



Competition Policy, Trade and the Global Economy: Existing WTO Elements, Commitments in Regional Trade Agreements, Current Challenges and Issues for Reflection

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**World Trade Institute
Global Economic Governance Seminar Series
Bern**

10 April 2019

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Principal Source for the Presentation

Robert D. Anderson, William E. Kovacic, Anna Caroline Müller and Nadezhda Sporysheva, ***Competition Policy, Trade and the Global Economy: Existing WTO Elements, RTA Commitments, Current Challenges and Issues for Reflection***, WTO Working Paper, ERSD-2018-12, available at https://www.wto.org/english/res_e/reser_e/ersd201812_e.htm.

NB: other sources to be noted as we proceed.

Overall perspective

- ❑ WTO negotiations on competition policy are unlikely for the foreseeable future, due to:
 - ❑ The general negotiating climate in the Organization; and
 - ❑ Continuing apprehensions of some developed country competition authorities regarding erosion of their independence.
- ❑ Nonetheless:
 - ❑ Competition policy is already present in the WTO Agreements, in concrete and specific ways that merit attention/input from experts;
 - ❑ Regional/bilateral trade agreements now routinely incorporate significant commitments on competition policy, suggesting possible approaches at the multilateral level;
 - ❑ The underlying level of readiness for disciplines in this area is now much greater than previously (e.g., 130+ countries with national laws/authorities as compared to 50-60 when earlier WTO work commenced); and
 - ❑ Current issues in the global economy implicate competition law enforcement and policy issues in important ways (to be discussed). Moreover, the threat of inter-jurisdictional clashes is real.
- ❑ In this context:
 - ❑ Need for renewed dialogue between the competition and trade communities, including in the WTO. Negotiations to follow when the time is right.

Issues to be further developed

- ❑ The role of competition policy in:
 - ❑ The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS);
 - ❑ The General Agreement on Trade in Services (GATS) and WTO Reference Paper on Basic Telecommunications Services; and
 - ❑ The WTO Agreement on Government Procurement (GPA).
- ❑ The treatment of competition policy in WTO Trade Policy Reviews and Accession Protocols.
- ❑ Competition policy provisions in Regional Trade Agreements (RTAs).
- ❑ Implications of recent digital markets and other cases involving transnational abuses of a dominant position and mergers.
- ❑ Institutional considerations and options for the future.

I. The role of competition policy in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights

Historical recognition of the role of competition policy in balancing the exercise of IP rights

- ❑ Concerns regarding the potential for anti-competitive abuses of rights protected under the TRIPS Agreement were voiced by many countries (especially developing countries) during the negotiation of the Agreement.
- ❑ Consequently, the TRIPS Agreement:
 - ❑ recognizes that appropriate measures may be needed to prevent the abuse of intellectual property rights by rights holders (Article 8.2)
 - ❑ explicitly provides scope for the enforcement of competition law vis-à-vis anti-competitive licensing practices and conditions;
 - ❑ establishes a right to consultations where WTO Members consider they have been adversely affected; and
 - ❑ recognizes anti-competitive practices as a justification for the compulsory licensing of patents.

Relevant provisions of the TRIPS Agreement: Article 40

- ❑ Recognizes that licensing practices that restrain competition may have adverse effects on trade or may impede technology transfer/diffusion (Article 40.1).
- ❑ Permits Members to specify anti-competitive practices constituting abuses of IPRs and to adopt measures to prevent or control such practices (Article 40.2). Such practices may include exclusive grantbacks, clauses preventing validity challenges and coercive package licensing.
- ❑ Note: the list of anti-competitive practices that may be addressed in Article 40.2 is a non-exhaustive list. Other practices may be relevant.

Relevant provisions of the TRIPS Agreement: Article 31

- ❑ Sets out detailed conditions for the granting of compulsory licences aimed at protecting the legitimate interests of rights holders.
- ❑ Provides for the non-application of two such conditions where a compulsory licence is granted to remedy “a practice determined after judicial or administrative process to be anti-competitive” (Article 31(k)).
- ❑ The conditions which may thereby be rendered non-applicable include: (i) the requirement to first seek a voluntary licence from the right holder (Art. 31(b)); and (ii) the requirement that use pursuant to a compulsory license be predominantly for the supply of the domestic market (Art. 31(f)).

Relevant provisions of the TRIPS Agreement: questions left unanswered

- ❑ The set of other practices (beyond those referred to in article 40.2) which may constitute actionable abuses under Members' competition laws.
- ❑ The standards under which such practices should be reviewed (e.g. per se or "rule of reason").
- ❑ What constitutes an adequate "judicial or administrative process" for purposes of Article 31(k)?
- ❑ The appropriate remedies to be employed (beyond the general requirement of consistency with other provisions of the Agreement).
- ❑ NB: appropriate answers to these questions require input from competition authorities/other experts! Arguably, a need for eventual international Guidelines in this area!

For further discussion:

- ❑ Anderson, Robert D., "Competition Policy and Intellectual Property in the WTO: More Guidance Needed?" in Josef Drexler, ed., *Research Handbook on Intellectual Property and Competition Law* (Edward Elgar, 2008), chapter 18, pp. 451-473.
- ❑ Anderson, Robert D. and William E. Kovacic, "The application of competition policy vis-à-vis intellectual property rights: the evolution of thought underlying policy change," forthcoming in Robert D. Anderson, Antony Taubman and Nuno Carvalho, eds., *Competition Policy and Intellectual Property Rights in Today's Global Economy* (provisional title; to be published jointly by Cambridge University Press, the World Intellectual Property Organization (WIPO) and the WTO in 2019), chapter 4 (Preliminary text available here: <https://www.wto.org/english/resseresserwpaps.htm>).
- ❑ Forthcoming book edited by Anderson, Taubman and Carvalho.

II. The General Agreement on Trade in Services and the *Telecoms* Reference Paper

GATS, Article VIII

- ❑ Addresses conduct involving monopolies and exclusive service suppliers (reflects historic importance of such structures and conduct in the services sector).
- ❑ Scope for trade in services dependent on unbundling of traditional 'natural monopolies' in important ways (e.g. in telecom, transportation and energy sectors).
- ❑ Mandates that: “Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member’s obligations under Article II (MFN treatment) and [any] specific commitments.

GATS, Article IX

- ❑ Establishes a framework for consultations regarding anti-competitive business practices that restrain competition and thereby restrict trade in services.
- ❑ Mandates that “Each Member shall, at the request of any other Member, enter into consultations with a view to eliminating [such] practices.”

Basic Telecoms Reference Paper

- ☐ Grew out of awareness of historic role of state-designated or protected monopolies in the telecom sector;
- ☐ Creates a positive obligation for Members to put in place/maintain appropriate measures to prevent anti-competitive practices;
- ☐ Covered anti-competitive practices include:
 - ☐ engaging in anti-competitive cross-subsidization;
 - ☐ using information obtained from competitors with anti-competitive results; and
 - ☐ not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.
- ☐ NB: above are mainly issues of “vertical control”. But not an exhaustive list!

Basic Telecoms Reference Paper (2)

- ❑ Relies importantly on the concept of essential facilities – a difficult/fraught concept in competition law jurisprudence.
- ❑ For more detail:
https://www.wto.org/english/Tratop_e/serv_e/telecom_e/tel23_e.htm .
- ❑ A model for addressing related issues in other sectors?

The *Telmex* case

- ❑ First and only panel decision grounded in the Reference Paper.
- ❑ Background: Telmex as a (lucrative) state-protected monopoly; slow transition to effective competition. US called for panel proceeding, arguing (in part) that Mexico had failed to honor the core requirement of the Reference Paper to prevent anti-competitive acts.
- ❑ Panel found/confirmed that:
 - ❑ The examples of anti-competitive acts in the reference paper are non-exhaustive, and that horizontal (quasi-cartel) arrangements are also covered;
 - ❑ Anti-competitive arrangements not exempt from the Reference Paper's commitments just because mandated by national legislation;
 - ❑ Mexico's national legislation/regulatory measures established a quasi-cartel situation in which Telmex's domestic competitors were forbidden from undercutting it when offering inter-connection services to foreign long-distance service suppliers. *A clear failure to implement measures to protect competition!*

Aftermath of the panel decision

- ❑ Mexico declined to appeal; took measures to bring its legislation/regulations into compliance with the Reference Paper's requirements.
- ❑ Long distance rates in Mexico have reportedly fallen.
- ❑ Interesting transition for Eduardo Perez Motta, former Mexican Ambassador to the WTO and subsequently President of the Federal Competition Commission (Mexico); later President of the International Competition Network.
- ❑ A great reference: Fox, Eleanor (2006). 'The WTO's First Anti-trust Case – Mexican Telecom: A Sleeping Victory for Trade and Competition,' Journal of International Economic Law 9(2), 271–292, doi:10.1093/jiel/jgl012. Advance Access publication 8 May 2006.

IV. Competition policy and the WTO Agreement on Government Procurement (GPA)

Background on the GPA

- ❑ A plurilateral agreement in the WTO framework (currently covers 47 WTO Members; two more expected soon);
- ❑ Aims to promote:
 - ❑ Market liberalization and trade in government procurement markets;
 - ❑ Value for money in Parties' national procurements; and
 - ❑ Good governance (transparency/absence of corruption in covered markets).
- ❑ Above aims easily undercut by collusive practices among suppliers – hence, need for competition law enforcement!

The GPA and competition policy

- ❑ Collusive tendering referenced specifically as a problem in the GPA;
- ❑ In fact, a two-way relationship (at least):
 - ❑ Competition law (anti-cartel) enforcement necessary to ensure goals of GPA not circumvented by bid rigging/collusive tendering;
 - ❑ GPA itself a potentially powerful tool for enhancing competition (making bid rigging more difficult);
 - ❑ Some (limited) risk of “excess transparency” if Agreement not well applied.
- ❑ Competition policy community perhaps insufficiently aware of the GPA’s potential contribution?

Why should we care about collusive tendering?

- Collusive tendering imposes heavy costs on public treasuries and therefore on taxpayers (can raise the costs of goods and services procured by 20-30 %, sometimes more). Limits what can be procured with given resources.
- Particularly detrimental due to the economic importance and essential role public procurement plays in modern economies:
 - Provision of transportation and other vital infrastructure (airports, highways, ports)
 - Public health (hospitals, medicines, water and sewer systems)
 - Schools and universities

The role of “buy local” requirements as a factor facilitating collusion: hence, need for joint application of trade and competition policy

- OECD Global Forum on Competition (February 2013): relevance of buy local requirements AND confluence of collusion and corruption concerns in specific cases. Highlights the usefulness of market opening as a preventative tool.
- Cases in point:
 - Canada: Quebec infrastructure markets.
 - The Swiss experience.

Tools for deterring collusive tendering (1): the more or less obvious

- Effective competition law enforcement, reinforced by tools such as leniency measures for cartel breakers.
- Education of the supplier community: certificates of independent bid preparation.
- Education of procurement officials (suspicious signs, usefulness of market research and internal estimates).

Tools for deterring collusive tendering (2): the perhaps not-so-obvious

- Pro-active measures to:
 - expand the pool of potential competitors and introduce enhanced supplier diversity, e.g. through trade liberalization;
 - competition advocacy to address entry restrictions;
 - and better (more open-ended) procurement design.

For further discussion:

- Anderson, Robert D., William E. Kovacic and Anna Caroline Müller, "Promoting Competition and Deterring Corruption in Public Procurement Markets: Synergies with Trade Liberalization," *Public Procurement Law Review*, vol. 26, 2017, pp. 77-97. A preliminary version is available here: <http://e15initiative.org/publications/promoting-competition-and-deterring-corruption-in-public-procurement-markets-synergies-with-trade-liberalisation>.
- Anderson, Robert D., Alison Jones and William E. Kovacic, "Preventing Corruption, Supplier Collusion and the Corrosion of Civic Trust: A Procompetitive Program to Improve the Effectiveness and Legitimacy of Public Procurement," *George Mason Law Review*, forthcoming 2019; initial text available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3289170.

V. Competition Policy in WTO TPRs and Accession Protocols

Trade Policy Reviews

“The regular collective appreciation and evaluation of the full range of individual Members' trade policies and practices and their impact on the functioning of the multilateral trading system.”*

NB: competition policy widely (universally) accepted as part of the picture to be assessed!

**Annex 3 to the WTO Agreement 'Trade Policy Review Mechanism', para. A(i).*

Main elements of competition policy discussed in TPR Reports



TPRB Meetings as a platform for discussions on competition policy (1)

TPRB meetings provide an effective platform to:

- share experience on competition policy enforcement;
- discuss competition concerns related to trade policy, such as, for instance, exemption of state-owned enterprises from competition legislation in some jurisdictions;
- encourage WTO Members which have not yet established competition laws to do so (e.g. Guatemala);
- discuss concerns related to the competition policy – IP interface.

TPRB Meetings as a platform for discussions on competition policy (2): the example of Mexico (2017)

- Developments in Mexico's competition policy from 2012 through 2016 were subject to intensive discussion during the TPRB meeting in April 2017.

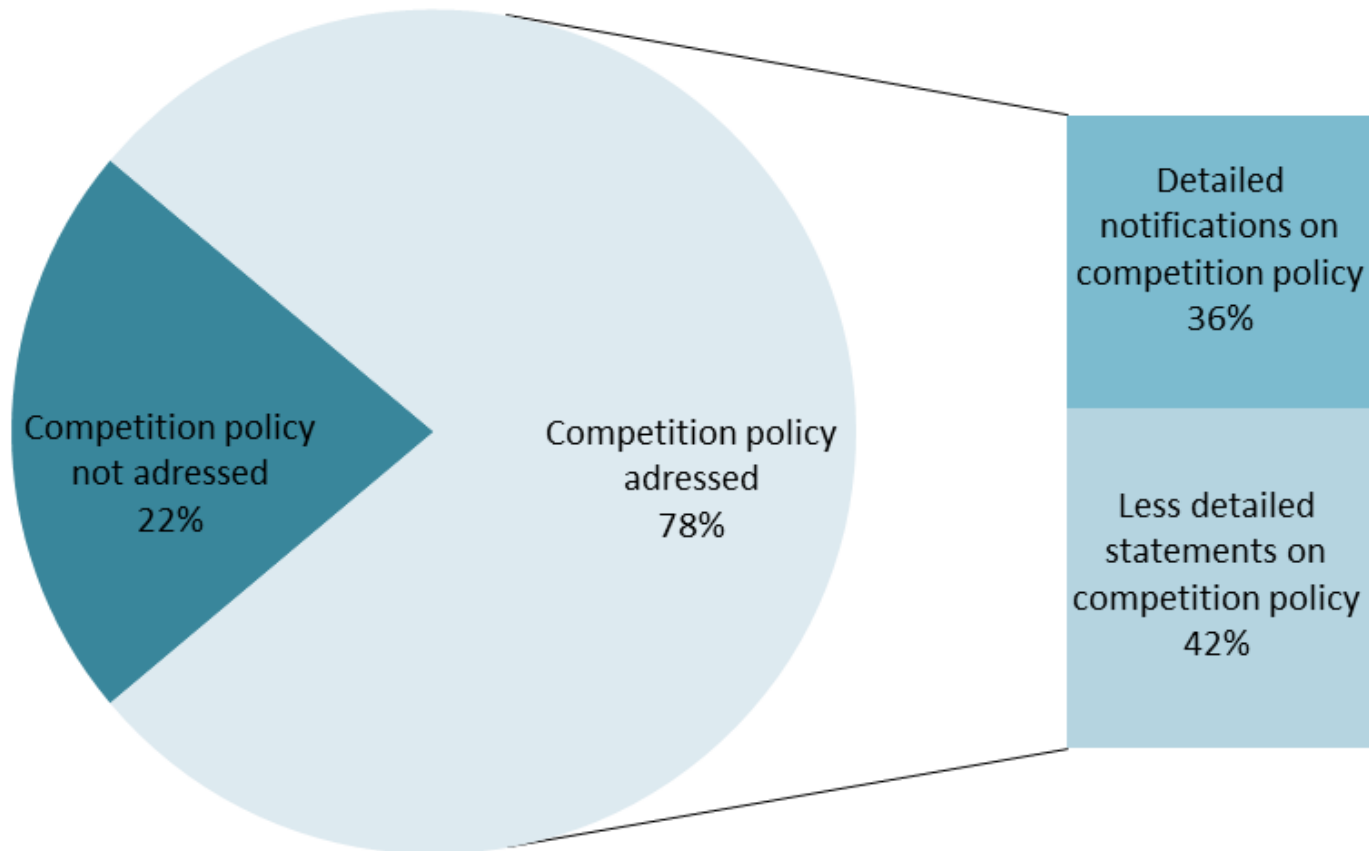
The role of competition policy in promoting free competition and to preventing and combating monopolies, monopolistic practices, cartels and other restrictions on the efficient functioning of markets was highlighted.

- Some Members indicated that Mexico's competition policy reform brings more vitality into the market and encouraged Mexico to continue to make efforts to strengthen the enforcement of IPRs.

WTO Accession Packages: "filling in the blanks"

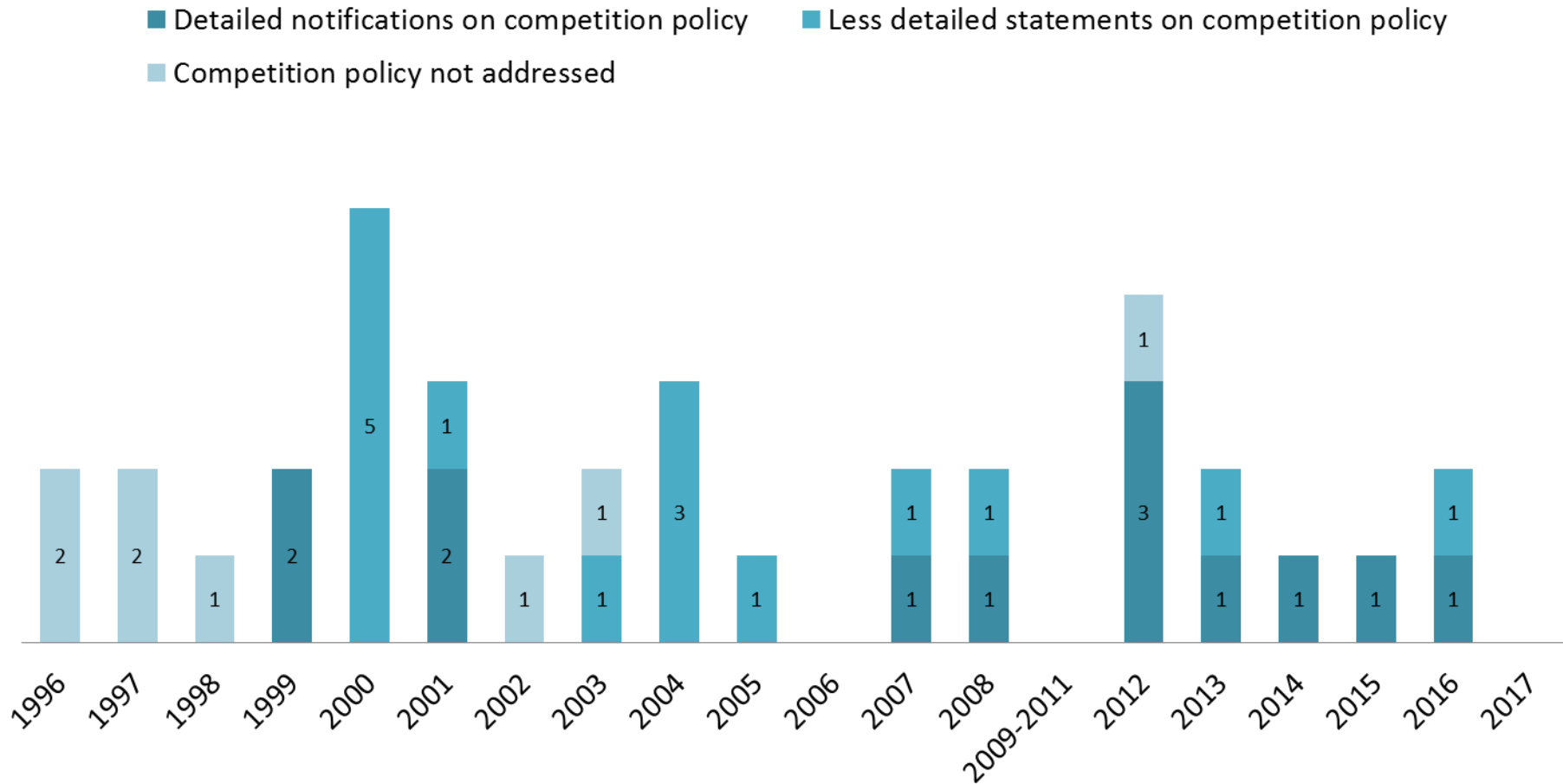
- Increasing emphasis on competition policy in WTO Accession Packages;
- 36 accessions to date;
- Around 80% acceding states were requested to provide information on their domestic competition policy regime;
- More detailed notifications in Accessions Packages over time;
- Competition policy is addressed in two ways: (i) specific notifications on national competition policies and laws; (ii) pro-competitive commitments and reforms.

Notifications on competition policy in WTO accession processes



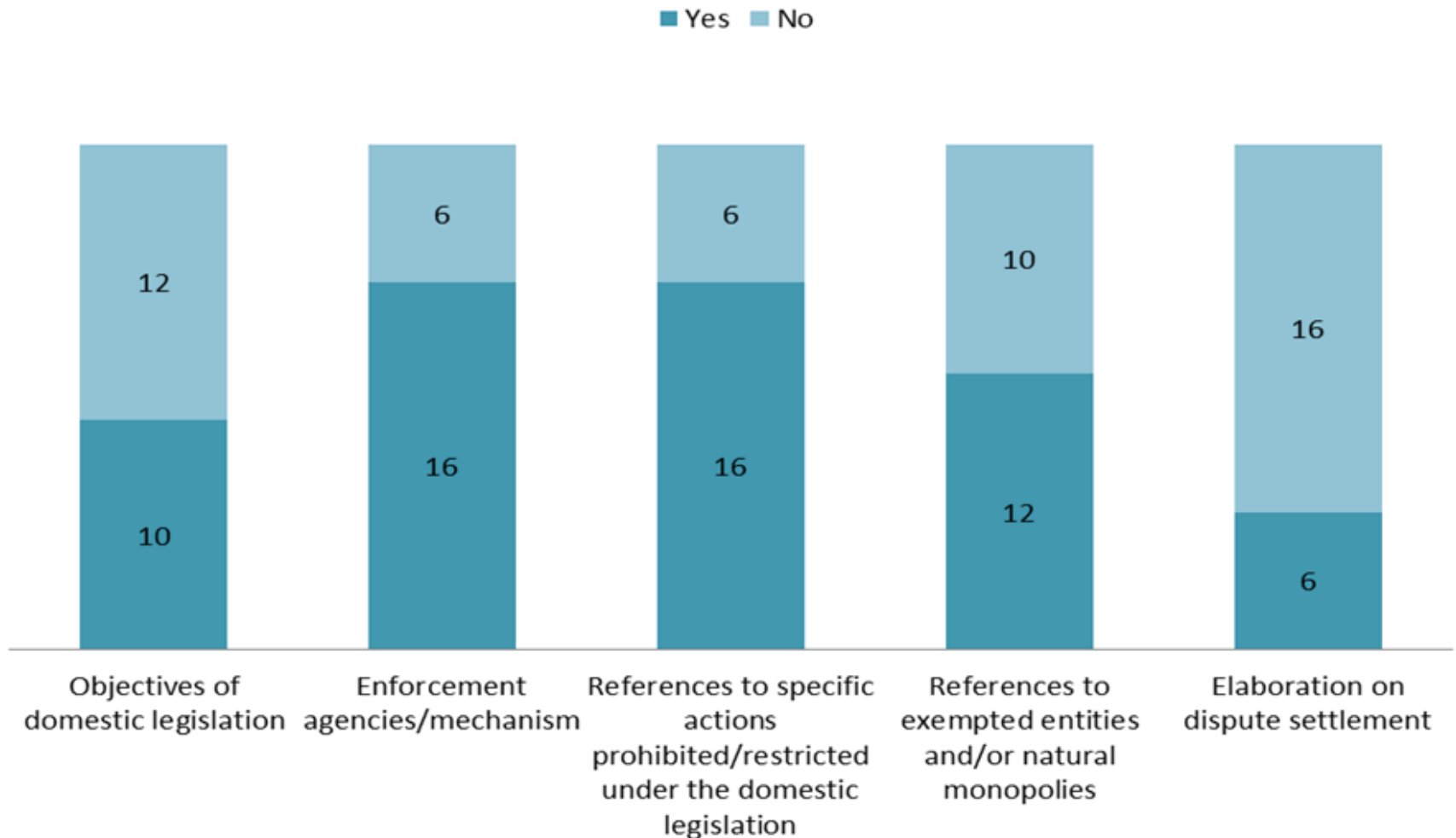
Source: R. D. Anderson, A. C. Müller and N. Sen, 'Competition Policy in WTO Accession Processes: Filling in The Blanks in The International Trading System', in Osakwe and Kireyev (eds.), *WTO Accessions: The Upper Floors of the Trading System* (WTO and Cambridge University Press, 2017).

Detail of notifications on competition policy in WTO accession processes



Source: Anderson et al, id.

Topics addressed in notifications related to competition policy



Source: Anderson et al, id.

Competition policy commitments: *example_of Seychelles*

‘From the date of accession, business entities [not to be] hindered by anti-competitive practices in their respective markets and the benefits derived from effective competition [to be] sustained’.

*Report of the Working Party on the Accession of the Republic of
Seychelles, para.83.*

Other competition related provisions in Accession Packages

State monopolies,
SOEs and
privatization

Fair pricing
practices

Consumer
benefits

The IP-
competition
interface

Overall pro-
competitive
reforms

Key take-aways

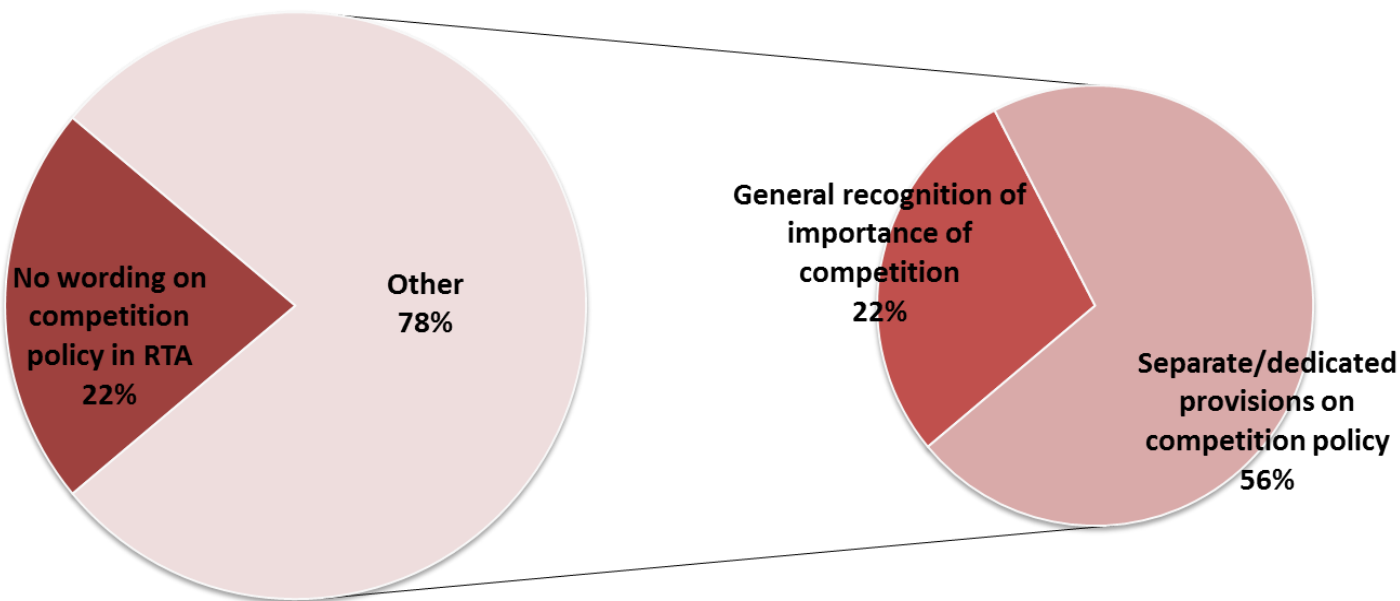
- The inclusion of competition policy measures in TPR Reports and further discussions during the TPRB Meeting are an important recognition of **the relevance and possible impact of competition policy measures 'on the functioning of the multilateral trading system'** (mandate of the TPRM); and, evidence for an increasing interest of the WTO Members to this subject over time.
- WTO accession process as a **platform for competitive market reforms;**
- Notifications, commitments and references related to competition policy in Accession Packages confirm the importance given by WTO Members to the transparent and non-discriminatory application of competition legislation and policy.

VI. Competition policy provisions in Regional Trade Agreements (RTAs)

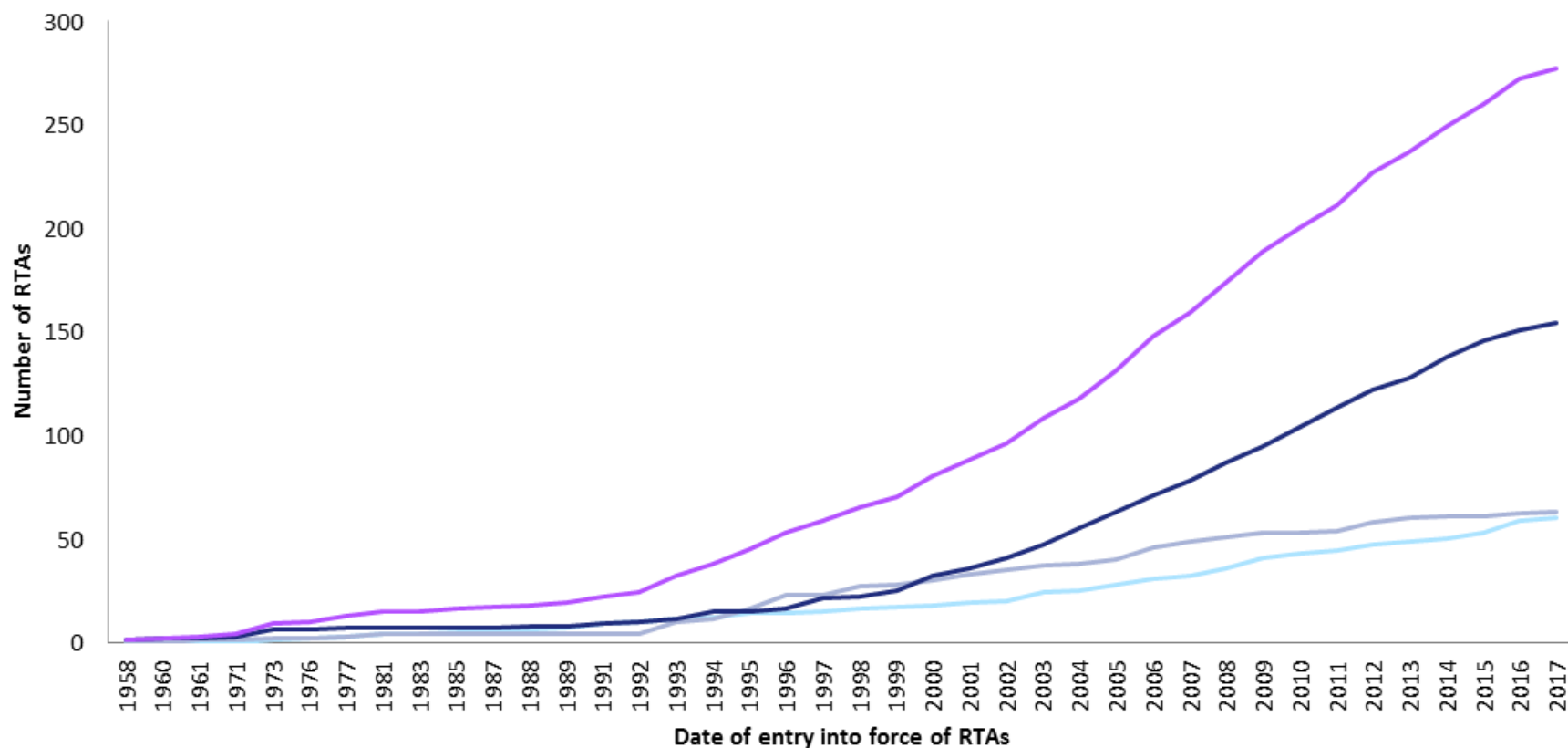
(Based on new empirical analysis reported in the 2018 Secretariat Working Paper)

Regulation of competition policy in RTAs

- **280 RTAs notified to the WTO were analysed.** This is more than the study by Laprevote et al, which included 216 RTAs in their sample



Treatment of competition policy in RTAs, 1958-2017



No wording on competition policy

Only general recognition of importance of competition policy

Dedicated chapters on competition policy

Total number of RTAs

Typical objectives of competition provisions in RTAs

- ensuring that the **potential gains from trade liberalization are not undermined by anti-competitive practices.**
- **promoting economic efficiency, development and prosperity:** e.g. ‘economic efficiency and consumer welfare’ in US-Singapore RTA; China-Chile RTA; Peru-Republic of Korea RTA; EAEU-Vietnam RTA; CPTPP.
- ensuring that **competition law itself is not applied in ways that adversely affect business confidence** and/or favour domestic as compared to foreign enterprises: ‘transparency principles’ and ‘procedural fairness’, see below.

Regional approaches (some trends): towards more convergence?

- a **European approach** (the EU and the EFTA): anti-competitive practices, state aid;
- a **NAFTA-based approach**: co-operation, horizontal principles;
- an **'Oceanian' approach** (ANZCERTA – Australia&New Zealand): harmonization of competition regimes.

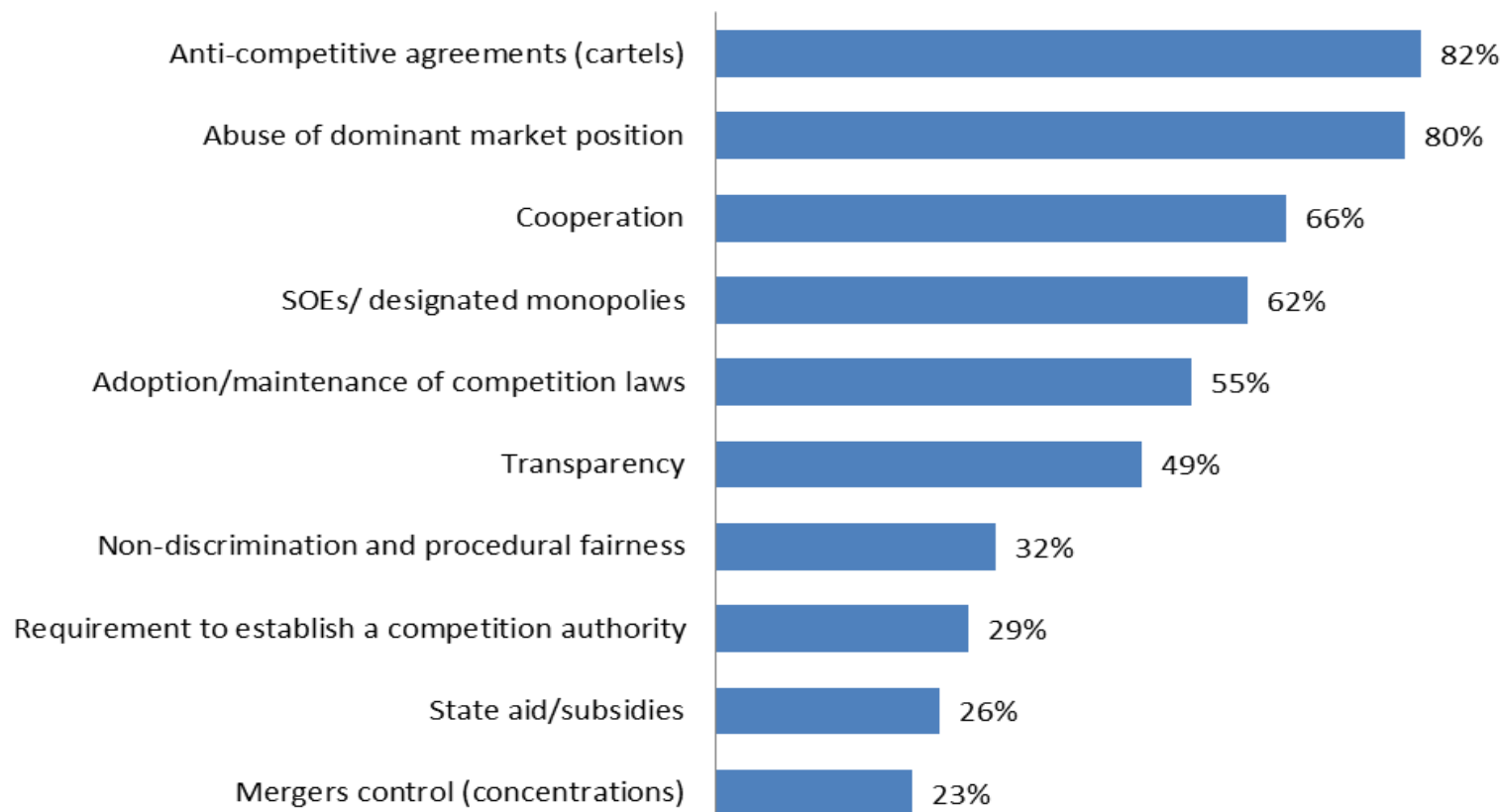
Other approaches?

Regional approaches (some trends): towards more convergence?

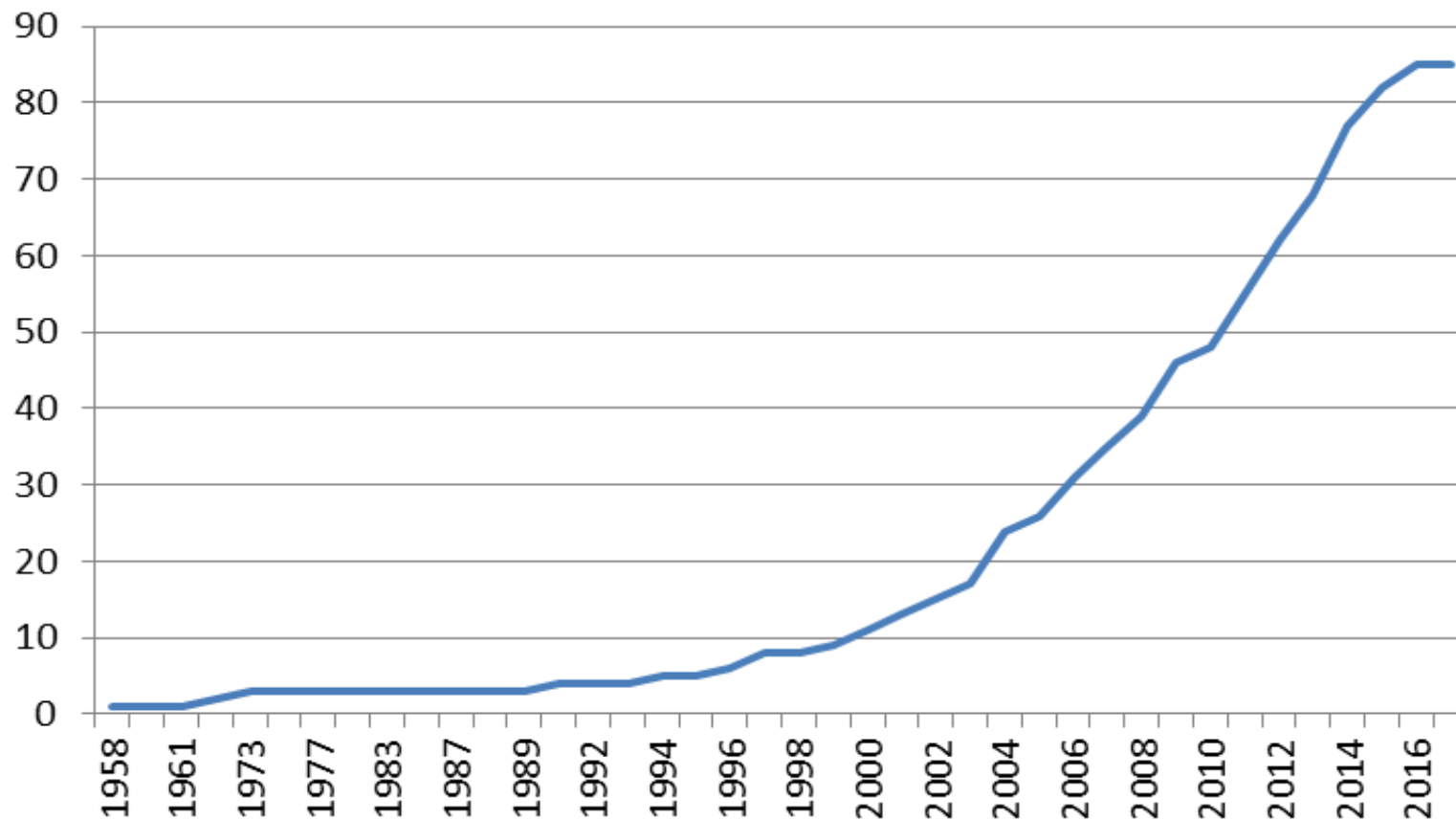
- **Asian:** horizontal principles;
- **Latin American:** follow traditional approaches (MERCOSUR); 'rendez-vous clauses', endeavours to harmonize competition laws (DR&Central America);
- **CIS countries:** EAEUT (Armenia, Belarus, Kazakhstan, Kyrgyzstan, Russia) - general principles; anti-competitive practices affecting transboundary markets;
- **Middle Eastern and African countries:** follow traditional approaches; WAEMU – Competition Council; AfCFTA?
- **CPTPP:** modernized NAFTA approach - novel provisions on private rights of action

Dedicated competition policy provisions

- **155 RTAs** (56% of the total 280 RTAs) have dedicated chapter on RTAs.



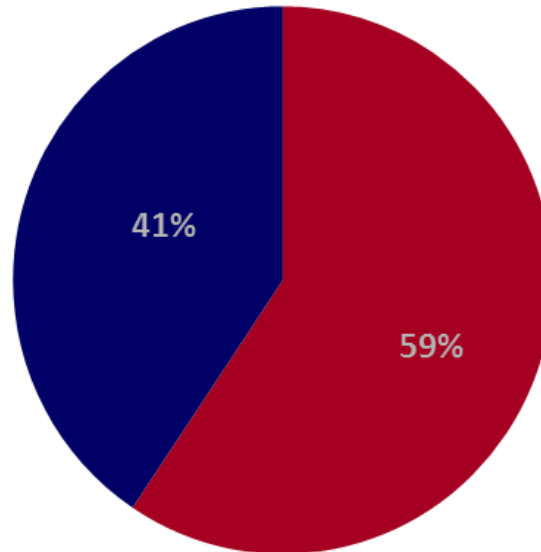
Incorporation in RTAs of a requirement to adopt/maintain national competition laws



Principles of competition law enforcement

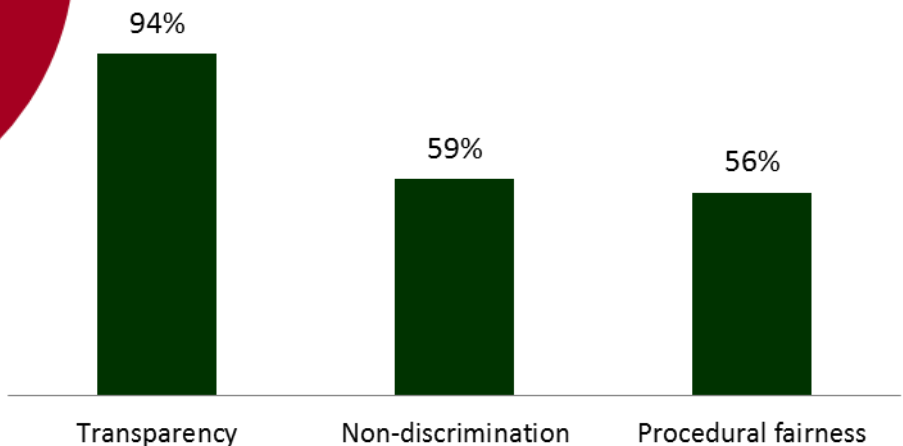
■ Requirement to apply any of the principles (transparency, non-discrimination, procedural fairness)

■ No requirement on any of the principles



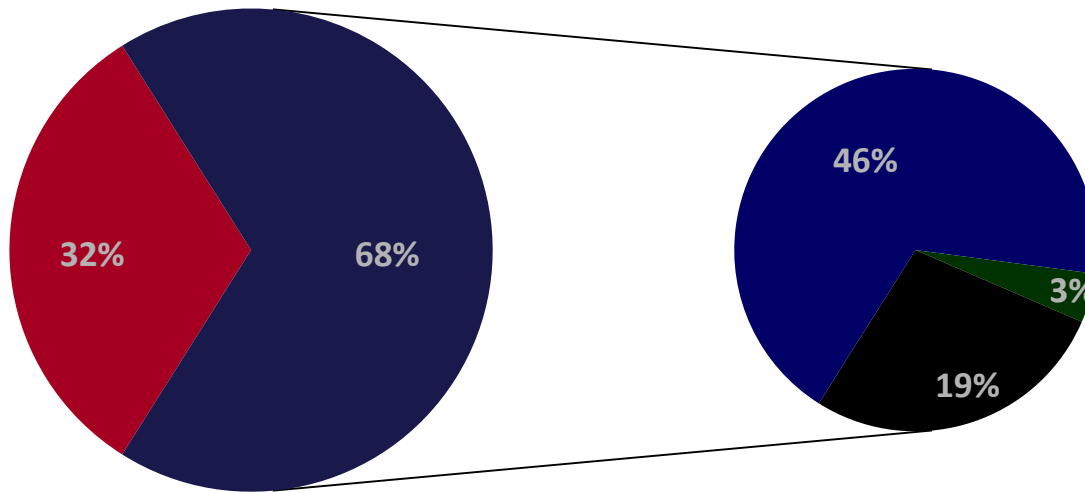
- Usually Asian countries (Japan, Singapore), the EU, EFTA, Latin America (Peru, Chile), Canada

Inclusion of principles of competition law enforcement



- What about CPTPP?

Regulation of SOEs and designated monopolies



- No wording on SOEs/designated monopolies in competition chapter
- SOEs/ monopolies are mentioned in competition chapter (RTAs btw developed-others)
- SOEs/ monopolies are mentioned in competition chapter (4 RTAs btw developed: EC, EEA, Australia-Japan, Australia-US)

- 7% RTAs with dedicated chapter establish the right for SOEs and designated monopolies to set different prices in different markets if they do so “based on normal commercial considerations “ (the US/Canada approach)

Regulation of SOEs and designated monopolies

The US-Colombia RTA

Article 13.6: State Enterprises

1. The Parties recognize that state enterprises should not operate in a manner that creates obstacles to trade and investment. In that light, each Party shall ensure that any state enterprise that it establishes or maintains:

(a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such enterprise exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges; and

(b) accords non-discriminatory treatment in the sale of its goods or services to covered investments.

The EU-Georgia RTA

Article 205: State monopolies, state enterprises and enterprises entrusted with special or exclusive rights

2. With regard to state monopolies of a commercial character, state enterprises and enterprises entrusted with special or exclusive rights, each Party shall ensure that such enterprises are subject to the competition laws referred to in Article 204(1), in so far as the application of those laws does not obstruct the performance, in law or in fact, of the particular tasks of public interest assigned to the enterprises in question.

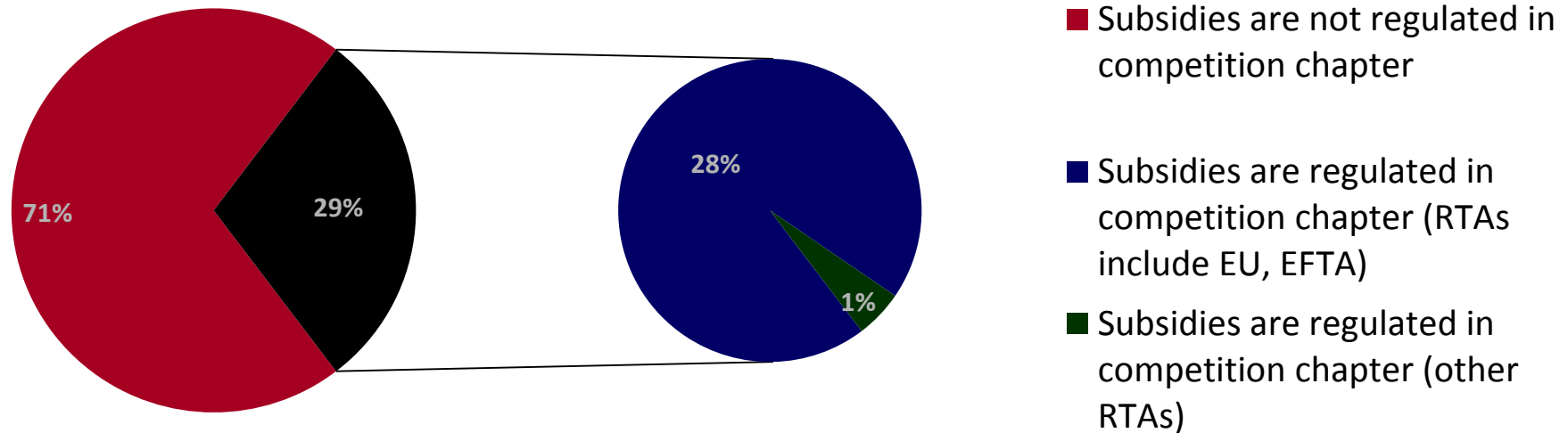
Regulation of SOEs and designated monopolies: the case of the CPTPP

A revolutionary approach to rule-making in defining the rules of commercial engagement for SOEs and complementing disciplines on SOEs under the WTO.
The SOEs chapter:

- ✓ Prohibits discriminatory behavior by SOEs toward other buyers/suppliers within the free trade area.
- ✓ Ensures that SOE purchases and sales are made on the basis of commercial considerations.
- ✓ Addresses government support programs to SOEs.
- ✓ Includes transparency provisions, which prescribe provision/publication of information on all SOEs.
- ✓ Is subject to the CPTPP's dispute settlement resolution mechanism.

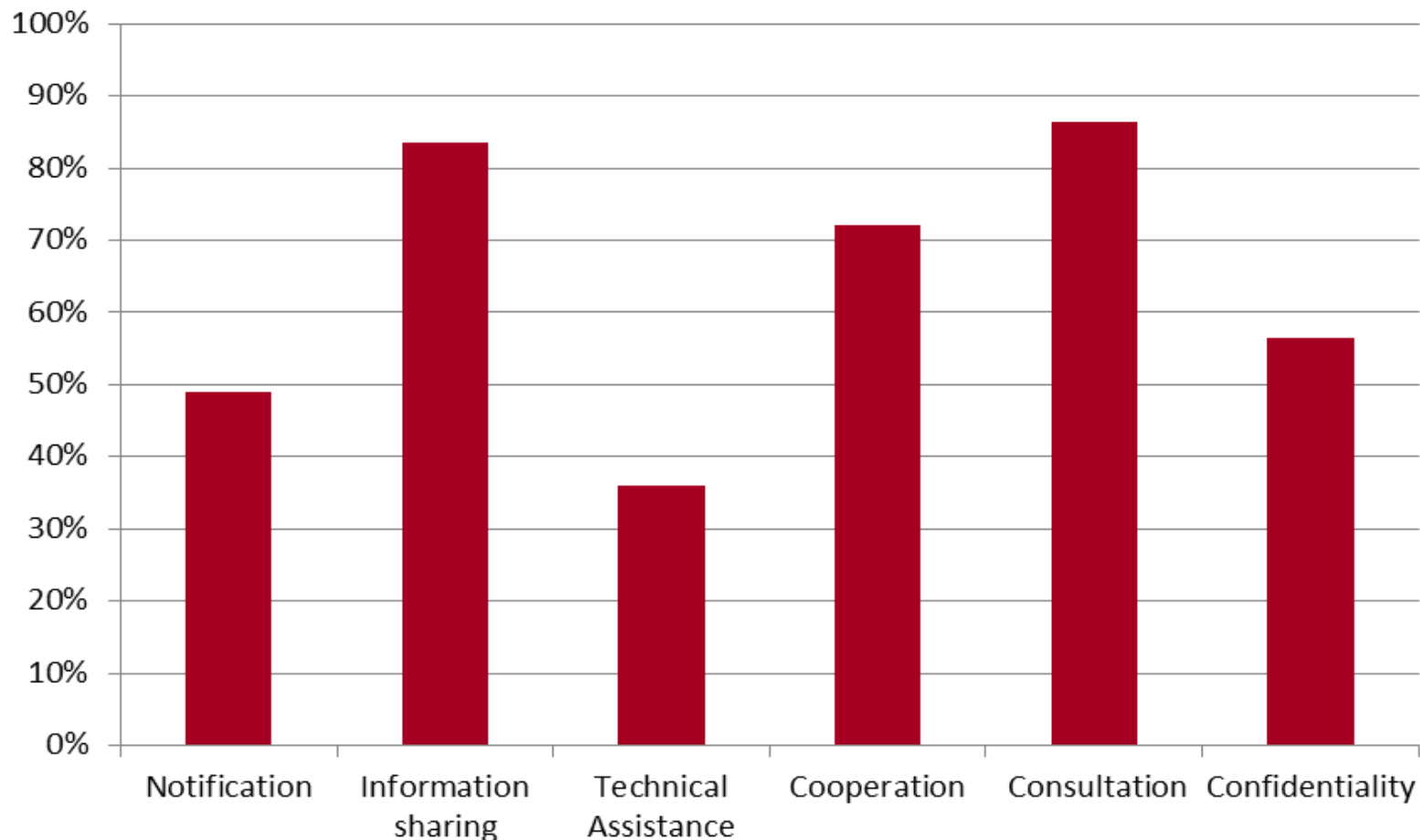
Further negotiations on extending the application of SOE disciplines?

Regulation of subsidies/state aid in competition chapters

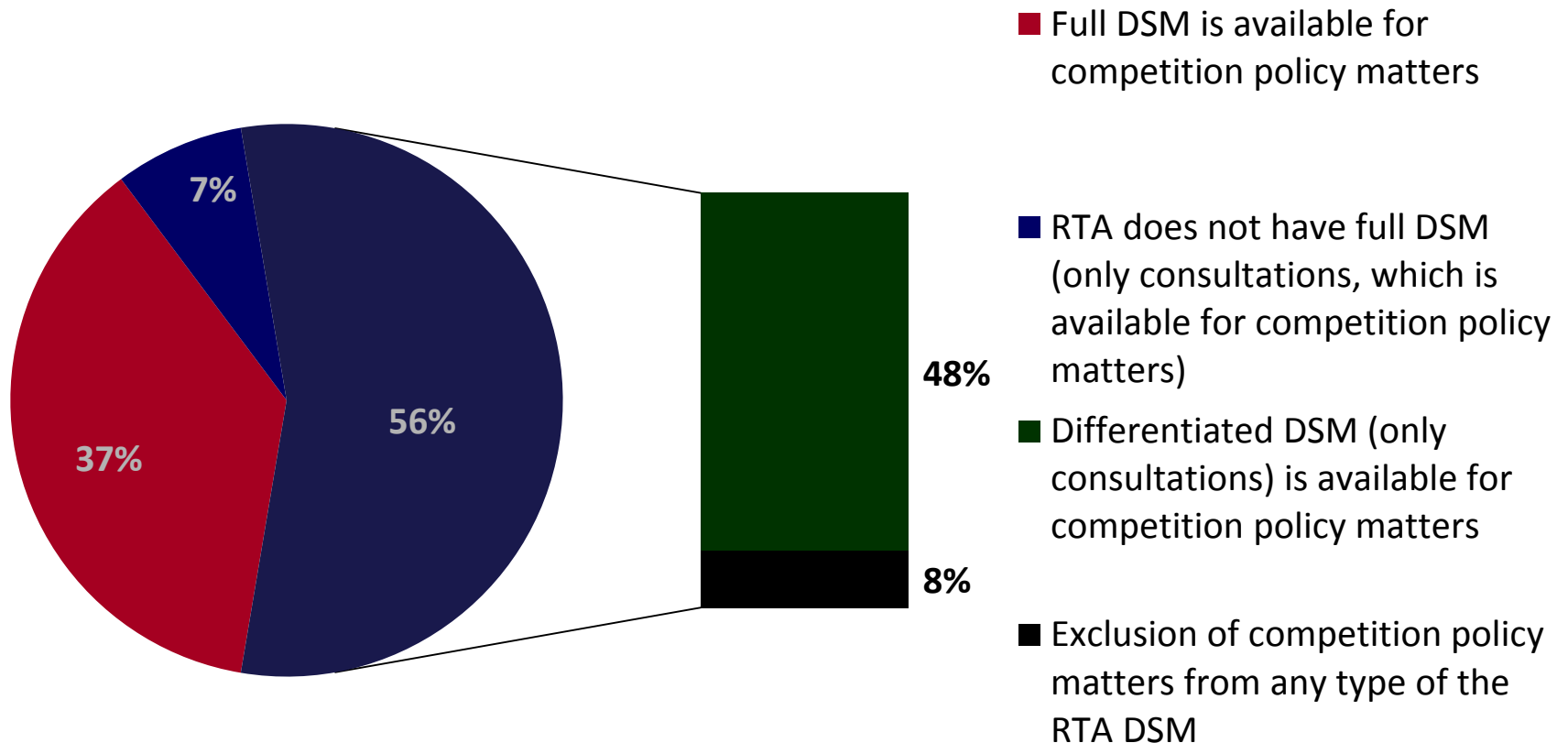


At the same time subsidies are regulated (usually by reaffirming the WTO disciplines) in separate chapters in RTAs.

Cooperation in competition law enforcement/policy mandated by RTAs



Dispute settlement with respect to competition policy matters



- Full DSM procedure is available in RTAs involving the EU, EFTA, Canada, Oceania

Private rights of enforcement

Only **2% of RTAs** with dedicated competition policy chapter have direct reference to private rights of enforcement (Oceania, Asia, Latin American countries)

The CPTPP – the most novel approach, which (as suggested by scholars) 'breaks new ground in the realm of international competition law and appears to be unprecedented in FTAs':

'each Party should adopt or maintain laws or other measures that provide an independent private right of action' that would provide a right to for 'injunctive, monetary and other remedies' (Article 16.2).

Key take-aways

- Most of the RTAs considered (around 80%) recognize importance of competition policies;
- Since the 2000s, countries tending to include more detailed, dedicated provisions in their RTAs;
- Around 60-80% from the total number have dedicated provisions, which address/refer to issues such as anti-competitive practices and SOEs;
- Around half of the RTAs refer to principles of competition law enforcement;
- Most of the RTAs include provisions on cooperation in competition policy;
- ***A template for action at the multilateral level?***

VII. Implications of recent digital markets and other transnational cases (abuse of dominance and mergers)

The recent EU *Google* cases (abuse of dominance)

❑ The Google Shopping case

In 2017, the EU Commission found 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 imposed the fine of €2.4 billion. ***US commentary on the decision emphasized how difficult it would be to bring a similar case in the US, given prevailing differences of competition law doctrine and evidentiary standards.***

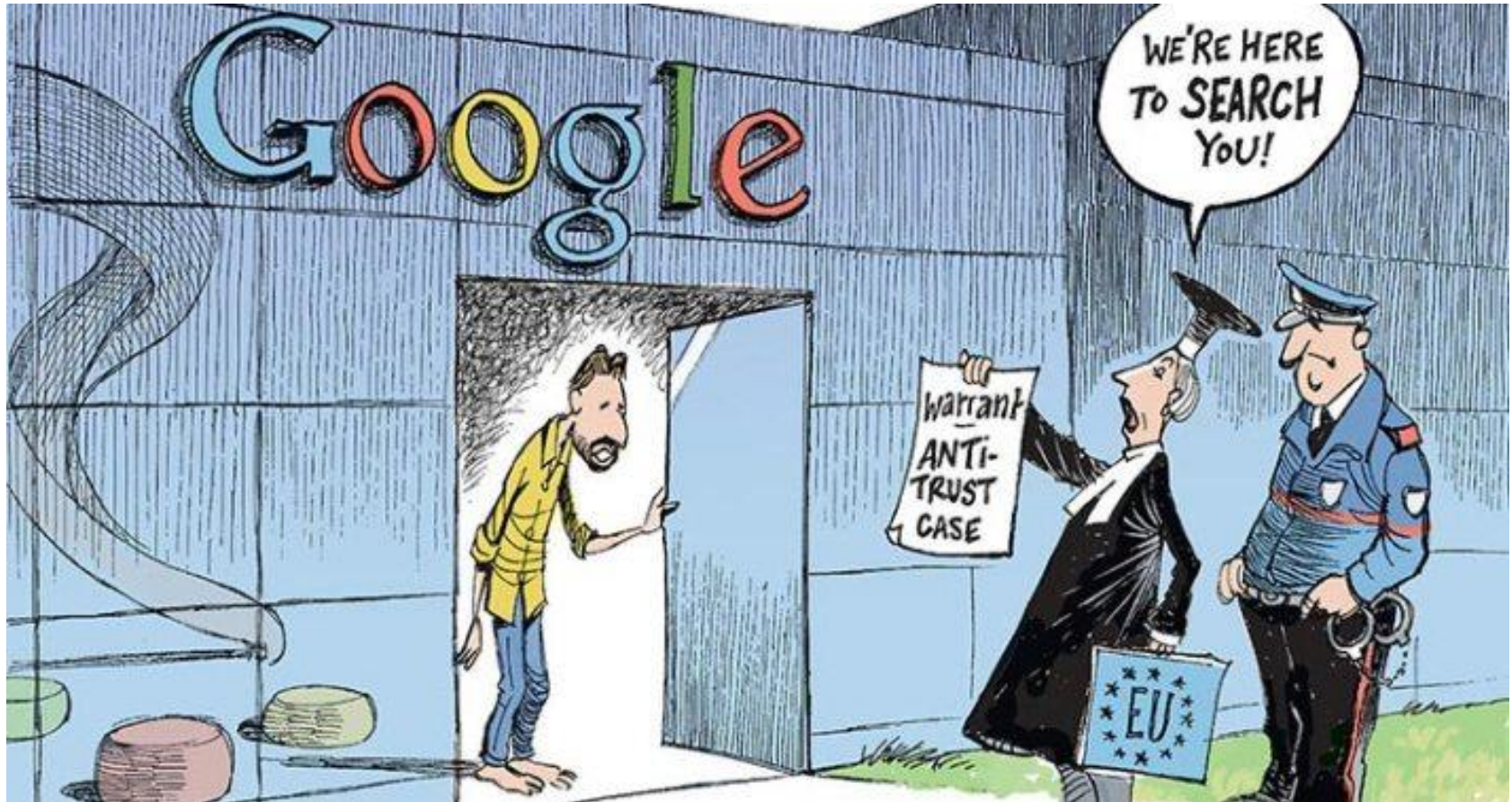
❑ The Google/Android case

In 2018, the EU Commission fined Google €4.34 billion for illegal practices after finding that the tech giant imposed illegal restrictions on Android device manufacturers and mobile network operators to cement its dominant position in general internet search.

❑ The Google/AdSense

In March 2019, the European Commission fined Google €1.49 billion for abusing 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.

Google cases



Not only in the EU, but as well in other jurisdictions, including BRICS economies.

Other current abuse cases

- ❑ **The Intel case**, which has been going on for almost seventeen years. In 2017, the Court of Justice of the European Union remitted the case back to the General Court, which initially upheld the European's Commission's €1.06 billion fine for Intel's alleged abuse of its dominant position through a loyalty/exclusivity rebate scheme for its x86 central processing units. Such practices, rather than being seen as restrictive of competition by object, are now to be analysed under an effects-based approach.
- ❑ **The Microsoft Media Player cases**, the Commission required that Microsoft offer for sale a version of its Windows Operating System that did not contain the Windows Media Player; disclose certain information to competitors that was deemed necessary for competitive access purposes; and pay a fine of €497 million. These remedies went beyond those that had been imposed in related US litigation, and elicited critical feedback from the US.
- ❑ **The Qualcomm case**, in which the European Commission has fined Qualcomm €997 million for abusing its market dominance in LTE baseband chipsets by preventing rivals from competing in the market. ***Western commentary has questioned the basis of the case/cited possible industrial policy motivations.***

Observations and implications

- Competition policy an essential element of framework for the digital market economy.
- **EU approach in these cases distinctly more interventionist than US.**
- Growing potential for **inter-jurisdictional clashes**, given the BRICS economies now also involved. Applies to merger as well as abuse of dominance cases (e.g. recent Bayer-Monsanto merger);
- A need for WTO disciplines to ensure non-discrimination, transparency and procedural fairness. Cf. US Administration's current proposal for a "Multilateral Framework on Procedures in Competition Law Investigation and Enforcement". ***Incorporates key elements of earlier WTO proposal for a "multilateral framework on competition policy"!***

VIII. Institutional considerations and options for the future

Assumptions (1)

- ❑ WTO is not likely going to be a major player in relation to questions of:
 - ❑ Case-specific international cooperation (possible exception: mergers?); and/or
 - ❑ The “science” of competition law enforcement (questions regarding specific doctrinal approaches in merger cases, etc.)

Assumptions (2)

- ❑ WTO can (potentially) play a useful role in:
 - ❑ Bolstering the role of competition policy institutionally (recognizing its universal importance in today's economy);
 - ❑ Ensuring **transparent and non-discriminatory application of competition policy** (as in earlier multilateral proposals and the current US framework initiative); and
 - ❑ Promoting informed debate on “competition policy and ... issues” having a trade dimension, e.g.:
 - ❑ Competition policy, trade and government procurement;
 - ❑ Competition policy and IP;
 - ❑ Competition policy and industrial policy.

Current status of work on competition policy in the WTO

- ❑ Exploratory work programme commenced at Singapore Ministerial Conference (December 1996).
- ❑ Doha Ministerial Declaration (para. 23): recognized “case for a multilateral framework” and directed Members to develop “modalities for negotiations”.
- ❑ Subsequently, negotiations opposed by developing countries (key developed jurisdictions also had mixed feelings). No consensus reached on modalities at Cancun.
- ❑ July 2004 General Council Decision on the Doha Work Programme: no further work toward negotiations on competition policy (or investment or transparency in government procurement) for duration of the Doha Round.
- ❑ Modest technical assistance/research/analysis are ongoing.

Relevant developments post-2004

- ❑ Proliferation of competition laws and enforcement regimes across the developing world, accompanied by very extensive capacity building efforts (UNCTAD; OECD; ICN; bilateral donors; CUTS);
- ❑ Strengthening of inter-agency co-operation e.g. in the International Competition Network (ICN) and through bilateral enforcement agreements.
- ❑ Very extensive incorporation of competition disciplines in RTAs (including TPP).
- ❑ Important focus on competition policy in work of international think tanks (see recent work of the E15 Expert Group).
- ❑ Some indications of greater receptivity to international disciplines on the part of the US and global business communities (US Chamber of Commerce ICPEG Report).
- ❑ At the same time, strains in the multilateral trading system and a difficult environment for forward movement generally.

What are the main arguments for introducing broad-based competition policy disciplines in the WTO?

1990s/early 2000s

- ❑ Risk that anti-competitive practices of firms will undermine intended benefits of trade liberalization (international cartels/vertical market restraints).
- ❑ Use of trade rules to facilitate/lock in of pro-competitive reforms necessary to enjoy benefits of trade liberalization.
- ❑ Scope for conflict of laws in this area (need for rules on transparency and non-discrimination).

2010s

- ❑ Same issues as before plus:
 - ❑ Emerging sectoral concerns (e.g. in energy and access to medicines).
 - ❑ Role of state-owned enterprises (SOEs) and industrial policy: need to ensure competitive neutrality.
 - ❑ Continuing need to support/reinforce the role of competition policy institutions in many jurisdictions.
 - ❑ Potential for conflicts of jurisdiction and possible use of competition law as a tool of protectionism.

What are some arguments for keeping competition policy outside the WTO?

•1990s/early 2000s

- ☐ Developing countries lack sufficient capacity for negotiation/meaningful implementation (no longer generally true).
- ☐ WTO will “warp” application of competition law through its focus on market access (concern exaggerated??)
- ☐ Intrusion on sovereign governments’ “policy space”? Just another tool for exploiting developing countries?

•2010s

- ☐ Not necessary to integrate competition policy with WTO; competition institutions growing up well without the WTO’s “help”; and other organizations (OECD, UNCTAD, ICN) already active in this area. But maybe they can have complimentary roles??

Additional points for reflection

- ❑ Interface with intellectual property, standards and the “new economy” and potential for international conflicts
- ❑ **Relevance of sectoral perspectives, e.g. regarding:**
 - Intellectual property (e.g., in relation to e-commerce and pharmaceuticals)
 - Government procurement
 - Transportation
 - Primary products and food

Key elements of the competition chapter of the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) Agreement

- Requirement to adopt/maintain a competition law to address anti-competitive conduct, with objective of economic efficiency and consumer welfare.
- Requirements for procedural fairness and transparency in the enforcement of competition law.
- Independent private rights of action to enforce the law.
- Cooperation with other parties' competition agencies in enforcing the law, and technical cooperation (capacity building).
- Right to consultations with other parties.
- NB: note also the separate substantive chapter on state-owned enterprises, including government monopolies.

Options for the future

- NB: Capacity building/other work of ICN/UNCTAD/OECD/CUTS/others remain vital, in any case. Question is only how to carry forward work on trade and competition policy issues. With this understanding:
- Continued reliance on FTAs/voluntary inter-agency agreements to promote intergovernmental cooperation in this area?
- Resumption of work in the WTO Working Group, possibly with direct “feed-in” from ICN/UNCTAD/OECD?
- Negotiation of a multilateral framework as envisioned in the original Doha Ministerial Declaration?
- “Multilateralization” or “plurilateralization” of the CPTPP or other FTA approach?
- More seminars! And more research/documentation of the issues! Possible inputs:
 - ✓ Roles of trade and competition policy in public procurement
 - ✓ Intellectual property, competition policy and TRIPS Agreement (new research volume forthcoming!)
 - ✓ Competition, Industrial and regulatory policy

Closing points for reflection

- ❑ Competition policy already present in the WTO Agreements, in concrete and specific though still limited ways;
- ❑ RTAs arguably provide a useful template for action at the multilateral level;
- ❑ Risks of missed opportunities/misapplication of existing rules;
- ❑ A solid basis on which to build;
- ❑ Importance of informed dialogue between the competition and trade communities.