

# Anticompetitive Market Distortions as an Ungoverned Space, and Prospects for Reform

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*Post-World War II international trade liberalization has eliminated many border restrictions and spurred economic growth. Nevertheless, there are certain types of activities with substantial negative implications for trade and competition that are not truly subject to national or international trade and competition strictures—these are in effect, “ungoverned spaces.” These harmful activities are the fruit of anticompetitive market distortions (ACMDs)—rules imposed by the state that distort competitive interactions and, frequently, trade flows. Sanctioned by governments, ACMDs are far more difficult to combat than purely private restrictions. Recent scholarly studies highlight the magnitude of the harm generated by ACMDs. One promising approach to curb ACMDs involves empowering government officials who support regulatory reform (for example, antitrust policymakers) to intervene with other organs of government in order to encourage the eradication or curbing of ACMDs. The growth of internet-enabled business platforms, which are far better able to evade governmental limits on competition than traditional suppliers of goods and services, may strengthen reformers’ hands. In addition, armed with research on the economic benefits of reform, a coalition of willing nations might be assembled to negotiate a plurilateral trade accord to reduce and eliminate particular types of ACMDs. To the extent they succeed, national and multilateral initiatives to curb ACMDs would broaden the reach of competition and trade laws, thereby shrinking the scale of ungoverned trade and competition law space in a welfare-enhancing manner.*

## Overview

Post-World War II trade liberalization<sup>1</sup> (under the auspices of GATT and World Trade Organization-inspired negotiations)<sup>2</sup>—in particular, large scale reductions in tariffs and non-tariff barriers—has achieved significant gains in global economic welfare. Moreover, while the near-term potential for further sweeping trade barrier reductions appears limited,<sup>3</sup> regional and bilateral trade reforms continue to be pursued (consider, for example, the Trans-Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (T-TIP) negotiations undertaken by major European, North American, South American, and Asian nations). Yet, even if all trade restrictions *at the border*

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were suddenly eliminated, major government-sponsored microeconomic distortions *within borders* would remain, severely limiting the economic potential of nations. These internal distortions, which may disrupt both domestic and international marketplace transactions, flow from harmful government rules

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that undermine merit-based competition. This leads to inefficient resource allocation and the stymying of entrepreneurship and innovation. Such anticompetitive government policies, also dubbed anticompetitive market distortions (ACMDs),<sup>4</sup> substantially suppress potential economic output in countries around the world, and impose a particularly large impediment to economic growth in developing countries. For example, foreign

banks considering entry into the Indian market face tight limitations on bank branching, sector-specific lending requirements, and controls on access to foreign currency, among myriad other requirements.<sup>5</sup> Such restraints reduce efficiency and competition within the Indian financial market to the detriment of economic welfare.

New approaches are needed to combat anticompetitive market distortions, which are largely immune from antitrust (or competition) law. Generally, these approaches do not apply to sovereign action<sup>6</sup> and international trade law disciplines, which focus on ensuring *trade-related* protections of specific economic rights. In short, ACMDs flourish because there is an ungoverned space reflecting a gap between the jurisdictional reach of competition laws and international trade laws.<sup>7</sup> Unlike purely private schemes that violate competition law and are deterred by legal sanctions (such as agreements among competitors to fix prices), ACMDs enjoy the direct backing of the government, and in that respect may be viewed as “governed,” albeit in a manner that reduces social welfare. But because ACMDs involve special favoritism by private interests, avoid government rules of general application, and make a mockery of the neutral application of the law, they may legitimately be deemed to be ungoverned.<sup>8</sup>

One promising approach to curb ACMDs involves empowering competition agencies—the government bureaucracies that administer antitrust laws and possess expertise on competitive processes—to intervene with government regulatory agencies (such as transportation, labor, and agriculture ministries) and legislatures in order to encourage the eradication of ACMDs. Recent work on the economic cost of ACMDs and on how to identify and advocate against ACMDs could help strengthen the hand of competition agencies in combating them. The growth of internet-enabled business platforms, which are far better able to evade governmental strictures on competition than traditional suppliers of goods and services, may strengthen reformers’ hands. In addition, international cooperation, including perhaps plurilateral agreements,<sup>9</sup> could further advance the anti-ACMD cause. In sum, the time may be ripe for coordinated efforts to phase out or, at least, curb government-generated ACMDs, thereby effectively reducing the scope of an ungoverned space that is the source of

substantial economic harm. This would reduce the burden of special interest market distortions in a way that promotes the rule of law.

### **The Nature and Measurement of Anticompetitive Market Distortions (ACMDs)**

Policymakers often justify government intervention into the marketplace as a response to market failure—the existence of real world imperfections. Externalities (third party effects of business activity that are not reflected in market prices, such as pollution), market power, natural monopolies, information imperfections, and the underprovision of public goods are examples of market failure.<sup>10</sup> An appropriate government response to a legitimate market failure will be designed to reduce or eliminate the social welfare loss (reduction in aggregate economic well-being) attributable to that market failure.<sup>11</sup>

#### *What is an ACMD?*

An ACMD, on the other hand, is a government policy that will provide a favored competitor or competitors an artificial advantage over other existing or potential competitors, thereby distorting the working of the affected market and reducing welfare. Regardless of the justification, it represents a harmful misuse of government authority. An ACMD may, for example, take the form of a firm-specific subsidy, a regulation that is designed to impose relatively higher cost burdens on disfavored firms, or an arbitrary rule that prevents new competitors from entering into a market. ACMDs that affect firms engaged in international commerce artificially alter the terms of international trade in a manner harmful to welfare. ACMDs in effect sanction welfare-damaging activities that shield them from oversight by competition law and trade law disciplines. In other words, ACMDs comprise special-interest rules that shrink the size of legal “space” governed by general trade and competition laws.<sup>12</sup> By treating similar entities in a dissimilar fashion and offering special benefits to favored parties, ACMDs also undermine the rule of law being viewed as “a system of binding rules” adopted and applied by a valid government authority that embody “clarity, predictability, and equal applicability.”<sup>13</sup>

#### *Classifying ACMDs<sup>14</sup>*

One helpful way to classify ACMDs is to state that they include rules and regulations that (1) limit the number and range of suppliers, (2) limit the ability of suppliers to compete, (3) reduce the incentives of suppliers to compete, (4) limit the choices and information available to consumers, and (5) apply to state-owned enterprises (SOEs).

#### *Limits on the number of suppliers*

Examples of the first category include direct bans on entry or indirect restrictions such as quality standards, certification rules, capital adequacy requirements for banks, and other administrative or bureaucratic barriers. Entry restrictions may not only confer market power and restrict output to favored firms, but may also inhibit the realization of economies of scale and discourage investment.



*Limitations on the ability to compete*

Such rules can take the form of anything that reduces the intensity with which firms compete. For instance, regulations limiting advertising can chill interfirm competition. Similarly, some regulations can lower the costs of established domestic firms by setting particularly high product standards that are geared toward goods produced by a favored domestic company, thereby blocking new entrants from abroad.

*Rules that reduce the incentive of suppliers to compete*

Some regulatory structures prompt cartel formation or otherwise dampen a firm's incentive to compete. Examples include government competition law exemptions for a favored group of firms, or government rules that make it highly costly for consumers to switch from one supplier to another.

*Rules that limit the choice and information available to consumers*

These include government restrictions on advertising or government systems of self-regulation and co-regulation, under which market participants can limit the sorts of information that are made available to consumers.

*Rules that apply to state-owned enterprises*

These include special subsidies or legal exemptions such as exemptions from competition law for state-owned enterprises; regulatory systems that are skewed to provide favors to state-owned competitors, particularly when they are deemed “national champions;” special tax benefits; and favorable government decisions on such topics as standards, procurement, and general regulatory enforcement.

*Why ACMDS are entrenched*

Unfortunately, ACMDS, often the fruit of anticompetitive rent-seeking (lobbying to obtain government favor) by well-organized, entrenched producer lobbies,<sup>15</sup> are particularly difficult to dislodge, because they are imposed and retained by the power of the state. Thus, the accretion of welfare-inimical ACMDS over time presents a major problem for economic reformers. This problem is particularly acute in developing countries, which frequently suffer from especially severe competitive distortions.<sup>16</sup>

*Scholarly Research on ACMDS*

In recent years, recognizing the harm caused by anticompetitive restrictions, international institutions have attempted to identify and categorize various types of harmful regulations and to estimate the consumer welfare costs they impose.<sup>17</sup> In particular, methodologies to identify ACMDS and to provide justifications for eliminating these restrictions have been developed by the Organization for Economic Cooperation and Development (OECD)<sup>18</sup> and by the International Competition Network (ICN), a virtual network of competition agencies and experts working to promote convergence toward procedural and substantive best practices.<sup>19</sup> Relatedly, economic studies (some of them supported by the World Bank)<sup>20</sup> have arrived at estimates of the nature and



size of the economic welfare costs of particular anticompetitive regulatory schemes. Furthermore, ongoing research by economic policy scholars seeks to devise a broad metric to measure the economic impact of ACMDs, employing indicators based on robustness of property rights protection, freedom to engage in international trade, and intensity of domestic competition.

#### *The Scope of ACMD-Related Harm*

World Bank-sponsored research on anticompetitive regulations covers many countries. “Drawing on a comprehensive set of studies,” a 2012 World Bank survey article concluded that regulatory reforms “to increase market competition can improve a country’s economic performance, increase business opportunities and firm productivity, and ultimately benefit consumers through usually lower prices for goods and services.”<sup>21</sup> Citing one of many examples, the article explained how elimination of Australia’s anticompetitive regional policies on electricity generation and transportation raised the country’s GDP by 2.5 percent, with significant drops in retail electricity prices, rail freight rates, and port charges.

#### *Identifying and Categorizing ACMDs*

The OECD’s “Competition Assessment Toolkit” is a well-designed “how-to” manual for spotting and analyzing regulatory distortions. The Toolkit “provid[es] a method for identifying unnecessary restraints on market activities and developing alternative, less restrictive measures that still achieve government policy objectives.”<sup>22</sup> It emphasizes in particular the effects of regulations that limit or bar particular suppliers from competing effectively and limit the choices and information available to customers.<sup>23</sup> The OECD applied the Toolkit in a 2014 OECD report on competition-distorting rules in Greece.<sup>24</sup> The study focused on four sectors of the Greek economy: food processing, retail trade, building materials, and tourism. It identified 555 regulatory restrictions and made 329 specific recommendations to mitigate harm to competition. The OECD “conservatively” calculated a €5.2 billion benefit to the Greek economy from the lifting of the regulations identified in the study, “although the positive effects on the Greek economy over time [would] likely...be far greater.” Since the OECD’s estimate covered only a small portion of Greece’s overregulated economy, the presumption is that the real economic impact of far-reaching regulatory relief in Greece would be many times greater. As Wall Street executive and New York Times contributing writer Steven Rattner put it in 2015,

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“equally important” as prudent fiscal policy “is the need for structural reforms in Greece’s inefficient, overregulated economy.”<sup>25</sup>

*ICN, OECD, and World Bank Collaboration*

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reform initiatives. The ICN has adapted analysis from the OECD’s Toolkit in preparing its “Recommended Practices on Competition Assessment,”<sup>26</sup> non-binding consensus recommendations submitted to the over 130 national competition agencies that participate in the ICN. Additionally, at its 2015 Annual Conference, the ICN issued a report dealing with the promotion of a “competition culture” within a country<sup>27</sup> and has also

involved OECD Competition Committee experts in its work. Furthermore, in June 2015, the World Bank and the OECD held their first joint annual conference on “Competition Policy for Inclusive Growth and Shared Prosperity.” The Conference Report (released in April 2016)<sup>28</sup> included a variety of largely empirical studies on the effects of competition policy—and regulatory regimes, in particular—on economic welfare in developed and developing countries. Those studies tended to show that competition policy can be most effective in reducing poverty and increasing shared prosperity by boosting competition in sectors that are most relevant to poor households such as food products, non-alcoholic beverages, transport, telecommunications, and, to a lesser extent, energy. (Two examples of successful competition agency advocacy initiatives to assist poorer consumers, recognized as winners of the 2014 joint World Bank—ICN Competition Advocacy Contest, are the rejection of a 20 percent increase in health care services in Kenya and reforms in Malawi sugar regulation that promoted increased availability of sugar across the country and new entrants in the distribution market.)<sup>29</sup> At the World Bank’s April 2016 Spring Meeting, the OECD’s Secretary General summarized the results of OECD and World Bank research on regulation and competition carried out in recent decades:

Twenty years ago, the OECD developed the Product Market Regulation Indicator, a quantitative tool that measures the incidence of regulatory barriers to competition through state control of business operations, legal and administrative barriers to start-ups, and obstacles to foreign trade and investment. The indicator has been used extensively by OECD countries to pursue a pro-competition agenda through better regulation.

Detailed information underpinning the indicator—that is regularly updated—has empowered policymakers to shine the policy spotlight on specific aspects of product market regulation that hinder competition. It has also facilitated direct comparisons of regulatory practices across OECD countries, which has catalyzed substantial reductions in barriers to competition over the years.



Now, thanks to fruitful collaboration with the World Bank, we have extended the coverage of the Product Market Regulation Indicator to a large number of non-OECD countries, mostly in Latin America and the Caribbean, but also in Africa and Asia. The highlights of this work are summarized in a note prepared jointly by the OECD and World Bank, copies of which are available here today.

The results suggest that regulatory barriers to competition are, on average, higher in emerging-market economies than in more advanced economies. The differences are most pronounced in two areas: obstacles to foreign trade and investment; and barriers to the entry of new businesses in network industries (energy, transport, and communications).

Provided that product market regulation reforms are supported by a vigorous anti-trust regime and enforced by a strong and independent competition agency, the potential gains from reducing barriers to entry are substantial. OECD analysis shows that a 30% reduction in regulatory barriers to competition—that corresponds to the average difference between advanced and emerging economies—could lift productivity in countries such as Brazil and Mexico by as much as 3 to 4 percent after five years.<sup>30</sup>

#### *Cross-Cutting Economy-Wide Productivity Simulator*

While World Bank and OECD research finds that potential productivity gains from reduced entry barriers are impressive, efforts to focus on particular markets are complicated by data limitations due to enormous information demands. To get a broader, economy-wide sense of the potential gains from reducing ACMDs, Shanker Singham of the Legatum Institute in London and other researchers have recently developed a broad yet simple metric to assess the impact of market-distortionary anticompetitive regulations based on a “Productivity Simulator.”<sup>31</sup> Transcending market-specific studies, the Simulator estimates the additional national economic growth that can be generated through far-reaching national regulatory reforms that, to the greatest extent possible, strengthen property rights, liberalize trade, and enhance market-based competitive forces. It also allows for relative comparisons of regulatory policy and the burden of anticompetitive regulations among different jurisdictions. Nation-specific Simulator scores are currently being compiled. The goal is to give each country a score that reflects the degree to which policy in a certain area promotes competition that maximizes economic welfare.

The Simulator sheds light on the relative importance of particular regulations on productivity and economic growth. With respect to strengthening property rights, the most important factors include intellectual property rights, the costs of enforcing contracts, the ability to challenge government regulations, and the strength of investor protection.

For promoting domestic competition, the most important factors include the competitiveness of the labor market, the efficiency of the regulatory promulgation process, and the degree of competition in infrastructure.

Surprisingly, for international competitiveness, the most important factors are trade facilitation-type issues involving the simplification of procedures in the international trade chain,<sup>32</sup> rather than tariffs and non-tariff barriers (NTBs). This suggests that during a time when tariffs and NTBs are being re-

duced around the world, all other factors affecting the ease with which goods flow between countries are becoming increasingly important, such as fees and charges, the harmonization and simplification of documents, and cooperation between border agencies within the country (internal) and with neighboring countries (external).<sup>33</sup>

Preliminary estimates based on applying the Simulator reveal the huge economic gains that could be achieved in India—a country widely regarded as having a very poor regulatory system—if it improved its performance in several different regulatory categories.<sup>34</sup> Those categories encompass freedom to own foreign currency bank accounts, international capital controls, resolving insolvency resolution, intellectual property protection, favoritism in government decision-making, transparency in government policymaking, and a host of doing-business factors (time and cost of getting electricity, the time and cost involved in starting a business, and the time involved in getting construction permits). Achieving the highest performance level (i.e. at the level of the country with the best regulatory record) in those would raise India’s per capita GDP from \$1,500 to \$3,723—a gain of 148 percent. An improvement in all measures of regulatory quality to the level of the world’s most pro-competitive

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regulatory framework would raise India’s per capita GDP from \$1,500 to \$29,691—a stunning gain of 1,875 percent. Admittedly, obtaining major improvements in these regulatory areas through “good government” reforms will be no easy task, particularly in light of a history of Indian corruption that undoubtedly has played a role in promoting regulatory complexity in that nation.<sup>35</sup>

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tory improvements in nations with poor regulatory quality have the potential to create enormous gains in the size of an economy and, thus, in economic welfare.

### International Efforts to Combat ACMDs

The recent (and growing) efforts by international institutions to highlight the costs of and promote the reform of ACMDs suggests that the time may be ripe to consider concrete steps, perhaps backed by international agreements among reform-minded countries, to eliminate those harmful rules. Incremental steps, possibly leading to broader plurilateral and multinational initiatives, may prove fruitful.

An economic literature on “counter-rent-seeking” discusses how, if conditions are favorable, a coalition may succeed in overturning government restric-





tions that limit economic freedom. An example is the coalition of textile and manufacturing interests that succeeded in achieving Parliament's 1846 repeal of the United Kingdom's protectionist "corn laws."<sup>36</sup> In that regard, recent research that has shined a spotlight on the magnitude of harm to the poor—particularly in areas such as basic agriculture, as highlighted by World Bank studies—and industry-specific economic dislocations caused by ACMDs is important. This research could empower civil society organizations and industrial groups harmed by regulatory restrictions to mount a publicity campaign aimed at curbing or repealing distortionary rules.

Fortuitously, a major change in technology that has transformed the global economy—the rise of the internet and the online commerce it has enabled—may prove particularly helpful to governmental and non-governmental advocates of ACMD reform.<sup>37</sup> The abil-

ity of entrepreneurs to sell and promote their goods and services online makes it harder for central governments to limit the establishment and operation of new enterprises through ACMDs. Unlike businesses in the past, which had to "set up shop" and thus were readily subject to direct government oversight, firms today can now reach customers directly and anonymously. Governments can

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seek to monitor online transactions and impose censorship through technological "filtering," but such efforts are costly and imperfect. In short, the emergence of the internet economy is rendering ACMDs harder to enforce and somewhat less effective. Furthermore, the widespread popularity of new internet-enabled commercial platforms such as Uber, Lyft, and Airbnb has created a new class of consumer allies of reform, who are opposed to the application of rigid government rules to protect inefficient and less flexible incumbent businesses.<sup>38</sup> These developments may help empower reform advocates to argue that ACMDs, at least those that seek to constrain internet commerce, are no longer worth maintaining, and are hindering highly publicized new commercial models that enjoy substantial public support.<sup>39</sup>

National campaigns to ferret out ACMDs could be usefully complemented and supported by international regulatory reform initiatives. Notably, previous multilateral cooperative efforts have brought about significant economic reforms despite seemingly well-entrenched opposition. For example, in the mid-1990s the World Trade Organization (WTO) ushered in plurilateral agreements on intellectual property protection, services trade, and trade-related investment measures<sup>40</sup> after a long, multi-year negotiating round. This occurred despite the fact that these topics strayed far beyond traditional trade topics centered on tariffs and quotas.<sup>41</sup> As an established and increasingly well-regarded organization whose best practices recommendations have influenced national competition law rules,<sup>42</sup> the ICN is in a good position to bolster anti-ACMD campaigns by national competition agencies. The ICN could invoke the growing literature on the major economic benefits of internet-enabled commerce, and its inherently

greater ability to get around regulatory strictures, by arguing that the time for governments to reconsider ACMDs finally has arrived.

Nevertheless, the role of the ICN is inherently limited. As a voluntary organization of competition agencies lacking in enforcement authority and an issuer of non-binding recommendations and reports, the ICN's power is one of moral suasion tied to its prestige. Even if they apply ICN guidance in spotting and analyzing ACMDs, national competition agencies must rely on their country's laws to block or repeal those distortive rules. Many competition agencies have no direct authority to overturn competition-distorting rules. Moreover, in dealing with ACMDs they must take into account political constraints placed on them by other government agencies and powerful private groups. Thus, while the ICN may help at the margin to embolden particular well-intentioned agencies that seek pro-competitive regulatory reform, more is needed to substantially rein in distortionary rules.

Turning to the World Trade Organization for help does not appear promising. As previously noted, WTO Doha round trade negotiations, which tackled ambitious new areas including agriculture, have ended in failure.<sup>43</sup> In any event, WTO enforcement measures, which have focused on narrow discrete issues, are not well-suited practically or politically to dealing with major regulatory overhauls.

What strategy merits pursuit? Enlightened leadership by the next U.S. Administration might focus initially on executive orders and federal agency reforms designed to identify, target, and help phase out the most harmful anticompetitive distortions on the federal level. This effort might build on the Obama administration's 2016 executive order directing federal agencies to "identify specific actions that they can take in their areas of responsibility to address undue burdens on competition."<sup>44</sup> For example, inefficient Dodd-Frank financial industry rules that artificially favor large banks over community banks, threatening harmful financial industry consolidations and imposing regulatory burdens, may merit being rolled back.<sup>45</sup> State distortions beyond the reach of federal preemption raise a separate problem, but exhortative efforts by the administration might lend support to state-level regulatory reform efforts. Simultaneously, the administration might start assembling a small coalition of other generally market-oriented nations—and perhaps the European Union, given its federal regulatory role—that have expressed an interest in the reduction of regulatory burdens. The competition agencies and regulatory assessment agencies from those jurisdictions—in the United States, the Federal Trade Commission, the Justice Department's Antitrust Division, and the White House Office of Information and Regulatory Affairs—could meet initially to explore common understandings about the nature of anticompetitive regulatory distortions and what can be done to combat them. Trade negotiators from individual countries could also be brought in to highlight regulatory impediments in other jurisdictions experienced by major companies engaged in international trade.

Eventually these discussions might lead to a plurilateral trade law accord to reduce and eliminate particular types of ACMDs. This would be far from unprecedented since plurilateral and bilateral accords, such as regional or bilateral free trade agreements containing competition law provisions have

proliferated in recent years<sup>46</sup> as alternatives to broader WTO measures. Obviously, implementing legislation, as well as executive action, would be needed to implement these accords, both in the United States and elsewhere. Annual high-level conferences could be held among members of the “coalition of the willing” to explore reforms that have been made and those that have not. Eventually (although probably not initially, given current political realities), the plurilateral accord could allow for the establishment of independent dispute-resolution bodies, assembled on an ad hoc basis, that deals with complaints by businesses from one country against another country party that has not implemented agreed-to regulatory changes. A precedent for such bodies is the North American Free Trade Agreement (NAFTA) dispute settlement process.<sup>47</sup> Dispute resolution decisions could trigger the losing party to make regulatory changes, or to grant specified concessions if it chooses to forego reforms. Over time, initial success of a small scale plurilateral accord, measured in terms of reduced regulatory burdens, might entice other nations to join in, thereby spreading the benefit of ACMD reform.<sup>48</sup> Relatedly, recent political developments, in particular Brexit, may point the way toward a variety of new plurilateral “free trade” negotiations that could encompass a broad set of issues, including reductions in regulatory burdens.<sup>49</sup> The elimination of UK agricultural subsidies that formerly had been mandated by European law (the Common Agricultural Policy, or CAP), for example, could promote a more competitive marketplace for agriculture and benefit both producers and consumers.<sup>50</sup>

Plurilateral negotiations are only one of various possible approaches to ACMD reform. The key to eventual success is to build on past models, and be willing to take a flexible tactical approach rather than inexorably follow an overly ambitious and grandiose plan (which may well have been the problem with the failure of the Doha WTO Round). Even incremental reductions in ACMD burdens promise great welfare benefits, and promoters of reform should continue to engage the broader multilateral organizations for hortatory support and the research community for factual ammunition. In any event, whatever specific strategies are advanced, it is to be hoped that new political leadership in the United States and other nations will seek to ameliorate anticompetitive distortions as an important means of spurring economic growth and welfare.

### Conclusion

Recent high-profile economic research coupled with a greater focus on regulatory distortions by international economic organizations have created a rare, auspicious moment that enlightened political leadership could seize to launch an international campaign against ACMDs. It must be recognized, of course, that combatting ACMDs is a long-term proposition that requires bold action coupled with political finesse and a long-term perspective that recognizes the value and necessity of incremental change. Coalitions of entrenched interests desirous of retaining the status quo undoubtedly will fight back, and will try to constrain the pace and scope of reform efforts. Nonetheless, the reform effort is well worth it and should be launched and pursued vigorously. Fortunately,



the rise of internet commerce provides a powerful new set of arguments that can be wielded effectively by ACMD opponents.

In sum, by broadening the applicable scope of competitively neutral, welfare-enhancing antitrust and trade laws rules, the curbing of ACMDs would

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yield economic benefits in a manner that strengthens the rule of law. The rise of international attention to the problem, and technological changes that undermine the status quo, suggest that the time may finally be ripe for serious ACMD reform.

**Notes**

<sup>1</sup> Scholarly consensus opinion holds that general trade liberalization enhances economic welfare. “Benefits of Trade Liberalization,” OECD, <http://www.oecd.org/trade/benefitlib/>.

<sup>2</sup> The General Agreement on Tariffs and Trade (GATT) was established as a negotiating framework for successive trade liberalization rounds when efforts to form a treaty-based International Trade Organization failed in the late 1940s. “The GATT Years: from Havana to Marrakech (2016),” World Trade Organization, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm); The 1986–1994 GATT Uruguay Round culminated in the establishment of a World Trade Organization (WTO). The WTO oversees trade negotiation rounds, administers the existing GATT agreements as well as new specialized plurilateral agreements, and houses appellate tribunals that hear challenges to particular national rules that allegedly violate agreement terms. “Agreement Establishing the WTO (2016),” World Trade Organization, [https://www.wto.org/english/res\\_e/booksp\\_e/agrmtseries1\\_wto\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/agrmtseries1_wto_e.pdf); The WTO has been characterized as a multinational structure that, by reducing the power of protectionist interest groups found in individual countries, can simultaneously promote welfare-enhancing trade and accountable government. John O. McGinnis and Mark L. Movsesian, “The World Trade Constitution,” *Harvard Law Review* 114 (2000): 511–605.

<sup>3</sup> Multilateral trade reform efforts stalled during the WTO’s Doha Development Round (launched in 2001 and effectively ended in December 2015), stymied by disputes over agricultural subsidies and a host of other questions. The Editorial Board, “Global Trade After the Failure of the Doha Round,” *New York Times*, January 1, 2016, [http://www.nytimes.com/2016/01/01/opinion/global-trade-after-the-failure-of-the-doha-round.html?rref=collection%2Ftimestopic%2FWorl%20Trade%20Organization&action=click&contentCollection=timetopics&region=stream&module=stream\\_unit&version=latest&contentPlacement=2&pgtype=collection](http://www.nytimes.com/2016/01/01/opinion/global-trade-after-the-failure-of-the-doha-round.html?rref=collection%2Ftimestopic%2FWorl%20Trade%20Organization&action=click&contentCollection=timetopics&region=stream&module=stream_unit&version=latest&contentPlacement=2&pgtype=collection).

<sup>4</sup> Alden F. Abbott and Shanker Singham, “Enhancing Welfare by Attacking Anticompetitive Market Distortions,” *Concurrences* 2011, 4 (2011): 1–5, <https://www.ftc.gov/sites/default/files/attachments/key-speeches-presentations/ssrn-id1977517.pdf>; Alden F. Abbott and Shanker Singham, “Competition Policy and International Trade Distortions,” *2013 European Yearbook of International Economic Law* (2013): 23–38, [https://books.google.com/books?id=uTVEAAAQBAJ&pg=PA23&dq=Alden+F.+Abbott+and+Shanker+Singham+Competition+Policy+and+International+Trade+Distortions+2013&source=bl&ots=aclUBnfyLl&sig=EGo7NknqpWze7S5Yrb0Fb0kDMvk&hl=en&sa=X&ved=0ahUKewjZkeWtgpMMAhWH1B4KHe6lDKwQ6AEILDAC#v=onepage&q=Alden%20F.%20Abbott%20and%20Shanker%20Singham%20Competition%20Policy%20and%20International%20Trade%20Distortions%202013&f=false;Shanker+Singham,+U.+Srinvasa+Rangan,+and+Robert+Bradley,+“The+Effect+of+Anticompetitive+Market+Distortions+\(ACMDs\)+on+Global+Markets,”+Concurrences+2014,+4+\(2014\):+1–16,+https://uploads.strikinglycdn.com/files/249882/826d872a-c8a9-4dbd-8f8a-6c673dd57d65/Concurrences%202014.pdf](https://books.google.com/books?id=uTVEAAAQBAJ&pg=PA23&dq=Alden+F.+Abbott+and+Shanker+Singham+Competition+Policy+and+International+Trade+Distortions+2013&source=bl&ots=aclUBnfyLl&sig=EGo7NknqpWze7S5Yrb0Fb0kDMvk&hl=en&sa=X&ved=0ahUKewjZkeWtgpMMAhWH1B4KHe6lDKwQ6AEILDAC#v=onepage&q=Alden%20F.%20Abbott%20and%20Shanker%20Singham%20Competition%20Policy%20and%20International%20Trade%20Distortions%202013&f=false;Shanker+Singham,+U.+Srinvasa+Rangan,+and+Robert+Bradley,+“The+Effect+of+Anticompetitive+Market+Distortions+(ACMDs)+on+Global+Markets,”+Concurrences+2014,+4+(2014):+1–16,+https://uploads.strikinglycdn.com/files/249882/826d872a-c8a9-4dbd-8f8a-6c673dd57d65/Concurrences%202014.pdf).

<sup>5</sup> Shanker Singham, U. Srinivasa Rangan, Robert Bradley, and A. Molly Kiniry, *Anti-Competitive Market Distortions and Their Impact: A Case Study of India* (London: Legatum Institute, 2016): 9 (“Legatum India Study”), <https://lif.blob.core.windows.net/lif/docs/default-source/publica->



tions/anti-competitive-market-distortions-and-their-impact---india-case-study-may-2016-pdf.pdf?sfvrsn=2.

<sup>6</sup>The set of legal rules dealing with conduct that artificially distorts markets and harms the competitive process (for example, competitor cartels that fix prices, mergers that restrict industry output, and monopoly abuses) is generally referred to as “antitrust law” in the United States and “competition law” in other countries. Both those terms are used interchangeably herein. In addition, although some nations do apply competition laws to certain situations involving government-imposed competitive abuses, for the most part, competition law is inapplicable to government statutes and regulations that are specifically designed to displace competitive forces—the rules that are the focus of this essay.

<sup>7</sup>The concept of “ungoverned spaces”—physical zones of limited or non-existent state control within sovereign states—has attracted substantial scholarly attention in recent years. Andrew J. Taylor, “Thoughts on the Nature and Consequences of Ungoverned Spaces,” *SAIS Review* 36, 1 (2016): 5–15.

<sup>8</sup>In other words, this essay extends the notion of an “ungoverned space” to the conceptual realm of activities (as opposed to territory) over which a state chooses to assert its jurisdiction by imposing competitively neutral legal rules, as a substitute for state-supplied special interest preferences.

<sup>9</sup>The WTO refers to general trade agreements that apply to all WTO members as multilateral agreements, and contrasts those with plurilateral agreements, which are trade accords among a limited number of like-minded nations. See, for example, “Plurilateralism against Multilateralism? A Multi-stakeholder Perspective,” World Trade Organization, WTO Public Forum 2012, [https://www.wto.org/english/forums\\_e/public\\_forum12\\_e/session29agah\\_e.pdf](https://www.wto.org/english/forums_e/public_forum12_e/session29agah_e.pdf).

<sup>10</sup>Winston, Clifford, *Government Failure versus Market Failure: Microeconomics Policy Research and Government Performance* (Washington, DC: AEI-Brookings Joint Center for Regulatory Studies, 2006).

<sup>11</sup>Government intervention to correct a market failure is only justified if the welfare costs associated with government intervention (regulation and other forms of intervention, such as litigation, are costly and subject to error) are smaller than the welfare benefits flowing from the intervention. In short, the costs due to possible “government failure” should be taken into account before government action is taken. Nobel Laureate James Buchanan and leading regulatory scholar A.E. Kahn have commented on the limitations of government intervention. James M. Buchanan, “Politics Without Romance: A Sketch of Normative Public Choice Theory and Its Normative Implications,” in *The Collected Works of James M. Buchanan: Volume 1, The Logical Foundations of Constitutional Liberty* (Indianapolis, IN: Liberty Fund, 1999): 45–59; A.E.; Kahn, “The Deregulatory Tar Baby: The Precarious Balance Between Regulation and Deregulation, 1970–2000 and Henceforward,” *Journal of Regulatory Economics* 21, 1 (2002): 35–56.

<sup>12</sup>In one sense, since ACMDs are merely a different type of legal rule, they do not really generate “ungoverned spaces,” merely “differently (or alternatively) governed” spaces. This is also true, however, of “ungoverned” physical spaces that are subject to governance by non-state actors. Jennifer Keister, “The Illusion of Chaos: Why Ungoverned Spaces Aren’t Ungoverned, and Why that Matters,” *Cato Policy Analysis* 766 (2014): 1–24, [http://object.cato.org/sites/cato.org/files/pubs/pdf/pa766\\_1.pdf](http://object.cato.org/sites/cato.org/files/pubs/pdf/pa766_1.pdf); In short, the term “ungoverned space” is more a normative conclusion that a certain type of governance (say by local clans or gangs in specific areas within a country that are outside the central government’s direct control) does not merit recognition, rather than a dispassionate exercise in positive analysis. By analogy to the “ungoverned physical spaces” literature, this essay treats ACMDs as “illegitimate” exercises of jurisdiction and thus as generators of ungoverned “trade and competition law” spaces.

<sup>13</sup>Ronald A. Cass, *The Rule of Law in America* (Baltimore, MD: Johns Hopkins University Press, 2001) 4; Lon L. Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1964) 39 (stressing that to comport with the rule of law, legal rules should be simple enough to give clear notice of what they require, have only prospective application, remain relatively constant over time, be internally consistent, and be administered by neutral officials).

<sup>14</sup>Alden F. Abbott and Shanker Singham, “Competition Policy and International Trade Distortions,” in Christoph Hermann, Markus Krajewski, and Jörg Philipp Terhechte, eds., *2013 European Yearbook of International Economic Law* (Heidelberg: Springer Publishing, 2013), 23–37.



<sup>15</sup> Anne O. Krueger, “The Political Economy of the Rent-Seeking Society,” *American Economic Review* 64, 3 (1974): 291–303, <https://assets.aeaweb.org/assets/production/journals/aer/top20/64.3.291-303.pdf>.

<sup>16</sup> Martha Martinez Licetti, Georgiana Pop, Tania Priscilla Begazo Gomez, trans., *A Step Ahead: Competition Policy for Shared Prosperity and Inclusive Growth* (Washington, DC: World Bank Group, 2016).

<sup>17</sup> Alden F. Abbott and Shanker Singham, “Anticompetitive Policies Reduce Economic Freedom and Hurt Prosperity,” in *Heritage Foundation 2016 Index of Economic Freedom* (Washington, DC: Heritage Foundation, 2016): 51–60, <http://www.heritage.org/index/book/chapter-5>.

<sup>18</sup> The Paris-based OECD is a research organization funded by developed countries. It publishes reports and develops reform proposals on different aspects of public policy that are discussed in committee meetings attended by its thirty-five member nations (plus some observer nations). “About the OECD,” OECD, 2016, <http://www.oecd.org/about/>.

<sup>19</sup> The ICN releases reports and develops a variety of best practices through its working groups, dealing with competition law enforcement, institutional design, and advocacy (advocacy focuses on the elimination of anticompetitive government policies, including ACMDs). “Steering Group,” ICN, 2016, <http://www.internationalcompetitionnetwork.org/about/steering-group.aspx> provides links to information on ongoing ICN initiatives and substantive projects; “ICN Guidance,” ICN, <http://www.internationalcompetitionnetwork.org/about/icnguidance.aspx> provides links to ICN products.

<sup>20</sup> The World Bank Group, an international economic development institution that provides financial and advisory services to developing countries, advocates against government adoption of and retention of ACMDs. “Competition Policy,” World Bank, 2016, <https://www.wbginvestmentclimate.org/advisory-services/cross-cutting-issues/competition-policy/>.

<sup>21</sup> Markus Kitzmuller and Martha Martinez Licetti, “Competition Policy: Encouraging Thriving Markets for Development,” *World Bank Group Viewpoint (Note No. 331)* (Sept. 2012), <http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/282884-1303327122200/VP331-Competition-Policy.pdf>.

<sup>22</sup> “Competition Assessment Toolkit, Volume I: Principles,” OECD, 2007, accessed August 2, 2016, <http://www.oecd.org/daf/competition/46193173.pdf>; “Volume II: Guidance,” OECD, 2010, accessed August 2, 2016, <http://www.oecd.org/daf/competition/45544507.pdf>; “Volume III: Operational Manual,” OECD, 2015, accessed August 2, 2016, [http://www.oecd.org/daf/competition/COMP\\_Toolkit\\_Vol.3\\_2015.pdf](http://www.oecd.org/daf/competition/COMP_Toolkit_Vol.3_2015.pdf).

<sup>23</sup> According to the OECD, specific aspects of regulation that should be avoided include limits on the number of suppliers of a particular product or services; limits on the ability of suppliers to compete; reductions on the incentives of suppliers to compete; and limits on the choices and information available to customers. “Competition Assessment Toolkit,” OECD, [www.oecd.org/daf/competition/assessment-toolkit.htm](http://www.oecd.org/daf/competition/assessment-toolkit.htm); OECD, *How Competition-Friendly is Regulation in Emerging Economies? Insights from the OECD Indicator of Product Market Regulation* (Paris: OECD, 2016) (discussing the nature of regulatory barriers to competition in developing and developed countries).

<sup>24</sup> “OECD Competition Assessment Reviews: Greece, 2014,” OECD, 2014, <http://www.oecd.org/daf/competition/Greece-Competition-Assessment-2013.pdf>.

<sup>25</sup> Steven Rattner, “Overregulating Life in Greece,” *New York Times*, July 15, 2015, [http://www.nytimes.com/2015/07/15/opinion/overregulating-life-in-greece.html?\\_r=0](http://www.nytimes.com/2015/07/15/opinion/overregulating-life-in-greece.html?_r=0).

<sup>26</sup> “Recommended Practices on Competition Assessment,” ICN, <http://www.internationalcompetitionnetwork.org/uploads/library/doc978.pdf>.

<sup>27</sup> ICN Advocacy Working Group, “Competition Culture Project Report (2015),” ICN, <http://www.internationalcompetitionnetwork.org/uploads/library/doc1035.pdf>.

<sup>28</sup> World Bank Group and OECD, “A Step Ahead: Competition Policy for Shared Prosperity and Economic Growth” (Conference Report, 2016).

<sup>29</sup> World Bank Group, “Winners Announced: 2014 Competition Advocacy Contest” (March 15, 2015), <http://www.worldbank.org/en/events/2014/11/26/2014-competition-advocacy-contest>.

<sup>30</sup> Angel Gurría, “Competition policy in developing countries: Helping markets perform better” (the Joint World Bank-OECD Event Competition policy in developing countries: Helping markets perform better, April 15, 2016), <https://www.oecd.org/fr/apropos/secretairegeneral/competition-policy-in-developing-countries-helping-markets-perform-better.htm>.

<sup>31</sup> This research, which has been developed by Shanker Singham, U. Srinivasa Rangan, Robert Bradley, and A. Molly Kiniry, has not yet been published and is being updated. The following description of the approach and preliminary results is based on draft materials available to the author.

<sup>32</sup> “Trade facilitation refers to policies and measures aimed at easing trade costs by improving efficiency at each stage of the international trade chain. According to the WTO definition, trade facilitation is the “simplification of trade procedures”, understood as the ‘activities, practices and formalities involved in collecting, presenting, communicating and processing data required for the movement of goods in international trade.’ Evdokia Moisé, Thomas Orliac, and Peter Minor, “Trade Facilitation Indicators: The Impact on Trade Costs,” *OECD Trade Policy Working Papers*, No. 118 (OECD Publishing, 2011): 7 (footnote reference omitted), [https://www.wto.org/english/tratop\\_e/tradfa\\_e/case\\_studies\\_e/oecd\\_paper\\_e.pdf](https://www.wto.org/english/tratop_e/tradfa_e/case_studies_e/oecd_paper_e.pdf).

<sup>33</sup> *Ibid*, 5.

<sup>34</sup> Legatum India Study, note 5.

<sup>35</sup> See Milan Vishnav and Sandip Sukhtankar, “Tackling Corruption in India,” *Carnegie Endowment for International Peace* (September 16, 2016), <http://carnegieendowment.org/2015/09/16/tackling-corruption-in-india-pub-61301>.

<sup>36</sup> Charles K. Rowley and Robert D. Tollison, “Rent-Seeking and Trade Protection,” in Charles K. Rowley, Robert D. Tollison, and Gordon Tullock eds., *The Political Economy of Rent-Seeking* (New York: Springer Publishing, 1988), 217–240, <https://books.google.com/books?id=E4HSBwAAQBAJ&pg=PA232&lpg=PA232&dq=counter+rent-seeking&source=bl&ots=ssx0OhzeoD&sig=83tghhvGN5cGUBvr5ZXyWCue1Lk&hl=en&sa=X&ved=0ahUKEwi0q-2H1tfMAhVCFj4KHRryB8UQU6AEIODAE#v=onepage&q=counter%20rent-seeking&f=false>.

<sup>37</sup> Adam Thierer, *Permissionless Innovation* (Arlington, VA: Mercatus Center at George Mason University, 2016); Arun Sundararajan, *The Sharing Economy* (Cambridge, MA: MIT Press, 2016).

<sup>38</sup> Internet publicity directed at highlighting jurisdictions that interfere with these new popular business models may over time help generate support for reform-minded coalitions, at least in some jurisdictions. For example, Uber publishes online a detailed description of its legal status in jurisdictions around the world. See IDWU, “Where (and Why) is Rideshare Banned?” (March 14, 2016), <http://www.idrivewithuber.com/where-and-why-is-rideshare-banned/>.

<sup>39</sup> Annual World Bank and ICN “Advocacy Contests” that publicize competition enforcement agency successes in reforming anticompetitive rules may lend support to forces for constructive regulatory change within individual nations. See World Bank Group, “2015–2016 Competition Advocacy Contest: Winners and Honorable Mentions” (2016) (discussing awards for reforms achieved by Mexico, Zimbabwe, France, Zambia, Lithuania, Peru, Honduras, Hong Kong, Poland, Sweden, Hungary, and Japan, Pakistan, Kuwait, Kenya, and the United States); note 29, *supra*.

<sup>40</sup> For a detailed discussion of these and other WTO trade agreements, see “Legal Texts: The WTO Agreements (2016),” World Trade Organization, [https://www.wto.org/english/docs\\_e/legal\\_e/ursum\\_e.htm](https://www.wto.org/english/docs_e/legal_e/ursum_e.htm).

<sup>41</sup> Admittedly, some areas, such as the reform of agricultural subsidies, have so far proven imperious to WTO deal-making, reflecting the strength of entrenched agricultural lobbies. That does not necessarily suggest, however, that discrete ACMDs, whose harm has been highly publicized and whose patrons are less powerful, could not be eliminated or eroded over time. (Farmer-beneficiaries of governmental subsidies, in addition to being well-organized, may prove to be a particularly potent force in maintaining their privileges, particularly if they can highlight claims of moral right (farmers are “special”) and deflect suggestions that they are harming the poor.)

<sup>42</sup> Alden Abbott, “Reflections on the International Competition Network (ICN) at 15: Steady Progress and Major Long-Term Challenges,” *Truth on the Market*, May 10, 2016, <https://truthonthemarket.com/2016/05/10/reflections-on-the-international-competition-network-icn-at-15-steady-progress-and-major-long-term-challenges/>.

<sup>43</sup> See New York Times, note 3, *op. cit.*

<sup>44</sup> “Executive Order -- Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy,” White House, April 15, 2016, <https://www.whitehouse.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers>.

<sup>45</sup> See Marshall Lux and Robert Greene, “Dodd-Frank Is Hurting Community Banks,” *New York Times*, April 14, 2016, <http://www.nytimes.com/roomfordebate/2016/04/14/has-dodd-frank->

eliminated-the-dangers-in-the-banking-system/dodd-frank-is-hurting-community-banks; “How are Small Banks Faring under Dodd-Frank?,” Mercatus Center, George Mason University (2014) (finding that there has been an “increased regulatory burden through reduced product and service offerings as small banks rethink their lines of business and consider consolidation activity”), <https://www.mercatus.org/sites/default/files/Peirce-Small-Bank-Survey-summary.pdf>.

<sup>46</sup> “Regional Trade Agreements,” *World Trade Organization*, 2016, [https://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](https://www.wto.org/english/tratop_e/region_e/region_e.htm).

<sup>47</sup> “Overview of the Dispute Settlement Provisions,” *NAFTA Secretariat*, 2016, <https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Overview-of-the-Dispute-Settlement-Provisions>.

<sup>48</sup> Perhaps in the longer term, some jurisdictions might also choose to pursue trade law legislative reforms aimed at reducing anticompetitive features of trade measures, such as protectionist antidumping standards. For a proposal that U.S. antidumping standards should conform to pro-competitive antitrust norms, see Alden Abbott, “U.S. Antidumping Law Needs a Dose of Free-Market Competition,” *Heritage Foundation Backgrounder No. 3030*, July 17, 2015, <http://www.heritage.org/research/reports/2015/07/us-antidumping-law-needs-a-dose-of-free-market-competition>.

<sup>49</sup> There are indications that the United Kingdom may consider a variety of bilateral (say, with China and with the United States) and plurilateral (say, with the British Commonwealth) accords with novel features in the wake of Brexit. See “Dust Not Settled on Brexit but UK Must Pursue Other FTAs,” London Business School, July 1, 2016, <https://www.london.edu/news-and-events/news/dust-not-settled-on-brexit-but-uk-must-pursue-other-ftas#.V6NjvkvrK70>; Sam Winders, *Brexit and Free Trade: Would a Post-Brexit UK Be Better Able to Sign Free Trade Agreements with the Rest of the World?* (London: The Bruges Group, 2016).

<sup>50</sup> See Iain Murray and Rory Broomfield, “Cutting the Gordian knot: A road Map for British exit from the European Union,” *Competitive Enterprise Institute, Issue Analysis No. 7* (August 2016): 71-75, [https://cei.org/sites/default/files/Iain%20Murray%20and%20Rory%20Broomfield%20-%20Cutting%20the%20Gordian%20Knot\\_0.pdf](https://cei.org/sites/default/files/Iain%20Murray%20and%20Rory%20Broomfield%20-%20Cutting%20the%20Gordian%20Knot_0.pdf).



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