

Principles and a Framework of Antitrust for Global Innovation

GLOBAL TRADE AND INNOVATION POLICY ALLIANCE | JUNE 2021

INTRODUCTION

Trade distortions traditionally arise from tariffs and regulatory barriers. They can also arise from less-traditional means, such as currency manipulation. But one major way that has largely remained unnoticed for too long is the abuse of antitrust. Thanks to the extra-territorial effects of domestic competition policies, nations can distort trade at the expense of fair competition. These trade distortions deter innovation and ultimately harm consumers. It is time for the World Trade Organization (WTO) to make antitrust a global matter worthy of scrutiny. In particular, the WTO needs to re-activate its Working Group on the Interaction Between Trade and Competition Policy ([WGTCP](#)) to embed the WTO with a clear purview on global antitrust matters.

Competition law (also termed antitrust) and enforcement are essential to ensure the appropriate level of competition and to foster innovation. More than 130 jurisdictions have competition law regimes, and all too often antitrust agencies make decisions in isolation, without considering other nations' actions. With increased global economic integration, more antitrust decisions regarding mergers have extra-territorial implications. Multiple antitrust authorities review a specific international merger without systematic coordination. Also, competition authorities can diverge in assessing what constitutes anticompetitive practices. Even worse, some nations use antitrust as a policy weapon to punish firms in rival nations. Sometimes this involves rejecting legitimate mergers because the merged firm would be a more effective competitor to the nation's domestic firms. Other times it involves launching antitrust cases against foreign companies simply because they are foreign competitors. Still other times it involves enacting competition regulations that are designed to negatively impact foreign firms.

It is time for a global framework with enforceable principles to discipline nations that use antitrust for protectionist means. To be sure, there are fora for cooperation, including the Competition Division of the Organization for Economic Cooperation and Development (OECD), the International Competition Network (ICN), and the United Nations Commission for Trade and Development (UNCTAD), as well as regional fora such as the Competition Law and Policy Group (CPLG) of the Economic Committee of the Asia-Pacific Economic Cooperation. These soft law instruments provide only guidance, not enforcement.

Consequently, a framework on fundamental principles of global antitrust needs to be adopted within a well-established multilateral institution: the WTO. With its enforceable rules and effective policing mechanisms, the WTO constitutes the optimal institution for our suggested framework and its four principles so that antitrust no longer remains a trade-distortive tool for some nations.

THEREFORE WE, THE MEMBERS OF THE GLOBAL TRADE AND INNOVATION POLICY ALLIANCE,

Considering the fundamental role of trade and innovation for the common good,

Recognizing the role of antitrust laws and policies in ensuring the appropriate level of competition,

Considering that international divergence in antitrust enforcement hinders innovation,

Acknowledging that uncoordinated enforcement of antitrust laws can be an instrument of disguised protectionism,

Affirming the harmful effects of disguised protectionism for global innovation and trade,

Believing that multilateral coordination on antitrust laws and policies shall enhance competition and innovation globally,

Advocating for a common framework on global antitrust at the WTO level to facilitate coordination and to address the weaponization of domestic antitrust rules by nations,

HAVE AGREED ON:

STATEMENT 1: THE INSTITUTIONAL FRAMEWORK FOR ANTITRUST AT THE WTO

1. The World Trade Organization ceded its mandate to ensure fair competition in 2004 when the General Council decided that the interaction between trade and competition policy would no longer be a matter of interest. Consequently, the Working Group on the Interaction Between Trade and Competition Policy has become inactive. The WTO urgently needs to re-activate the WGTCP in order to design multilateral, legally binding principles within an adequate institutional framework.
2. Because free and fair trade can never become a reality without free and fair competition, the WTO needs to become competent on antitrust matters. A WTO-led global antitrust framework should not only lay down multilateral principles fostering coordination among antitrust agencies but should also articulate domestic principles fostering the convergence of antitrust assessments. This would empower the dispute settlement mechanism of the WTO to ensure that commitments are credible.
3. The work of the International Competition Network and the Competition Division of the OECD are also essential and necessary. The skills and resources available in these two fora shall cooperate with the WTO in designing and enforcing the common framework on principles of global dynamic antitrust.

STATEMENT 2: THE NEED FOR A GLOBAL AGREEMENT ON ANTITRUST POLICIES

1. Globalization and digitalization have revealed the need for multilateral coordination and supervision regarding the enforcement of antitrust laws with extra-territorial effects. Mergers of firms with a presence in more than one country have become more frequent. Still, the risk of international mergers' unequal treatment prevents firms from expanding and innovating with sufficient legal certainty. Also, anticompetitive practices can be prosecuted with various levels of priorities across jurisdictions, sometimes leading to jurisdictions complacently leaving highly harmful collusive practices to prosper at the expense of global welfare and innovation. Moreover, antitrust enforcers differently perceive and address the successes of leading global firms, depending on their strategic interests. Different antitrust tools and perspectives lead to certain conduct being categorized as abusive without the global consistency needed. Finally, unfair competition occurs through forced mergers where state-backed enterprises unfairly compete with other global players.
2. Manipulations of antitrust rules as a distortionary trade tool impose significant economic and social costs, including reduced innovation.

STATEMENT 3: FOUR STEPS TOWARD A GLOBAL FRAMEWORK ON ANTITRUST

The world needs an international agreement addressing competition distortions. This legally binding framework adopted under the leadership of the WTO would contain the following principles.

1. Assisted by the International Competition Network and the Competition Division of the OECD, the WTO Working Group on Trade and Competition Policy shall design a common framework to foster coordination across antitrust agencies.
2. The Working Group shall lay down rules that prevent domestic enforcers from weaponizing antitrust laws for protectionist purposes.
3. The Working Group shall lay down rules that provide for clear and enforceable means to foster coordination among antitrust agencies whenever extra-territorial effects of domestic antitrust matters arise.
4. The Working Group shall lay down rules that enable nations to use the Dispute Settlement Mechanism and the Appellate Body to raise matters of alleged distortions of competition through national antitrust policies.

WE, THE MEMBERS OF THE GLOBAL TRADE AND INNOVATION POLICY ALLIANCE,

Are committed to making these steps the reality of the 21st-century global trade,

Are calling for the World Trade Organization to embrace the enumerated framework,

Are calling for the World Trade Organization to adopt rules implementing these principles for the benefit of trade and innovation.

SIGNED BY:

Bay Area Council Economic Institute

Fundación Idea

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