracts users on the other market side (potential buyers/suppliers).[99] These twin effects tend to result in "winner-take-all" outcomes, whereby a single network becomes dominant in each relevant market.[100] Additionally, the "scale without mass" feature of digital platforms enables them to add vast numbers of new users rapidly and at negligible cost.[101]

High switching costs tend to produce customer lock-in, frustrating new entrants seeking to expand in a market.[102] The more consumers use and provide personal data to online services, the more costly and difficult it becomes to switch away and transfer their data.[103] While switching costs may be not relevant to search engines, as switching away does not entail major costs, they are relevant to individual users of social networks such as Facebook and auction platforms such as eBay.[104]

Relatedly, the role of two-sided or multisided platforms in digital markets has come under increased scrutiny.[105] By its very nature, a

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INT'L ECON. & ECON. POL'Y 49, 50 (2014); ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 88, at 135.

95 *See* ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 88, at 135–36.

96 *See* Haucap & Heimeshoff, *supra* note 94, at 51.

97 *Id.*

98 *See id.*

99 *See id.* ("Taking *eBay* as an illustration, more potential buyers attract more sellers to offer goods on *eBay* as (a) the likelihood to sell their goods increases with the number of potential buyers and (b) competition among buyers for the good will be more intense and, therefore, auction revenues are likely to be higher. A higher number of sellers and an increased variety of goods offered, in turn, make the trading platform more attractive for more potential buyers." (citation omitted)).

100 ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 88, at 135; *see* Haucap & Heimeshoff, *supra* note 94, at 51.

101 *See* ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 88, at 135.

102 *Id.* at 136.

103 *See id.*

104 *See* Haucap & Heimeshoff, *supra* note 94, at 54.

105 See, for example, the investigation and commitments entered by the Dutch, French, German, and Swiss competition authorities regarding clauses implemented by online booking platforms, as well as the EU COMPETITION AUTHS., REPORT ON THE MONITORING EXERCISE

two-sided market involves facilitating interactions with, or the provision of services to, distinct groups of customers.[106] The value added of such platforms lies specifically in the fact that, by coordinating the offers and demands of a large number of users, mutual positive network externalities are created.[107] However, at the same time, participating firms may try to maximize the advantages accruing to themselves by imposing terms or clauses with potential anticompetitive effects.[108] Moreover, multisided platforms may present further issues as "there is no consensus on whether the two sides of a platform are in the same market and in which circumstances,"[109] making it difficult to determine whether possible anticompetitive effects are outweighed by efficiencies realized.

Data is also becoming a central focus of competition law enforcers. A key set of questions concerns the extent to which access to data provides a competitive advantage, obstructing new entry and leading the incumbent to a position of dominance.[110] Though theoretical arguments and empirical evidence on this are still scarce, leading antitrust enforcers are already looking deeper into possible infringements, having in some cases already issued decisions and fined tech giants on this matter.

Box 3. Data and Antitrust Concerns in Different Jurisdictions

The German Bundeskartellamt (Federal Cartel Office) investigated Facebook's data processing policies under the suspicion that they infringed competition law as an exploitative abuse.[111] Following an appeal to the Düsseldorf Higher Regional Court, Facebook obtained a temporary injunction which

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Carried Out in the Online Hotel Booking Sector (2016), https://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf [https://perma.cc/4TTU-9F4C].

106 Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. Econ. 645, 646 (2006).

107 *See* Org. for Econ. Co-operation & Dev., Two-Sided Markets 11 (2009), https://www.oecd.org/daf/competition/44445730.pdf [https://perma.cc/Q7D3-RLHX].

108 *See* Org. for Econ. Co-operation & Dev., Rethinking Antitrust Tools for Multi-Sided Platforms 101–22 (2018), https://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf [https://perma.cc/Z8SG-3H2N]. An early example of a competition policy intervention concerning two-sided markets in Canada was the *Interac* case. *See* Robert D. Anderson & Brian Rivard, *Antitrust Policy Towards EFT Networks: The Canadian Experience in the* Interac *Case*, 67 Antitrust L.J. 389, 392 (1999).

109 World Econ. F., Competition Policy in a Globalized, Digitalized Economy 9–10 (2019), http://www3.weforum.org/docs/WEF_Competition_Policy_in_a_Globalized_Digitalized_Economy_Report.pdf [https://perma.cc/2PAN-K9D8].

110 *See id.* at 9–10.

111 *See id.* at 11.

suspended the Bundeskartellamt's decision.[112] In June 2020, the Federal Court of Justice upheld the Bundeskartellamt's concerns, observing that "[t]here are no serious doubts about Facebook's dominant position in the German social media network market, or that Facebook is abusing its dominant position with the terms of use prohibited by the Federal Cartel Office."[113]

Additionally, E.U. competition regulators have opened an investigation into Google's data collection practices, and they have sent Google questionnaires as part of their preliminary assessment.[114]

In the United States, the FTC is also examining questions regarding the interplay between data and competition law. Recently, it reached a record-breaking settlement with Facebook, imposing the largest fine for a privacy violation in U.S. history.[115] The $5 billion penalty results from allegations that the social media giant violated an existing FTC order by misleading its users about the ways app developers and advertisers could obtain their personal data.[116]

Big data processing can also give rise to concerns regarding possible collusive effects. In particular, reactive algorithmic pricing based on data analytics has been shown to produce effects similar to explicit coordination. A recent background note by the OECD Secretariat observed that, although it is still not completely clear, in markets prone to collusion, high-speed trial-and-error is likely to facilitate such outcomes.[117] For example, the so-called "tit-for-tat" algorithm—a strategy in which firms copy their competitor's actions from a previous period—can often lead to cooperative behavior.[118] Although, in terms of technology, an artificial intelligence ("AI") sophisticated enough to take over business decisions arguably does not yet exist, the antitrust

112 *See id.* at 21 n.89.

113 Bundesgerichtschof [BGH] [Federal Court of Justice] June 23, 2020, 23 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 1, 22 (Ger.), https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=BGh&Art=en&sid=85cc78a3e172a98f27d14ff1caa04715&nr=109506&pos=3&anz=85 [https://perma.cc/8AL4-E2SL], *translated in German Legal Ruling Deals Facebook Blow in Data Use*, ASSOCIATED PRESS (June 23, 2020), https://apnews.com/58fc6fe8606d7e22bf3e8a06921f7a70 [https://perma.cc/UD3R-CTQB].

114 Foo Yun Chee, *Exclusive: EU Antitrust Regulators Say They Are Investigating Google's Data Collection*, REUTERS (November 30, 2019, 4:02 PM), https://www.reuters.com/article/us-eu-alphabet-antitrust-exclusive-idUSKBN1Y40NX?taid=5de2dce916deae000192d613&utm_campaign=trueAnthem:+Trending+Content&utm_medium=trueAnthem&utm_source=twitter [https://perma.cc/3EC2-XYAU].

115 Press Release, Fed. Trade Comm'n, FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook (July 24, 2019), https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions [https://perma.cc/X9T2-AMLZ].

116 *See id.*

117 ORG. FOR ECON. CO-OPERATION & DEV., ALGORITHMS AND COLLUSION 30 (2017), https://one.oecd.org/document/DAF/COMP(2017)4/en/pdf [https://perma.cc/693T-UEEK].

118 Ai Deng, *What Do We Know About Algorithmic Tacit Collusion?*, ANTITRUST, Fall 2018, at 88, 89.

community needs to keep an eye on AI developments in order to be proactive and prepared to address challenges ahead.[119]

Competition in digital markets also differs from many traditional markets because it tends to be based primarily on innovation rather than pricing.[120] This is sometimes referred to as Schumpeterian competition, in which new players successively replace incumbent firms through innovation and the successful deployment of new technology.[121] When competitive dynamics are framed this way, it is sometimes suggested that such anticompetitive effects are unlikely to be long-lasting.[122] Experience indicates, though, that significant welfare losses may occur before one platform or entrenched business model is replaced by another.[123]

The OECD identifies the following characteristics as being critical to competition law enforcement and competition advocacy in digital markets: (1) the emergence of data as a new primary competitive asset; (2) privacy as an important component of analysis during merger reviews; and (3) increased difficulties in defining the relevant market[124] and market power due to new relationships between commercial markets for data and nominally free end-user products.[125] A variety of competition law provisions may be relevant, including provisions relating to mergers, abuses of a dominant position, and cartels and anticompetitive agreements.[126] Further issues arise in the application of intellectual property rights ("IPRs") and technological protection measures to digital content, which may, for instance, lead to geoblocking (limitations on distribution and price differentiation even in

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119 *See id.* at 94.

120 *See* Julian Wright, *One-Sided Logic in Two-Sided Markets*, 3 REV. NETWORK ECON. 44, 60–61 (2004); Haucap & Heimeshoff, *supra* note 94, at 50.

121 *See* ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 88, at 137; Haucap and Heimeshoff, *supra* note 94, at 50.

122 Thomas M. Jorde & David J. Teece, *Innovation, Cooperation, and Antitrust*, *in* ANTITRUST, INNOVATION, AND COMPETITIVENESS 48 (Thomas M. Jorde & David J. Teece eds., 1992).

123 *See* Joseph Farrell & Michael L. Katz, *Competition or Predation? Schumpeterian Rivalry in Network Markets* 3 (Competition Policy Ctr., Working Paper No. CPC01-23, 2001), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=507084 [https://perma.cc/2QZ7-UU9G].

124 One possible alternative suggested by the OECD is to use a small but significant nontransitory decrease in quality ("SSNDQ") test. For more information, see ORG. FOR ECON. CO-OPERATION & DEV., THE ROLE AND MEASUREMENT OF QUALITY IN COMPETITION ANALYSIS 8–9 (2013), http://www.oecd.org/daf/competition/Quality-in-competition-analysis-2013.pdf [https://perma.cc/45QU-FX7S].

125 ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 88, at 137–38.

126 *See id.*

a single market such as the European Union)[127] and restrictions on downstream or secondary sales (the question of so-called "digital exhaustion").[128] In this regard, IPRs may have an anticompetitive effect in markets for digital content, though this is not necessarily the case.[129]

Concerns regarding possible anticompetitive effects associated with digital markets have given rise to several important competition law enforcement cases in recent years, spanning a range of major jurisdictions. Several of these involve the active enforcement role of the European Commission.[130] In addition, competition enforcement agencies increasingly are addressing concerns related to the digital economy through their advocacy efforts.[131]

Box 4. E.U. Enforcement Activities in Digital Markets: Microsoft, Intel, and the Google Saga[132]

In the Microsoft Media Player cases, the European Commission "required that Microsoft offer for sale a version of its Windows Operating System that did not contain the Windows Media Player;" mandated disclosure of information necessary for competitive access purposes; and imposed a fine of €497 million (about $613 million).[133] These remedies went beyond those imposed in related U.S. litigation, generating critical feedback from the United States.[134]

In the Intel case, in 2017, the Court of Justice of the European Union overruled a decision of the General Court of the European Union, which had upheld a fine of €1.06 billion that the Commission had imposed regarding a loyalty and exclusivity rebate scheme.[135] Additionally, it enunciated a new effects-based approach for the analysis of such practices.[136] The case has been

127 *See Geo-blocking*, Eur. Comm'n, https://ec.europa.eu/digital-single-market/en/geo-blocking-digital-single-market [https://perma.cc/YP43-D2WU].

128 *See generally* Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. Rev. 889 (2011) (discussing concept of digital exhaustion). For more on the interface of IPRs and competition law and policy, see *infra* Section I.D.

129 *See Final Report on the E-commerce Sector Inquiry*, at 16, COM (2017) 229 final (May 10, 2017).

130 *See infra* Box 4.

131 *See infra* Box 5.

132 *See* Anderson et al., *supra* note 91, at 23–24.

133 Anderson et al., *supra* note 91, at 23; *see* Case T-201/04, Microsoft Corp. v. Comm'n, 2007 E.C.R. II-3619.

134 *See* Robert D. Anderson, *Systemic Implications of Deeper Transatlantic Convergence in Competition/Antitrust Policy*, *in* Systemic Implications of Transatlantic Regulatory Cooperation and Competition 197, 229 (Simon J. Evenett & Robert M. Stern eds., 2011); Anderson et al., *supra* note 91, at 23.

135 Anderson et al., *supra* note 91, at 23; Ian Giles & Jay Modrall, *Major Victory for Intel as CJEU Sends Case Back to General Court for Re-examination*, Kluwer Competition L. Blog (Sept. 12, 2017), http://competitionlawblog.kluwercompetitionlaw.com/2017/09/12/major-victory-intel-cjeu-sends-case-back-general-court-re-examination/ [https://perma.cc/9G5K-YLVT].

136 *See* Anderson et al., *supra* note 91, at 24; Giles & Modrall, *supra* note 135.

remitted back to the General Court, where Intel has a new chance to convince the General Court to overturn the decision or reduce the fine.[137]

In the Google Shopping case,[138] the European Commission, imposed a fine of €2.4billion, finding that:

Google abused its market dominance as a search engine by promoting its own comparison shopping service in its search results, and demoting those of competitors. . . . It [thereby] denied other companies the chance to compete on the merits and to innovate. And most importantly, it denied European consumers a genuine choice of service and the full benefits of innovation.[139]

U.S. commentary on the decision highlighted doubts that such a case could be brought successfully in the United States: "Pursuing a U.S. case against Google would be more complicated than in Europe, antitrust experts said, because of a higher standard of evidence needed to prove wrongdoing by the search giant."[140] Separately, the Federal Antimonopoly Service in the Russia Federation imposed a fine of 438 million rubles (about €7.3 million) in 2017 for related conduct.[141]

In the Google/Android case, in July 2018, the European Commission found that Google imposed illegal restrictions on Android device manufacturers and mobile network operators to entrench its dominant position in general internet searches.[142] Specifically, it held that Google restricted competition through

137 Case C-413/14, Intel Corp. v. Comm'n, ECLI:EU:C:2016:788 (Oct. 20, 2016); *see* Laurent De Muyter & Alexandre G. Verheyden, *Rewarding Loyalty: ECJ Holds that Loyalty Rebates Do Not Per Se Restrict Competition*, KLUWER COMPETITION L. BLOG (Sept. 28, 2017), http://competitionlawblog.kluwercompetitionlaw.com/2017/09/28/rewarding-loyalty-ecj-holds-loyalty-rebates-not-per-se-restrict-competition/ [https://perma.cc/MN92-ARW4].

138 *See* 2018 O.J. (C 9) 11.

139 European Commission Press Release IP/17/1784, Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service (June 27, 2017), http://europa.eu/rapid/press-release_IP-17-1784_en.htm [https://perma.cc/U23V-99Y6].

140 Michael Birnbaum & Brian Fung, *E.U. Fines Google a Record $2.7 Billion in Antitrust Case Over Search Results*, WASH. POST (June 27, 2017, 12:29 PM), https://www.washingtonpost.com/world/eu-announces-record-27-billion-antitrust-fine-on-google-over-search-results/2017/06/27/1f7c475e-5b20-11e7-8e2f-ef443171f6bd_story.html?utm_term=.F9322df28277 [https://perma.cc/L97E-6GE3]. In January 2013, the FTC declined to prosecute Google after an extensive investigation of the company's online search practices. Press Release, Fed. Trade Comm'n, Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns in the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search (Jan. 3, 2013), https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc [https://perma.cc/SU6Z-UZVZ]. In lieu of an enforceable order, the agency accepted a letter in which Google made "voluntary commitments" to adjust various business practices. *See* Letter from Michael J. Lawrence, Google LLC, to Haidee Schwartz, Acting Deputy Dir., Bureau of Competition, Fed. Trade Comm'n (Dec. 22, 2017), https://www.ftc.gov/system/files/documents/closing_letters/nid/google_letter.pdf [https://perma.cc/VL8E-YH8U] (reporting on implementation of representations contained in Letter from David Drummond, Senior Vice President for Corp. Dev. and Chief Legal Officer, Google LLC, to Jon Leibowitz, Chairman, Fed. Trade Comm'n (Dec. 27, 2012)).

141 *FAS Russia Reaches Settlement with Google*, FED. ANTIMONOPOLY SERV. RUSSIAN FED'N (Apr. 17, 2017), http://en.fas.gov.ru/press-center/news/detail.html?id=49774 [https://perma.cc/3X3D-FKTU].

142 European Commission Press Release IP/18/4581, Antitrust: Commission Fines Google

three separate categories of illegal practices by tying Google's search and browser apps, making certain payments conditional on exclusive pre-installation of Google Search, and obstructing the development and distribution of competing operating systems.[143] Commentators have queried whether the decision is consistent with the interest of consumers.[144] Subsequently, Google appealed to the General Court.[145]

In Google/AdSense, the European Commission "fined Google €1.49 billion [1.29% of Google's turnover in 2018] for [the] illegal misuse of its dominant position in the market for the brokering of online search [advertisements]," in breach of E.U. antitrust rules.[146] The Commission found that Google "abused its market dominance by imposing a number of restrictive clauses in contracts with third-party websites which prevented Google's rivals from placing their search adverts on these websites."[147] As in the previous two cases, Google has filed an appeal before the General Court.[148]

In these and other cases, the E.U. Commission has manifestly gone beyond prevailing interpretations of U.S. jurisprudence governing single-firm exclusionary conduct.[149] According to Kovacic:

> The European Union has not encountered the limitations faced by the U.S. antitrust agencies in using its law enforcement powers to address claims of exclusion involving intellectual property. EU doctrine governing abuse of dominance sets more stringent limits upon companies than prevailing ju-

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€4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine (July 18, 2018), http://europa.eu/rapid/press-release_IP-18-4581_en.htm [https://perma.cc/4PD8-DJZA].

143 *See* Friso Bostoen, *The Commission's Android Decision: Google Cements its Dominance in Search . . . to the Benefit of Consumers?*, LEXXION (July 27, 2018), https://www.lexxion.eu/en/coreblogpost/google-android-decision/ [https://perma.cc/9K2G-UGZ8].

144 *See, e.g.*, *id.*; Pinar Akman, *Will the European Commission's Google Android Decision Benefit Consumers?*, TRUTH ON THE MARKET (July 19, 2018), https://truthonthemarket.com/2018/07/19/will-the-european-commissions-google-android-decision-benefit-consumers/ [https://perma.cc/RR55-M4BR].

145 Sam Schechner, *Google Appeals $5 Billion EU Fine in Android Case*, WALL STREET J. (Oct. 9, 2018, 2:58 PM), https://www.wsj.com/articles/google-appeals-5-billion-eu-fine-in-android-case-1539109713 [https://perma.cc/X2P8-AMX7].

146 European Commission Press Release IP/19/1770, Antitrust: Commission Fines Google €1.49 Billion for Abusive Practices in Online Advertising (Mar. 20, 2019), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770 [https://perma.cc/L8U2-VLLY].

147 *Id.*

148 *See* Jane Wakefield, *Google Starts Appeal Against £2bn Shopping Fine*, BBC NEWS (Feb. 12, 2020), https://www.bbc.com/news/technology-51462397#:~:text=Google's%20appeal%20against%20a%20huge,the%20General%20Court%20in%20Luxembourg [https://perma.cc/EXX4-SMHD].

149 *See* Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Good Times, Bad Times, Trust Will Take Us Far: Competition Enforcement and the Relationship Between Washington and Brussels (Feb. 21, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-college-europe-brussels [https://perma.cc/4D85-F76Y].

> dicial interpretations of the Sherman, Clayton, and FTC Acts. In *Microsoft* and *Intel*, the European Commission obtained remedies notably more substantial than DOJ or the FTC attained in their cases, respectively. In *Google*, the European Commission seems poised to gain concessions related to search practices that emerged from the FTC's inquiry unscathed.[150]

Notwithstanding the above, two recent developments potentially signal a strengthened approach or approaches to the enforcement of U.S. antitrust laws concerning monopolization in the digital sector. First, on October 6, 2020, the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law, released a lengthy staff report criticizing Google, Apple, Facebook, and Amazon (sometimes referred to as "GAFA") for alleged violations of U.S. antitrust laws, including buying out competitors, giving preferential treatment to their own services, and exercising market power vis-à-vis smaller businesses using their platforms.[151] The report proposes that the U.S. Congress consider passing rules that would require large firms to offer equal terms to companies selling products and services on their platforms.[152] It also recommends barring dominant platforms from competing in "adjacent lines of business" in which they possess significant commercial advantages.[153] The report further proposes that Congress define a new standard for antitrust violations, affirming that the laws are "designed to protect not just consumers, but also workers, entrepreneurs, independent businesses, open markets, a fair economy, and democratic ideals."[154] If put into effect, these recommendations would significantly strengthen law enforcement by U.S. antitrust authorities in digital markets, create new mechanisms for ex ante regulation of dominant tech platforms, and, more generally, catalyze a potentially significant reorientation of U.S. antitrust law.

Second, on October 20, 2020, the U.S. Department of Justice—supported by eleven state attorneys general—filed a civil antitrust

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150 William E. Kovacic, *From* Microsoft *to* Google*: Intellectual Property, High Technology, and the Reorientation of U.S. Competition Policy and Practice*, 23 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 645, 652 (2013).

151 MAJORITY STAFF OF S. COMM. ON THE JUDICIARY, SUBCOMM. ON ANTITRUST, COMMERCIAL & ADMINISTRATIVE LAW, 116TH CONG., REP. AND RECOMMENDATIONS ON INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 6 (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf [https://perma.cc/P3QX-X5L2].

152 *Id.* at 20.

153 *Id.*

154 *Id.* at 392.

lawsuit in the U.S. District Court for the District of Columbia to enjoin Google from unlawfully maintaining monopolies through alleged exclusionary practices in the search and search advertising markets.[155] The Complaint alleges that Google

> has entered into a series of exclusionary agreements that collectively lock up the primary avenues through which users access search engines, and thus the internet, by requiring that Google be set as the preset default general search engine on billions of mobile devices and computers worldwide and, in many cases, prohibiting preinstallation of a competitor. In particular, the Complaint alleges that Google has unlawfully maintained monopolies in search and search advertising by:
> - Entering into exclusivity agreements that forbid preinstallation of any competing search service.
> - Entering into tying and other arrangements that force preinstallation of its search applications in prime locations on mobile devices and make them undeletable, regardless of consumer preference.
> - Entering into long-term agreements with Apple that require Google to be the default—and de facto exclusive—general search engine on Apple's popular Safari browser and other Apple search tools.
> - Generally using monopoly profits to buy preferential treatment for its search engine on devices, web browsers, and other search access points, creating a continuous and self-reinforcing cycle of monopolization.[156]

A prominent observer of U.S. antitrust policy, Tim Wu, has suggested that:

> The Google lawsuit may . . . be just the beginning. It may very well be that Facebook faces its own complaint for its own alleged misdeeds. Apple could be added as Google's coconspirator and Amazon could face new regulatory legislation. If so, the next several years may very well consist of something close to a full-out power struggle between the U.S. government and the country's most powerful tech companies.[157]

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155 Complaint, United States v. Google LLC, No. 1:20-cv-03010, 2020 WL 6152114 (D.D.C. Oct. 20, 2020).

156 Press Release, U.S. Dep't of Justice, Justice Department Sues Monopolist Google For Violating Antitrust Laws (Oct. 20, 2020), https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws [https://perma.cc/SC5Z-AZFV]; *accord* Complaint, *supra* note 155, ¶¶ 4, 10, 45, 56, 147.

157 Tim Wu, *The Google Antitrust Suit Could Be the Start of a Full-out Power Struggle with*

If so, this would represent a remarkable new thrust for the enforcement of U.S. competition law in digital markets. The developments that Professor Wu describes have set in motion what promises to be a contentious debate about the future of U.S. oversight of dominant firm conduct, in digital markets and in other sectors of the economy.[158] Commenting upon the filing of DOJ's monopolization complaint against his company, Kent Walker, Google's Chief Legal Officer, set out a theme that will figure prominently in that debate:

> People use Google because they choose to, not because they're forced to, or because they can't find alternatives. . . . Like countless other businesses, we pay to promote our services, just like a cereal brand might pay a supermarket to stock its products at the end of a row or on a shelf at eye level.[159]

The foregoing encapsulates the conflicting perspectives implicated by these issues. The aim of this Article is not to resolve the modern policy debate, but rather to identify implications that the judicial and/or policy decisions that are ultimately taken may have for the global economy.

Competition authorities have taken a similar interest in matters relating to mergers involving major digital platforms. For example, during the last decade, Google, Amazon, Facebook, Microsoft, and Apple were involved in more than 400 acquisitions globally.[160] Although mergers between established firms and start-ups can benefit consumers, commentators have expressed concerns that bigger tech companies are acquiring up-and-coming start-ups that are potential future competitors.[161]

In sum, the successful operation of digital markets in the interest of consumers as well as producers seems very likely to implicate significant activities on the part of national competition authorities. At

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Big Tech, GLOBE & MAIL (Oct. 23, 2020), https://www.theglobeandmail.com/opinion/article-the-google-antitrust-suit-could-be-the-start-of-a-full-out-power/ [https://perma.cc/HQ2X-76UF].

158 *See, e.g.*, Mark Jamison, *House Antitrust Report on Big Tech Recommends Punishing Business Success*, AEIDEAS (Oct. 8, 2020), https://www.aei.org/technology-and-innovation/house-antitrust-report-on-big-tech-recommends-punishing-business-success/ [https://perma.cc/72Y6-YDJV] (criticizing the reasoning and recommendations of the Majority Staff Report of the House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law).

159 Kent Walker, *A Deeply Flawed Lawsuit that Would Do Nothing to Help Consumers*, GOOGLE: THE KEYWORD (Oct. 20, 2020), https://blog.google/outreach-initiatives/public-policy/response-doj/ [https://perma.cc/4J2G-MYSV].

160 WORLD ECON. F., *supra* note 109, at 12. Some major notified acquisitions include Facebook-Instagram, Facebook-WhatsApp, and Google-DoubleClick. *Id.*

161 *Id.*

the same time, the proliferation of cases and relevant policy initiatives carries the potential for coordination failures and even outright conflict.[162] Although international coordination in this specific subject area of competition policy as it relates to digital markets is, perhaps, in a relatively early phase, some countries have already recognized the importance of cooperation in this area and called for forward-looking discussions in relevant international fora.[163]

At the same time, it is evident that jurisdictions such as the European Union and the United Kingdom are moving ahead relatively swiftly with plans to establish new regulatory mechanisms—a Digital Services Act in the European Union,[164] and a Digital Markets Unit in the United Kingdom[165]—and other jurisdictions, including the United States, may be poised to create new regulatory frameworks of their own. These initiatives seem to be outrunning efforts to achieve fuller cross-border discussion and consensus building about the appropriate content of and methods for digital platform regulation. It is conceivable that, unless major jurisdictions attach more urgency to meeting the challenges of international cooperation, new frameworks, with the potential for major cross-border spillover effects, will come into effect within the next two years in individual influential jurisdictions without the benefit for the type of international engagement that this Article suggests is desirable.

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162 More recently, the current U.S. Assistant Attorney General for Antitrust has called for continuing dialogue in this area, noting that "European competition law still imposes a 'special duty' [to safeguard competition] on dominant market players, while we in the U.S. do not believe any such duty exists." *See* Delrahim, *supra* note 149.

163 On March 21–23, 2018, during the ICN Conference, representatives of several competition agencies "emphasised the role of competition in the modern-day economy, placing an emphasis on competition in the digital world." Press Release, Int'l Competition Network, 2018 ICN Annual Conference 1 (April 2, 2018), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/ICN2018PR.pdf [https://perma.cc/ZX4X-L8TC]. It was highlighted that "[d]ue to digitalisation and globalisation, competition agencies increasingly have to deal with different types of markets and changing business models." *Id.* at 2. All speakers agreed "on the need to conduct market studies to understand digital markets better." *Id.* For a related perspective, see Richard A. Epstein & Michael S. Greve, *Introduction: The Intractable Problem of Antitrust Jurisdiction*, *in* COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY 1 (Richard A. Epstein & Michael S. Greve eds., 2004).

164 *See The Digital Services Act Package*, EUR. COMM'N, https://ec.europa.eu/digital-single-market/en/digital-services-act-package [https://perma.cc/8GPQ-79UT].

165 *See* COMPETITION & MARKETS AUTH., ONLINE PLATFORMS AND DIGITAL ADVERTISING: MARKET STUDY FINAL REPORT 5 (2020), https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf [https://perma.cc/5T24-ZY83] (recommending the creation of a Digital Markets Unit to enforce anticompetition regulations in the United Kingdom).

Box 5. Examples of Competition Advocacy Regarding Digitalization

On September 18, 2017, the Canadian Competition Bureau published a report entitled *Big Data and Innovation: Implications for Competition Policy in Canada*.[166] The report highlights that global developments in technology raise important challenges related to competition law enforcement, for example, by changing the ways in which data is harnessed and innovation driven across industries.[167] However, the Bureau ultimately determined that "[t]he key principles of competition law enforcement remain valid in big data investigations."[168] Accordingly, the Bureau highlighted that fundamental competition law enforcement principles will continue to guide its investigations and analysis while it will adapt its tools and methods to this evolving area.[169]

In 2017, the European Commission published its *Final Report on the E-commerce Sector Inquiry* in the context of its "Digital Single Market Strategy."[170] The report observed that certain practices may restrict competition by unduly limiting how products are distributed throughout the European Union, potentially limiting consumer choice and preventing lower prices online.[171] As noted by the Directorate-General for Competition, the inquiry's "findings allow the Commission to target its enforcement of EU antitrust rules in e-commerce markets."[172] This is particularly relevant in the light of recent enforcement cases such as *Google*, *Amazon*, and *Facebook*.[173]

Also in 2017, the Japanese Fair Trade Commission conducted a study on data and competition policy.[174] The study indicates possible "risk[s] of competition being impeded and the interests of consumers being harmed as a result" of "[concentration of big data] in certain enterprises."[175] While the Study Group highlights that Japan's Antimonopoly Act "is applicable to most competition concerns [related to] the collection and utilization of data," some issues such as "digital cartels," and the "monopolization and oligopolization of digital platforms," remain.[176]

The Executive Order of the President of the Russian Federation No. 618 "On State Competition Policy Guidelines," accompanied by the National Plan

166 Competition Bureau Can., Big Data and Innovation: Key Themes for Competition Policy in Canada 4 (2018), https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CB-Report-BigData-Eng.pdf/$file/CB-Report-BigData-Eng.pdf [https://perma.cc/5CLZ-BYHZ].

167 *Id.*

168 *Id.*

169 *Id.*

170 *Final Report on the E-commerce Sector Inquiry*, at 3, COM (2017) 229 final (May 10, 2017).

171 *See id.* at 5–6.

172 European Comm'n, EU Competition Policy in Action 21 (2017), https://publications.europa.eu/en/publication-detail/-/publication/b11a5d15-c5ca-11e7-9b01-01aa75ed71a1 [https://perma.cc/D4NK-259J].

173 *See* 2018 J.O. (C 9) 11; 2017 J.O. (C 264) 7; Commission Decision in Case No. M.8228—Facebook/WhatsApp, COM (2017) 3192 final (May 17, 2017).

174 Japan Fair Trade Comm'n, Report of Study Group on Data and Competition Policy 1 (2017), https://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170606.html [https://perma.cc/7GNB-6KKX].

175 *Id.* at 66.

176 *Id.*

on Competition Policy Development in the Russian Federation for the period of 2018–2020, lists a series of reforms intended to improve antimonopoly regulation in order to effectively address anticompetitive conduct on cross-border markets in light of digitalization and globalization.[177] These reforms are consistent with Russia's recent enforcement activities in the *Google* case[178] and the *Bayer AG/Monsanto* merger in which considerations related to "big data" also figured importantly.[179]

In July 2020, the U.K. Competition and Markets Authority published its final report on Online Platforms and Digital Advertising.[180] Among other recommendations, the report endorsed the establishment of a new regulatory mechanism—a Digital Markets Unit—to oversee the operations of dominant online platforms, including the promulgation and enforcement of a binding code of conduct.[181]

D. The Broadening Application of Competition Policy Vis-à-Vis Intellectual Property Rights in the Global Economy

Today, competition policy is a powerful tool impacting global commerce and conditions for innovation, technology transfer, and the exercise of IPRs. Unlike in decades past, concern with maintaining an appropriate balance between IP and competition policy now spans across developing and emerging jurisdictions, including the BRICS economies,[182] as manifested in relevant guidelines and advocacy efforts.[183] Furthermore, competition agencies in a range of jurisdictions have engaged in vigorous enforcement activities relating to anticompetitive abuses of dominant positions that also implicate the exercise of IPRs.[184]

The evolution of competition policies with respect to intellectual property has a long and interesting history. Initially, the pioneers in this area, especially the United States, Canada, and the European Union, focused on licensing practices as the primary area of inter-

177 *See* Ob Osnovneh Napravleneyeh Gosudarstvennoyeh Politiki Po Razvitiu Konkurenchii [Decree of the President of the Russian Federation on State Competition Policy Guidelines], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2017, No. 52, Item 8111.

178 *See FAS Russia Reaches Settlement with Google*, *supra* note 141.

179 Vassily Rudomino et al., *Bayer/Monsanto Transaction: Brand New Approach of FAS Russia to Merger Control*, KLUWER COMPETITION L. BLOG (July 11, 2018), http://competitionlawblog.kluwercompetitionlaw.com/2018/07/11/bayermonsanto-transaction-brand-new-approach-fas-russia-merger-control/ [https://perma.cc/73HS-ZH5H].

180 COMPETITION & MARKETS AUTH., *supra* note 165.

181 *Id.* at 5.

182 The BRICS economies comprise Brazil, the Russian Federation, India, China, and South Africa.

183 *See* Anderson at al., *supra* note 91, at 5.

184 *Id.*

est.[185] In the case of Canada and the United States, a significant degree of cross-jurisdictional learning was evident from the outset, resulting, following a period in which both jurisdictions applied rigid per se rules, in an economics-based rule-of-reason approach.[186] In the European Union, by contrast, competition policy in this area focused on the overriding objective of creating a single European market.[187] This was a key concern, for example, underlying the first set of block exemptions for patent and know-how licenses adopted in 1984.[188] Responding to criticism of this approach, subsequent revisions to the block exemptions increasingly placed greater weight on economics-based approaches, while retaining a focus on preserving and strengthening the single market.[189] In Japan and Korea, initial policy frameworks emphasized industrial policy objectives, particularly, the diffusion of new technologies.[190] Subsequently, those jurisdictions have also progressed towards a more consumer welfare-focused approach akin to the United States, Canadian, and European Union approaches in its effects.[191] An important point of convergence in these respective approaches is the recognition that while IPRs provide the power to exclude, they do not necessarily confer market power upon their owners.[192]

To a striking degree, the treatment of licensing practices is now a settled issue in the foregoing jurisdictions. Ongoing policy evolution has focused rather on a newer set of issues including anticompetitive patent settlements, standard essential patents, and the conduct of Patent Assertion Entities.[193] Over time, these trends are impacting and

185 *See* Robert D. Anderson & William E. Kovacic, *The Application of Competition Policy Vis-à-Vis Intellectual Property Rights: The Evolution of Thought Underlying Policy Change* 3 (World Trade Org., Working Paper No. ERSD-2017-13, 2017), https://www.wto.org/english/res_e/reser_e/ersd201713_e.htm [https://perma.cc/CC55-HHAG].

186 *See id.*

187 *See* Anderson et al., *supra* note 91, at 17.

188 *See* Commission Regulation 2349/84 of 23 July 1983 on the Application of Article 85(3) of the Treaty to Certain Categories of Patent Licensing Agreements, 1984 O.J. (L 219) 15; Commission Regulation 556/89 of 30 Nov. 1988 on the Application of Article 85(3) of the Treaty to Certain Categories of Know-how Licensing Agreements, 1988 O.J. (L 61) 1; *see also* Valentine Korah, *EEC Licensing of Intellectual Property*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 55, 65 (1993) (discussing the 1984 block exemptions for patent and know-how licenses).

189 *See* Anderson et al., *supra* note 91, at 17; Anderson & Kovacic, *supra* note 185, at 11.

190 *See* Anderson et al., *supra* note 91, at 31.

191 *See id.*

192 *See, e.g.*, *id.* at 8, 37.

193 *See id.* at 5.

seem likely to impact a broad range of emerging and developing economies.[194]

An important related development consists in the engagement of new jurisdictions, particularly, though not exclusively, the BRICS economies, with policy initiatives and applications in this area. That there is limited jurisprudence or enforcement experience to guide policy in this area in these jurisdictions is a complicating factor, however. Policies have emerged, either through an iterative process (such as in India), the evolving thinking of the competition authority (such as in Brazil, Russia, and South Africa), or from a top-down government mandate to develop relevant guidelines (such as in China).[195] In some of these jurisdictions, there are signs of a gradual movement toward more economics-based approaches as competition regimes have matured.[196]

This accretion of guidelines and policy initiatives at different stages of concretization and involving a wide range of individual jurisdictions, while manifesting a common overall concern and interest in the topic, also carries the potential for differences in the evolution of policies or even outright conflicts.[197] In our view, both competition policy and IP policy constitute policies for which a modicum of coordination across jurisdictions is warranted.[198] This is because remedies imposed by particular jurisdictions in relevant cases (e.g., providing for compulsory licensing) can have spillover effects in other jurisdictions (by facilitating access to relevant technology).[199] These effects have the potential to affect incentives for investment across jurisdictions.

The importance of minimum standards to ensure adequate protection for the rights of innovators while encouraging dissemination of new technologies and preventing free riding is a core underlying rationale of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement").[200] The case for international

194 For further analysis, see Anderson et al., *supra* note 91; *supra* text accompanying note 91.

195 *See* Anderson et al., *supra* note 91, at 64.

196 *See* Geeta Gouri, *Economic Evidence in Competition Law Enforcement in India*, *in* COMPETITION LAW ENFORCEMENT IN THE BRICS AND IN DEVELOPING COUNTRIES 223 (Frederic Jenny & Yannis Katsoulacos eds., 2016).

197 *See* Anderson et al., *supra* note 91, at 65.

198 *Id.*

199 *Id.*

200 Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement]; Robert D. Anderson et al., *The WTO TRIPS Agreement as*

coordination with respect to competition policy is to date less widely acknowledged than it is for IP. Nonetheless, the possibility of spillovers in competition law and policy is increasingly acknowledged, for example, with respect to varying stances across jurisdictions towards transnational mergers or abuses of dominant position.[201] The international dimension of maintaining competition in the technology sector, moreover, is echoed in the TRIPS Agreement's recognition that, as a remedy for anticompetitive behavior, the compulsory licensing of patents need not be predominantly authorized for the domestic market only.[202]

a Platform for Application of Competition Policy to the Contemporary Knowledge Economy, *in* COMPETITION POLICY AND INTELLECTUAL PROPERTY IN TODAY'S GLOBAL ECONOMY (Robert D. Anderson et al. eds., forthcoming 2021) (manuscript at 9) (on file with authors).

201 *See* Richard A. Epstein & Michael S. Greve, *Introduction: The Intractable Problem of Antitrust Jurisdiction*, *in* COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY 1, 26–27 (Richard A. Epstein & Michael S. Greve eds., 2004). In addition to negative spillovers (e.g., one jurisdiction or its enterprises being adversely affected by enforcement decisions taken in other jurisdictions), there can of course be important positive spillovers from competition law enforcement (e.g., anti-cartel enforcement in one jurisdiction also benefitting consumers in other jurisdictions in which the same cartels have been active).

202 *See* TRIPS Agreement, *supra* note 200, art. 31(k).

BOX 6. ANTICOMPETITIVE ABUSES OF DOMINANT POSITION THAT IMPLICATE IPRS: THE *QUALCOMM* CASE[203]

In the *Qualcomm* case, the European Commission fined Qualcomm €997 million for abusing its market dominance in LTE baseband chipsets by preventing rivals from competing in the market.[204] Antitrust regulators worldwide have charged and investigated Qualcomm for their allegedly anticompetitive practices.[205] Chinese authorities concluded that Qualcomm charged excessive or unreasonably high royalties through its refusal to supply a list of licensed patents and its practice of charging royalties for expired patents, mandated royalty-free grant backs for material patents, bundled SEPs and non-SEPs together, and charged relatively high royalty rates on the basis of the net wholesale selling price of each device, thus abusing its dominant market position.[206] Qualcomm was ordered to pay a fine of $975 million—eight percent of Qualcomm's 2013 revenue from the Chinese market—and was issued a corrective order.[207] This case attracted worldwide attention and arguably elevated China's profile as a jurisdiction actively enforcing anticompetition policy against dominant companies.[208] The remedy may have additional spillover effects outside China "where regulators, [some observers] warn, may re-examine Qualcomm's licensing practices."[209]

Concern with such spillovers largely underlies the rationale for the ongoing work in the area of international and comparative competition policy of the ICN, the OECD, and UNCTAD—organizations

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203 For more information on this matter, see Anderson et al., *supra* note 91, at 24, 48.

204 European Commission Press Release IP/18/421, Antitrust: Commission Fines Qualcomm _997 Million for Abuse of Dominant Market Position (Jan. 24, 2018), http://europa.eu/rapid/press-release_IP-18-421_en.htm [https://perma.cc/5RDG-MLQB].

205 In January 2017, the FTC filed a complaint in U.S. District Court for the Northern District of California alleging that Qualcomm had illegally monopolized markets for various microprocessors used in smart phones. *See* Reuters, *Qualcomm Accused of Anticompetitive Practices by F.T.C.*, N.Y. TIMES (Jan. 17, 2017), https://www.nytimes.com/2017/01/17/business/qualcomm-accused-of-anticompetitive-practices-by-ftc.html [https://perma.cc/BJG8-JG4Y]. In May 2019, the district court found that Qualcomm had engaged in illegal monopolization and enjoined the company from continuing the challenged practices, FTC v. Qualcomm Inc., 411 F. Supp. 3d 658 (N.D. Cal. 2019), *rev'd and vacated*, 969 F.3d 974 (9th Cir. 2020), but in August 2020 the U.S. Court of Appeals for the Ninth Circuit subsequently reversed the lower court's decision. FTC v. Qualcomm Inc., 969 F.3d 974 (9th Cir. 2020). The Ninth Circuit denied the FTC's request for en banc review. Order Denying Petition for Rehearing En Banc, FTC v. Qualcomm Inc., No. 19-16122 (9th Cir. Oct. 28, 2020); *accord* Mike Freeman, *Qualcomm Gets Another Victory in Antitrust Battle with Federal Trade Commission*, SAN DIEGO UNION TRIB. (Oct. 28, 2020, 4:29 PM), https://www.sandiegouniontribune.com/business/story/2020-10-28/qualcomm-gets-another-victory-in-anti-trust-battle-with-federal-trade-commission [https://perma.cc/2K4G-RT6T].

206 Anderson et al, *supra* note 91, at 48.

207 *Id.*

208 *See id.*

209 Tiernan Ray, *Qualcomm Rising: China Overhang Removed, Say Bulls; Spillover Risk, Say Bears*, BARRON'S (Feb. 10, 2015, 9:42 AM), https://www.barrons.com/articles/qualcomm-rising-china-overhang-removed-say-bulls-spillover-risk-say-bears-1423579349 [https://perma.cc/8JHK-D3PH].

whose analytical, policy development, and advocacy work has promoted domestic policy convergence to a significant degree.[210] Moreover, states have established the importance of the competition policy-IP interface in drafting their RTAs,[211] and many have called for further discussion of relevant issues within the ICN framework,[212] as well as in other relevant international organizations (including the WIPO Development Agenda framework and the WTO).[213] A provision of the WTO's TRIPS Agreement specifically mandating cooperation between jurisdictions in dealing with anticompetitive IP licensing practices also underscores the longstanding acceptance that some form of cooperation between jurisdictions may be necessary in this field.[214]

II. State-Owned Enterprises, Subsidies, and Competitive Neutrality

The role of State-Owned Enterprises ("SOEs") is a significant issue at the intersection of international trade and competition policy in today's global economy. Indeed, SOEs are at the center of current debates about China's trade and commercial relations with many Western economies.[215] SOEs comprise some of the world's largest multinational companies, participating in industries including finance, public utilities, manufacturing, mining, and petroleum.[216] Thus, they

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210 *See* Hollman & Kovacic, *supra* note 24, at 274–76, 286–88, 320; *see also infra* Section IV.B.

211 *See, e.g.*, Free Trade Agreement art. 111(1)(e), Chile-China, Nov. 18, 2005, http://fta.mofcom.gov.cn/chile/xieyi/freetradexieding2.pdf [https://perma.cc/SXX4-EVRD] ("The aim of cooperation on intellectual property rights will be . . . to encourage the rejection of practices or conditions pertaining to intellectual property rights which constitute abuse of rights, restrain competition or may impede transfer and dissemination of new developments . . . ."). For additional analysis of provisions and related discussion concerning IP in RTAs, see generally Raymundo Valdés & Maegan McCann, *Intellectual Property Provisions in Regional Trade Agreements: Revision and Update*, *in* Regional Trade Agreements and the Multilateral Trading System 497 (Rohini Acharya ed., 2016) (analyzing content related to IPs in all active RTAs which have been notified to the WTO).

212 For example, at the ICN meeting in 2015, the South Korean and U.S. competition agencies discussed means of ensuring cooperation in enforcing competition law while upholding intellectual property rights. Fair Trade Comm'n Republic of Kor., 2016 Annual Report 276 (2016), http://www.ftc.go.kr/eng/cop/bbs/selectBoardList.do?key=517&bbsId=BBSMSTR_000000002404&bbsTyCode=BBST11 [https://perma.cc/E5NF-CMMD].

213 *See* Anderson et al., *supra* note 91, at 65 & n.465.

214 *See* TRIPS Agreement, *supra* note 200, art. 40, ¶ 3.

215 *See* Rory MacFarquhar, Visiting Fellow, Peterson Inst. for Int'l Econ., State-Owned Enterprises and U.S.-China Relations (Feb. 7, 2017) https://piie.com/system/files/documents/macfarquhar20170207ppt.pdf [https://perma.cc/WLQ4-3P6W].

216 *See* Org. for Econ. Co-operation & Dev., State-Owned Enterprises as Global Competitors 20–21 (2016), https://read.oecd-ilibrary.org/finance-and-investment/state-owned-enterprises-as-global-competitors_9789264262096-en#page1 [https://perma.cc/H6ZL-TPBZ].

often compete with private firms for resources, ideas, and consumers. SOEs may also enjoy government-granted advantages including direct subsidies, state-backed guarantees, preferential regulatory treatment, and antitrust or bankruptcy exemptions, all of which can provide a competitive edge.[217]

An important question is whether governments can pursue their objectives in this area without adversely impacting competition in the relevant markets. Theoretically, when the state intervenes in the economy to remedy market failure, this is possible.[218] This argument is most convincing in sectors which favor natural monopoly, the potential abuse of which is generally difficult to regulate.[219] On the other hand, preferential treatment of SOEs may also have negative consequences at the national level, as such treatment can entrench market power and impede innovation.[220]

SOEs can generate anticompetitive cross-border effects that create hurdles both for private businesses and for the implementation of policies which seek to foster competitive international markets.[221] When current legal and policy frameworks make it difficult to address these significant damaging effects, commercial tensions may arise and support for protectionism may increase.[222] A recent OECD Trade Policy Paper offered the following rationales for the cross-border activities of SOEs:

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217 Przemyslaw Kowalski et al., *State-Owned Enterprises: Trade Effects and Policy Implications* 4 (Org. for Econ. Co-operation & Dev., Trade Policy Paper No. 147, 2013), https://www.oecd-ilibrary.org/docserver/5k4869ckqk7l-en.pdf?expires=1603257252&id=id&accname=guest&checksum=AE2128F0C2D1A093EFFCCBBBB4EE13D1 [https://perma.cc/Y246-YHSJ].

218 *See, e.g.*, PAUL R. KRUGMAN ET AL., INTERNATIONAL ECONOMICS 236–67 (10th ed. 2014).

219 Antonio Capobianco & Hans Christiansen, *Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options* 7 (Org. for Econ. Co-operation & Dev., Corporate Governance Working Paper No. 1, 2011), https://www.oecd-ilibrary.org/docserver/5kg9xfgjdhg6-en.pdf?expires=1603257456&id=id&accname=guest&checksum=EA48B8BC0040E23BA6EC9123BB50C348 [https://perma.cc/NG2J-FRRV]. Another form of market failure is the creation of "externalities," or "widespread societal benefits for which no market price can be charged," by business activities. *Id.* at 7 n.5. These externalities can be corrected by requiring that SOEs be the only actors which carry out such activities. *Id.* "However, in this case governments retain the alternative option of correcting the market failure through remedial payments to private operators." *Id.* "The use of SOEs to develop certain economic activities for which, at the outset, there is no market in order to nurture private commercial activities can also be portrayed as an effort to correct externalities." *Id.* at 7–8.

220 *See generally* William E. Kovacic, *Competition Policy and State-Owned Enterprises in China*, 16 WORLD TRADE REV. 693 (2017) (discussing this phenomenon and the inefficiencies resulting from China's administrative monopolies and state-owned enterprises).

221 Kowalski et al., *supra* note 217, at 10, 13–15.

222 *Id.* at 10.

> First, some countries may be using SOEs as a vehicle for pursuing non-commercial or strategic objectives and this may involve anti-competitive effects for their trading partners. Second, when SOEs expand to international markets, a number of issues which in a domestic context can either be contained or are not considered as problems, move to the forefront and become an international concern. Third, certain schemes of compensating SOEs for their public services obligations at home, which are proportional to the business volume rather than public service obligations themselves, may create a distortive and government supported incentive for commercial expansion, including to foreign markets. Fourth, support for SOEs in pursuit of economies of scale may be justified on general economic grounds from a domestic perspective but if this involves increasing market shares abroad it may be perceived differently in different constituencies.[223]

As other scholars have also noted, when SOEs are at play, the interplay of competition and industrial policies requires a careful balancing of interests, for example, between creating "national champions" and achieving productive efficiency.[224]

Furthermore, subsidies granted to SOEs raise another concern that cuts across borders. Funding and incentives given to such companies might, in certain cases, configure an unfair advantage in the form of direct grants, tax breaks, low-cost loans, subsidized inputs, regulatory exemptions, or equity injections by governments.[225] This is potentially of concern in the case of SOEs, as they may already enjoy some state extended privileges. While subsidies have in some economies risen to the top of the policy agenda because they are central to national industrial policy (e.g., China),[226] others have made considerable efforts to decrease or mitigate the effects of market-distorting government support (e.g., the European Union).[227] Regardless, "subsidies

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223 *Id.* at 5.

224 WORLD ECON. F., *supra* note 109, at 13.

225 Jehan Sauvage, *Why Government Subsidies Are Bad for Global Competition*, ORG. FOR ECON. CO-OPERATION & DEV. (April 15, 2019), https://www.oecd.org/trade/why-subsidies-are-bad-global-competition [https://perma.cc/97GT-GJX4].

226 *See* David J. Lynch, *Initial U.S.-China Trade Deal Has Major Hole: Beijing's Massive Business Subsidies*, WASH. POST (Dec. 31, 2019, 9:27 AM), https://www.washingtonpost.com/business/economy/initial-us-china-trade-deal-has-major-hole-beijings-massive-business-subsidies/2019/12/30/f4de4d14-22a3-11ea-86f3-3b5019d451db_story.html [https://perma.cc/LTD4-DE42].

227 *See* Kowalski et al., *supra* note 217, at 76.

still amount to hundreds of billions of dollars spent every year by governments to subsidize selected businesses or sectors."[228]

Support provided to SOEs in the form of subsidies is not necessarily industry specific and can benefit a wide range of sectors such as agriculture, fisheries, fossil fuels, industrial, and high-tech industries.[229] Today, the increasing fragmentation of global production along value chains arguably results in negative international spillovers, in particular by increasing the incentive for governments to subsidize specific domestic economic activities in order to promote foreign direct investment, generating as such a competition of "incentives" between states.[230]

Recognizing these concerns, the European Union has pioneered the regulation of "state aids" to industries that distort or threaten to distort competition in the internal market as a dimension of competition policy. The European Union's Directorate-General for Competition has put a considerable amount of effort in investigating and controlling such measures.[231] Those incompatible with the internal market are to be abolished or altered.[232] In contrast, Chinese industrial policy has heavily supported the use of subsidies, including for SOEs.[233] State-owned firms have not only enjoyed explicit subsidies but also hidden benefits such as implicit government guarantees for debts and lower interest for bank loans, creating criticism from other market economies, even at the WTO level.[234] Overall, the prevalence of subsidies calls for policy analysis and international cooperation to focus more on how they might impact international markets.

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228 Sauvage, *supra* note 225.

229 For an overview of how governmental subsidies touch a number of sectors, see Chad P. Bown & Jennifer A. Hillman, *WTO'ing a Resolution to the China Subsidy Problem* (Peterson Inst. for Int'l Econ., Working Paper No. 19-17, 2019), https://www.piie.com/sites/default/files/documents/wp19-17.pdf [https://perma.cc/ZCD7-AL9E]. For an example of how subsidies touch the high-tech industry, see BERNARD HOEKMAN, SUBSIDIES AND SPILLOVERS IN A VALUE CHAIN WORLD: NEW RULES REQUIRED? (2015), http://e15initiative.org/wp-content/uploads/2015/07/E15_Subsidies_Hoekman_final.pdf [https://perma.cc/K2BH-ZKQ3].

230 HOEKMAN, *supra* note 229, at 1–2, 4.

231 *Cf.* María Muñoz de Juan, *Monitoring of State Aid: From Ex Ante to Ex Post Control*, 17 EUR. ST. AID L.Q. 483 (2018) (discussing the European Commission's enforcement of state aid regulations and noting how decentralized enforcement will help the European Commission maintain robust enforcement).

232 *See* Consolidated Version of the Treaty of the Functioning of the European Union art. 108, May 9, 2008, 2012 O.J. (C 115) 92 [hereinafter TFEU].

233 *See* Lynch, *supra* note 226.

234 *See id.*; Gabriel Wildau & Yizhen Jia, *China's State Enterprises Cut Debt as Private Groups Lever Up*, FIN. TIMES (June 7, 2018), https://www.ft.com/content/77a6da72-6964-11e8-8cf3-0c230fa67aec [https://perma.cc/5PQJ-DNP6].

Related considerations are increasingly reflected in the treatment of SOEs in RTAs.[235] For instance, RTAs involving the European Union and EFTA countries often contain provisions on SOEs to address possible distortionary effects.[236] In fact, the EU/EFTA-inspired RTAs subject SOEs to competition laws, general provisions on abuse of dominance, or even to the norms of Article 106 of the Treaty on the Functioning of the European Union.[237] As further examples, NAFTA-inspired RTAs usually require that SOEs and state monopolies "(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."[238] The Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP") and the United States-Mexico-Canada Agreement ("USMCA") (the successor of NAFTA) incorporate particularly ambitious standards on the operation of SOEs, which go well beyond WTO disciplines in this area.[239]

To be sure, the implementation of competition considerations as such is not a straightforward task. Kovacic observes that in China, limited success in scaling back state ownership and resulting market distortions has impeded the attainment of the objectives of the 2008 Anti-Monopoly Law notwithstanding China's impressive effort to implement the law.[240] Kovacic thus suggests confronting the following issues to further address the market distorting effects of SOEs in China, and thereby ease tensions in the global economy.

First, "state ownership's" purpose should be clarified and updated so that the market may play the decisive role in resource allocation.[241] Second, there should be an explicit distinction between public ownership of capital and government activities that interfere with such operations.[242] Third, reformed SOEs should be subject to competitive market forces, either through rationalization of their structure and op-

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235 *See* LAPRÉVOTE ET AL., *supra* note 20, at 2.

236 *See id.* at 13; *see also* Trade Part of the EU-Mercosur Association Agreement: State-Owned Enterprises, Enterprises Granted Exclusive or Special Privileges, June 28, 2019, https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_158165.%20State-owned%20Enterprises.pdf [https://perma.cc/S6KQ-23QQ].

237 TFEU, *supra* note 232, art. 106; *see* LAPRÉVOTE ET AL., *supra* note 20, at 7–8.

238 LAPRÉVOTE ET AL., *supra* note 20, at 7.

239 *See* DAVID A. GANTZ, THE USMCA: UPDATING NAFTA BY DRAWING ON THE TRANS-PACIFIC PARTNERSHIP 3 (2020), https://www.bakerinstitute.org/files/15490/ [https://perma.cc/9AMY-MX73].

240 *See* Kovacic, *supra* note 220, at 693.

241 *Id.* at 709.

242 *Id.*

erations to enable them to operate competitively, or through precluding their intervention in the market's resource allocation.[243] Kovacic's analysis thus highlights the centrality of competition law and policy considerations in current U.S.-China trade relations. Important questions for the international community include whether and how to carry forward a proactive agenda in this area.

In a closely related vein, increasing interest is evident in addressing the market distorting effects of SOEs through the concept of competitive neutrality. Indeed, the European Union has embraced this concept for more than 50 years.[244] Article 106 of the Treaty on the Functioning of the European Union establishes that public companies are governed by competition law, and that E.U. member states are not permitted to act in contravention of the Treaty's competition principles.[245] Public companies are also required to adhere to the Treaty's rules on monopolization and subsidies.[246]

An early statement made by Australia regarding the impact of SOEs focused on broadly parallel concerns and remains relevant to policy debates on these issues:

> Competitive neutrality requires that government business activities should not enjoy net competitive advantages over their private sector competitors simply by virtue of public sector ownership.
>
> The implementation of competitive neutrality policy arrangements is intended to remove resource allocation distortions arising out of public ownership of significant business activities and to improve competitive processes. Where competitive neutrality arrangements are not in place, resource allocation distortions occur because prices charged by significant government businesses need not fully reflect resource costs. Consequently, this can distort decisions on production and consumption, for example where to purchase goods and services, and the mix of goods and services provided by the government sector. It can also distort investment and other decisions of private sector competitors.
>
> Competitive neutrality requires that governments should not use their legislative or fiscal powers to advantage their own businesses over the private sector. If governments do advantage their businesses in this way, it will distort the

243 *Id.* at 710.

244 Capobianco & Christiansen, *supra* note 219, at 14.

245 TFEU, *supra* note 232, art. 106; Capobianco & Christiansen, *supra* note 219, at 14.

246 TFEU, *supra* note 232, art. 106; Capobianco & Christiansen, *supra* note 219, at 14.

> competitive process and reduce efficiency, the more so if the government businesses are technically less efficient than their private sector competitors.[247]

Competitive neutrality rules that have been introduced by some OECD jurisdictions carry forward these concerns, also building on the OECD Guidelines on Corporate Governance of State-Owned Enterprises.[248] Such rules aim to mitigate or eliminate competitive advantages of SOEs including with respect to taxation, financing costs, and regulation.[249] Some of these frameworks are ownership neutral while some refer specifically to state-owned businesses (e.g., in Australia).[250] Furthermore, a recent International Competition Policy Expert Group Report calls for the establishment of an ICN working group on the anticompetitive harm caused by SOEs and state-supported enterprises.[251] Additionally, relevant WTO disputes[252] and countervailing duty investigations by national investigation authorities[253] concerning

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247 COMMONWEALTH COMPETITIVE NEUTRALITY POLICY STATEMENT 4–5 (1996) https://treasury.gov.au/publication/commonwealth-competitive-neutrality-policy-statement/ [https://perma.cc/U9JJ-BFWP].

248 ORG. FOR ECON. CO-OPERATION & DEV., OECD GUIDELINES ON CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES 21 (2015), https://www.oecd-ilibrary.org/docserver/9789264244160-en.pdf?expires=1603295881&id=id&accname=guest&checksum=DF7F31E2034B99DDD9E77A2F0C35172B [https://perma.cc/7VB5-MAHH]; *see also* Capobianco & Christiansen, *supra* note 219, at 5 (explaining that the OECD Guidelines on Corporate Governance of State-Owned Enterprises advocates for a level playing field in markets involving state-owned and private sector businesses).

249 *See* ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 248, at 20–21.

250 *See* Capobianco & Christiansen, *supra* note 219, at 15–16, 21–23.

251 INT'L COMPETITION POLICY EXPERT GRP., *supra* note 25, at 10.

252 See, *e.g.*, *DS537: Canada—Measures Governing the Sale of Wine*, WORLD TRADE ORG. (Sept. 7, 2020), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds537_e.htm [https://perma.cc/5KPU-ZZY9] (discussing proceedings initiated by Australia to challenge Canadian regulations regarding the sale of wine); *DS380: India—Certain Taxes and Other Measures on Imported Wines and Spirits*, WORLD TRADE ORG. (Feb. 24, 2010), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds380_e.htm [https://perma.cc/Q75D-AHD6] (discussing allegations brought by the European Union that certain Indian states were applying taxation policy discriminatorily against European imports of wine and spirits).

253 *See, e.g.*, Canadian International Trade Tribunal, *Dumping and Subsidizing Order, Preliminary Injury Inquiry*, No. PI-2012-001 (Aug. 24, 2015), https://decisions.citt-tcce.gc.ca/citt-tcce/a/en/item/354350/index.do?q=hot-Rolled+Carbon+Steel+Plate+and+High-Strength+Low-Alloy+Steel+Plate+Originatingin+or+Exported+rom™he+Republic+of+India+and™he+Russian+Federation [https://perma.cc/S49K-UMEP] (finding that alleged subsidization by the Indian and Russian governments of products allegedly dumped into the Canadian market was sufficient to warrant further investigation). While the countervailing measures are subject to the WTO Agreement on Subsidies and Countervailing Measures, see *id.* at 5 n.16, which is outside the scope of this article, the issue illustrates the broad scope of possible competitive impacts of SOEs.

the operation of SOEs indicate that ensuring competitive neutrality on the part of SOEs is becoming increasingly important.

The OECD in its Guidelines on Corporate Governance of State-Owned Enterprises,[254] as well as in related analysis, also highlights the importance of governments continuing to honor their commitments in international trade agreements, particularly concerning nondiscrimination, as a tool for maintaining the level playing field and fair competition in the marketplace.[255] While these principles constitute important steps to addressing concerns regarding the potential market distorting effects of SOEs, some further developments and harmonization seem necessary.

III. International Progress in Implementing Standards to Ensure Procedural Fairness in Competition Law Enforcement

While the proliferation of competition regimes across the world has undoubtedly had many positive effects, concerns are growing that the application of competition laws may not always be transparent and impartial. This is of particular concern in environments characterized by a weak rule of law, most notably an absence of guaranteed or uniform fundamental procedural rights.[256] Various jurisdictions thus are relying upon competition advocacy initiatives to address concerns about anticompetitive outcomes resulting from the failure to apply competition laws in a transparent, accurate, and impartial manner.

A number of RTAs, in initial attempts to address these issues, establish certain standards regarding relevant principles in competition policy enforcement including the principle of transparency and requirements of nondiscrimination and procedural fairness.[257] Procedural fairness has also been discussed across international fora including the OECD[258] and the ICN.[259] Affirming these concerns, a recent

254 Capobianco & Christiansen, *supra* note 219, at 5.

255 *See* Org. for Econ. Co-operation & Dev., *supra* note 216, at 157.

256 *See* Int'l Chamber of Commerce, Effective Procedural Safeguards in Competition Law Enforcement Proceedings 1 (2017), https://cdn.iccwbo.org/content/uploads/sites/3/2017/07/ICC-Due-Process-Best-Practices-2017.pdf [https://perma.cc/C6B7-5BXA].

257 *See, e.g.*, Comprehensive Economic and Trade Agreement (CETA) Between Canada, of the One Part, and the European Union and its Member States, of the Other Part, art. 17.2.4, 2017 O.J. (L 11) 23, 113.

258 *See, e.g.*, Org. for Econ. Co-operation & Dev., Procedural Fairness and Transparency 9 (2012), http://www.oecd.org/competition/abuse/proceduralfairnessandtransparency-2012.htm [https://perma.cc/L48F-CF8D].

259 *See, e.g.*, Int'l Competition Network, Competition Agency Transparency Practices 1–2 (2013), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/

Report by the International Competition Policy Expert Group proposed that multilateral bodies implement a code setting out "minimum due process or procedural fairness guarantees," while also encouraging that other international organizations study related issues and concerns.[260]

BOX 7. RECOMMENDATIONS BY THE INTERNATIONAL COMPETITION POLICY EXPERT GROUP

In March 2017, the International Competition Policy Expert Group, a body linked to the U.S. Chamber of Commerce, published a Report calling on the United States and other interested governments to consider the following recommendations: (1) to encourage the adoption of a code articulating "transparent, accurate, and impartial procedures" by OECD or other multilateral bodies;[261] and (2) to continue solidifying international consensus around how competition law can be appropriately used and how it can be transparently, accurately, and impartially enforced.[262] To this end, the United States should consider advocating "that the OECD and/or other multilateral bodies adopt a code enumerating . . . transparent, accurate, and impartial procedures."[263]

Furthermore, as the Report states:

Concurrently, the United States should consider the utility of requesting that other forums (for example, the World Bank) study the economic benefits of enhanced due process and transparency protections. The United States should also promote transparent, accurate, and impartial competition law enforcement processes as a topic for consideration by all ICN Working Groups, and ask that the evaluation of procedural soundness and transparency be made an ICN special project and key 'ICN Second Decade' initiative.[264]

The Report also "urges that the Working Group focus on how to effectively ensure that a country applies its competition laws in a manner that is consistent with accepted standards of process, to ensure that competition enforcement proceedings are transparent, accurate, and impartial."[265]

The Report also notes the following:

In addition to the broader substantive concerns regarding the misuse of competition policy for protectionist and discriminatory purposes, the Working Group should also address the need for transparent, accurate, and impartial competition enforcement processes globally, and consider options for dealing with specific procedural issues, such as targeted sanctions or a listing mechanism akin to [United States Trade Representative's]'s annual Special 301 listing of foreign nations that have inadequate IP protection Senior U.S. representatives should be encouraged to emphasize adherence to and enforcement of due process clauses in the competition provisions of trade agreements to which the United States is a party.[266]

AEWG_ReportTransparency.pdf [https://perma.cc/KHN7-C4B7]; *see also infra* text accompanying notes 273–89.

260 INT'L COMPETITION POLICY EXPERT GRP., *supra* note 25, at 10.

261 *Id.*

262 *Id.* at 9.

263 *Id.* at 10.

264 *Id.* at 15.

265 *Id.* at 9.

266 *Id.* at 14.

Most recently, in an important and productive effort to ensure due process in competition law enforcement potentially reaching around the globe, a number of competition agencies, with important leadership from U.S. Assistant Attorney General for Antitrust Makan Delrahim, have pursued developing rules establishing fundamental commitments to "non-discrimination, transparency, timely resolution, confidentiality, conflicts of interest, proper notice, opportunity to defend, access to counsel, and judicial review" in competition enforcement.[267] The resulting Multilateral Framework on Procedures in Competition Law Investigation and Enforcement ("MFP") is both an outgrowth of and a complement to the work of the ICN, the OECD, and other organizations to promote procedural fairness in antitrust enforcement.[268] Notably, the MFP seeks to "bridg[e] the differences between civil and common law countries, between administrative and prosecutorial approaches, and between young and old agencies in small and large markets."[269] The initiative received wide support in the drafting stages.[270] Interestingly, proponents cited the competition chapters of relevant free trade agreements and the prior work of other international organizations as among the framework's building blocks.

At the request of several partner agencies, competition enforcers agreed to implement the proposed framework through the ICN. In April 2019, the Steering Group of the ICN became open for all national, supranational, and customs-territory-specific competition agencies—both ICN member and nonmember agencies—to join as participants.[271] On May 1, 2019, the framework became open for signature, coming into effect on May 15, 2019.[272] On the success of this initiative, Assistant Attorney General Delrahim expressed that the adoption of the framework "sends a clear signal that competition agencies across the globe—despite differences in their structures and proceedings, as well as the legal systems in which they operate—are committed to procedural fairness."[273] This represents an important

267 Delrahim, *supra* note 25.

268 *Id.*

269 *Id.*

270 *Id.*

271 *See Fair(er) Antitrust Enforcement*, Norton Rose Fulbright (June 7, 2020), https://www.nortonrosefulbright.com/en-us/knowledge/publications/cf577d43/fairer-antitrust-enforcement-will-the-icns-new-global-framework [https://perma.cc/VXR5-Q9UF].

272 *See id.*

273 Press Release, U.S. Dep't of Justice, New Multilateral Framework on Procedures Approved by the International Competition Network (April 5, 2019), https://www.justice.gov/opa/pr/new-multilateral-framework-procedures-approved-international-competition-network [https://perma.cc/LF3V-T3GX].

success for the global community in finding consensus on the important issues addressed in the mentioned framework.

IV. Processes and Fora for Future Work

Notwithstanding clear and significant progress in international competition policy, the foregoing developments also indicate that additional forms of international cooperation may be needed to ensure that competition policy is applied in an appropriately transparent and nondiscriminatory manner which still permits for policy innovation and regulatory diversity at the national level. At the outset, three broad observations are salient: first, the ICN, building on and advancing the OECD and UNCTAD's pathbreaking work in promoting competition policy globally,[274] has become the leading international forum for cooperation between national competition authorities over the past two decades.[275] Any further multilateral work should take account of and build constructively on these frameworks. Second, the WTO's past work suggests that renewed dialogue in that context might enhance international policy formulation, even if the scope is limited to stock taking and exploratory work. Third, organizationally, the work of the WTO can feasibly draw and build upon work in these other fora.

A. Essential Pioneers: UNCTAD and the OECD

For the past three decades, UNCTAD has been the focal point in the United Nations for all matters related to competition policy.[276] It fulfils its key mandate by "[p]roviding a forum for intergovernmental deliberations," "[u]ndertaking research, policy analysis and data collection," and "[p]roviding technical assistance to developing countries" on matters pertaining to competition law and policy.[277] In particular, its Intergovernmental Group of Experts ("IGE") meets annually with the goal of strengthening global cooperation on competition policy implementation and fostering greater convergence through dialogue.[278] Additionally, the IGE conducts its work through voluntary competition law and policy peer review and by organizing topical

274 *See infra* Section IV.A.

275 Hollman & Kovacic, *supra* note 24, at 274–75, 286.

276 *Id.* at 295–96.

277 *Competition and Consumer Policies Programme: Mandate and Key Functions*, United Nations Conf. on Trade & Dev., https://unctad.org/en/Pages/DITC/CompetitionLaw/ccpbMandate.aspx [https://perma.cc/BT4W-J2HP].

278 *See Intergovernmental Group of Experts on Competition Law and Policy*, United Nations Conf. on Trade & Dev., https://unctad.org/en/Pages/DITC/CompetitionLaw/Intergov-

round tables on specialized competition issues.[279] On technical assistance and capacity-building activities, UNCTAD's COMPAL program works in 17 Latin American countries to strengthen their capacity building abilities and institutional framework on competition and consumer protection matters, with the goal of providing the necessary tools to implement competition policies and improve consumer welfare.[280]

In like manner, the OECD provides a unique platform for competition officials from developed and emerging economies to discuss both traditional as well as cutting-edge competition issues, fostering market-oriented reform throughout the world.[281] Its efforts are widely respected in the competition community and have contributed importantly to consensus building in many areas of competition law enforcement. Ongoing and past projects and activities have dealt with several of the topics discussed in this paper, e.g., competition law and policy and SOEs,[282] IP,[283] the digital economy,[284] the harm caused by international cartels, and the use of competition provisions in RTAs.[285] In addition, since its inception the OECD's Competition Committee has been at the forefront of shaping global competition agency cooperation.[286] Recognizing that the increase of cross-border activities adds to the complexity of cooperation in multijurisdictional cases and some-

ernmental-Group-of-Experts-on-Competition-Law-and-Policy.aspx [https://perma.cc/7ZC2-6AM8].

279 *Id.*

280 *Acerca del COMPAL*, UNITED NATIONS CONF. ON TRADE & DEV., https://unctadcompal.org/acerca-del-compal/ [https://perma.cc/R58H-7F4G].

281 *International Co-operation in Competition*, ORG. FOR ECON. CO-OPERATION & DEV., http://www.oecd.org/competition/internationalco-operationandcompetition.htm [https://perma.cc/LKL3-29EB].

282 *See, e.g.*, Capobianco & Christiansen, *supra* note 219, at 3–4 (evaluating the efficacy of the OECD Guidelines on Corporate Governance of State-Owned Enterprises and how they can foster competitive neutrality around the globe).

283 *See, e.g.*, ORG. FOR ECON. CO-OPERATION & DEV., LICENSING OF IP RIGHTS AND COMPETITION LAW 1–2 (June 6, 2019), https://one.oecd.org/document/DAF/COMP(2019)3/en/pdf [https://perma.cc/BT66-VSSH].

284 *See, e.g.*, ORG. FOR ECON. CO-OPERATION & DEV., CONSUMER DATA RIGHTS AND COMPETITION 1, 5 (June 12, 2020), https://one.oecd.org/document/DAF/COMP(2020)1/en/pdf [https://perma.cc/AZ3J-SZEZ].

285 *See, e.g.*, *Competition Provisions in Trade Agreements*, ORG. FOR ECON. CO-OPERATION & DEV. (Dec. 5, 2019), http://www.oecd.org/daf/competition/competition-provisions-in-trade-agreements.htm [https://perma.cc/949L-9GX6]. For more details on the OECD's past work, including best practice roundtables, publications, and competition law assessments, see *Competition*, ORG. FOR ECON. CO-OPERATION & DEV., https://www.oecd.org/competition/ [https://perma.cc/6LP8-66BN].

286 *International Cooperation in Competition*, *supra* note 281.

times leads to inconsistent decisions and unchallenged illegal conduct, international cooperation has become one of the Competition Committee's main priorities since 2012.[287] Moreover, the annual Forum on Global Competition promotes a larger dialogue about how competition policy connects with other facets of economic development.[288]

B. The Vital Contribution of the ICN

Since its establishment in 2001, and building on the work of the OECD, UNCTAD, and other fora, the ICN has become the leading global force in promoting international cooperation in competition law enforcement and in shaping widely accepted international competition policy norms.[289] The organization's achievements cover such areas as anticartel enforcement, merger review, abuse of dominance, competition advocacy, and competition policy implementation.[290] The organization's outputs include case-handling and enforcement manuals, reports on the deliberations of its Working Groups, templates for legislation and rules, databases, toolkits, and capacity building activities.[291] Overall, significant progress towards the ICN's main objective, greater convergence of competition laws, has been achieved.[292] Relevant projects have aimed to: (1) foster understanding of national competition systems and the similarities and differences among them, (2) identify and develop consensus on competition best practices, and (3) encourage individual jurisdictions to adopt advanced techniques.[293] Their success has resulted in the proliferation of the adoption of com-

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287 *Id.*

288 *About the Forum*, ORG. FOR ECON. CO-OPERATION & DEV., http://www.oecd.org/competition/globalforum/about/ [https://perma.cc/YTE6-UN93].

289 *See* Hollman & Kovacic, *supra* note 24, at 274–75, 286. The membership of the ICN comprises 139 competition agencies from 126 jurisdictions. Press Release, Int'l Competition Network, 2019 Annual Conference (May 17, 2019), https://www.internationalcompetitionnetwork.org/featured/2019-annual-conference-press-release/ [https://perma.cc/GW2Z-9FZT].

290 INT'L COMPETITION NETWORK, ICN FACTSHEET AND KEY MESSAGES 1 (2009), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/Factsheet2009.pdf [https://perma.cc/TG8Q-RRT7].

291 *Id.*; *see* INT'L COMPETITION NETWORK, ICN WORK PRODUCTS CATALOG 2 (2019), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/11/ICNWPCatalog9-2019.pdf [https://perma.cc/3Y26-GDCP].

292 *See* INT'L COMPETITION NETWORK, THE FUTURE OF THE ICN IN ITS SECOND DECADE 42–43 (2016), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/ICN2dDecade2016.pdf [https://perma.cc/K8FL-5PLN]; Hollman & Kovacic, *supra* note 24, at 278. Hollman and Kovacic define "convergence" as "the broad acceptance of standards concerning the substantive doctrine and analytical methods of competition law, the procedures for applying substantive commands, and the methods for administering a competition agency." Hollman & Kovacic, *supra* note 24, at 278.

293 Hollman & Kovacic, *supra* note 24, at 275–76.

petition law instruments including best practice documents and guidelines, the improved performance of individual jurisdictions, and the reduction of conflicts among jurisdictions with respect to the treatment of specific matters.[294] Although some elements and procedures established in competition laws worldwide may vary, competition regimes today share a few core elements including a clear prohibition on cartels, a mandate for effects-based merger review, and the prohibition against firms abusing a dominant position.[295]

The ICN's Working Groups will continue to lead projects addressing the fundamentals of sound competition enforcement and other emerging policy issues in the coming years. The ICN recently approved new projects focused on unilateral conduct, vertical mergers, merger investigative techniques, enforcement cooperation, agency organizational choices, leniency programs, and advocacy, among other issue areas.[296]

These efforts to promote convergence in substantive approaches have helped foster a more coherent international policy environment than would have otherwise prevailed. Yet, further important contributions can arguably be made at this level. For example, there is merit in the idea of establishing a common clearinghouse for merger filings, so that one centrally located document can provide all necessary preliminary information about the merger.[297] Such developments in the convergence of procedural approaches can arguably only be done at the ICN.[298]

There are, however, additional issues that could potentially require deliberations beyond the ICN framework. First, while the ICN has adopted a highly focused approach based on its constituency of highly specialized agencies—competition policy is naturally intertwined with issues of trade, IP, economic regulation, industrial policy, foreign investment, and the free movement of goods, services, and capital.[299]

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294 *See* Hetham Abu Karky, *The Impact of the International Competition Network on Competition Advocacy and Global Competition Collaboration*, 40 Eur. Competition L. Rev. 490, 491–93 (2019); Press Release, Fed. Trade Comn'n, International Competition Network Advances Convergence Through Initiatives on Enforcement Cooperation and Investigative Process (Apr. 26, 2013), https://www.ftc.gov/news-events/press-releases/2013/04/international-competition-network-advances-convergence-through [https://perma.cc/93MB-4PDN].

295 Org. for Econ. Co-operation & Dev., *supra* note 27, at 6.

296 Press Release, Int'l Competition Network, *supra* note 289.

297 Fox, *supra* note 26, at 7.

298 *See id.*

299 *Id.*

Second, in many cases, cross-cutting problems in global competition policy stem from differences in policy goals and industrial policies and are truly global in nature, thus resistant to lower-level policy intervention.[300] High-level decisions that go to the core of economic policy making are required to resolve them.[301]

Third, the ICN has focused on issuing nonbinding recommendations.[302] While such recommendations are an important achievement, perhaps further progress could be achieved through establishing binding, treaty-based obligations. The ICN's role in facilitating convergence among competition law systems would thus be an essential platform in such an evolution from soft to hard law. According to Hollman and Kovacic:

> The concept that soft law evolves into hard law has logical appeal. Global problems would seem to require global solutions. An agreement could reduce the risk of jurisdictional conflict and resolve conflicts that arise. In addition, without an agreement, states' interests will not align sufficiently to resolve conflicts that arise.[303]

As we have discussed, some of the issues most in need of intergovernmental discussion include the need for the safeguarding the impartiality of competition law, wider issues surrounding state monopolies, and the interface between IP and competition. In that regard, some commentators argue that many of the interfaces described in this article find their "natural home" for policy dialogue in the WTO—at least to the extent they have specific trade policy dimensions—and that "flanking principles in the WTO," such as nondiscrimination, transparency, and procedural fairness, are relevant.[304] This is in light of the WTO's existing functions and objectives, its historical mandate for and past work on competition policy, and WTO Members' general interest in advancing competition policy matters.[305]

C. Possible Contributions of Renewed Discussion in the WTO[306]

This Article has explored the competition policy dimension of current policy issues in the global economy, including issues concerning IP, anticompetitive practices in digital markets, and the role of

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300 *Id.* at 5.

301 *Id.*

302 Hollman & Kovacic, *supra* note 24, at 286.

303 *Id.* at 312 (footnotes omitted).

304 *See, e.g.*, FOX, *supra* note 26, at 4–6, 8.

305 *See id.* at 5–6, 8; ANDERSON & MÜLLER, *supra* note 13, at 5, 8, 10.

306 For additional discussion on this topic, see ANDERSON & MÜLLER, *supra* note 13.

state-owned enterprises. The WTO's work would aim to complement and reinforce the work of the ICN and other relevant organizations, rather than duplicating it. In this context, and subject to further deliberations and input by WTO Members and those of other relevant international bodies, the WTO could contribute to greater policy coherence and to a stronger framework for the promotion of competition by addressing the following issues.[307]

- **The application of the WTO's founding principles of nondiscrimination, transparency, and procedural fairness, in relation to competition law enforcement.**[308] As we have seen, the relevance of these principles—an important focus of the original work of the WTO Working Group on Trade and Competition Policy—has since been validated and amplified by the work of the ICN and related developments including the U.S.-led Multilateral Framework on Procedures in Competition Law Investigation and Enforcement.[309]
- **Further codification of generally agreed norms such as general commitments by WTO Members to counter hardcore cartels and support international cooperation.**[310] Again, this element is common to both the original WTO Working Group and subsequent developments in RTAs and the ICN. Codification of norms would also acknowledge the priority given to competition agencies themselves to implement these standards.
- **Support for common action or commitments in relation to cross-border anticompetitive practices, including in digital markets.** The difficulty of detecting such practices, however, calls for cooperative action and information sharing.[311] In this regard, existing provisions of the TRIPS Agreement, notably Articles 8.2, 31(k), and 40 could play a role.[312] While significant efforts against these practices are reflected in the framework of the ICN and RTAs,

307 See ANDERSON & MÜLLER, *supra* note 13, at 10, for additional discussion on these matters.

308 ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 27, at 10.

309 *See supra* Parts I, III; Delrahim, *supra* note 25.

310 *See* ANDERSON & MÜLLER, *supra* note 13, at 4. For a potentially significant development, see *FAS Anti-Cartel Efforts Reach the UN General Assembly*, FED. ANTIMONOPOLY SERV. RUSSIAN FED'N (Mar. 13, 2018), http://en.fas.gov.ru/press-center/news/detail.html?id=52832 [https://perma.cc/WDG6-DMCP].

311 *See supra* Section I.C.

312 *See* TRIPS Agreement, *supra* note 200, 1869 U.N.T.S. at 303, 314, 317.

high-level international discussions may be needed in order to find effective solutions.

- **Potentially, jurisdictional issues which arise in the application of competition law to export cartels.** This issue draws interest from both developing countries and some elements of the business community.[313] Fox suggests that "[t]he cartel externality problem has a natural home in the WTO."[314]

An even broader array of issues is evident with respect to the interaction of trade and competition policy. These would include, at a minimum, measures addressing the following:[315]

- **The concept of competitive neutrality, especially with respect to the treatment of SOEs.** The role of SOEs was an important consideration in the early work of the WTO Working Group and has since been amplified in subsequent norm-setting RTAs[316] and the work of the OECD and other international organizations.[317] As we have seen, there is also a clear link to elements of the existing WTO Agreements.[318]
- **The role of competition policy in relation to global value chains.** As noted, these, by definition, involve significant issues concerning vertical linkages.[319] Consequently, competition policy should be viewed as one of the international community's tools for appropriate regulation of global value chains.
- **The relationship between competition policy and industrial policy.** As Fox has suggested, the WTO might be in a position to "narrow the bounds" of permissible trade remedies laws and subsidies in light of their distortionary effect on international trade and particular harm to de-

313 ANDERSON & MÜLLER, *supra* note 13, at 10.

314 FOX, *supra* note 26, at 6; ANDERSON & MÜLLER, *supra* note 13, at 10.

315 See ANDERSON & MÜLLER, *supra* note 13, at 10, for additional discussion on these matters.

316 For instance, the CPTPP and the USMCA incorporate hardcore restrictions on SOEs and designated monopolies, going above and beyond those established in WTO agreements. *See* GANTZ, *supra* note 239, at 3; *supra* Part II.

317 *See* Capobianco & Christiansen, *supra* note 219, at 5.

318 Notably, in light of concerns related to overcapacity in certain sectors, WTO Members are taking an increasing interest in SOE financing and in ways to complement the SCM Agreement disciplines. *See, e.g.*, Committee on Subsidies and Countervailing Measures, *Subsidies and Overcapacity: The Role of Below-Market Financing*, WTO Doc. G/SCM/W/575 (Apr. 13, 2018), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/G/SCM/W575.pdf&Open=true [https://perma.cc/6UUG-HSHS].

319 *See* DAVIES, *supra* note 22, at 4.

veloping countries.[320] Certainly, industrial subsidies and SOE support are core elements of current discussions surrounding proposed WTO reforms,[321] and are central to any prospect of progress towards resolution of current issues in China-U.S. trade.[322]

- **Addressing the significance of competition policy for "governmental barriers to participation in public procurement markets."**[323] Government procurement is already a dynamic and vital area of concern for the WTO.[324] This issue represents an important confluence between export-oriented business interests (seeking access to foreign procurement markets) and competition authorities' interests (understanding that closed markets intrinsically limit competition and facilitate bid rigging).[325]
- **The potential application of competition-related disciplines including those discussed in the WTO Reference Paper on Basic Telecommunications ("Reference Paper") in terms of other infrastructure sectors as well as issues concerning trade in services more generally.**[326] The Reference Paper arguably goes the furthest amongst the existing WTO Agreements in establishing commitments

320 Fox, *supra* note 26, at 7.

321 *See How to Rescue the WTO*, Economist (July 19, 2018), https://www.economist.com/leaders/2018/07/19/how-to-rescue-the-wto?frsc=DG%7Ce [https://perma.cc/367R-EZ4V]; *EU-China Summit, Beijing, 16 July 2018*, Council Eur. Union (July 16, 2018), http://www.consilium.europa.eu/en/meetings/international-summit/2018/07/16/ [https://perma.cc/KXN4-J7Q8]; *EU and China Discuss Economic and Trade Relations at the 7th High-Level Economic and Trade Dialogue*, Eur. Commission (June 25, 2018), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1873 [https://perma.cc/7QAJ-AKWJ] ("The EU and China agreed to set up a working group to concretely co-operate on reform to help the WTO meet new challenges and to further develop rules in key areas relevant for the global level playing field, such as industrial subsidies.").

322 *See* Kovacic, *supra* note 220, at 710–11.

323 Anderson & Müller, *supra* note 13, at 10; *see* Robert D. Anderson et al., Promoting Competition and Deterring Corruption in Public Procurement Markets: Synergies with Trade Liberalisation (2016), http://e15initiative.org/publications/promoting-competition-and-deterring-corruption-in-public-procurement-markets-synergies-with-trade-liberalisation/ [https://perma.cc/F4GC-MMUS].

324 Anderson & Müller, *supra* note 13, at 10; *see* Robert D. Anderson & Sue Arrowsmith, *The WTO Regime on Government Procurement: Past, Present and Future*, *in* The WTO Regime on Government Procurement 3, 3–5 (Sue Arrowsmith & Robert D. Anderson eds., 2011).

325 Anderson & Müller, *supra* note 13, at 10; *see* Anderson & Arrowsmith, *supra* note 324, at 4, 38.

326 *See* Anderson & Müller, *supra* note 13, at 10.

against anticompetitive practices.[327] Other infrastructure sectors, including electrical energy, however, might face similar structural problems.[328]

- **The interface between competition policy and IP.** As we have noted, the TRIPS Agreement specifically invokes concerns about anticompetitive licensing practices and foresees the application of competition rules in this area.[329] The relevant provisions, however, offer only limited guidance with respect to related issues.[330] There is a need for further international deliberation on these issues, building on related work in the OECD, ICN, the World Intellectual Property Organization (WIPO), and other fora.[331]

Meaningful work on these issues at the multilateral environment will be possible only when the political environment allows this and would require an affirmative decision or decisions on the part of national authorities. The following reflects on possible organizational paths for such discussions, in this light.

D. Possible Organizational Paths for Discussions at the Multilateral Level[332]

As noted earlier, the original WTO Working Group still exists as a vehicle for possible work, although it is currently designated as inactive. The WTO General Council's 2004 decision concerning the status of the Working Group reads as follows:

> [T]he Council agrees that [work on the Interaction between Trade and Competition Policy, together with the related issues of the Relationship between Trade and Investment and Transparency in Government Procurement] will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round.[333]

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327 *See id.*

328 *See id.* In the context of the services negotiations which were initiated in 2000, WTO Members have proposed establishing separate Reference Papers for other sectors. *See, e.g.*, *Postal and Courier Services*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/serv_e/postal_courier_e/postal_courier_e.htm [https://perma.cc/CX9L-VMAS].

329 *See* ANDERSON & MÜLLER, *supra* note 13, at 6–7, 10–11.

330 *See id.* at 11.

331 *See id.* For additional discussion, see *supra* Section II.D.

332 *See* ANDERSON AND MÜLLER, *supra* note 13.

333 World Trade Org., Gen. Council, Doha Work Programme: Decision Adopted by the General Council on 1 August 2004, para. 2(g), WTO Doc. WT/L/579 (adopted Aug. 1, 2004).

This formulation clearly leaves an opening for work on these issues to resume following the conclusion of the Doha Round. This language also does not rule out resumption of exploratory work on these issues, so long as such work is not directed "towards negotiations."[334] Certainly, the WTO Working Group, which earned solid credit for a similar exploratory work program in its early stages,[335] would be a logical body for furthering such discussion. It also leaves open the possibility of the Working Group undertaking a wide variety of projects including gathering updated information and practical experience from global competition authorities, including how they have handled trade policy and trade law questions, and developing an updated information platform to use for both a capacity building role and a structure for continuing policy discussion. These alone are desirable outcomes, and they do not need to create expectations of negotiations as an inevitable further step.

In any further WTO work program on trade and competition policy, other organizations active in the competition policy field should be solicited for broad input. These would include, first and foremost, the ICN, but also UNCTAD, the OECD, and civil society organizations such as CUTS. Such organizations should be given specific, dedicated roles in the development of relevant standards.

Such external delegation of tasks is not unprecedented in the negotiation of WTO agreements. For instance, the negotiation of the WTO Agreement on Government Procurement ("GPA") drew importantly upon preparatory work done in the OECD.[336] The WTO's work on trade-related IPRs has been extensively cross-fertilized by the WIPO's past work.[337] Moreover, the TRIPS Agreement builds upon and integrates elements of a number of pre-existing international treaties, including the Paris Convention for the Protection of

334 *See id.*

335 *See* ANDERSON & MÜLLER, *supra* note 13, at 2–4.

336 *See* Revised Agreement on Government Procurement, Mar. 30, 2012, Marrakesh Agreement Establishing the World Trade Organization, Annex 4 [hereinafter GPA], https://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf [https://perma.cc/C4RZ-Y5TM]; Annet Blank & Gabrielle Marceau, *The History of the Government Procurement Negotiations Since 1945*, 5 PUB. PROCUREMENT L. REV. 77, 77–78 (1996), *reprinted in* THE WTO AND GOVERNMENT PROCUREMENT 3, 3–4 (Simon J. Evenett & Bernard Hoekman eds., 1996); Anderson & Arrowsmith, *supra* note 324, at 15.

337 *See, e.g.*, TRIPS Agreement, *supra* note 200, 1869 U.N.T.S. at 300 (noting "[d]esiring to establish a mutually supportive relationship between the WTO and the World Intellectual Property Organization" as a purpose for the TRIPS Agreement).

Industrial Property[338] and the Berne Convention for the Protection of Literary and Artistic Works.[339] A similarly consultative approach regarding trade and competition policy, permitting input from organizations with more specialized expertise in competition policy per se, could greatly enhance both the usefulness and the political and institutional acceptability of renewing work in the WTO framework on trade and competition policy.

The WTO GPA may be relevant to international work on competition policy in another way. Specifically, the GPA is an opt-in agreement which is binding only on a subset of WTO members that have acceded to it.[340] Conceivably, this could work as a model for a possible WTO agreement embodying international prohibitions of hardcore cartels.[341]

CONCLUSION

This Article has reviewed and reflected upon a wide array of issues concerning competition law enforcement which impact international trade and the global economy. In contrast to the situation prevailing 20 years ago, competition policy is no longer viewed primarily as a domestic matter merely of interest to developed economies. Rather, it has become an essential element of the global economy's legal and institutional framework. As just one example of how competition policy has become increasingly prominent on the global stage, when the WTO Working Group on the Interaction between Trade and Competition Policy was first convened in 1997,[342] 70 economies had national competition legislation.[343] Currently, more than 130 countries have national competition laws.[344] These include all of the BRICS economies and many other developing economies.[345]

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338 Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305.

339 Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, S. TREATY DOC. NO. 99-27, 828 U.N.T.S. 221; *see* TRIPS Agreement, *supra* note 200, arts. 1–3.

340 For pertinent background, see Robert D. Anderson & Anna Caroline Müller, *The Revised WTO Agreement on Government Procurement (GPA): Key Design Features and Significance for Global Trade and Development*, 48 GEO. J. INT'L L. 949 (2017).

341 A prohibition of hardcore cartels was one element of the original proposals for a multilateral framework on competition policy that were debated at the WTO in the early 2000s but ultimately not implemented.

342 ANDERSON & MÜLLER, *supra* note 13, at 2.

343 Mark R.A. Palim, *The Worldwide Growth of Competition Law: An Empirical Analysis*, 43 ANTITRUST BULL. 105, 109 (1998).

344 Kovacic & Lopez-Galdos, *supra* note 16, at 86.

345 *See id.* at 86 n.6.

Efforts to establish a general agreement on competition policy within the international trading system have to date been unsuccessful. The importance of competition policy for global trade is nonetheless evident in the discussions carried out and notifications made on competition policy in the WTO accession process[346] as well as in notified RTAs, which systematically reference the role of national competition policies in developed and developing jurisdictions.[347] These provisions and activities indicate that the framers of those agreements and initiatives viewed competition policy as both directly relevant and complementary to the international trading system.

Additionally, an extensive set of RTAs have incorporated competition policy chapters since 2004, linking economies around the globe.[348] These provisions signal, at a minimum, significant convergence on the framing of competition policy disciplines within international trade agreements. As such, they are a clear reference point for stock-taking at the multilateral level and may even provide a template for related action.

Concurrently, particular issues of competition law enforcement and competition policy are gaining increased attention in international circles including:

- The international dimension of competition law cases, particularly their resulting spillover effects and the potential for jurisdictional conflicts;
- The broadening application of competition policy vis-à-vis IPRs in the global economy;
- Issues within digital markets, particularly the potential for monopolization and the maintenance of competition;
- Issues relating to SOEs as well as the place of industrial policy, subsidies, and the maintenance of competitive neutrality in emerging economies; and
- A growing concern in global business circles to ensure that competition law is enforced in a nondiscriminatory, transparent, and procedurally fair manner.

Moreover, each of the above issues and developments naturally implicates the interests of multiple jurisdictions and international markets. As such, if and when WTO Members are ready to proceed, they

346 Robert D. Anderson et al., *Competition Policy in WTO Accessions: Filling in the Blanks in the International Trading System*, *in* TRADE MULTILATERALISM IN THE TWENTY-FIRST CENTURY 299, 302 (Alexei Kireyev & Chiedu Osakwe eds., 2017).

347 *See* LAPRÉVOTE ET AL., *supra* note 20, at 1.

348 *Id.*; Robert Teh, *Competition Provisions in Regional Trade Agreements*, *in* REGIONAL RULES IN THE GLOBAL TRADING SYSTEM 418, 484–85 (Antoni Estevadeordal et al. eds., 2009).

are prima facie legitimate subjects for discussion and stock-taking within the multilateral trading system.

Indeed, as also discussed in this Article, the work carried out by the WTO Working Group on the Interaction between Trade and Competition Policy, as well as complementary and ongoing work in the ICN, the OECD, UNCTAD and other organizations, arguably establishes a solid basis for examining these issues. Furthermore, although no consensus was reached on the need for a more general agreement on competition policy in the WTO, and while the WTO Working Group is currently designated as inactive, it remains a potential resource and avenue for advancement if and when WTO Members find the time has come.

To be clear, these issues and developments are complex, and any related initiatives will doubtlessly require careful reflection. In any relevant international arrangements, great care should be taken to preserve or strengthen the operational imperatives and independence of competition law enforcement.[349] Perhaps, the best approach is simply to encourage continuing dialogue on relevant issues in international fora that are or have been active in this area. A valuable, objective, and fairly uncontroversial contribution by the WTO to this dialogue would consist of systematically collected updated information on legal and policy settings across the WTO's Membership, the sharing of practical experience focused on the interplay between trade and competition, and cooperation on empirically based capacity building.

This Article has shown though that these issues are important ones with significant implications for trade, prosperity, and development at both the national and global levels. There is, moreover, a risk of coordination failures, if not outright policy conflicts, in this area if action is not taken. And, with the experience gained and progress made in the international competition community in the past 20 years, there is a solid basis for meaningful discussions among a broad cross-section of developed and emerging economies if and when they are prepared to take the issues up.

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349 The idea of requiring and reinforcing independence in law enforcement proceedings is certainly not new or alien to the WTO. For example, the WTO Agreement on Government Procurement requires each participating government to implement independent and impartial supplier complaint ("domestic review") bodies. *See* GPA, *supra* note 336, art. XVIII.