COMPETITION LAW AND TRADE POLICY: "NEVER THE TWAIN SHALL MEET"?

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This article addresses the complex—and, at least from some perspectives, fraught—interrelationship between trade policy[1] and competition enforcement.[2]

Trade and competition are closely connected: It is not controversial that competition issues affect trade patterns.[3] And trade policy will have an impact on competition: protectionist trade policy (often underwritten by appeals to industrial policy) tends to reduce domestic competition, while liberalizing trade policy instruments complements competition promotion and enforcement.

Yet, efforts to combine the two areas into a coherent framework have faced significant challenges. At the Ministerial Conference of the World Trade Organization (WTO) in Singapore (Singapore Ministerial), Members established

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* Member of the Bar of Ontario. I dedicate this article to the late Denyse MacKenzie, a mentor and friend, who introduced me to competition law, and much else besides.

[1] As discussed in this article, "trade policy" refers to those policies of a state that are chiefly concerned with that state's terms of *international* trade.

[2] As discussed in this article, "competition *enforcement*" refers to positive acts or decisions of a state in the context of its competition *framework* to enforce domestic competition disciplines. A competition framework may well be broader than enforcement—it might, for example, encompass competition *advocacy*. Enforcement or advocacy by a competition *authority* is usually underwritten by competition *policy*, a state's overall policy and political decision to support and enhance a competitive domestic market. As we will see, a state's international competition policy may be in support of its trade policy as well as domestic competition policy. I concentrate on *enforcement* because of its direct impact on business. Finally, none of the justifications for an expansive competition enforcement that incorporates industrial (or trade) policy considerations argues in favor of collusive behavior. There is no objection to "pure" competition enforcement when it comes to anticompetitive conduct that, in some jurisdictions at least, comes within anticartel criminal offenses. Accordingly, references to competition enforcement are with respect to merger reviews.

[3] Rambod Behboodi, Deputy Comm'r for Competition Promotion, Competition Bureau of Canada, Official Presentation at the Canadian International Council: Competition, Competitiveness and Convergence—Trade and Competition Policy in an Integrated Global Economy (June 2015), genevatradelaw.com/index.php/competition-competitiveness-and-convergence/.

a Working Group on the Interaction between Trade and Competition Policy (WGTCP) to study the extent to which competition enforcement should be incorporated in framework agreements governing international trade.[4] That initiative did not, in the end, get far.[5] Multilateral negotiations on "trade and competition" faltered and then disappeared. But the need to address competition issues in trade policy instruments did not go away.[6]

There are also institutional reasons why trade policy considerations have largely been kept separate from competition law and policy. For most states,[7] competition policy—which could also encompass other economic regulation objectives and measures such as state aid regulation—is a necessary instrument of economic development. Yet at least in jurisdictions with active competition enforcement, implementing and enforcing competition rules is the responsibility of discrete agencies. And whatever their exact mandates, these competition agencies tend to operate in highly specialized silos.

Competition decisions prohibiting mergers or breaking up cartels have sometimes run into opposition from advocates of "industrial policy" who seek the promotion of sectoral national champions to compete on the world stage. But thanks to their independence, and also in light of studies that have demonstrated the true competitive costs of an active "industrial policy," competition authorities have tended to resist the siren call of industrial policy advocates.

At the same time, changing patterns of trade and, in particular, the rise of a new economic model in China, with massive interlocking state-trading enterprises dominating export markets, pose a threat to the integrity of functioning competitive markets targeted by those enterprises. This issue was brought into intense focus by the decision of the Commission of the European Union in *Siemens/Alstom*,[8] but the debate has long provenance.

Against this background, this article discusses the extent to which trade policy considerations can usefully form an element both in the development

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[4] *See Interaction Between Trade and Competition Policy*, WORLD TRADE ORG., www.wto.org/english/tratop_e/comp_e/comp_e.htm.

[5] In 2004, the General Council of the WTO decided that this issue "will not form part of the Work Programme set out in that Declaration and therefore no work . . . will take place within the WTO during the Doha Round. Doha Work Programme, *Decision Adopted by the General Council on 1 August 2004*, WTO Doc. WT/L/579 (Aug. 2, 2004), www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm#invest_comp_gpa.

[6] Canada (and its partners) pursued two parallel paths to address the underlying policy concerns: (a) "the negotiation and implementation of competition provisions in international trade agreements," *International Efforts—Topics*, COMPETITION BUREAU CANADA (Mar. 16, 2021), www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03763.html#tab4; and (b) "cooperation instruments with the [Competition] Bureau's international counterparts that facilitate cooperation and coordination in cross-border enforcement matters." *Id.* at tab 2.

[7] This would include supranational entities such as the European Union.

[8] Case M.8677—Siemens/Alstom, Comm'n Decision, 2019 O.J. (C 300) 14 (June 2, 2019).

of domestic competition policy and in competition enforcement efforts, in particular in merger review.

The global trading framework needs active, healthy, and coherent national competition regimes to function properly. Through trade agreements, trading partners seek to ensure minimal domestic competition governance; through cooperation, training, and convergence, they seek to bring coherence to competition enforcement and, thus, to spur competition not just domestically but internationally. But the texture of the global trading framework is more lumpy than smooth. And its functioning is subject to unusual stresses and challenges. Competition policy functions within this structure and not abstracted from it. This article does not land on a definitive balance between "competition" and "trade policy." But there is no reason why taking due account of the fuller context of global competition should compromise the attainment of competition objectives.

I. COMPETITION ENFORCEMENT AND EFFECTIVE TRADE POLICY

In both definitional and systemic terms, competition concepts and competitive markets are at the core of the world trading order. Basic trade disciplines make no sense or are inoperable without some reference to competitive market; systemically, competition enforcement is essential as a buttress for liberalizing trade agreements.

A. TRADE DISCIPLINES AS EMANATIONS OF COMPETITIVE MARKETS

Competition between products in the context of a functioning market[9] is at the heart of the most basic disciplines of trade liberalization agreements: reduction or elimination of border measures, and most favored nation (MFN)

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[9] Referring to the findings of the Panel in *Japan—Taxes on Alcoholic Beverages*, the Appellate Body noted:

> In this case, the Panel emphasized the need to look not only at such matters as physical characteristics, common end-uses, and tariff classifications, but also at the "market place". This seems appropriate. The GATT 1994 is a commercial agreement, and the WTO is concerned, after all, with markets. It does not seem inappropriate to look at competition in the relevant markets as one among a number of means of identifying the broader category of products that might be described as "directly competitive or substitutable".

Appellate Body Report, *Japan—Taxes on Alcoholic Beverages* at 25, WTO Doc. WT/DS8/AB/R (Oct. 4, 1996) (emphasis added) (citation omitted).

and national treatment requirements.[10] A cap on tariffs[11] or the prohibition of quantitative restrictions[12] makes sense only if imported products are permitted to compete, and in fact compete freely, in the domestic market. National treatment requirements[13] impose disciplines on *government* measures that affect conditions of competition between imported and domestic like products; the MFN principle[14] prohibits discrimination between imported products from different WTO Members. Similar disciplines exist in the context of services.[15] These disciplines are predicated on concepts—"like products" and "treatment no less favorable"—that are defined, at least in part, in *competitive market* terms: products are "like" not only when they are identical[16] but also when "directly competitive or substitutable"[17] within a given market context;[18] "na-

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[10] The term "free trade agreement" (FTA) is something of a misnomer, as most FTAs do not fully liberalize trade between the parties. The term sometimes used interchangeably with FTAs is "regional trade agreement" (RTA), but that appears too limiting. The Canada-European Union "Comprehensive Economic and Trade Agreement" (CETA) introduced new terminology into the trade law and policy lexicon, but one might question whether this is simply a (slightly) more ambitious FTA or a whole new species of economic and trade regulation. Canada-European Union Comprehensive Economic and Trade Agreement, 2017 O.J. (L 11) 23 (Sept. 21, 2017), ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/. Finally, the WTO Agreement is a *liberalizing* but not a "free" trade agreement.

[11] For example, see Article II of the General Agreement on Tariffs and Trade (GATT). Tariff "bindings" under the GATT and the WTO are, in turn, subject to a range of further "anti-circumvention" provisions, ranging from disciplines on customs valuations and other formalities, to rules of origin. General Agreement on Tariffs and Trade, art. II, Oct. 30, 1947, 61 Stat. A-II, 55 U.N.T.S. 194 [hereinafter GATT].

[12] *Id.* art. XI.

[13] *Id.* art. III.

[14] *Id.* art. I.

[15] General Agreement on Trade in Services, art. II, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) (Most-Favoured-Nation Treatment); *id.* art. XVII (National Treatment); *id.* art. XVI (Market Access).

[16] For example, see the definition of "like products" in Article 2.6 of the WTO Anti-dumping Agreement (A-D Agreement) and in the Appellate Body Report on *Japan—Taxes on Alcoholic Beverages*. Agreement on the Implementation of Article VI of GATT 1994, art. 2.6, 1868 U.N.T.S. 201 1994; *Japan—Taxes on Alcoholic Beverages*, *supra* note 9, at 19–23.

[17] The language is found in Annex I *Ad* Article III, of the GATT:

> A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where *competition was involved* between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

GATT, *supra* note 11, Annex I *Ad* art. III (emphasis added).

[18] In the report on *Japan—Taxes on Alcoholic* Beverages, the Appellate Body referenced wording from a previous report:

> The Report of the Working Party on *Border Tax Adjustments*, adopted by the CONTRACTING PARTIES in 1970, set out the basic approach for interpreting "like or similar products" generally in the various provisions of the GATT 1947:
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> > . . . the interpretation of the term should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a "similar" product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is "similar": the product's end-uses in a given market; *con-*

tional treatment" is not concerned with "any particular trade volume but rather . . . the equal competitive relationship between imported and domestic products."[19]

B. COMPETITION ENFORCEMENT AS BUTTRESS FOR LIBERALIZATION

WTO disciplines[20] govern measures of Members; they do not *directly* regulate private actions.[21] There have been instances where a panel has examined whether ostensibly *private* measures were nevertheless "attributable to the Government" of a Member and thus subject to the WTO Agreement.[22] In addition, certain disciplines cover actions of private actors where the actors are "directed" or "entrusted" by government to undertake those actions.[23]

This is not because Members do not appreciate or recognize the impact of private actors on domestic or international markets.[24] Rather, the GATT and

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> *sumers' tastes and habits*, which change from country to country; the product's properties, nature and quality.

Japan—Taxes on Alcoholic Beverages, *supra* note 9, at 20 (emphasis added) (citation omitted).

[19] *Id.* at 16.

[20] By using this word, I refer to the ensemble of the rights and obligations of Members under the WTO Agreement, as further clarified and applied through the dispute settlement mechanism of the WTO. I have avoided referring to WTO "rules" for two reasons: first, there is risk of confusion because "rules" could also refer to trade remedy measures such as antidumping and countervailing duties; and second, common references to WTO rules appear to make a distinction between *legal* obligations under international law and a lesser category, mere "rules," in respect of trade-related treaty obligations. The most cogent, if implicit, judicial expression of this latter school of thought can be found in Case C-149/96, *Portuguese Republic v. Council of the Eur. Union*:

> However, the lack of reciprocity in that regard on the part of the Community's trading partners, in relation to the WTO agreements which are based on "reciprocal and mutually advantageous arrangements" and which must ipso facto be distinguished from agreements concluded by the Community, referred to in paragraph 42 of the present judgment, may lead to disuniform application of the WTO rules.

Case C-149/96, Portuguese Republic v. Council of the Eur. Union, 1999 E.C.R. I-08395 (CJ).

[21] *See, e.g.*, Communication from the Eur. Community and Its Member States at 1, *Working Group on the Interaction Between Trade and Competition Policy*, WTO Doc. WT/WGTCP/W/1 (June 11, 1997) [hereinafter *EC Communication*] ("Tariff and non-tariff barriers as well as regulatory obstacles have been either reduced or eliminated. In contrast, while the benefits of rules for business behaviour are generally recognized, none has been developed at the international level.").

[22] Panel Report, *Japan—Measures Affecting Consumer Photographic Film and Paper*, ¶ 10.60, WTO Doc. WT/DS44/R (Mar. 31, 1998; adopted Apr. 22, 1998).

[23] Agreement on Subsidies and Countervailing Measures (SCM Agreement), art. I (effective Jan. 1, 1995), www.wto.org/english/docs_e/legal_e/24-scm.doc. *See, e.g.*, Appellate Body Report, *United States—Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WTO Doc. WT/DS296/AB/R (June 27, 2005).

[24] *See, e.g.*, *EC Communication*, *supra* note 21, at 1:

> A primary concern of countries, at all levels of development, has thus been to prevent that the fruits of liberalization and deregulation undertaken by governments should be nullified by the establishment of barriers set up by business having a same effect.

the WTO have operated on the basis of an unstated assumption[25] that *private conduct* that could detract from liberalized trade gains ought normally be governed through competition disciplines[26] in a way that does not, in itself, constitute a barrier to trade.

See also Communication from Japan at 1, *Working Group on the Interaction Between Trade and Competition Policy*, WTO Doc. WT/WGTCP/W/168 (July 19, 2001) ("[I]t has been pointed out that the benefits of liberalized trade could be distorted by anti-competitive business practices as well as governmental measures that are the direct object of regulation by the WTO rules.").

In its Communication, the World Bank provided examples of anticompetitive internal acts with trade consequences:

> Where traded goods are concerned, there are ways in which a local oligopoly can effectively control competition from imports as well as local competition. Where local producers have integrated forward into distribution, including the distribution of imports, they can use this position to prevent imports from gaining a foothold. Also, cases have been identified in which all producers in a region were under common ownership—the oligopoly extended past national borders to include nearby sources of potential competitive pressure. In some instances, control over access to international business services has been the basis for local enterprises to maintain a non-competitive arrangement.

Communication from the World Bank at 3, *Working Group on the Interaction Between Trade and Competition Policy*, WTO Doc. WT/WGTCP/W/22 (July 9, 1997) (citation omitted).

The OECD also identified the ways in which the absence of an effective competition framework could have a trade impact:

> For example, domestic producers may enter into anticompetitive exclusive dealing agreements that foreclose foreign firms from distributing and/or selling competing products, or engage in a joint boycott of domestic distributors of imports or purchasers of imports. A locally dominant firm can abuse its position, e.g., through loyalty discounts, to exclude competitors. The practical effect is that foreign suppliers of competing products cannot actually sell into the domestic market. Moreover, international cartels may divide up world markets.

Communication from the OECD at 15, *Working Group on the Interaction Between Trade and Competition Policy*, WTO Doc. WT/WGTCP/W/21 (July 29, 1997).

[25] *See* Rambod Behboodi, *Legal Reasoning and the International Law of Trade*, J. WORLD TRADE, Aug. 1998, at 55, 64–68.

[26] Communication of Australia ¶ 16, *Working Group on the Interaction Between Trade and Competition Policy*, WTO Doc. WT/WGTCP/W/159 (Mar. 13, 2001) ("Effective competition regimes can help ensure that internal regulatory and/or private business practices do not undermine the hard-won market access and efficiency gains arising from progressive reductions in border protection."). *See also* Submission from Japan at 5, *Working Group on the Interaction Between Trade and Competition Policy*, WTO Doc. WT/WGTCP/W/52 (Dec. 4, 1997). When firms' anticompetitive behavior is not sufficiently regulated, such behavior might be abused by firms to block imports. Thus, in such cases, competition law can play a role of enhancing free trade.

The Submission then sets out a number of case studies. In the *Soda Ash* case, for example, "[t]he quantity of imports increased as much as eight times in the four years after the JFTC's decision." Submission from Japan, *supra*, at 5.

Canada's submission notes:

> The major antitrust jurisdictions and the international policy community recognize that strong competition policy is needed to promote efficiency and competitiveness, strengthen internal markets and ensure that, as government-imposed barriers come down, they are not replaced by private restraints to trade—cartels (both domestic and international), anti-competitive mergers and abuses of dominant position.

Submission from Canada at 5, *Working Group on the Interaction Between Trade and Competition Policy*, WTO Doc. WT/WGTCP/W/51 (Dec. 4, 1997).

This assumption could sometimes be incorrect, as competition policy and enforcement could interfere with trade. This could happen where "extraterritorial application" of competition laws inhibits trade directly or introduces uncertainty in the market, resulting in reduced trade.[27] Perhaps reflecting its own somewhat tortuous trade relationship with the United States, in its submissions to the WTO, Japan identified at least three instances where "extraterritorial application" could have trade effects:

- threat of review is used as a means of implementing "voluntary import promotion" measures;
- lack of knowledge of the home market of exporters results in review and measures that create undue uncertainty for the exporter and attendant impact on trade; and
- asymmetric anti-cartel enforcement could, in turn, skew trade patterns.

In the same vein, trade *problems* can be manifestations, or symptoms, of deeper competition issues:

- As trade barriers fall, firms become more global in operation and get exposed not only to deeper regulatory frameworks that were hidden behind more direct trade barriers but also to different business practices and cultures that are not easily addressed through trade policy.[28] One of the most notorious examples of this was the long-running *Kodak-Fuji* dispute between the United States and Japan, which eventually found its way to the WTO.[29] The dispute centered mostly around film distribution networks in Japan.[30]

According to the United States:

> [A]t the beginning of the Kennedy Round in 1963, foreign and domestic manufacturers distributed photographic film and paper through Japan's primary wholesalers who, in turn, sold to other wholesalers or retailers. Photographic material manufacturers competed against one another to market their products to the same wholesalers. Foreign as well as Japanese manufacturers did business with many of Japan's distributors. By the mid-1970's, however, *when many formal market barriers had fallen*, the Japanese Government had

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To this end, competition chapters have been incorporated in many trade liberalization agreements. Robert D. Anderson et al., *Competition Policy, Trade and the Global Economy: Existing WTO Elements, Commitments in Regional Trade Agreements, Current Challenges and Issues for Reflection* 26 et seq. (WTO Staff Working Paper No. ERSD-2018-12, Oct. 21, 2018).

[27] Submission from Japan, *supra* note 26, at 6.

[28] Hank Spier, Gen. Manager, ACCC, Speech at Board of Foreign Trade, Taipei, Seminar on International Trade Politics After the WTO Singapore Ministerial Conference: The Interaction Between Trade and Competition Policy: The Perspective of the Australian Competition & Consumer Commission 1 (May 2, 1997).

[29] *Japan—Photographic Film and Paper*, *supra* note 22.

[30] *See, e.g.*, *id.* ¶¶ 2 et seq.

> fundamentally altered relationships between manufacturers and wholesalers. By then, all of the leading wholesalers in Japan exclusively handled Japanese products.[31]
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> . . . .
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> Japan has implemented these promotion countermeasures through the Premiums Law and certain regulations issued by the JFTC[32] under the Antimonopoly Law.[33]
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> . . . .
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> [T]he Premiums Law expressly exempts the cartel-like practices of the councils from antitrust enforcement.[34]

- In the absence of a "meaningful, soundly enforced national competition" regime, domestic monopolies or oligopolies can benefit from rents in the domestic market and sell at ultra-competitive prices in export markets, giving rise to dumping.[35]
- The absence of an agreed international framework for competition enforcement can, in a trade context, give rise to a paradoxical outcome: although *private* action attributable to a Member may be subject to WTO disciplines, the same or more restrictive private practices that are not attributable to a Member would fall totally outside the scope of WTO disciplines if a government had chosen not to intervene because of the lack of a

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[31] *Id.* ¶ 4.2 (emphasis added).

[32] Japan Fair Trade Commission, responsible for the enforcement of Japan's Antimonopoly Law and, according to the United States, the "Premium Laws" at issue in the dispute.

[33] *Id.* ¶ 4.16.

[34] *Id.* ¶ 4.18.

[35] "Dumping" exists where an exporter sells its product abroad at lower prices than it does at home or at prices that are below cost regardless of objective (for example, *intent* to drive out competition in the import market) or potential ultimate effect (monopolization through predatory pricing). "Antidumping duties" seek to address "material injury" caused as a result of dumping to producers of the like product in the importing country; duties are limited to the dumping found to exist and should normally be imposed only to the extent necessary to alleviate the observed material injury (or to forestall a threat of material injury). Communication from the United States at 1–3, 12, *Working Group on the Interaction Between Trade and Competition Policy*, WTO Doc. WT/WGTCP/W/88 (Aug. 28, 1998). Furthermore:

> Specifically, competition laws have an impact on the problem of *injurious dumping*, in that the absence of, or the lack of adequate enforcement of, meaningful competition laws is one of the circumstances that may enable producers that profit from non-competitive domestic markets to engage in injurious dumping in the first place, as is discussed more fully below.

Id. at 4. "Dumping" should be distinguished from the concept of "predatory pricing" in anticartel enforcement.

The interaction between trade and competition is not unidirectional but iterative. *See, e.g.*, Eduardo Pérez Motta, *Competition Policy and Trade in the Global Economy: Towards and Integrated Approach* 14 (E15 Expert Group on Competition Policy and the Trade System, Policy Options Paper, 2016), www3.weforum.org/docs/E15/WEF_Competitition_Policy_Trade_Global_Economy_Towards_Integrated_Approach_report_2015_1401.pdf ("decisions in trade policies and trade laws, specifically anti-dumping and safeguards, that not only affect competition but can induce anticompetitive practices like cartelization or abuse of dominance."); *see also* Eduardo Pérez Motta, *The Relationship Between Trade and Competition in a Globalized Economy*, *infra* this issue, 83 ANTITRUST L.J. 169 (2021).

competition law or because the practice is not considered as an enforcement priority.[36]

- Inconsistent or discriminatory competition enforcement can give rise to trade issues.[37]
- Without bilateral or plurilateral disciplines on government procurement enshrined in trade agreements to help promote "*competition*, transparency, integrity and enhanced value for money in national procurement regimes,"[38] these markets would be uniquely susceptible to capture and protectionism.

II. THE IMPACT OF TRADE POLICY ON COMPETITION

The relationship between trade and competition is complementary.[39] Indeed, "ultimate objectives and outcomes of a successful policy of trade liberalization will in many instances closely resemble or complement those achieved through the instruments of competition policy."[40]

Trade policy can, and does, serve as an "abettor" of domestic competition enforcement (or lack thereof) in two ways: on the one hand, *trade restrictive* policies could and generally do have the effect (more often than not intended) of shielding domestic industries from foreign competition; on the other hand, trade liberalization policies tend to favor competition enforcement and promotion, not only in the domestic market but also with respect to exporting industries.[41]

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[36] Communication from the Eur. Community and Its Member States at 11, *Working Group on the Interaction Between Trade and Competition Policy*, WTO Doc. WT/WGTCP/W/78 (July 7, 1998).

[37] D. Daniel Sokol, *Tensions Between Antitrust and Industrial Policy*, 22 GEO. MASON L. REV. 1247, 1257 (2015) ("Empirical work analyzing the period of the 1990s found that there was protectionism involved in European merger control. DG Comp had a higher probability of intervening against non-European firms when there were European competitors in the same market.") (citations omitted).

[38] Robert D. Anderson & William E. Kovacic, *Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets*, 18 PUB. PROCUREMENT L. REV. 67, 74 (2009) (emphasis added).

[39] Spier, *supra* note 28. *See also* Communication from the OECD, *supra* note 24, at 15. ("Despite some different perspectives, the Trade and Competition Policy Committees agree that the core objectives of trade and competition policies are mutually reinforcing. Both seek to enhance welfare through economic efficiency and encourage competitive, market-oriented directions.").

[40] Communication from the United States at 2, *Working Group on the Interaction Between Trade and Competition Policy*, WTO Doc. WT/WGTCP/W/35 (Oct. 1, 1997). *See also* Communication from Australia, *supra* note 26, ¶ 15.

[41] *See also* Mark Thatcher, *From Old to New Industrial Policy via Economic Regulation*, RIVISTA DELLA REGOLAZIONE DEI MERCATI, Dec. 2014, at 8.

A. TRADE POLICY AS A SHIELD AGAINST COMPETITION

Every instrument of trade policy, in whatever form and for whatever reason, has the potential for anticompetitive outcomes—indeed, in many instances, that would be the policy intent. Quantitative restrictions (QRs), for example, have the express purpose and effect of limiting competition in the domestic market. The massive "tariffication" exercise in the transition from the GATT to the WTO sought to make the distorting effect of QRs transparent by requiring their replacement with tariffs of equivalent effect;[42] because the object of the exercise was merely to convert all barriers to tariffs rather than immediately reduce those barriers,[43] it did not remove competitive distortions.

Tariffs have multiple objectives that range from raising revenue,[44] to correcting for actual or perceived externalities[45] or market imperfections,[46] to outright protection. In terms of their effects, in turn, tariffs may be calibrated for maximum protectionist (and therefore, competition-distorting) results—for example, prohibitive tariffs that have the "equivalent effect" of import prohibitions in the tariffication exercise.[47] Or, they may be structured for reve-

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[42] *See, e.g.*, Final Panel Report (NAFTA), *Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products*, ch. 20, at 44 (CDA-95-2008-01, Dec. 2, 1996).

[43] The Panel in the *Canada—US-Origin Agricultural Products* matter found:

> What is evident from the record of the Uruguay Round negotiations on agriculture set out above is: (a) the commitment of states to remove their non-tariff barriers to imports of agricultural products, (b) as the quid pro quo for the removal of the non-tariff barriers, the right of states to establish tariff equivalents (at rates not exceeding the level of protection provided by the non-tariff barriers they replaced), and (c) the expectation that such tariff equivalents would in fact be established. The certainty of this expectation, affirmed by the practice of WTO Members, is reflected, albeit rather obscurely, in the language of Article 4.2 of the WTO Agreement on Agriculture.

Id. ch. 20, ¶ 180.

And continuing a few paragraphs later, the Panel states:

> That is, they were replacing protection in the form of quotas or other non-tariff barriers with protection in the form of tariffs. This right to establish such tariffs was also subject to certain reduction and volume commitments, including a commitment to phase those tariffs down over time.

Id. ch. 20, ¶ 185 (footnote omitted).

[44] In 2017, Canada raised some C$5.6 billion in revenues from tariffs. Release: Canada's import duties, 1988 to 2018 (Oct. 19, 2018), www150.statcan.gc.ca/n1/daily-quotidien/181019/t002d-eng.htm. This is about 1% of the total value of imports, but still a significant contribution to the Canadian treasury.

[45] *See* Sam Fleming & Chris Giles, *EU Risks Trade Fight over Carbon Border Tax Plans*, FIN. TIMES (Oct. 16, 2019), www.ft.com/content/154368c8-ef55-11e9-ad1e-4367d8281195 (discussing current debate in the European Union on a border carbon tax).

[46] As in the case of injurious dumping or subsidization, or as safety valve in the case of safeguards measures.

[47] *See, e.g.*, Josh Wingrove & Erik Hertzberg, *Does Canada Really Charge a 270% Tariff on Milk?*, WIS. AGRICULTURIST (June 11, 2018), www.farmprogress.com/dairy/does-canada-really-charge-270-tariff-milk ("Canada has high milk tariffs beyond the allowed quotas, with an average duty of 218.5% on dairy."); *Sugar & Sweeteners: Policy*, USDA ECON. RSCH. SERV.,

nue-raising, ideally with minimal impact on the domestic competitive market—somewhat chimerical "optimal"[48] tariffs.

Subsidies are a third class of trade instruments[49] that affect not just terms of trade but, crucially, domestic[50] and international[51] competition, though perhaps not in the same way as the other two classes of trade instruments. Because of the discussion later in this article about "consumer welfare" as a primary objective of competition policy, it is worthwhile briefly to explore the competition effects of subsidies.

Export subsidies are one of two pure subsidy-as-trade-instrument types of subsidies and, not coincidentally, one of two types of subsidies prohibited

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www.ers.usda.gov/topics/crops/sugar-sweeteners/policy.aspx (prohibitive sugar import tariffs into the United States).

[48] An "optimal" tariff is set at a level that raises revenue but that is low enough that an exporter will absorb the costs rather than passing it on to consumers in the home market. In practice, finding this sweet spot without attracting domestic rent-seekers to press for higher tariffs—with concomitant effect on domestic prices—is both economically and politically difficult. A recent study of the after-effects of the recent U.S.-China tariff war is illustrative:

> Chinese firms could lower the prices they charge to offset the tariff hikes in order to avoid losing market share in the United States. For example, a 25 percent tariff hike would need to be offset by a 20 percent price cut by the Chinese supplier to leave the total cost to the U.S. importer firm unchanged (1.25 x 0.80 = 1.0). Chinese firms will be more prone to lower prices to the extent that they believe U.S. purchasers can either do without their products or find alternatives from other suppliers.
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> A May 2019 *Liberty Street Economics* post noted that prices on imports from China have been stable in the face of higher tariffs. This stability has continued in the face of further tariff hikes. As seen in the chart below, prices on goods from China fell by only 2 percent in dollar terms between June 2018, just before the first tariffs were imposed, and September 2019.

Matthew Higgins, Thomas Klitgaard & Michael Nattinger, *Who Pays the Tax on Imports from China?*, FED. RSRV. BANK N.Y.: LIBERTY ST. ECON. (Nov. 25, 2019), libertystreeteconomics.newyorkfed.org/2019/11/who-pays-the-tax-on-imports-from-china.html#:~:text=the%20continued%20stability%20of%20import,to%20pay%20the%20tariff%20tax.

[49] Characterizing subsidies as "trade instruments" may well be controversial. It is, to be sure, overbroad: in discussing the origins and effects of industrial subsidies in a much earlier work, I observed that many domestic subsidies find their origins in desired policy or political outcomes that are not trade related. The trade effect of *trade-related* subsidies has been heavily litigated; however, some of these effects are purely theoretical. *See, e.g.*, Arbitrator Decision § III.C., *United States—Continued Dumping and Subsidy Offset Act of 2000*, WTO Doc. WT/DS217/ARB (Aug. 31, 2004) ("trade effects" were based on a mathematical modelling of the impact of subsidies rather than any observed or measured effects). In other cases, the trade effects are inconsistently evaluated/assessed. *See, e.g.*, Rambod Behboodi (@GenevaTrade Law), TWITTER (Nov. 4, 2019), www.twitter.com/GenevaTradeLaw/status/1191345830042750976. At the same time, definitionally, *targeted* subsidies—that is, subsidies that are specific to a company, sector, or region—are *presumed* to potentially affect trade and are therefore subject to the SCM Agreement. I refer to subsidies as "trade instruments" in this sense.

[50] Indeed, subsidies, or "state aid" disciplines are part of the competition enforcement framework of the European Union.

[51] *See, e.g.*, Eur. Comm'n, *White Paper on Levelling the Playing Field as Regards Foreign Subsidies*, COM (2020) 253 final (June 17, 2020).

outright in the SCM Agreement.[52] In consumer welfare terms, export subsidies are a positive: an export subsidy is a net transfer of wealth from the treasury of the exporting country to consumers in the domestic market. To the extent that the importing country is not itself a producer of the product at issue, an export subsidy is entirely cost-free to the importing country. What is more, in a competitive international environment export subsidies by one country trigger competitive subsidization for competitors,[53] offering more choice and depressing prices further for third country consumers.[54]

The other type of presumptively trade-distorting subsidy prohibited by the SCM Agreement is an *import-substitution subsidy*: "subsidies contingent, whether solely or as one of several other conditions, *upon the use of domestic over imported goods*."[55] These are essentially industrial policy measures aimed at promoting home-grown industries. From a strictly consumer welfare perspective, the domestic competition effect of import-substitution subsidies is at worst neutral, but possibly even positive. In principle, a domestic subsidy *either* makes available domestic goods that would otherwise not be able to compete with imports or results in price-depression for imports; indeed, domestic subsidization could well encourage more innovation to compete with imported goods or force an exporter to seek matching subsidies of its own. However, the effect on the economic competitiveness of the subsidizing *country* is likely to be less salutary, as taxes raised from profitable and competitive sectors of the economy are diverted to less competitive sectors.[56]

Under the SCM Agreement, the trade effect of all other subsidies is not presumed but must be demonstrated; Members of the WTO may take action where a causal relationship[57] has been established between a subsidy and either material injury or adverse effects to the producers of other Members.

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[52] Article 3 of the SCM Agreement prohibits exports contingent upon export performance and subsidies contingent upon the use of domestic goods over imports. Each has a direct impact on trade in that the object of the subsidy in question ("contingent upon") is to either increase exports or decrease imports. SCM Agreement, *supra* note 23, art. 3.

[53] Competitive export subsidization is not permitted in the WTO. Panel Report, *Canada—Measures Affecting the Export of Civilian Aircraft*, ¶ 5.113, WTO Doc. WT/DS70/RW (May 9, 2000). However, until the matter was resolved definitively in the context of WTO dispute settlement, "matching" was a *negotiated* response to certain types of subsidized export credits. OECD, *Trade and Agriculture Directorate Participants to the Arrangement on Officially Supported Export Credits* at 16, TAD/PG(2018)1 (Jan. 16, 2018).

[54] The *competition* effects of competitive export subsidization in the home market of a subsidizing country are somewhat more complex. A typical response is the imposition of countervailing measures, which tends to reduce competition; another is *inward* competitive subsidization, which tends to preserve a semblance of a competitive market subject to the distorting effects, both economically and politically, of tax-and-subsidize policies.

[55] SCM Agreement, *supra note* 23, art. 3.

[56] There are additional dynamic costs: that in a subsidizing framework, producers divert resources from investment and marketing to "lobbying" and other "public choice" expenditure.

[57] Agreement on Subsidies and Countervailing Measures, *supra* note 23, arts. 5, 6, 15.

Three high-profile cases under the "adverse effects" provisions of the SCM Agreement[58] underline the deeper challenge of subsidies to competition and competitive markets despite the salutary effect of lower prices, in some instances, for consumers: massive distortion, in both domestic and export markets, in terms of market share[59] and, consequently, sectorial investments and general allocation of resources. That is, producers are rewarded *not* by the market for their innovation, cost cutting, and sales success—thereby making the economy as a whole more dynamic and competitive—but for their ability to extract subsidies: they are effectively shielded from normal forces in their business activities.

B. TRADE POLICY AS ENHANCER OF COMPETITION

As trade barriers fall and markets integrate, three things happen.

First, liberalized trade increases domestic competition by reducing protection (and resulting rents) for domestic firms, usually requiring adjustment.[60] Those firms that manage, in the face of competing imports, to lower costs, to innovate, and to look for other markets, will in turn become more competitive not just in relation to the home markets, but also when exporting. In this context, competition authorities turn their attention to the role of imports[61] in "ensuring the competitive structure of domestic markets."[62]

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[58] Arbitrator Decision, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WTO Docs. WT/DS353/ARB & WT/DS353/ARB/Add.1 (Oct. 13, 2020); Panel Report, *EC and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WTO Doc. WT/316/RW2 (Dec. 2, 2019); Panel Reports, *United States—Subsidies on Upland Cotton*, WTO Docs. WT/DS267/R (Sept. 8, 2004) & WT/DC267/RW (Dec. 18, 2007).

[59] Arbitrator Decision, *EC and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, ¶ 6.477 et seq., WTO Doc. WT/DS316/ARB (Oct. 2, 2019) (arbitration on quantum of damages).

[60] Communication from the Eur. Community and its Member States, *supra* note 36, at 10:

> A high level of external protection, which effectively insulates domestic markets from foreign competition, can contribute to a high degree of concentration in the domestic market and facilitate cartel-type arrangements among domestic firms or abuses of a dominant position. Certain types of trade policy interventions, in particular when foreign exporters benefit from quota rents, can also foster tacit or explicit collusion among domestic and foreign firms. The impact on competition of trade policy measures is likely to be harmful in the case of long-standing trade restrictions—such as high tariffs or quotas—in particular if there is a lack of clear commitment to their progressive reduction or elimination.

[61] Spier, *supra* note 28, at 2 (emphasis added):

> Australian merger analysis focuses on whether the proposed transaction would have the likely effect of substantially lessening competition in a substantial market in Australia. The nationality of the acquiring company is not a relevant consideration in Australian merger law. *However, the role of imports in providing a competitive force in Australian markets is an important consideration.*

[62] Submission from Canada, *supra* note 26, at 3. *Id.* at 6 ("[I]t has been noted that foreign competition via imports can play a key role in limiting the potential for abuse of market power in the domestic economy.").

Second, domestic firms gain access to export markets on more rational terms: instead of concentrating on overcoming tariffs, discriminatory measures, subsidies, and non-tariff barriers, they can compete on the normal attributes (cost, quality, and desirability) of their product. In this way, export-oriented firms not only gain access to markets they did not have before, but they also can redirect resources to innovation and efficiency gains—which translates to better products, greater choice, and lower prices for the consumer.

Third, modern trade liberalization agreements—themselves trade policy instruments—contain comprehensive disciplines that, though principally aimed at protecting negotiated tariff reductions, have the effect of ensuring a *rational* framework for competition. The WTO Agreement, for example, contains extensive rules governing technical barriers to trade as well as sanitary and phytosanitary measures. These go beyond the normal non-discrimination rules of the GATT; they set out substantive and procedural rules to ensure that such measures are rational and rationally applied. These (and other rules) are, in themselves competition enhancing in at least two ways. For one, as baseline rules that apply equally to all products without discrimination as to origin and other irrelevant considerations, they provide predictability essential for the sales and marketing of, and investment in, consumer goods. For another, and crucially, they enhance the legitimacy of the market framework in which imported and domestic goods compete.

III. THE RELEVANCE OF TRADE POLICY FOR COMPETITION ENFORCEMENT

We have seen that competition concepts permeate, and indeed shape, trade policy and trade law and that competition enforcement is essential in protecting gains from trade liberalization agreements. It is true that trade policy instruments occasionally serve as a means of lessening domestic competition. The tariff policies of the United States over the last four years are recent examples of this: they have had the object of reducing competition in key commodity markets, even as the rest of the world has been pursuing competition enhancing trade agreements, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)[63] or the African Continental Free Trade Area (AfCTFA).[64] At the same time, a country's trade policy

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[63] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP or TPP-11) (effective Dec. 31, 2020) (trade agreement among Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam).

[64] African Union, African Continental Free Trade Area (AfCTFA) (effective May 30, 2019), au.int/en/cfta.

has a complementary relationship with competition policy and can, and does in fact, help competition enforcement in multiple ways.[65]

But would it be appropriate to take trade policy considerations into account in competition enforcement?

Part A examines the objectives of competition policy. As against this background, Part B examines the extent to which "trade policy" has played, and ought to play (if at all), a part in competition enforcement by reviewing two merger decisions in South Africa and the European Union.

A. THE OBJECTIVES OF COMPETITION POLICY

According to the OECD, "The primary objective of competition policy is to *enhance consumer welfare* by promoting competition and controlling practices that could restrict it."[66] This is somewhat reductive,[67] but does reflect the practice and self-perception of some competition authorities.[68]

In the United States, the Federal Trade Commission describes itself in the following terms:

> The FTC is a bipartisan federal agency with a unique dual mission to protect consumers and promote competition. For one hundred years, our collegial and consensus-driven agency has championed the interests of American consumers. As we begin our second century, the FTC is dedicated to advancing consumer interests while encouraging innovation and competition in our dynamic economy.[69]

In the section dealing with "Promoting Competition," the FTC further elaborates on its mandate:

> Competition in America is about price, selection, and service. It benefits consumers by keeping prices low and the quality and choice of goods and services high. By enforcing antitrust laws, the FTC helps ensure that our

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[65] As mentioned above, progressive reduction of tariff and non-tariff barriers helps reduce domestic rents, identify uncompetitive industries, and challenge domestic cartels that have yet to be caught or prosecuted.

[66] OECD, POLICY FRAMEWORK FOR INVESTMENT USER'S TOOLKIT: CHAPTER 4: COMPETITION POLICY 2 (2012) (emphasis added), www.oecd.org/investment/toolkit/policyareas/competition/Competition%20Policy%20Guidance,%20Thomsen.pdf.

[67] *See, e.g.*, Communication from the United States, *supra* note 40, at 2:

> There is currently no consensus on what should be the optimal objectives of a national competition policy. However, one can say that a generally shared objective of competition policy is to ensure that markets work well. A basic approach in assessing how well a market works is to focus on the process by which the market delivers goods and services to the consumer.

[68] The objectives of each state's competition framework are often set out in its competition statutes. Over time, the real effect of the statutes undergoes evolution through policy papers, jurisprudence, and exercise of enforcement discretion on the part of an authority.

[69] *What We Do*, FED. TRADE COMM'N, www.ftc.gov/about-ftc/what-we-do.

> markets are open and free. The FTC will challenge anticompetitive mergers and business practices that could harm *consumers* by resulting in higher prices, lower quality, fewer choices, or reduced rates of innovation. We monitor business practices, review potential mergers, and challenge them when appropriate to ensure that the market works according to consumer preferences, not illegal practices.[70]

For its part, the Antitrust Division of the U.S. Department of Justice is responsible for both criminal prosecutions and civil actions in respect of certain violations of the antitrust laws. It sets out its mission as follows:

> The goal of the antitrust laws is to protect economic freedom and opportunity by promoting free and fair competition in the marketplace.
>
> Competition in a free market benefits American consumers through lower prices, better quality and greater choice. Competition provides businesses the opportunity to compete on price and quality, in an open market and on a level playing field, unhampered by anticompetitive restraints.[71]

The Australian Consumer and Competition Commission (ACCC) states that:

> Most of our compliance and enforcement work is conducted under the provisions of *Competition and Consumer Act 2010* (the Act). The purpose of the Act is to enhance the welfare of Australians by:
>
> - promoting competition among business
> - promoting fair trading by business
> - protecting consumers in their dealings with business.[72]

Of note, the ACCC may grant a merger authorization if it is satisfied that "the likely public benefit resulting from the proposed acquisition outweighs the likely resulting public detriment."[73]

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[70] *Id.*

[71] *Mission*, ANTITRUST DIV., U.S. DEP'T OF JUSTICE, www.justice.gov/atr/mission.

[72] *Compliance & Enforcement Policy & Priorities*, ACCC, www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities. Note, however, that both the U.S. FTC and the ACCC have very specific consumer protection mandates—such as detecting misleading advertising and fraudulent behavior targeting consumers—that are outside of what is traditionally thought of as "competition law and policy." As a result, it is possible that "consumer welfare" references in their mandates or legislation are not necessarily in relation to their antitrust/competition work.

[73] ACCC, Merger Authorisation Guidelines 4 (Oct. 2018), www.accc.gov.au/system/files/Merger%20Authorisation%20Guidelines%20-%20October%202018.pdf.

In a minor shift in—or broadening of—emphasis,[74] the European Commission identifies[75] its mandate as "ensuring that all companies compete equally and fairly on their merits. This benefits consumers, businesses and the European economy as a whole."[76] The Commission elaborates on its mandate in the following terms:

> Competition policy is about applying rules to make sure companies compete fairly with each other. This encourages enterprise and efficiency, creates a wider choice for consumers and helps reduce prices and improve quality. These are the reasons why the EU fights anti-competitive behaviour, reviews mergers and state aid and encourages liberalisation.[77]

"Enterprise and efficiency" parallel the tough love approach set out in the mission of the U.S. DOJ: "Competition also tests and hardens American companies at home, the better to succeed abroad."[78]

The Competition Bureau of Canada sets out its mandate as ensuring "that Canadian businesses and consumers prosper in a competitive and innovative marketplace"[79] and identifies five benefits of competition:

- makes the economy work more efficiently;[80]
- strengthens businesses' ability to adapt and compete in global markets;
- gives small and medium businesses an equitable chance to compete and participate in the economy;

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[74] *See also* Communication from the United States, *supra* note 40, at 3 ("It is fair to say that such an approach that emphasizes consumer welfare, the competitive process and economic efficiency is a general guideline for most national competition policies. *National policies essentially differ in the extent and degree to which they focus on these factors or take other factors into account.*") (emphasis added).

[75] In testimony before the United States Senate, Tad Lipsky noted that:

> [T]he EU Treaties adopt a range of policy objectives as the basis for the competition rules—including for example the concept of competitive "distortion," the "special responsibility," the prohibition on "unfair prices" and terms and the promotion of rivalry apart from its effect on economic performance . . . .

A Comparative Look at Competition Law Approaches to Monopoly and Abuse of Dominance in the US and EU: Hearing Before the S. Comm. on the Judiciary, Subcomm. on Antitrust, Competition Pol'y & Consumer Rights, 115th Cong. (Dec. 19, 2018) (statement of Abbott B. (Tad) Lipsky, Jr., Antonin Scalia Law School, Geo. Mason Univ.).

[76] *Directorate-General for Competition*, EUR. COMM'N, ec.europa.eu/dgs/competition/index_en.htm.

[77] Directorate-General for Competition, Competition: Making Markets Work Better 3 (2016), op.europa.eu/en/publication-detail/-/publication/8200c251-aa42-11e6-aab7-01aa75ed71a1.

[78] *Mission*, *supra* note 71.

[79] *Our Organization: What Is the Competition Bureau?*, CANADA (Sept. 25, 2019), www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04296.html.

[80] *Id.*; *see also* Submission from Canada, *supra* note 26, at 5:

> Canadian competition policy focuses on the goals of protecting and preserving competition and promoting economic efficiency. The concept of economic efficiency as an objective of competition policy in Canada and elsewhere has further evolved to encompass the goal of international competitiveness.

- provides consumers with competitive prices, product choices, and the information they need to make informed purchasing decisions; and
- balances the interests of consumers and producers, wholesalers, and retailers, dominant players and minor players, the public interest and the private interest.[81]

Reflecting its unique circumstances,[82] the post-Apartheid competition regime of South Africa expands somewhat on these objectives. The *Competition Act 1998* sets out the objectives of the competition regime as the following:

(a) to promote the efficiency, adaptability and development[83] of the economy;
(b) to provide consumers with competitive prices and product choices;
(c) to promote employment and advance the social and economic welfare of South Africans;
(d) to expand opportunities for South African participation in world markets and recognize the role of foreign competition in the Republic;
(e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
(f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.[84]

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[81] *Our Organization: What Is the Competition Bureau?*, *supra* note 79.

[82] As the Competition Commission noted early in its mandate:

> The need for a new competition policy in South Africa must be seen in the context of a historical legacy of excessive economic concentration and ownership, collusive practices by enterprises and the abuse of economic power by firms in dominant positions.
>
> It was also recognised, however, that the South African economy and society was in a state of transition, in terms of a broader restructuring of the economy, the effects of globalisation and trade liberalisation and the need to redress past inequality and non-participation in the national economy.

Competition Commission, BIZCOMMUNITY: FINANCE NEWS SOUTH AFRICA (July 26, 2011), www.bizcommunity.com/Article/196/357/62228.html.

[83] This article does not delve too deeply into the question of the relationship between competition policy, industrial policy, and economic development issues. It is useful to note here that the post-war rapid economic and industrial development of certain Asian countries under a system of managed competition is often used as a counter-model to "unbridled" competition or consumer-centric competition policy. *See, e.g.*, Simon Roberts, *Competition Policy, Industrial Policy, and Corporate Conduct*, *in* THE INDUSTRIAL POLICY REVOLUTION II (Joseph E. Stiglitz, Justin Yifu Lin & Ebrahim Patel eds., 2013). The contra-positioning of a consumer-centric economic model and one based on a whole-of-economy industrial policy has deeper roots:

> These interests of the community are, however, infinitely different from the private interests of all the separate individuals of the nation, if each individual is to be regarded as existing for himself alone and not in the character of a member of the national community, if we regard (as Smith and Say do) individuals as mere producers and consumers, not citizens of states or members of nations . . . .

FRIEDRICH LIST, THE NATIONAL SYSTEM OF POLITICAL ECONOMY 139–40 (trans. Sampson S. Lloyd trans., Longmans, Green and Co. 1916) (1856).

[84] Competition Act No. 89 of 1998, ch. 1 § 2 (S. Afr.), www.gov.za/sites/default/files/gcis_document/201409/a89-98.pdf. As the Competition Commission emphasizes: "A fundamental principle of competition policy and law in South Africa thus is the need to balance economic efficiency with socio-economic equity and development." Note from the Secretariat, *Study on*

Consumer welfare appears to be a consistent shared objective of competition frameworks. It should come as no surprise, however, that like all other regulatory instruments, competition policy, law, and enforcement serve multiple objectives depending on the particular circumstances, both economic and social, of a country. This is not to question "convergence"[85] in competition enforcement, or its desirability;[86] rather, it is an acknowledgement of the fact that both the intended and the actual effects of competition enforcement can and do vary for quite legitimate reasons.[87]

Issues Relating to a Possible Multilateral Framework on Competition Policy at 13, WTO Doc. WT/WGTCP/W/228 (May 19, 2003) (quoting *Introduction*, SOUTH AFR. COMPETITION COMM'N. (as of Feb. 2, 2003)).

[85] In my speech as Deputy Commissioner for Competition Promotion, I set out the Competition Bureau's understanding of "convergence" in the following terms:

> And we do this not by hectoring or cajoling or sanctioning or sending in the Fifth Fleet. Rather, in the most classically Canadian way possible, by example, through training and suasion. We call this convergence. *Soft convergence*. Instead of asking countries to adopt our laws—a hard sell at the best of times—under soft convergence, we set out what we believe are the underlying principles of good competition law. We then ask our trade partners to consider these best practices as models in structuring their own regimes. We participate in workshops, in training sessions, in bilateral and multilateral meetings and in exchange programs. We share information about matters of mutual interest; we exchange working documents; we participate in developing recommended practices in international competition organizations.

Behboodi, *supra* note 3 (emphasis added).

[86] As I noted in my speech:

> Effective competition law can be enabled by convergence towards harmonized competition laws and policies.
>
> • If similar principles underpin each country's competition policy, then countries can plan their business structures and practices in a way that conforms to both jurisdictions.
>
> • For instance, harmonized approaches and timelines for merger review allow firms to smoothly plan and file their required information with every relevant jurisdiction in a timely manner.
>
> • Likewise, a common approach to cartels and competitor collaborations helps firms build effective alliances and joint ventures that are effective across international borders, to the potential benefit of consumers and business alike.
>
> Convergence of competition approaches and principles also helps domestic agencies like the Competition Bureau collaborate with our international counterparts on cases that touch multiple nations' markets. As competition agencies gain common understandings of anti-competitive conduct such as cartels, predatory pricing, bundling and other practices, it becomes more useful to share information, analysis, and enforcement approaches.

Id.

[87] *See, e.g.*, Communication from the United States, *supra* note 40, at 3:

> Antitrust laws, consumer protection laws, regulatory policies designed to correct market failures and market deregulation policies all work to ensure that competition among goods producers and among service providers, and accurate information in the hands of consumers, generate the best products at the lowest prices, spur efficiency and innovation, strengthen the economy, and produce benefits for consumers, workers, and investors alike.

B. TRADE POLICY CONSIDERATIONS IN COMPETITION ENFORCEMENT

The U.S. DOJ mission statement captures a workable set of principles for competition enforcement:

1. benefiting "consumers through lower prices, better quality and greater choice";[88]
2. providing "businesses the opportunity to compete on price and quality, in an open market and on a level playing field, unhampered by anticompetitive restraints";[89] and
3. testing and hardening "American companies at home, the better to succeed abroad."[90]

"Succeed abroad"; "level playing field"—this is the language of trade policy. Expand "consumers" to include producers purchasing input products, and all three objectives of competition policy blend into trade policy concerns. And, critically, it is only from a trade policy perspective that the three objectives cohere: a competitive market enables producers to have access to cheaper inputs, thus positioning them to succeed in international markets. It is not just the "hardening" of American companies; rather, giving them room to grow domestically in a market unhampered by cartels[91] is what makes an effective competition framework an essential part of success abroad.[92]

The standard perspective should be supplemented with two additional considerations that, in policy terms, pull in opposite directions: On the one hand, global value chains and just-in-time manufacturing mean that cartels, oligopolies, or monopolies in any part of the world can have an outsized impact on global trading patterns and on markets far away; global cooperation in competition policy and enforcement is now essential for the proper functioning of most major manufacturing concerns.[93] On the other hand, the emergence of state-trading enterprises as major global players that, in turn, compete with private entities "presents particular challenges for competition, trade, and investment policies."[94] The principal challenge is to promote and preserve domestic competition without exposing local industries to predation by nonmarket state actors.

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[88] *Mission*, *supra* note 71.

[89] *Id.*

[90] *Id.*

[91] Spier, *supra* note 28, at 2 ("Both policy makers and regulators in Australia recognise that it is critically important to ensure that those trade-exposed sectors of the economy have competitive input markets, so as to be able to compete internationally.").

[92] I hasten to add that "success abroad" is not meant as a mercantilist observation, but rather to distinguish trade policy, which is concerned with trade performance, from domestic industrial policy, which is broader in object and effect.

[93] Motta, *Competition Policy and Trade in the Global Economy: Towards and Integrated Approach*, *supra* note 35, at 6.

[94] *Id.*

A review of the literature reveals a vast library of scholarly and expert analyses of the relationship between industrial policy and competition policy.[95] In most instances, because of the focus of industrial policy on creating national champions for *international* competitiveness purposes, "industrial policy" and "trade policy" have tended to merge. Indeed, the report of the German Monopolies Commission on industrial policy[96] addressed "strategic trade policy" in its opening sections.[97] Below, I examine two key objections, substantive and institutional, to the consideration of industrial policy (including international competitiveness) in competition analyses. I then discuss factors that might render *trade* policy considerations relevant in competition enforcement by examining two specific cases.

1. *Industrial Policy, "National Champions," and Competition Law*

The German Monopolies Commission, reacting to competition policy decisions that were made on *industrial* policy grounds[98] undertook a comprehensive study, published in its *2002/2003 Report*. The *Report* specifically notes the prevailing policy of the German government[99] to promote "so-called 'national champions', large German enterprises which are hoped will take on top positions in the 'world league' of the 'global players', provided they are 'strong' enough."[100]

On *substance*, the *Report* sets out four core objections to the "national champion" model.

First, highlighting the private nature of international commerce, the *Report* questions the relevance or usefulness of the notion of "competitiveness of a

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[95] Informal Note by the Chairman (Rev.), *Bibliography on Trade and International Competition*, *Working Group on the Interaction Between Trade and Competition Policy*, WTO Doc. WT/WGTCP/W/11/Rev. 1 (Nov. 27, 1997); OECD, *Competition Provisions in Trade Agreements*, DAF/COMP/GF(2019)1 (July 29, 2019). *See also* Ioannis Lianos, *The Future of Competition Policy in Europe: Some Reflections on the Interaction Between Industrial Policy and Competition Law* 6 (Ctr. for Law, Economics and Society Policy Paper Series 1/2019); OECD, *Roundtable on Competition Policy, Industrial Policy and National Champions*, DAF/COMP/GF(2009)9 (Oct. 19, 2009) [hereinafter OECD *2009 Roundtable*].

[96] COMPETITION POLICY UNDER SHADOW OF "NATIONAL CHAMPIONS": THE FIFTEENTH BIENNIAL REPORT, MONOPOLKOMMISSION 575 (2002/2003) [hereinafter REPORT] (translation on file with author).

[97] *Id.* ¶ 15.

[98] The *Report* specifically mentions ministerial authorizations related to the Deutsche Post AG, or certain association agreements in the energy sector.

[99] As Marty notes, the German government's policy had deep roots. Frédéric Marty, *Concurrence et Politique Industrielle: Analyse de Logiques Distincte*, *in* ENTREPRISES STRATÉGIQUES NATIONALES ET MODÈLES ÉCONOMIQUES EUROPÉENS 131 (Viviane de Beaufort ed., 2012) (electronic version at 4).

[100] REPORT, *supra* note 96, ¶ 1.

national economy."[101] Second, the search for or promotion of a national champion is not free of cost; building up one national champion could impair the competitiveness of other companies:

> The impairment takes place indirectly via price adjustments in input, output and monetary markets. Its causes are therefore not immediately evident for those concerned. Nevertheless, there is a connection between promoting the competitiveness of the "national champion" and impairing the competitiveness of other companies, and this connection needs to be taken into account by politicians if they want to avoid being accused of irresponsibility.[102]

Third, in the absence of "market failure," governments must not intervene in production structures, such as "which goods and services are cheaper to purchase abroad rather than to produce at home."[103] Finally, distribution of public goods—in this instance, "state intervention" in support of one sector or another, in the form of competition policy exemptions—is distorted by public choice considerations.[104]

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[101] *Id.* ¶ 6. But see the above discussion on the impact of subsidization on competition. Subsidization requires a net transfer of resources from productive sectors to less productive ones. Where an industry enhances its competitiveness through subsidies rather than efficiency or innovation, and the subsidies continue by drawing from productive and profitable sectors, this will necessarily have an impact on the international competitiveness of the national economy as a whole.

[102] *Id.* ¶ 10.

[103] *Id.* ¶ 12. Lianos refers to the difficulty of "performing a balancing test that integrates allocative and productive efficiency concerns while taking an industrial policy perspective . . . ." Lianos, *supra* note 95, at 7. Even industrial policy advocates see the limits of "champion selection":

> [P]icking a specific firm as the champion of the sector, instead of letting the market's competitive process decide which firm will emerge as the leader, can be ineffective since i) the government cannot assess the chances of commercial success better than the market (it may pick a winner that is not the most efficient) . . . .

George Petropoulos, *How Should the Relationship Between Competition Policy and Industrial Policy Evolve in the European Union?*, BRUEGEL: BLOG (July 15, 2019), bruegel.org/2019/07/how-should-the-relationship-between-competition-policy-and-industrial-policy-evolve-in-the-european-union/. *See also* Dirk Auer & Geoffrey A. Manne, *Is European Competition Law Protectionist?* (ICLE Antitrust & Consumer Protection Program Issue Brief, 2019-03-25), laweconcenter.org/wp-content/uploads/2019/04/Is-European-Competition-Law-Protectionist-Issue-Brief.pdf. This is not to say that competition authorities do not also concentrate resources on specific sectors for competition, rather than industrial, policy purposes. As the authors note, "The harsh fines inflicted upon US firms are not necessarily evidence of protectionism. Instead, they are likely a result of the Commission's decision to focus significant attention on the tech sector." Auer & Manne, *supra*, at 3.

[104] REPORT, *supra* note 96, ¶ 13. Auer & Manne, *supra* note 103, at 3 (quoting President Obama: "Sometimes their vendors—their service providers—who can't compete with ours, are essentially trying to set up some roadblocks for our companies to operate effectively there. We have owned the Internet. Our companies have created it, expanded it, perfected it, in ways they can't compete.").

Motta examined "how competition law could be used to counterbalance, with consumer interest in mind, the negative influence of domestic interest groups on the trade and investment policies of their governments." Motta, *Competition Policy and Trade in the Global Economy: Towards and Integrated Approach*, *supra* note 35, at 12. Petropoulos remarks that "the govern-

The *Report* then addresses "strategic trade policy," which was the principal response to these objections: international competitiveness in trade requires "economies of scale and scope";[105] this, in turn, argues for integrating trade-based "monopoly and oligopoly effects" in competition analyses. It is not a given, however, that the assumptions on which monopoly-based "strategic trade policy" is based are tenable.[106] Indeed, the most allegedly successful exemplar of "strategic trade policy," Japan, was anything but: "The nationally and internationally successful industries are characterised by a lack, or even a deliberate rejection, of state intervention and by intense competition, also in domestic markets. Barriers to market entry and the cartels fostered by the MITI can mainly be found amongst the underdeveloped sectors."[107]

Procedurally, the *Report* expresses concern about mixing competition policy determination with industrial policy considerations.[108] Such an approach "bears the risk of a significant change of the economic system, moving away from a competition system controlled by the state solely by means of certain

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ment's selection process may involve the risk of capture and rent-seeking, especially when the selection process is not transparent and the rules of selection are not clear." Petropoulos, *supra* note 103. Jenny and Neven note "the concern that any policy involving temporary protection would be prone to capture." Frédéric Jenny & Damien Neven, *Competition Policy in the Aftermath of the* Siemens/Alstom *Prohibition: An Agenda for the New Commission*, CONCURRENCES COMPETITION L. REV., May 2019, at 3 (citation omitted). Sokol is much more ambitious: "Antitrust should try to limit the political impulse based on interest group capture in other parts of government as part of a broader competition policy to improve national competitiveness." Sokol, *supra* note 37, at 1248.

[105] REPORT, *supra* note 96, ¶ 15. Lianos traces this line of thinking back to the early days of the European Common Market's development of a competition enforcement mechanism. As early as 1967, it was argued that:

> Europe should develop an industrial policy in order to establish large European corporate groups by allowing mega-mergers between European firms. These would provide the necessary economies of scale to develop global champions based in Europe that could compete effectively with the US multinational behemoths . . . . European governments should aim to establish large industrial units "*which are able both in size and management to compete with the American giants*" . . . .

Lianos, *supra* note 95, at 7 (citations omitted).

[106] REPORT, *supra* note 96, ¶¶ 17, 20, 22. There are four assumption: (1) "the monopoly and oligopoly profits gained abroad exceed the costs of concentration of market power in the domestic markets"; (2) "oligopolistic competition results in substantial profits for the companies concerned"; (3) a domestic monopoly will counter the effects of a global monopoly; and (4) the state can accurately identify "suitable technologies, companies and industries as well as the incentive effects" to achieve its strategic goals. *Id.* ¶¶ 17, 22.

[107] *Id.* ¶ 21.

[108] Lianos notes that the political structure of decision-making in the European Union has long provenance. The 1981 draft regulation failed because:

> [a]ll the national competition law regimes of the larger Member States, such as Germany, France and the UK, provided discretion to a political decision-making body, most often the minister or secretary of state to overrule the determination of the competition authority. Merger control in each of these jurisdictions was intrinsically linked to the need to protect and manage the national industrial state.

Lianos, *supra* note 95, at 10.

narrowly defined prohibitions, and towards state control of all developments."[109]

Indeed, the very structure of decision-making in competition enforcement can increase this risk.[110] As Lipsky notes with respect to the EU abuse-of-dominance enforcement: "Although Commission competition decisions are subject to review by the EU courts, such decisions are made by the College of Commissioners—a body consisting of twenty-eight individuals with limited expertise in the legal and economic disciplines most relevant to antitrust enforcement."[111] Furthermore, "the Commissioner for Competition is a Member State politician, confirmed by the EU Parliament for the explicit purpose of exercising political control over the activities of DG Comp."[112] Although in this instance, the involvement of political actors results in more *restrictive* enforcement rather than the concerns raised by the *Report*.[113]

2. *Multifactorial Competition Determination*

I begin this section with two observations.

First, "industrial policy" has experienced a significant evolution over the years,[114] reflecting not only domestic institutional and ideological changes, but

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[109] REPORT, *supra* note 96, ¶ 29. In the same vein, Marty notes two structural oppositions between industrial policy and competition enforcement: industrial policy requires a certain level of economic dirigisme, whereas competition enforcement relies on market forces; competition policy does not, in itself, have distributive objectives, whereas industrial policy is concerned with transfer of benefits between economic actors. Marty, *supra* note 99, at 4. *But see* Auer & Manne, *supra* note 103, at 4:

> [T]he Commission is a political body, and, as we discuss below, it is hardly structured to be immune to domestic political influences that may tend toward protectionism. The decision to prioritize enforcement in the tech sector is not taken in a vacuum. Whether this policy preference is down to legitimate concerns about high-tech markets or to (potentially unconscious) protectionism is almost impossible to tell.

[110] Sokol, *supra* note 37, at 1263 ("An absence of effective procedural fairness impairs effective competition law and policy. It also makes it more difficult for businesses to plan effectively because of the risk involved in antitrust enforcement that is based not on the particular conduct in question but on the uncertainty due to uneven enforcement.") (citations omitted).

[111] Lipsky, *supra* note 75, at 2, 8 et seq. In the testimony and elsewhere, Lipsky has also identified due process concerns in this approach that, though relevant overall, are outside the scope of this article.

[112] *Id.* at 9.

[113] Thatcher notes:

> [F]or instance, under the 1989 European Merger Control Regulation, most large mergers and acquisitions are decided by the European Commission—with thresholds that catch most major acquisitions. The Commission acts almost entirely using competition criteria—whether the merger creates a 'significant impediment to competition' and has little legal scope for looking at other criteria.

Thatcher, *supra* note 41, at 19 (citations omitted).

[114] *Id.* at 11. He notes that traditionally:

> Industrial policy rested on an institutional framework that provided many instruments for national governments. One key pillar was public ownership of producers in major

also developments in the structures (EU enlargement, the emergence of China) and superstructures (the wildfire spread of trade liberalization agreements) of international trade and economics. Second, modern perspectives on holistic competition assessment and determination do not consider "industrial policy" objectives as *overriding* competition considerations.[115]

This article focuses on *trade* policy[116]—the relative position of national industries and the domestic market in international markets. In the section below, I examine how competition-restricting trade policy instruments have been used in merger review. This demonstrates that trade policy is never too far from competition assessment. In the section that follows, I look at the *Siemens/Alstom* decision to assess the extent to which merger determinations could benefit from trade policy considerations as one among a number of economic and policy factors.

a. Tongaat-Hulett/Transvaal Suiker

At issue was the takeover by South Africa's Tongaat-Hulett Group Limited (THG) of the sugar, molasses, and animal feed business of the TSB group of companies.[117]

The Competition Tribunal of the Republic of South Africa (Tribunal) opened its determination by noting:

> Across the world, the production and consumption of sugar is subject to massive regulatory intervention. In evaluating this merger considerable attention has been given to the interplay between regulation and competition, between regulation in the rest of the world and regulation in South Africa,

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> sectors such as banking and finance, manufacturing and extractive industries, or indeed sometimes entire industries, notably the network industries (then often called 'public utilities.').

This is not to say that traditional modes of thinking have gone away completely. Marty refers not just to international competitiveness, but also delocalization, deindustrialization, and the importance of maintaining strategic industries in the face of the 2008 crisis. Marty, *supra* note 99, at 1.

[115] Petropoulos, *supra* note 103.

[116] Petropoulos identifies "industrial policy" objectives and instruments that help clarify the distinction between industrial and trade policy:

> However, even in a competitive environment, there might be market imperfections that impose constraints on investments in innovation and growth. Then, there is a need for industrial policies that can remove these constraints and motivate investments. Such impediments may arise due to capital-market imperfections and credit constraints, administrative burden, or complicated labour or tax rules.

Id.

[117] Tongaat-Hulett Group Ltd. & Transvaal Suiker Beperk Middenen Ontwikkeling (Pty) Ltd/Senteeko (Edms) Bpk/New Komati Sugar Miller's Partnership TSB Bestuursdienste, Case No. 83/LM/Jul00, [2000] ZACT 47 (Nov. 27, 2000) (S. Afr.).

> and between competition in the rest of the world and competition in South Africa.[118]

It then set out the key characteristics—including distorting elements—of the world sugar market.[119] At the time of the determination, the regulatory framework for sugar in South Africa consisted of three pillars:[120]

1. tariffs protecting the domestic market;[121]
2. an "equitable proceeds arrangement that provides for the equitable sharing of industry proceeds";[122] and
3. a "single channel export arrangement."[123]

The existence of similar regulatory mechanisms in other producing countries required a careful attention to the "the interplay between domestic producers and consumers of sugar, on the one hand, and, on the other hand, the production and consumption of sugar in the rest of the world" in defining the relevant market.[124] The question was whether the relevant market is international or "it is contained within the boundaries of a domestic market effectively isolated from the vagaries of production and consumption elsewhere, from, in other words, the vagaries of international trade."[125]

The Tribunal noted the characteristics of the product[126] ("absolutely homogeneous" and "already highly traded"),[127] producers ("a great many producers located across the globe none of whom are large enough to influence world supply"),[128] and global market conditions (quoted international price, and developed international trading and transport infrastructures).[129] It also considered the highly regulated market and, in particular, "uncoordinated interventions of national states or regional economic blocs."[130] This meant that "sugar available on the international market was commercially non-via-

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[118] *Id.* ¶ 16.

[119] Among these were: preferential trade agreements, domestic farm subsidies, and export quotas. *Id.* ¶ 17.

[120] *Id.* ¶ 27.

[121] *Id.* The tariffs are calculated on the basis of a reference price and aim to stabilize the domestic sugar price at a sustainable "import parity" level. *Id.* ¶¶ 28, 30.

[122] *Id.* ¶ 27.

[123] *Id.* Surplus production is removed from the domestic market; raw sugar is exported through a single channel entity, while refiners are responsible for export of refined sugar. *Id.* ¶ 33.

[124] *Id.* ¶ 34.

[125] *Id.*

[126] The homogeneity of the product means that "price is the sole basis for competition." *Id.* ¶ 77.

[127] *Id.* ¶¶ 35, 43.

[128] *Id.* ¶ 43.

[129] *Id.* ¶ 43.

[130] *Id.* ¶ 44.

ble" for domestic users.[131] In this light, the Tribunal noted: "Despite an active international market in sugar, the presence of the tariff places it beyond the practical reach of South African consumers. *We conclude then that the relevant geographic market is South Africa.*"[132]

The Tribunal then turned to the competitive impact of the proposed merger. The parties' principal line of defense was that in the light of the domestic regulatory framework governing sugar, "competition in the market, that is in the relevant domestic market, has been eliminated."[133] Of note, *domestic* deregulation in South Africa depended on "prior deregulation of the European and US markets"[134]—markets marked by domestic or export subsidies[135] or protective tariffs[136] and already the subject of international trade litigation. The merger could not "substantially lessen competition" where none exists.

The Tribunal observed that South Africa's tariffs were "one of the regulatory pillars."[137] Because the tariffs were not prohibitive, there did exist a "ceiling" on the ability of the domestic industry to raise prices.[138]

Against this background, the Commission argued for narrow perspective on the enforcement of the Competition Act—and specifically that trade policy considerations "should not determine the outcome of a competition evaluation."[139]

The Tribunal noted that the government of South Africa remains committed to "protecting domestic producers from *international* competition."[140] By

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[131] *Id.* ¶ 54.

[132] *Id.* ¶ 55.

[133] *Id.* ¶ 60.

[134] *Id.* ¶ 62.

[135] Appellate Body Report, *Eur. Communities—Export Subsidies on Sugar*, WTO Doc. WT/DS265/AB/R; WT/DS266/AB/R; WT/DS283/AB/R (Apr. 28, 2005).

[136] Aspects of the U.S. protection of its sugar industry were discussed in *Mexico—Soft Drinks.* Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WTO Doc. WT/DS308/AB/R (Mar. 6, 2006). *See also* Christopher Gaudoin, *The Sugar Policy in the United States: A Continuous Management of the Internal Market*, AGRIC. STRATEGIES (Oct. 1, 2018), www.agriculture-strategies.eu/en/2018/10/the-sugar-policy-in-the-united-states-a-continuous-management-of-the-internal-market/ ("The United States has a very responsive import protection system. Excluding the import quota, customs duties are prohibitive and amount to $338/t for raw sugar and $357/t for refined sugar.") (emphasis omitted).

[137] *Tongaat-Hulett*, ¶ 64.

[138] *Id.* The Commission observed:

> South African producers cannot increase their price above the tariff adjusted world price, that is, above the import parity price. This ceiling is absolutely effective regardless of the structure of the South African market. Hence if the ability to *increase* price in the wake of the merger were indicative of the extent of the market power, then we would have to conclude that the merger does not give rise to such power.

Id.

[139] *Id.* ¶ 70.

[140] *Id.* ¶ 76.

keeping imported sugar "beyond the practical reach of South African consumers," the sugar tariff insulated South Africa's producers from international competition.[141] The Tribunal broadly agreed with the propositions that:

1. it should not adopt a formalistic approach "that is narrowly focused on competition to the exclusion of the environment within which competition plays itself out"; and
2. the market "is characterized by a regulatory framework that impacts on the level of competition."[142]

It would not be appropriate for a competition authority to predicate its decision "on the claimed permanence of a given regulatory structure."[143] The Tribunal prohibited the merger.

b. Siemens/Alstom

Just before the release of the competition decision in *Siemens/Alstom*,[144] 19 Member States of the European Union called for "the identification of possible evolutions of the antitrust rules to better take into account international markets and competition in merger analysis."[145] The decision itself elicited an immediate political reaction on the part of key EU members.[146] The governments of Germany and France issued a "manifesto" that called for additional

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[141] *Id.* ¶¶ 55, 69.

[142] *Id.* ¶¶ 82–83.

[143] *Id.* ¶ 83.

[144] Case M.8677—Siemens/Alstom, Comm'n Decision (June 2, 2019) (summary at 2019 O.J. (C 300) 14), www.ec.europa.eu/competition/mergers/cases1/20219/m8677_9376_7.pdf. I will concentrate on the high-speed and very high-speed rolling stock portions of the decision. Independently of the rolling stock issue, the Commission maintained its objections in respect of certain mainline signaling markets. *Id.* ¶ 41.

> [T]he Commission concludes that: neither the first nor the second nor the final proposed ETCS ATP wayside and interlocking commitments eliminate all the identified competition concerns in (i) ETCS ATP wayside (re-signaling and overlay) projects in the EEA; (ii) standalone interlocking projects in Belgium, Croatia, Greece, Hungary, Portugal, Romania, Spain, and the UK; and (iii) interlocking equipment in the UK; and neither the first nor final proposed ETCS OBU commitments eliminate all the identified competition concerns in (i) ETCS OBU projects in the EEA; and (ii) legacy OBU projects in Belgium.

Id. ¶ 1769.

[145] Jorge Valero, *19 EU Countries Call for New Antitrust Rules to Create 'European Champions'*, EURACTIV (Jan. 9, 2019), www.euractiv.com/section/economy-jobs/news/19-eu-countries-call-for-new-antitrust-rules-to-create-european-champions/.

[146] Rochelle Toplensky, Victor Mallet & Tobias Buck, *France and Germany Rally Support for Siemens-Alstom Merger*, FIN. TIMES (Jan. 21, 2019):

> "It's the moment of truth," said Mr Le Maire ahead of a meeting with EU competition commissioner Margrethe Vestager in Paris on Monday, according to Bloomberg.
>
> "The German and French governments are in favour of the merger as are the heads of Siemens and Alstom. It's the best response to the rising power of the Chinese in the rail sector," he said.

flexibility for the Commission: "to take greater account of competition at the global level, potential future competition and the time frame when it comes to looking ahead to the development of competition to give the European Commission more flexibility when assessing relevant markets."[147]

Although France managed to persuade a number of Member States to support a declaration calling for a review of competition rules,[148] "national regulators in the UK, Spain, the Netherlands and Belgium . . . welcomed the veto."[149]

i. *Subject Matter*

At issue was the acquisition of sole control of Alstom[150] by Siemens.[151] The object of the takeover was the "the combination of Alstom and Siemens' mobility business," each with "unique customer value and operational potential" with the objective of enabling "the Merged Entity to compete effectively at global level in the future . . . addressing the increasing competitive pressure from rapidly growing (Asian) competitors."[152]

ii. *The Product Market*

The Notifying Party considered that the relevant product market should be defined as self-propelled single-deck trains capable of speeds to and above 250 km/h.[153] The Commission disagreed. However, following an assessment of reasons why there was a clear market segmentation at the 300 km/h threshold,[154] the Commission found that it was "not necessary to conclude on the precise delineation of the relevant product market":[155] it raised concerns under

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"We need international champions in Europe that are able to compete globally," Mr Altmaier told Reuters on Monday in Munich.

[147] *A Franco-German Manifesto for a European Industrial Policy Fit for the 21st Century*, BUNDESMINISTERIUM FÜR WIRTSCHAFT UND ENERGIE. *See also* Konstantinos Efstathiou, *The Alstom-Siemens Merger and the Need for European Champions*, BRUEGEL.ORG (Mar. 11, 2019), bruegel.org/2019/03/the-alstom-siemens-merger-and-the-need-for-european-champions/ (blog posts).

[148] Jorge Valero, *Juncker Prepares the Ground for Alstom-Siemens Merger Rejection*, EURACTIVE (Feb. 5, 2019).

[149] *EU Blocks Planned Siemens-Alstom Rail Deal in Landmark Decision*, FIN. TIMES (Feb. 6, 2019). Of note, the Office of Rail Regulation, which oversees the UK's railways, said: "We've made it clear from the outset that this [merger] was a bad deal for British passengers, freight customers and taxpayers."

[150] Case M.8677—*Siemens/Alstom*, ¶ 4.

[151] *Id.* ¶¶ 2–3.

[152] *Id.* ¶¶ 5, 9.

[153] *Id.* ¶¶ 47–51.

[154] *Id.* ¶¶ 62, 68–69, 72, 75, 77–78, 80.

[155] *Id.* ¶ 89.

both definitions—"overall market for high and very high-speed trains and . . . the separate market for very high-speed trains."[156]

iii. *The Geographic Market*

The Notifying Party considered the geographic market for high-speed rolling stock to be worldwide,[157] with China, Korea, and Japan excluded. The Commission found that:

- EEA-specific technical requirements constitute a "barrier to entry";
- critically, "it is overall very difficult to adapt a high-speed platform operated outside of the EEA to customers located within the EEA"[158]; and
- the specifications affect the products' price points in and out of the EEA market.[159]

As well, there were different sets of competitors within the EEA and in the rest of the world.[160]

Overall, the Commission found that "the relevant geographic markets for both high and very high-speed trains are at least EEA-wide and include Switzerland."[161] Though it could not "exclude that the relevant markets are broader and cover the rest of the world," the Commission did not find that fact relevant because of the impact of the transaction on "effective competition regardless of the precise geographic market definition."[162]

iv. *The Competitive Assessment*

The Commission undertook its competitive assessment in two periods: 2008–2018 and, reflecting the arguments of the Notifying Party concerning recent developments in the market, 2013–2018.[163]

The Commission agreed that in a "lumpy market," even a single order can result in a significant change in market share. However, clear evidence

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[156] *Id.*

[157] *Id.* ¶¶ 107–108.

[158] *Id.* ¶ 113.

[159] *Id.* ¶ 116–118.

[160] *Id.* ¶ 114. In China, Japan, and Korea, in particular, joint-venture and public procurement rules kept foreign competitors out of those markets (*id.* ¶¶ 108, 129–130), whereas Asian producers were not interested in the EEA market because of "existing significant competition" *and* because "national rail operators in certain EEA Member States tend to procure high-speed rolling stock from domestic suppliers." *Id.* ¶ 115.

[161] *Id.* ¶ 133.

[162] *Id.*

[163] *Id.* ¶ 143 (with the caveat that in "markets characterized by lumpy demand", selection of the review period risks "a very distorted view" of the parties' competitive positions. *Id.* ¶ 185).

demonstrated the Parties' "stable leadership" in the market because (1) each was an incumbent monopoly supplier to its national operator;[164] and (2) they "have won almost all tenders by non-national operators in the EEA and Switzerland"[165] and in major markets outside the area.[166] From a customer perspective, each party was the other party's closest competitor on product range and technical capacity and exercised competitive pressures on the other.[167] Within the geographic market, only one competitor was considered "credible";[168] the other globally significant suppliers[169] were not significant players outside of the excluded markets.[170] Moreover, market trends did not demonstrate a change in the trend such as to expect greater competitive pressure on the parties.[171]

The rolling stock market is "lumpy" also in the sense that it is analogous to differentiated products markets,[172] giving rise to a potential for "extensive price discrimination."[173] In a market dominated by bidding such as this one, a merger between dominant players has the potential of affecting the bidding aggressiveness of all other players.[174] Finally, in the very high-speed rolling stock market, "there is no new entry as regards tenders."[175] The reason, the Commission noted, was a multilevel set of barriers to entry.

First, the sector was marked by high barriers to entry: "[F]rom the perspective of a new entrant, the investment required for the development of high-speed and, in particular, very high-speed trains is constrained by the limited scope to recoup costs due to the infrequent number of tenders for such rolling stock."[176]

Second, to even pre-qualify to make a bid, manufacturers are required to "put forward references of prior supplies of trains in effective operation at the

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[164] *Id.* ¶ 199.

[165] *Id.* ¶¶ 204–205.

[166] *Id.* ¶ 206.

[167] *Id.* ¶¶ 340–349, 356.

[168] *Id.* ¶¶ 206, 266–269 (Talgo, of Spain).

[169] CRRC of China, Hyundai-Rotem of Korea, and Kawasaki of Japan. *Id.* ¶ 270

[170] In particular, "CRRC has not sold any high or very high-speed rolling stock in normal competitive conditions so far, nor has it been deemed fit to do so." *Id.* ¶ 274.

[171] *Id.* ¶¶ 319–320.

[172] *Id.* ¶ 371.

[173] *Id.* ¶ 372.

[174] *Id.* ¶ 375.

[175] *Id.* ¶ 405.

[176] *Id.* ¶ 462.

time of the bid."[177] This requirement in turn further amplifies the competitive advantages of existing market players.[178]

Third, the EEA market is marked by a requirement for complex regulatory authorizations regarding technical and safety rules at both European Union and member State levels.[179] It is not expected that suppliers would bid with an already certified solution. At the same time, "the fact that a prospective supplier's other (or previous) models are certified/authorised to operate in the EEA provides a competitive advantage."[180]

Fourth, political support for national champions has deterred "the entry of established rolling stock manufacturers in the high and very high-speed market in the countries where such relationship exists."[181] Even in the absence of national champions, informal local production requirements "can constitute an important aspect of a bid or a competitive advantage for the bidder."[182]

Against this background, the Commission was not persuaded by the parties' arguments concerning the potential competitive challenges posed by Asian rolling stock manufacturers, in particular CRRC.

Key tenders were coming up by 2020.[183] Alstom had raised concerns about CRRC competition a decade before, and this competition had not materialized[184]—indeed, CRRC's strategy outside China[185] and its "lack of credibility as a prospective bidder in the EEA"[186] suggest that barriers to entry are "particularly steep for CRRC, Hyundai-Rotem and Kawasaki."[187] None of the potential customers of CRRC had prequalified it for tender.[188] Without "very likely and large-scale entry" in relatively short order, the merged unit would not face any competitive constraints in the upcoming tenders.[189]

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[177] *Id.* ¶ 464.

[178] *Id.* ¶ 483 ("Alstom's and Siemens' continuous stream of orders from SNCF and Deutsche Bahn provides them with an unparalleled track-record which they can leverage when tendering, both within the EEA and in the rest of the world." *Id.* ¶ 484).

[179] *Id.* ¶ 470.

[180] *Id.* ¶ 471.

[181] *Id.* ¶ 478.

[182] *Id.* ¶ 476.

[183] *Id.* ¶ 493.

[184] *Id.* ¶ 492.

[185] *Id.* ¶ 510 ("In the rest of the world, CRRC's sales have remained limited and it does not have a single high-speed train in operation outside of China to this date. In particular, a large number of high-speed projects involving Chinese interest have been cancelled around the world.") (citations omitted).

[186] *Id.* ¶ 497. The Commission noted three principal issues with the credibility of the CRRC as a competitor. *See supra* note 185.

[187] *Id.*

[188] *Id.* ¶ 513.

[189] *Id.* ¶ 494.

After a thorough examination of the Parties' commitments, the Commission prohibited the merger.

c. Competition Enforcement and Trade Policy

It is impossible to conceive of two products more different from one another than sugar and very high-speed trains; in market and economic terms—as, literally, in geographic terms—South Africa and the European Union are poles apart. In many respects, comparing *Siemens/Alstom* and *Tongaat-Hulett* would appear to be a fool's errand. And yet, the analytical foundations of *Siemens/Alstom* rest on a previous case that ought to have alerted the Commission to the need for a more global and dynamic analysis,[190] such as the one the Tribunal used in *Tongaat-Hulett*.

In its *de Havilland*[191] decision, the first[192] under the "concentrations" Regulation of the then-European Communities,[193] the Commission adopted a strongly consumer welfare-oriented approach to merger reviews and dismissed industry rationalization as a sufficient reason to override consumer welfare concerns.[194] The case is important for one other reason: just about every market assumption on which the decision was based[195] proved ephemeral and vanished before the end of the decade.[196]

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[190] Jenny and Neven state that:

> "unfair" competition from companies based outside the EU may be a cause for concern. In those circumstances, what is sought is merely to take into account that competition is distorted by various types of support abroad, including subsidies and barriers to market access. Competition authorities should take these distortions into account in their analysis of the competitive dynamics before and after the merger.

Jenny & Neven, *supra* note 104, at 4 (citations omitted).

[191] Case No. IV/M.053—Aerospatiale-Alenia/de Havilland, Comm'n Decision, 1991 O.J. (L 334) 42.

[192] Lianos, *supra* note 95, at 11.

[193] Council Regulation (EC) No. 4064/89 on the control of concentrations between undertakings, 1989 O.J. (L 395) 1.

[194] *Aerospatiale-Alenia/de Havilland*, 1991 O.J. (L 334) at 60.

[195] *Id.* at 43 ("It is considered therefore that there is no significant overlap of turbo-props and regional jets"); *id.* at 46 ("Factors other than seat capacity do not therefore define the relevant product markets"; "The parties claim that small aircraft may be substitutable for larger aircraft since carriers could make more frequent flights"); *id.* at 47 ("there is no interpenetration between the markets of China and the eastern European countries and the overall world markets, *and it is not expected that there will be such interpenetration in the foreseeable future*") (emphasis added); *id.* at 53 ("It is questionable whether Embraer will now be able to develop a commuter type in the larger segments"; "after completion of the proposed concentration, it is less likely that Embraer could compete effectively in these segments against ATR/de Havilland"); *id.* at 54 ("The established airlines which have already acquired ATR or de Havilland commuters are . . . likely to stay with them in placing future orders"); *id.* at 57 ("in terms of increase in annual deliveries the market appears to have therefore already reached maturity"; "it is considered that it would not be rational to now enter the commuter aircraft market.").

[196] *See, e.g.*, Panel Report, *Brazil—Export Financing Programme for Aircraft*, WTO Doc. WT/DS46/R (Apr. 14, 1999); Panel Report, *Canada—Measures Affecting the Export of Civilian Air-*

The *de Havilland* decision is a reminder that competition policy, like all other regulatory instruments or interventions, sometimes rests on assumptions that are not borne out. In that sector, within five years of the decision, the Canadair regional jet had reshaped the regional aircraft landscape, and Embraer had become a major contender in the market[197]—overtaking Canadair in short order.[198] Deregulation in the sector resulted in the proliferation of discount airlines and a massive increase in demand for short-haul aircraft in the European Union. How a *merged* ATR-de Havilland entity could have responded to these market developments is a different question.[199] What we do know is that ATR came close to considering all options and was essentially saved by higher jet fuel prices[200] and strategic miscalculation by its competitors.

To be sure, despite the *Manifesto*, neither Siemens nor Alstom is in the competitive position in which ATR found itself at either end of the 90s; the European high-speed rail sector is structurally less hospitable to new entrants—especially foreign ones—than the regional aircraft sector where suppliers act in a global market; there is no prospect of "deregulation" in European rail. Indeed, it could reasonably be argued that the *Manifesto* is, itself, a post hoc clarification of a key element of the findings of the Commission in respect of the *political* landscape of the European rail sector in general, and the relationship of Alstom and Siemens with their home countries more specifically. Interviews with experts in the European rail sector confirm that, *for the time being*, Germany and France are not likely to be turning to any other suppliers than their own national champions.[201] To the extent that Sie-

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craft, WTO Doc. WT/DS70/R (Apr. 14, 1999); Rambod Behboodi, Comment, *The Aircraft Cases: Canada and Brazil*, 39 CANADIAN YEARBOOK INT'L L. 387 (2016).

[197] OECD *2009 Roundtable*, *supra* note 95, at 25.

> The advocates of sector-specific industrial policies and national champions can point to several striking successes. In Brazil, Embraer was created in 1969 as a government-owned company (it was privatised in 1994) and was supported through its early development (by means of subsidies and preferential procurement rules) before becoming a successful global player in the aeronautics sector, to the point that aircraft are now Brazil's top export product.

Id.

[198] *The Decline and Fall of Bombardier*, LEEHAM NEWS & ANALYSIS (May 6, 2019), leehamnews.com/2019/05/06/the-decline-and-fall-of-bombardier/ (subscription required).

[199] Many of its competitors—Saab, Bae, Dornier, and Fokker—have already gone out of business. Slobodan Lekic, *Jet Fuel Prices Spark Turboprop Comeback*, ASSOCIATED PRESS (Mar. 23, 2008), www.nbcnews.com/id/wbna23744617 ("By the beginning of the millennium, several turboprop manufacturers—including Fokker and Saab—had either declared bankruptcy or abandoned production of turboprops, leaving Bombardier ATR as the only major turboprop manufacturer.").

[200] *Id.* ("The world's remaining manufacturers of turboprops for commuter airlines, Canada's Bombardier and France's ATR, have ramped up production to 140 of the planes this year, after making 100 deliveries in 2007. This compares with only 26 in 2002.").

[201] The situation is different in the electrical and signaling markets.

mens and Alstom were relying on potential competition in the European market as support for the merger, the Commission might well have cited *Tongaat-Hulett* to the effect that so long as European governments remain committed to "protecting domestic producers from international competition"[202] through their procurement practices, a merger was not necessary to help the suppliers compete with the CRCC in the *European* market.

Be that as it may, the Commission's cursory references to CRRC's failures in non-Chinese markets and its declared lack of interest in the European market do not reflect a complete understanding of CRRC, China, or the global trading environment. For example, as developments in the regional jet market demonstrated, classical considerations of profitability are not likely to serve as a market entry barrier if home governments are determined to overcome the barrier through state support. In the regional jet market, the supported players were private sector entities; state support[203] as an element of market entry is even more relevant when dealing with a state-owned enterprise[204] and considerably more so in respect of an enterprise twice the size of the proposed merged entity.[205] In the same vein, concerns about CRRC's current technological shortcomings do not reflect a full understanding of China's long-term strategy for technology acquisition.[206] There is the fact that within months of the release of the *Siemens/Alstom* decision, CRRC announced its intent to enter into the European market through a local acquisition.[207] And overlaid on top of all of this is China's *integrated* global policy in support of its industrial expansion.[208]

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[202] Tongaat-Hulett Group Ltd. & Transvaal Suiker Beperk Middenen Ontwikkeling (Pty) Ltd/Senteeko (Edms) Bpk/New Komati Sugar Miller's Partnership TSB Bestuursdienste, Case No. 83/LM/Jul00, [2000] ZACT 47, ¶ 76 (Nov. 27, 2000) (S. Afr.).

[203] State support is not just subsidies:

> But with the Chinese government keen to develop its exports, and with rail one of 10 focus industries targeted for growth, it increasingly found the companies were competing with each other for international contracts. As a result, the decision was taken in 2014 to merge and integrate the resources of the two companies to become CRRC, a process which took nine months to play out.

Kevin Smith, *CRRC Aims for Europe*, INT'L RAILWAY J. (Apr. 12, 2016), www.railjournal.com/in_depth/crrc-aims-for-europe.

[204] Rochelle Toplensky, *EU Blocks Planned Siemens-Alstom Rail Deal in Landmark Decision*, FIN. TIMES (Feb. 6, 2019).

[205] *Id.*

[206] OFFICE OF THE U.S. TRADE REPRESENTATIVE, FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 (Mar. 22, 2018), www.ustr.gov/sites/default/files/Section%20301%20FINAL.PDF.

[207] Keith Barrow, *CRRC to Acquire Vossloh Locomotives*, INT'L RAILWAY J. (Aug. 27, 2019), www.railjournal.com/financial/crrc-to-acquire-vossloh-locomotives/.

[208] Shin Watanabe, *China Drops $11bn Anchors to Expand Maritime Silk Road*, NIKKEIASIA (Jan. 5, 2020), www.asia.nikkei.com/Spotlight/Belt-and-Road/China-drops-11bn-anchors-to-expand-Maritime-Silk-Road.

Siemens/Alstom is not in danger of becoming another *de Havilland*. But the decision could have been significantly strengthened—even as a "pure" competition analysis—had it looked more closely at the overall international *trade* framework governing, or *mis*governing, state-trading enterprises, subsidies, China's technology transfer policies, and government procurement.

IV. CONCLUSION

Could or should trade policy considerations have a legitimate role in *merger* reviews? Could considerations other than consumer welfare animate competition determinations? In response to this question, I make four observations.

First, in at least two competition regimes—those of the United States and Australia—"consumer welfare" serves as a proxy for a country's broader economic, industrial, and trade objectives. Others eschew, expressly or implicitly, "industrial policy" or other trade or economic concerns as appropriate competition policy considerations. In this respect, the competition frameworks of Canada[209] and South Africa[210] reflect more amply—at any rate, more transparently—the complexities of competition policy.

Second, there has been a proliferation of competition enforcement agencies in the last two decades.[211] As Motta observes, "The mere fact of having more competition authorities in different countries, even if they were to have identi-

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[209] Thomas Ross observes:

> [T]he Competition Act recognizes at several points that Canada is a trading nation and that many markets extend well beyond the country's borders. Firms need not worry that the Act forces the Competition Bureau to view market shares completely in domestic terms, and indeed the Bureau has found markets to be international in scope on many occasions.

Thomas Ross, *Recent Canadian Policy Toward Industry: Competition Policy, Industrial Policy and National Champions*, *in* COMPETITION LAW AND ECONOMICS: ADVANCES IN COMPETITION POLICY ENFORCEMENT IN THE EU AND NORTH AMERICA 332, 355–56 (Abel M. Mateus & Teresa Moreira eds., 2010) (citation omitted).

[210] In its contribution to the OECD study, South Africa notes:

> The merger provisions of the Act similarly require the competition decision maker to take account of industrial policy objectives. Hence when deciding a merger the relevant competition agency—the Tribunal in the case of mergers above a specified threshold and the Commission in respect of those falling below the threshold—is required to decide whether the merger is likely to give rise to a substantial lessening of competition, and then, regardless of the outcome of the competition evaluation, to determine the transaction's impact on a specified number of public interest grounds, which include the standard industrial policy objectives such as the transaction's likely impact on region or sector, on the ability of small businesses to become competitive, and on the ability of national industries to compete in international markets.

OECD *2009 Roundtable*, *supra* note 95, at 193.

[211] Motta, *Competition Policy and Trade in the Global Economy: Towards and Integrated Approach*, *supra* note 35, at 13.

cal laws and procedures, escalates the risk of inconsistent decisions."[212] This results in increased compliance costs as well as business risk, with potential for negative impact on trade and investment flows.

Third, much of the discourse on the relevance of industrial policy to competition enforcement appears to rely on evocative characterization to advance rhetorical objectives. Marty notes, for example, that whereas industrial policy involves a public choice as to industrial priorities, the fundamental objective of competition policy is non-interference in market processes.[213] The *Monopolkommission* referred to "state intervention."[214] Buhart and Henry assert that the European Union "has consistently shown steadfast resolve to abide by principles of law and economics, and not politics."[215] Sokol argues that "[a]ntitrust promotes consumer welfare whereas industrial policy promotes government intervention for privileged groups or industries."[216]

This is rhetoric masquerading as analysis; it is problematic, for two reasons.

For one thing, "industrial policy" could range from specific subsidies or preferences[217]—"optimal selection of sectors of priority activity"[218]—all the way to general infrastructure.[219] As France's contribution to an OECD study noted:

> [I]ndustrial policy can no longer be simply defined as all vertical policies as opposed to cross-cutting policies, such as competition policy. Innovation

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[212] *Id.*

[213] Marty, *supra* note 99, at 8.

[214] REPORT, *supra* note 96, ¶¶ 13, 21.

[215] Jacques Buhart & David Henry, *Industrial Policy to Trump Competition? The* Siemens/Alstom *Railway Merger and Its Aftermath*, CONCURRENCES: COMPETITION L. REV., May 2019, at 6.

[216] Sokol, *supra* note 37, at 1247. Contrast that with South Africa:

> It is important to note that the relevant competition authority is the only decision maker, including in the assessment of the public interest impact of the merger. Neither the Minister nor any other executive structure is entitled to override the competition authorities' decisions. A ministry or department of state may make representation to the Commission and the Tribunal and, on several important occasions, have done so, but the decision making prerogative resides solely with the competition authorities.

OECD *2009 Roundtable*, *supra* note 95, at 193.

[217] OECD *2009 Roundtable*, *supra* note 95, at 25:

> The expression "industrial policy" means different things to different people. According to the context, it may refer to government interventions influencing business decisions, from general measures such as across-the-board investment incentives to more targeted, sector-specific incentives, or "nationalist" policies such as domestic content requirements for public procurement, the direct or indirect subsidisation of specific companies, or dirigiste policies such as the creation of national champions and their protection from competitors and foreign acquirers.

[218] Buhart & Henry, *supra* note 215, at 9.

[219] Takako Ishihara, Assoc. Professor, Hyogo Univ., Presentation at 12th Technical Training Course on the Antimonopoly Act and Competition Policy: Industrial Policy and Competition Policy 2 (Aug. 26, 2005).

> policies are broadly cross-cutting, as are policies relating to intellectual property, business-oriented higher education, entrepreneurship, the small business environment, design, the adaptation of the productive system to geopolitical changes in world demand, sustainable development and the green industries needed to reduce greenhouses gases, business tax breaks, etc.[220]

In the face of this broadening of "industrial policy" objectives, and even as he acknowledges that "industrial policy has multiple meanings," Sokol's assertion that "[i]ndustrial policy threatens consumer welfare"[221] appears inconsonant, or at best inapposite. This is so because it requires drawing a hard and fast distinction between "consumers" on the one hand, and beneficiaries of industrial policy on the other, that is not tenable in a modern and interconnected economy. Similarly, "trade policy" need not concentrate on specific industries but could have, as a principal object, improvement of a country's terms of trade.

For another, antitrust is, *itself*, a form of "government intervention": where competition authorities stop a merger on "consumer welfare"[222] grounds it is a market intervention[223] *conceptually* no different from permitting the merger on the basis, or in the light, of industrial, trade, or other economic considerations. Similarly, stopping producers from realizing efficiency gains[224] on competition grounds is a form of state-driven production decision. Public choice concerns about the beneficiaries of industrial policy ought equally to be relevant for industrial beneficiaries of ostensibly "consumer"-driven competition enforcement. In a merger assessment, the analysis relies on product and geographical market definitions,[225] and the market position of competitors, none

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[220] OECD *2009 Roundtable*, *supra* note 95, at 85.

[221] Sokol, *supra* note 37, at 1248 (citation omitted). *See also* Ross, *supra* note 209, at 333.

[222] *See* Lianos, *supra* note 95, at 18 ("[M]ost competition law regimes have built a broader narrative for intervention, on the basis of some wider conception of 'consumer welfare,' or the avoidance of 'consumer harm.'").

[223] Thatcher, *supra* note 41, at 14 ("Thus liberalisation of markets can form part of state strategies to aid domestic firms. This is especially so because the state also re-regulates competition, which offers opportunities to shape markets and favour certain firms, either by aiding competition or by limiting it and seeking to protect existing suppliers.") (citation omitted).

[224] Lianos observes:

> A merger between two EU-based undertakings that would have enabled them to compete more effectively with a dominant undertaking on the affected market(s), thus making the market(s) more contestable, would likely not raise competition concerns. However, one of the difficulties the parties may have in this case is that the positive effects of a merger on productive efficiency or the capacity of the merged entity to innovate may not neutralise the possible anticompetitive effects of the specific merger on the consumers of the affected relevant markets in the EU.

Lianos, *supra* note 95, at 19.

[225] Sir Philip Lowe, *Competition and Industrial Policy in Europe: How Can They Work Together?* at 2, OXERA (Oct. 2019), www.oxera.com/insights/agenda/articles/competition-and-industrial-policy-in-europe-how-can-they-work-together/#content. He further notes, "Both state

of which—as South Africa's Competition Tribunal observed—is independent of trade policy in non-local cases; a competition investigation could be driven by protectionist sentiments, subject to industry capture.[226] And, of course, letting a market function when the market is distorted,[227] or does not respond to public policy concerns,[228] or suffers from massive externalities[229] is a different issue altogether. Sokol's assertion brings to mind ideological libertarians' dedication to opposing all government regulation, except of course when it comes to protecting property rights[230] based on ex ante distribution patterns.

This is not to question the legitimacy of competition interventions. Nor do I suggest that competition policy ought to be the mechanism through which all industrial or trade policy should be routed.[231] Rather, loaded terminology tends to confuse more than elucidate, and we should be aware when the debate is being driven by characterization ("state intervention in the market!") rather than analysis ("what is the appropriate level/instrument of intervention?").

Fourth, is competition enforcement an appropriate instrument for trade policy intervention? To be sure, where an underlying problem can be framed as a strictly *trade* problem, in the ordinary course, that problem ought to be addressed through trade measures, disciplines, and institutions. After all, a competition authority is primarily responsible for assessing the impact of a merger on its own domestic market. To the extent that we are talking about allegedly unfair practices of trading partners, other mechanisms, both domestic and international, exist to address those concerns. For example, the WTO has disciplines—and very strict ones at that—governing state-trading enterprises and export subsidies. Thus, trade concerns should be addressed through those

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aid control and competition policy need to take account of the international dimension of markets, and a dynamic assessment of competitive pressures in markets is essential." *Id.* at 3.

[226] Sokol, *supra* note 37, at 1259–60.

[227] Appellate Body Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WTO Doc. WT/DS257/AB/R (Jan. 19, 2004).

[228] Appellate Body Reports, *Canada—Measures Relating to the Feed-In Tariff Program*, WTO Doc. WT/DS412/AB/R. On renewables, public policy-driven "market intervention" through carbon pricing and other regulatory actions has changed Germany's electricity generation profile, resulting in massive reduction in carbon emissions.

[229] Rambod Behboodi & Christopher Hyner, *Countervailing Climate Change: Emissions Trading and the SCM Agreement*, 50 GEO. J. INT'L L. 599 (2019).

[230] Will Wilkinson, *The Useful Libertarian Idiocy of the Great Barrington Declaration*, NISKANEN CTR.: BLOG (Oct. 27, 2020), www.niskanencenter.org/the-useful-libertarian-idiocy-of-the-great-barrington-declaration/.

[231] Lowe states (in my view, correctly): "[I]f firms are faced with unfair and subsidised competition from outside the EU, perhaps the most appropriate response should be provided by trade defence mechanisms and WTO anti-subsidy procedures, rather than by weakening competition law enforcement." Lowe, *supra* note 225, at 3.

mechanisms. As well, the European Union has a robust trade defense regime to guard against precisely these types of concerns.[232]

At the same time, competition policy is an aspect of a state's overall economic policy. There is no theoretical or policy reason to place trade policy and competition frameworks in watertight compartments. The tension between trade policy, on the one hand, and competition policy, on the other, is particularly manifest in smaller economies: to have industries of scale[233] to be competitive globally,[234] a country cannot afford to insist on too dogmatic an approach to purely *domestic* competition. This was evident in *Tongaat-Hulett*. Ross objects that "economies of scale can often be achieved through ways other than through the creation of one or a few champions."[235] He asserts:

> And of course, firms can build up their scale of operations by selling in other countries—that is, it is not clear that size in the domestic market is necessary

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[232] Jenney and Neven note the "concern that these instruments could be captured to grant protection to European firms rather than addressing unfair practices abroad." Jenney & Neven, *supra* note 104, at 4. They appear to argue that competition enforcement should seek to counteract the potential for regulatory capture through trade instruments.

[233] Communication from Australia, at 2, *Working Group on the Interaction Between Trade and Competition Policy*, WTO Doc. WT/WGTCP/W/39 (Oct. 1, 1997):

> A particular challenge small or developing economies may face is that of ensuring that firms can grow sufficiently large in the domestic market place to have the muscle and capital reserves to succeed in the international markets. Markets may be fragmented and in this way form an obstacle to the growth of firms.
>
> . . . .
>
> A national competition policy therefore has to be able to accommodate the growth of firms, regardless of whether this occurs through organic growth or through mergers and acquisitions. However, it has to be able also to deal with anti-competitive mergers and acquisitions as well as abuses of market power by individual firms without limiting the ambit of competition policy itself.

See also Mathew Heim & Catarina Midões, *Protecting Competition or Protecting (Some) Competitors: A European Debate*, CONCURRENCES: COMPETITION L. REV., May 2019, at 17, 20 (dismissing the "scale-up argument" by referring to an OECD paper: "The assertion that there is a positive correlation between firm size and competitive advantage is undermined by the mixed record of many mergers, a fact which calls into question the government's ability to efficiently pick—let alone create—winners." OECD *2009 Roundtable*, *supra* note 95, at 14).

In particular, note the findings of the OECD:

> The existence of positive externalities induced by sector-wide economies of scale and agglomeration effects has been documented empirically. In particular, informational externalities seem to be strong in developing countries, since there is a lot of uncertainty as to the prospects of success in new sectors, which may deter private initiative.

OECD *2009 Roundtable*, *supra*, at 26.

[234] Ross notes, however:

> [I]t is clear that many markets are not global. Even when firms sell in many countries, the competitive conditions in those countries can be very different. The implication is then that a country that permits the development of a single national champion may well face a powerful domestic monopolist at home, at least in some of those champions' markets.

Ross, *supra* note 209, at 353 (citation omitted).

[235] *Id.*

> to realize economies of scale before sales can be made in export markets. In many cases, export sales can lead the drive to realize those economies.[236]

Possibly, but only *if* they could sell in markets undistorted by domestic subsidies, export subsidies by third countries, subsidies that distort global markets,[237] state-trading enterprises, or failure to price global environmental externalities. Even in larger economies, in respect of national industries that face competition from state-owned industries with access to unlimited, and often invisible, support from deep state pockets,[238] it is not impertinent to ask whether competition authorities should consider these trade policy factors in their analysis instead of relying on narrow "consumer welfare" concepts.

The global trading framework needs active, healthy, and coherent national competition regimes to function properly. Through trade agreements, trading partners seek to ensure minimal domestic competition governance; through cooperation, training, and convergence, they seek to bring coherence to competition enforcement and, thus, to spur competition not just domestically but also internationally. But the texture of the global trading framework is more lumpy than smooth. And its functioning is subject to unusual stresses and challenges. Competition policy functions within this structure and not abstracted from it. There is no reason why taking due account of the fuller context of global competition should "materially compromise"[239] the attainment of competition objectives.

In response to the Commission decision on *Siemens/Alstom*, the UK rail regulator said that it had "made it clear from the outset that this was a bad deal for British passengers, freight customers and taxpayers."[240] It "was pleased to have played an important role in persuading the Commission to reach the same view."[241] Employees of Siemens and Alstom, the companies' suppliers and contractors, the shareholders, and the beneficiaries of taxes collected from all the revenue generated by the network might well wonder why their inter-

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[236] *Id.*

[237] Panel Report, *United States—Subsidies on Upland Cotton*, WTO Doc. WT/DS267/R (Sept. 8, 2004).

[238] Heim and Midões consider that "unfair competition" should be dealt with by other instruments than competition enforcement. Heim & Midões, *supra* note 233, at 18 (Yet while the effect may be unfair competition coming from companies based in third countries, the root cause is state support in those countries. As such the solution is not likely to lie with competition enforcement, but rather with other instruments.). But then, as Jenny and Neven noted, this raises concerns about regulatory capture of the trade policy apparatus. Jenny & Neven, *supra* note 104, at 5.

[239] OECD, *supra* note 95, at 194.

[240] *Siemens Alstom Merger Blocked by European Commission*, RAILWAY GAZETTE INT'L (Feb. 6, 2019), www.railwaygazette.com/business/siemens-alstom-merger-blocked-by-european-commission/48009.article?adredir=1.

[241] *Id.*

ests should be subordinated to those of "British passengers, freight customers and taxpayers" when facing emboldened competition from state-sponsored competitors.

The object of this article has not been to identify the perfect balance between these competing considerations, but rather to help advance a necessary discussion and stimulate further analysis and debate on the optimal modalities of introducing trade considerations into competition assessments.