Competere Foundation

# Shanker Singham Written Testimony

## Global Context

1. Global economic growth, particularly in the European Union, Japan, Korea, and other major G7 economies, has remained subdued for at least two decades despite what should have been a period of extraordinary technological acceleration. GDP per capita growth in the G7 fell from about 2.6 percent per year in the 1970s and 1980s to 1.9 percent in the 1990s, 0.7 percent in the 2000s, and only about 1.0 percent in 2010–2021. The slowdown is even more pronounced in Western European economies, and recent data show UK GDP per capita actually falling in the post Covid period, while U.S. GDP per capita has recovered modestly.[1] This persistent slowdown, despite rapid technological change, marks one of the defining economic challenges facing advanced economies.

2. This puzzle is reinforced by international trade and technology trends. One would normally have expected higher growth in the 2000s and 2010s because of the Uruguay Round, the entry of former Eastern bloc economies into the global trading system, and the rise of large emerging economies such as India and China. Instead, advanced economy GDP per capita growth weakened, which suggests the presence of powerful growth retardants that offset or blocked the gains from openness and innovation.[2] The absence of these expected gains highlights a long-standing puzzle in growth analysis rather than any shortcoming in the technologies themselves.

3. The scale of technological progress can be seen in the work of Fujitsu's Center for Cognitive and Advanced Technologies on the reasons productivity should have risen. Figure 1 below shows the dramatic improvements in computing power, automation capability, and data processing, all of which reduce the cost of information transmission and enable firms to reorganize production, improve supply chains, and allocate resources more efficiently. [3] Under standard growth frameworks, such changes ought to have produced measurable increases in output per worker and GDP per capita in advanced economies.

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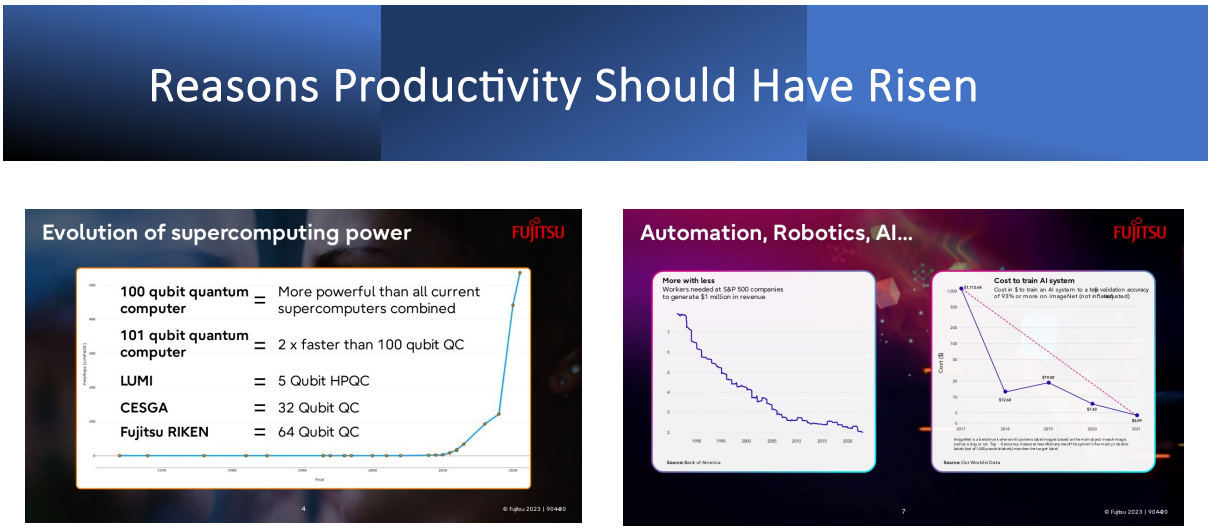
[1] Douglas McWilliams, *The Growth Challenge: The Decline in GDP per Capita Growth in Advanced Economies* (London: The Growth Commission, July 2023), 6–8, 11–14.
[2] McWilliams, *The Growth Challenge*, 7–8, 13–14.
[3] Fujitsu, "Reasons Productivity Should Have Risen," Center for Cognitive and Advanced Technologies, presentation materials, 2024.

The fact that these gains did not materialize to a greater extent in measured growth underscores how severe the impediments to transmission have been.




- Source: Fujitsu, The Center for Cognitive and Advanced Technologies

*Figure 1*

4. Over the same period, digital firms have come to account for an increasingly large share of economic value. This is evident both in the emergence of globally significant digital platforms and in the changing composition of major equity indices. A straightforward valuation-weighted estimate of the share of the Dow 30's market capitalization accounted for digital firms suggests a profound structural transformation. For 2000, 2010, and 2024, central estimates of this digital share are approximately 20 percent, 28 percent, and 58 percent respectively, based on aggregation of the market values of the major digital constituents of the index.[4] Figure 2 below summarizes these approximate values. This shift in where value is created is central to understanding how modern economies operate and where economic leadership now lies.

[4] Detailed valuation methodology for these estimates appears in Annex 1

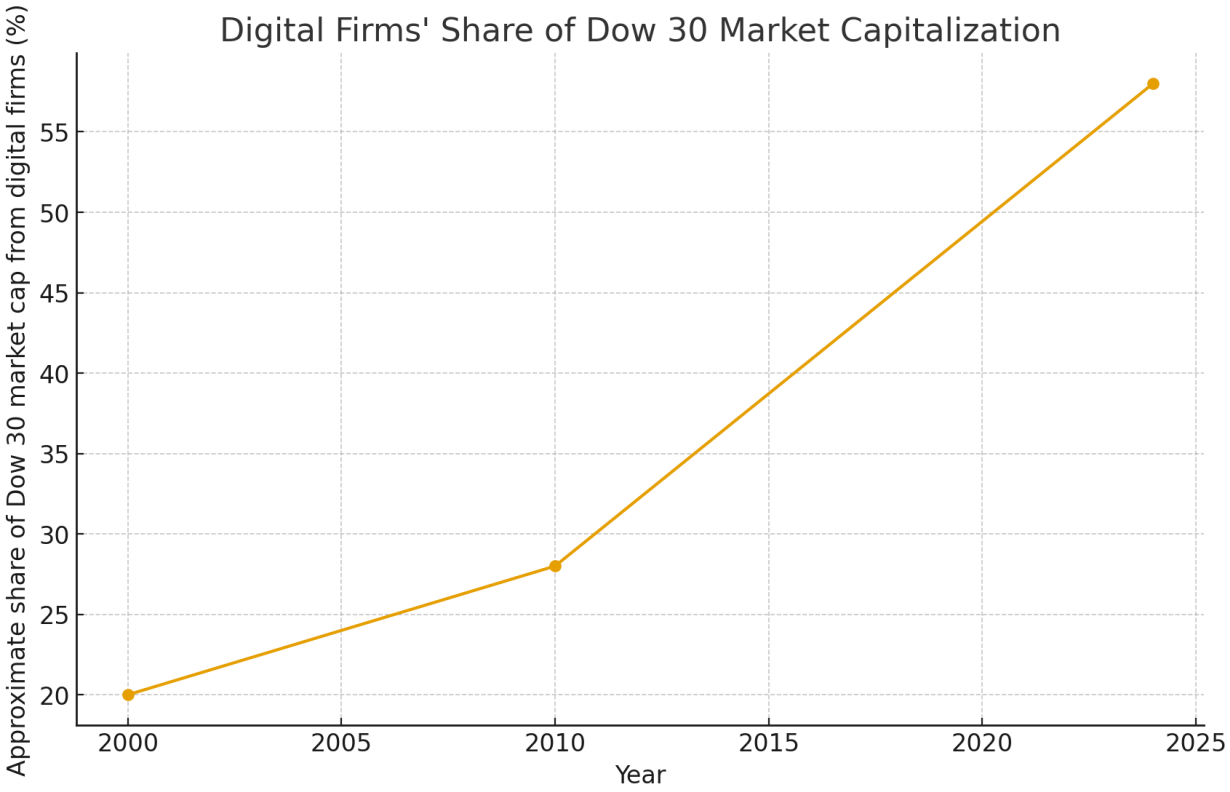



*Figure 2. Approximate share of Dow 30 market capitalization accounted for digital firms, 2000–2024*

5. These estimates indicate that a relatively small group of digital firms now accounts for most of the value represented in the Dow 30 index and a substantial share of total United States equity market value. The increasing centrality of these firms to the functioning of both the U.S. and global economies is difficult to overstate. At the same time, many other jurisdictions have not developed comparable digital clusters or have not permitted them to scale, which is reflected in the lower digital shares observed in markets such as the United Kingdom, the major EU economies, Hong Kong, Korea, and Singapore.[5] These contrasts illustrate how different policy and institutional environments influence whether digital firms emerge, scale, and contribute to national economic performance.

6. To make these differences across jurisdictions concrete, it is useful to measure how much of each major equity market is accounted for by the same tech-digital cluster that contains the so-called "Magnificent Seven" firms in the United States. For this purpose, tech-digital is defined as the portion of each index whose primary Global Industry Classification Standard sector is information technology, communication services, or consumer discretionary. This three-sector cluster includes all of the large United States digital

[5] MSCI, "MSCI USA Index (Sector Weights)," 2024; MSCI, "MSCI United Kingdom Index," 2024; MSCI, "MSCI Europe Index," 2024; Hang Seng Indexes Company, "Hang Seng Index Factsheet," 2024; MSCI, "MSCI Korea Index," 2024; MSCI, "MSCI Singapore Index," 2024.

platforms commonly referred to as the "Mag7," with Microsoft, Apple, and Nvidia classified in information technology, Alphabet and Meta classified in communication services, and Amazon and Tesla classified in consumer discretionary.[6]

7. Using this definition and the most recent index factsheets for 2024–2025, a simple cross-country comparison can be constructed that shows the share of each market's total capitalization represented by tech-digital sectors. In the United States, the tech-digital cluster accounts for approximately 55.4 percent of the MSCI USA Index. In the United Kingdom, the comparable figure is about 9.9 percent of the FTSE 100. For developed Europe as a whole, the tech-digital share of the MSCI Europe Index is roughly 19.1 percent. In Hong Kong, the estimate is 14 percent information-technology weighting of the Hang Seng Index.[7] In Singapore the corresponding share of the MSCI Singapore Index is approximately 23.3 percent. In Korea, once the large chaebol conglomerate groups are removed from the calculation, independent digital firms account for only about 4 percent of total equity market capitalization.[8,9]

8. This adjustment is necessary because Korean chaebol such as Samsung, SK, LG, Hyundai, and related family-controlled groups are diversified industrial conglomerates with activities spanning many unrelated sectors. Treating the full market value of these groups as "digital" when only a small portion of their business is comparable to Mag7-type platforms would significantly overstate the scale of Korea's independent digital sector. The 4 percent figure reflects the share of Korea's market represented by non-chaebol digital firms (principally Naver, Kakao, Krafton, and HYBE) after chaebol holdings are excluded from the relevant sectors. Since some chaebol divisions do engage in genuinely digital activities, the true

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[6] MSCI Inc., MSCI USA Index (USD) Factsheet, accessed December 9, 2025; S&P Global, "S&P 500: Top Constituents by Market Capitalization," accessed December 9, 2025.

[7] Hang Seng Index sector data show that information technology accounts for roughly 14 percent of the index as of late 2024. Other sectors that might normally be grouped into a "new economy" cluster, such as consumer discretionary and communication services, include substantial non-digital activities. For example, brick-and-mortar retail, casinos, autos, and telecommunications. Because these mixed sectors cannot be reliably decomposed without constituent-level analysis, treating their full weight as "digital" would materially overstate Hong Kong's true tech-digital share. The 14 percent figure should therefore be treated as a conservative lower bound, with the actual digital share somewhat higher but not significantly so.

[8] MSCI Inc., *MSCI USA Index (USD) Factsheet*; MSCI Inc., *MSCI United Kingdom Index (USD) Factsheet*; MSCI Inc., *MSCI Europe Index (USD) Factsheet*; Hang Seng Indexes Company, *Hang Seng Index Factsheet*, 2024; MSCI Inc., *MSCI Korea Index (USD) Factsheet*; MSCI Inc., *MSCI Singapore Index (USD) Factsheet*, all accessed December 9, 2025.

[9] The headline sector weights for the MSCI Korea Index classify approximately 59.7 percent of the index as belonging to information technology, communication services, and consumer discretionary. A decomposition of the MSCI Korea 20/35 factsheet and associated ETF holdings shows that major chaebol groups account for roughly four-fifths of total index weight and for most of the headline "tech-digital" component. Once these chaebol holdings are removed, the remaining non-chaebol digital firms represent about 4 percent of the total index, and roughly one-fifth of the non-chaebol segment. The 4 percent figure is therefore used as a conservative estimate of Korea's independent digital sector.

independent digital share is likely somewhat higher than 4 percent, but not by much; 4 percent should be understood as a conservative estimate.[10]

9. Read in conjunction with the earlier Dow estimates, this cross-country comparison shows that the United States is the only major jurisdiction in which tech-digital firms consistently account for more than half of total equity market value, reflecting the scale and centrality of the Mag7 and related platforms. Other markets exhibit substantially lower tech-digital shares, either because comparable firms have not emerged or because policy and institutional choices have constrained their ability to scale. Figure 3 illustrates these differences.

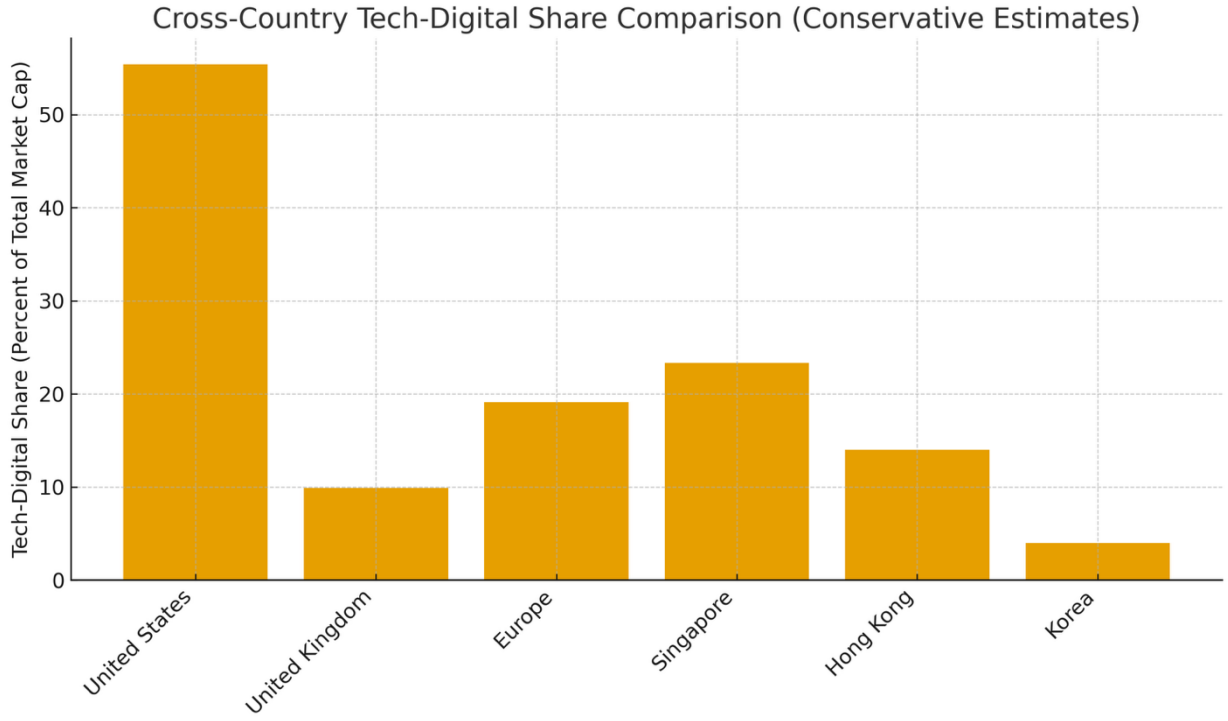


*Figure 3: Tech-digital share of major equity markets, percent of total index market capitalization.*

10. These comparisons indicate that the United States is the only major jurisdiction that has fully translated recent advances in digital technologies into large, globally competitive firms capable of operating at scale. Many other advanced economies have access to the same technological capabilities yet have not seen comparable digital growth. The 2025 National Security Strategy observes that continental Europe has experienced a significant decline in its share of global GDP, falling from 25 percent in 1990 to 14 percent today, partly because national and transnational regulations have undermined creativity and industriousness, and it warns that many European governments continue to pursue a failed

[10] *MSCI Korea Index (USD) Factsheet*

focus on regulatory suffocation.[11] These observations are consistent with the view that regulatory and competition policy frameworks can either support or suppress the growth of digital firms, and that differences in these frameworks help explain the divergence in outcomes across jurisdictions.

## Competition and Digital Policies in the Context of Global Growth

11. As we can see above, tech companies have played a central role in driving increases in GDP per capita in modern economies. Digital platforms in particular have expanded opportunities for participation in global markets by reducing transaction and information costs, permitting small and medium sized enterprises to reach wider consumer bases, and supporting the creation of new market segments such as online professional services and telemedicine. These developments have enabled households and firms to benefit from greater product variety, expanded geographic reach, and lower effective search and distribution costs, outcomes that align with the channels through which income growth occurs in the broader economic literature. The Competere Foundation's analysis notes that large digital platforms have facilitated instantaneous transfers of information, significantly reduced the cost of distribution, and supported new forms of economic activity.[12] The discussion of the New Media Economy framework from Shanker Singham's *Trade, Competition and Domestic Regulatory Policy* likewise explains that reductions in transmission costs in the microprocessor era contributed to the rise of multi sided platforms characterized by network effects, scale economies, and new pathways for productivity gains.[13] In combination, these factors have made digital platforms a major source of global output and income expansion. As digital platforms have become integral to modern economic activity, the policy environment in which they operate has emerged as a significant determinant of national and global growth. Most significant constraints on growth now arise from domestic regulatory measures that function as anti-competitive market distortions (ACMDs), rather than from traditional border barriers.[14]

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[11] The White House, National Security Strategy of the United States (Washington, DC: The White House, 2025), 28.
[12] See Annex 2 for Shanker A. Singham, *Advice on Application of Competition Policy Against Large U.S. Firms in Korea* (Competere Foundation, October 2025), hereinafter "Competition Policy Against Large U.S. Firms."
[13] Shanker A. Singham and Alden F. Abbott, *Trade, Competition and Domestic Regulatory Policy: Trade Liberalisation, Competitive Markets and Property Rights Protection* (Routledge, 2023), Chapter 14 ("Impact of the New Media Economy"), hereinafter "Trade, Competition and Domestic Regulatory Policy."
[14] Shanker A. Singham, Trade Policy in the Trump Administration: Advancing Reduction of Anti-Competitive Market Distortions (Competere LLC, August 21, 2025), hereinafter "Trade Policy in the Trump Administration."

12. The economic effects described above are transmitted most directly through small and medium-sized enterprises, for whom digital platforms function as essential market infrastructure rather than merely optional distribution channels. In this sense, platforms shape not only aggregate growth outcomes but also the conditions of entry, expansion, and rivalry faced by smaller firms. SMEs rely on platform ecosystems to substitute for fixed investment in logistics, payments, marketing, and trust mechanisms, enabling participation in domestic and cross-border markets that would otherwise be inaccessible. Where digital platforms operate at scale under predictable, effects-based regulatory conditions, they lower entry barriers and intensify competition among SMEs, contributing to productivity growth and income expansion. Conversely, regulatory interventions that fragment platform operations, raise compliance costs, or introduce discretionary and opaque enforcement tend to impose disproportionate burdens on smaller firms, which lack the resources to absorb regulatory risk or adapt to frequent rule changes. In such cases, the primary economic effect of regulatory distortion is not a constraint on large firms per se, but a reduction in SME entry, innovation, and competitive intensity. This distributional channel is central to understanding how domestic regulatory measures can operate as anti-competitive market distortions with macroeconomic consequences, even when they are formally framed as competition or consumer protection policies.[15,16]

## An introduction to ACMD theory

13. Anti-competitive market distortions (ACMDs) are domestic policy measures that impair the competitive environment by weakening property rights protection, reducing the intensity of domestic rivalry, or restricting exposure to international competition.[17] These interventions operate through the three pillars that underpin productivity and income growth: property rights, domestic competition, and international competition.[18] Distortions in any of these areas alter the incentives that govern investment, innovation, entry, and resource allocation, and thereby depress economic performance.

14. In practical terms, ACMDs include a wide range of domestic measures, such as regulatory requirements that raise fixed costs for new entrants, subsidies or state support that shield particular firms from market discipline, selective enforcement of competition rules, and sector-specific regulations that disadvantage foreign suppliers relative to domestic firms.

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[15] Southeast Asia Public Policy Institute, *Digital Platform Regulation in APEC Economies: Empowering Innovation and Inclusive Growth* (Bangkok and Singapore: Southeast Asia Public Policy Institute, September 2025).
[16] Nigel Cory, *Understanding the Impact of KFTC Enforcement on U.S. Firms: Qualitative Evidence and Analysis* (Washington, DC: National Bureau of Asian Research, November 2025).
[17] See Annex 2
[18] Ibid

Some of these interventions are explicitly protectionist, while others arise as unintended consequences of sectoral regulation or precautionary approaches in competition policy. What unites them is that they alter competitive conditions in ways that privilege particular firms, business models, or technologies, and that they frequently operate as de facto non-tariff barriers when they fall more heavily on foreign producers or on firms integrated into global value chains.

15. The SRB model was developed to quantify how such distortions affect GDP per capita by translating policy conditions into measurable pillar indices for property rights protection, domestic competition, and international competition.[19] Each index aggregates observable policy and institutional sub-factors. For example, the property rights index incorporates measures of contract enforcement, judicial effectiveness, expropriation risk, and protection of intellectual property. The domestic competition index reflects regulatory freedom, labor and financial market flexibility, business conditions, infrastructure and utilities access, and other indicators that shape firm rivalry. The international competition index captures tariff and non-tariff barriers and trade-facilitation metrics, such as customs efficiency and timeliness of shipments.[20] These indices are constructed to be exogenous explanatory variables by excluding outcome-based measures, ensuring that the model captures policy conditions rather than economic results.[21]

16. The econometric structure of the SRB model relates GDP per capita to a set of fundamental variables that directly determine productivity, including foreign direct investment, domestic credit availability, public health expenditures, educational attainment, and natural resource endowments.[22] These factors represent the channels through which policy conditions in the three pillars influence productivity. The model is calibrated using cross-country data with standard controls, enabling analysts to compare countries on a consistent basis. The original SRB formulation demonstrated a strong ability to explain cross-national variation in income, accounting for roughly 90 percent of the variation in GDP per capita with a mean prediction error of approximately 4 percent.[23]

17. As the model was refined, the SRB-γ specification was introduced to address econometric issues and to make the analysis more useful for policymakers. The earlier version combined the three pillars into a single composite index, creating potential

[19] Ibid
[20] Ibid
[21] Ibid
[22] Ibid
[23] Trade Policy in the Trump Administration

multicollinearity and endogeneity concerns.[24] The SRB-γ model resolves these issues by correlating each pillar separately with GDP per capita in a panel data framework that includes country and time fixed effects.[25] In this formulation, each pillar enters the regression independently along with appropriate control variables, allowing the model to isolate the distinct contribution of property rights, domestic competition, and international competition to income levels. The fixed-effects structure mitigates omitted-variable bias and clarifies how improvements in pillar scores translate into higher productivity.[26]

18. Because the SRB-γ model provides a transparent link between policy conditions and income, it enables policymakers to evaluate the economic cost of distortions and the benefits of reform. Improvements in domestic competition or property rights protection, for example, feed through the productivity channels in the model and produce measurable increases in GDP per capita.[27] These effects are not isolated to specific markets but reflect economy-wide changes in investment, credit availability, and the efficiency of resource allocation. The model's predictive accuracy and its consistency with other empirical findings on the growth impact of anti-competitive regulation reinforce the conclusion that domestic policy distortions can impose substantial macroeconomic costs.[28]

19. Competere's applied work in Korea and in the evaluation of regulatory actions affecting U.S. firms in Korea illustrates the real-world operation of these mechanisms. These studies apply the SRB-γ model to show how domestic regulatory measures function as ACMDs by raising compliance burdens, limiting entry, disadvantaging foreign suppliers, or fragmenting digital markets, and then estimate the associated losses in GDP per capita relative to a more pro-competitive policy environment.[29] These analyses demonstrate that domestic regulatory choices, including in digital markets, can significantly alter a nation's competitiveness and long-run income trajectory.

20. Taken together, this body of work shows that ACMDs are not narrow competition issues but macroeconomic impediments. By weakening pillar conditions, they depress productivity and shift a country's long-run income path downward. The SRB-γ model provides a

[24] Shanker A. Singham, *International Trade, Regulation and the Global Economy: The Impact of Anti-Competitive Market Distortions* (Routledge, 2025), hereinafter "International Trade, Regulation and the Global Economy".
[25] Ibid
[26] Ibid
[27] Ibid
[28] See Annex 2
[29] Ibid

disciplined method to identify these distortions, quantify their effects, and guide reforms that strengthen competition, protect property rights, and enhance openness.[30]

21. As digital activity occupies a growing share of output and trade, digital regulatory measures increasingly shape these competition and property rights conditions and therefore play a central role in determining long run growth trajectories.

## Why digital regulations can be ACMDs

22. Domestic regulation in the digital sector can function as an ACMD when it alters the competitive process by weakening property rights, raising barriers to entry, limiting exposure to foreign competition, or constraining the ability of firms to innovate.[31] Digital markets are characterized by marginal-cost curves that decline toward zero once the core product and infrastructure have been established and user numbers scale. While initial marginal costs may be high, they fall rapidly as user numbers grow, producing strong scale economies. Regulations that do not account for these characteristics can disrupt the conditions that sustain productivity and consumer benefit.[32] While governments may pursue legitimate policy objectives, regulatory measures that restrict market access, impose disproportionate burdens on certain firms, or mandate structural or behavioral constraints without evidence of harm can weaken the pillars of domestic and international competition and thereby reduce long-run economic performance.[33]

23. Not all forms of government intervention are anti-competitive. Measures that protect consumers from fraud, ensure safety, or preserve the integrity of financial systems are consistent with competitive markets when they are proportionate and non-discriminatory.[34] However, interventions become anti-competitive when they advantage particular firms, business models, or national industries, when they raise compliance costs in ways that deter entry or innovation, or when they fragment markets and prevent firms from realizing scale economies. Overly interventionist actions by competition authorities can also create distortions by imposing remedies or conduct obligations that interfere with dynamic rivalry or by mischaracterizing competitive conditions based on static market assumptions.[35] In such cases, even well-intentioned interventions can function as ACMDs because they alter competitive incentives, restrict investment, or shield domestic incumbents from market pressure.

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[30] Ibid
[31] Trade Policy in the Trump Administration
[32] Trade, Competition and Domestic Regulatory Policy
[33] Trade Policy in the Trump Administration
[34] Ibid
[35] Trade, Competition and Domestic Regulatory Policy

24. Digital regulation can operate as an ACMD through several mechanisms. Regulatory measures that increase fixed costs or compliance burdens can disproportionately harm smaller firms or new entrants, reduce contestability and limit innovation. Restrictions on data flows or interoperability can fragment digital ecosystems, reducing scale and the efficiency gains associated with network effects. Behavioral obligations that limit the ability of firms to integrate products, invest in new services, or optimize platform functionality can reduce service quality and prevent firms from achieving efficiencies that benefit consumers.[36] When these measures fall more heavily on foreign suppliers or on firms integrated into global value chains, they function as de facto non-tariff barriers, limiting international competition and reducing participation in global digital trade.[37]

25. As digital platforms have become integral to modern economic activity, the policy environment in which they operate has emerged as a significant determinant of national and global growth. Most significant constraints on growth now arise from domestic regulatory measures that function as ACMDs, rather than from traditional border barriers.[38] In this analysis, such measures are understood to affect three core pillars of an economy: the intensity of domestic competition, the openness of international competition, and the security of property rights.[39] Singham's *International Trade, Regulation and the Global Economy: The Impact of Anti-Competitive Market Distortions* develops an econometric framework, referred to as the SRB-γ model, that quantitatively relates each of these conditions to GDP per capita and finds statistically significant positive relationships between all three pillars and income levels, with domestic competition exhibiting a particularly strong association.[40]

26. In many jurisdictions, these challenges have been magnified by a broader shift away from traditional ex post, effects-based antitrust enforcement toward ex ante prescriptive regulatory frameworks for digital markets.[41] Under an effects-based approach, intervention is guided by demonstrable evidence of harm to the competitive process and is disciplined by established standards of proof. The emerging ex ante approach instead imposes predefined obligations or prohibitions on designated firms, often reflecting static assumptions about market structure or firm behavior rather than the outcomes of actual

[36] Trade Policy in the Trump Administration
[37] Ibid
[38] Trade Policy in the Trump Administration
[39] Ibid
[40] International Trade, Regulation and the Global Economy
[41] Trade Policy in the Trump Administration

competitive dynamics.[42] This shift increases the likelihood that regulation will target conduct that is either competitively neutral or efficiency enhancing, and reduces the ability of markets to adjust through innovation and rivalry. As a result, regulatory intervention is more likely to function as an ACMD, affecting the conditions of domestic and international competition and weakening the incentives that sustain investment and productivity growth.

27. The evidence from Competere's analyses shows that digital regulatory measures can impose substantial economic costs when they weaken the competitive and innovation enhancing conditions that support growth. Broad or precautionary regulatory regimes can increase compliance burdens, limit the ability of firms to innovate, reinforce the position of less efficient competitors, and create structural impediments that reduce the output and quality improvements associated with digital platforms.[43] Likewise, domestic regulatory measures, including those affecting data, privacy, digital services, and platform conduct, now constitute a growing share of non-tariff barriers that restrict market access and raise the cost of participation in global supply chains.[44] Interventions which fragment platform ecosystems, constrain scale, or rely on static market definitions can undermine the beneficial effects associated with network economies and reduce the capacity of platforms to deliver consumer benefit.[45] These effects operate through the three pillars and can therefore limit productivity and depress GDP per capita when implemented without demonstrated evidence of consumer harm or efficiency gains.

28. Digital markets present particular regulatory challenges because they evolve rapidly, rely on continuous investment cycles, and integrate multiple functions that traditionally operated in separate competitive spaces. Regulators often apply static market definitions or precautionary frameworks in these environments, even though digital markets are characterized by dynamic rivalry, rapid innovation, and interdependent product and service offerings.[46] These characteristics increase the risk that well intentioned regulatory measures will misdiagnose competitive conditions, impose obligations that do not correspond to actual sources of market power, or adopt remedies that destabilize the innovation cycles on which platform markets depend.[47] Regulatory complexity also heightens the likelihood of error and can generate distortions when rules introduce uncertainty, fail to account for convergence across markets, or prioritize competitor

[42] Trade, Competition and Domestic Regulatory Policy
[43] See Annex 2
[44] Trade Policy in the Trump Administration
[45] Trade, Competition and Domestic Regulatory Policy
[46] Ibid
[47] Trade Policy in the Trump Administration

welfare over consumer welfare.[48,49] Because these factors directly influence the three pillars of domestic competition, international competition, and property rights, the design and application of digital regulation has increasingly become a central determinant of long run economic performance.

29. Regulatory intervention in digital markets also carries a heightened risk of Type 1 error, in which authorities take action against conduct that is competitive or efficiency enhancing. Analyses in the economic and legal literature draw on the established view in antitrust jurisprudence, including the Supreme Court's reasoning in *Verizon v. Trinko*, that false positives can be more damaging than false negatives because they deter the forms of rivalry and investment that competition law is intended to protect.[50] Research further notes that premature or misdirected intervention in dynamic markets can suppress innovation, reduce output, and weaken long run productivity growth, outcomes that are particularly pronounced in sectors characterized by rapid technological change and network effects.[51] These concerns are reinforced by empirical findings showing that observed increases in concentration associated with expanding output or declining marginal costs often reflect innovation rather than reduced competition.[52] The error cost analysis in the modern antitrust literature likewise emphasizes that false positives can impose especially high costs in innovation driven markets, where mistaken intervention can disrupt investment cycles and reduce welfare over time.[53] When regulatory frameworks do not adequately account for these dynamics, the likelihood of error increases and the resulting distortions can impose significant and long lasting economic costs.

30. Taken together, these features of digital markets and the regulatory risks associated with them demonstrate why digital policy design has become a central determinant of economic performance. Domestic regulatory measures in the digital sphere now constitute a significant share of the non-tariff barriers that shape conditions of trade and influence the competitiveness of national economies.[54] When regulatory measures weaken the pillars of domestic competition, international competition, or property rights, the resulting

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[48] International Trade, Regulation and the Global Economy
[49] Trade, Competition and Domestic Regulatory Policy
[50] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).
[51] Geoffrey A. Manne, "Error Costs in Digital Markets," *Global Antitrust Institute Report on the Digital Economy* (2020).
[52] Sharat Ganapati, "Growing Oligopolies, Prices, Output, and Productivity," *American Economic Journal: Microeconomics* 13, no. 3 (2021): 309–27.
[53] Joshua D. Wright and Murat C. Mungan, "The Easterbrook Theorem: An Application to Digital Markets," Working Paper, Texas A&M University School of Law, 2022.
[54] Trade Policy in the Trump Administration

distortions depress productivity and reduce GDP per capita.[55] Because digital platforms have become foundational infrastructure for communication, commerce, and the delivery of services across borders, the effects of these distortions extend beyond the regulating jurisdiction and influence the growth prospects of trading partners and integrated supply chains.[56] These dynamics underscore that digital regulation is now a macroeconomic policy choice with consequences for national prosperity and global economic performance, warranting careful evaluation of how specific regulatory approaches operate in practice.

## Underlying assumptions that underpin regulatory choices

31. Governments frequently approach digital platforms as if they were privatized versions of long standing public utilities, applying regulatory tools that were developed for sectors characterized by government ownership, limited entry, and cost structures that differ fundamentally from those of modern technology firms.[57] This perspective reflects an assumption that digital markets operate like traditional industrial sectors with U-shaped marginal cost curves and predictable patterns of output and pricing, even though digital platforms are characterized by marginal costs declining to zero, rapid scalability, and competitive dynamics driven by innovation rather than capacity constraints. These assumptions further treat large market shares as evidence of durable market power, notwithstanding the significant entry and expansion that occur when innovation or new functionality alters the competitive landscape. [58] Drawing on these assumptions, some authorities turn to doctrines such as the essential facilities doctrine, which historically applied to state controlled monopolies in infrastructure sectors where mandated access was necessary to enable downstream competition. Courts have long cautioned against expansive use of the essential facilities doctrine, which is sometimes invoked to justify regulatory mandates in digital markets. In *Twin Laboratories v. Weider Health and Fitness*, the Second Circuit rejected an attempt to compel access to a rival's distribution network, holding that the doctrine applies only in the narrowest circumstances and only when a facility cannot be reasonably duplicated, the defendant controls that facility, and the refusal to provide access creates a clear threat to competition. The court emphasized that a firm does not become an essential facility merely because access would make a competitor's business easier or more profitable, and it declined to impose a duty to deal where alternative channels were available.[59] Twin Labs illustrates that the essential facilities doctrine does not apply to markets in which firms can build independent

[55] International Trade, Regulation and the Global Economy
[56] See Annex 2
[57] Trade, Competition and Domestic Regulatory Policy
[58] See Annex 2
[59] *Twin Laboratories, Inc. v. Weider Health & Fitness*, 900 F.2d 566 (2d Cir. 1990).

distribution systems or compete through alternative business models, a principle directly relevant to digital platforms that operate in contestable and rapidly evolving environments.[60] These analogies misinterpret the economic characteristics of digital markets, which are defined by dynamic rivalry, network effects, and convergence across functions, and have contributed to regulatory responses that are misaligned with the mechanisms through which platform based competition delivers consumer benefit and productivity growth.

32. Regulatory misdiagnosis is further reinforced when jurisdictions adopt competition doctrines developed in the European Union without regard to the institutional context that shaped them. The EU's early approach to vertical restraints and to firms designated as dominant was driven by concerns unique to the process of constructing the single market.[61] During the 1980s and 1990s, European competition authorities sought to prevent commercial arrangements that could reintroduce barriers between member states, particularly exclusive dealing or territorial limitations that operated along national lines and threatened to fragment the internal market.[62] This integration imperative coupled with a civil law tradition produced a more formalistic and interventionist approach toward vertical agreements and dominance than that taken in the United States, where enforcement has traditionally required demonstrated harm to the competitive process rather than a structural inference based on firm size or contractual form (except during the recent period in which U.S. enforcement shifted toward a more EU-style orientation under FTC Chair Khan).[63] Outside the EU, however, the institutional conditions that justified this approach do not exist, and replicating EU doctrines in markets without the same integration concerns introduces regulatory constraints that lack economic justification. When these doctrines are layered onto digital markets, and combined with misapplied concepts such as the essential facilities doctrine, the resulting regulatory structures risk suppressing innovation, reducing investment, and generating anti-competitive market distortions that weaken long-run economic performance.[64]

33. Nearly all the core assumptions that have come to shape government treatment of digital platforms are incorrect. These misconceptions distort the way regulators interpret platform behavior, frame competitive conditions, and assess market outcomes, and they have contributed to policy responses that diverge from the economic realities of digital markets. Correcting these errors is essential to evaluating the regulatory approaches discussed

[60] See Annex 2
[61] Trade, Competition and Domestic Regulatory Policy
[62] Shanker A. Singham, *A General Theory of Trade and Competition: Trade Liberalisation and Competitive Markets* (London: Cameron May 2007).
[63] Trade, Competition and Domestic Regulatory Policy
[64] International Trade, Regulation and the Global Economy

below and to understanding how certain interventions risk creating anti-competitive market distortions rather than promoting competitive, innovation-driven markets.

1. The first incorrect assumption is that digital platforms resemble old-line government firms that were later privatized, such as legacy telecommunications incumbents. Digital platforms did not inherit state-granted monopolies, protected market positions, or exclusive control over physical infrastructure. Instead, they emerged comparatively recently through entrepreneurial activity, with founders often assuming substantial personal risk in environments characterized by limited access to capital and uncertain commercial viability. Although leading technology firms now account for a significant share of the value of major equity indices, many of the most prominent platforms did not exist two decades ago. Their rapid emergence and scaling reflect competitive pressures, innovation cycles, and shifting consumer preferences rather than the continuation of state-controlled enterprises. Treating them as privatized utilities therefore mischaracterizes both their origins and the competitive conditions under which they operate.
    a. The rise of these firms is reflected in the aggregate market value of the leading U.S. technology platforms. Estimates of the combined market capitalization of the "Magnificent Seven" firms show an increase from well under one trillion dollars in the early 2000s to over 8 trillion dollars by 2025, indicating that a group of companies which either did not exist or were relatively small two decades ago now accounts for a substantial share of total U.S. equity market value.[65] The charts presented above make this pattern explicit by showing that the rise of large digital firms reflects changes in where value is created in the economy rather than the persistence of inherited monopoly positions, with the United States exhibiting far higher digital-market capitalization shares than jurisdictions that have imposed more precautionary regulatory approaches.
2. The second incorrect assumption is that the underlying economics of digital platforms is similar to that of traditional non-technology firms. Digital platform markets are characterized by marginal cost curves that decline toward zero once the core product and infrastructure have been established, a defining feature that alters both cost structures and competitive dynamics.[66] Scale and network effects are essential to efficiency in these markets, and platforms that fail to expand or sustain their installed user bases can lose relevance quickly.[67] The experience of early social networking sites, including the rapid displacement of MySpace by a rival offering superior functionality, demonstrates how firms that appear dominant can

[65] The Magnificent Seven: U.S. Big Tech Market Cap Boom, 2000Q3–2025," Voronoi, accessed December 8, 2025, https://www.voronoiapp.com/markets/-The-Magnificent-Seven-US-Big-Tech-Market-Cap-Boom-2000Q3-2025-1612.
[66] Trade, Competition and Domestic Regulatory Policy
[67] See Annex 2

be overtaken when innovation shifts user preferences.[68,69] Treating these economic characteristics as equivalent to those of conventional industrial firms obscures how scale, low marginal costs, and network effects drive consumer benefit in digital markets, and can lead to regulatory approaches that undermine the mechanisms through which platform competition supports productivity growth.[70]

3. The third incorrect assumption is that market share in digital platform markets is a reliable proxy for market power. Market power is properly understood as the ability to profitably raise price, restrict output, reduce quality, or otherwise degrade competitive conditions.[71] In digital markets, high observed market shares often reflect the temporary results of innovation, investment, and strong network effects, rather than durable power over price.[72] Firms that appear dominant at one point in time can be rapidly displaced when a rival introduces a superior product or functionality, as illustrated by the swift replacement of MySpace by Facebook in the social networking sector. More recent developments in generative artificial intelligence similarly show that even firms with substantial incumbency advantages can face significant competitive pressure when new technologies emerge.[73] Because digital competition operates through dynamic rivalry rather than static market positions, analytical tools such as the Olley-Pakes decomposition, which distinguishes productivity gains arising from within-firm improvements and those arising from reallocation toward more productive firms, provide a more accurate framework for assessing competitive effects than simple concentration measures.[74] Reliance on market share alone therefore risks conflating success achieved through competition on the merits with the actual exercise of market power and can lead to regulatory interventions that misidentify competitive outcomes as harms.
4. The fourth incorrect assumption is that the goal of competition policy is to protect small competitors or to preserve a preferred market structure, rather than to safeguard the competitive process that delivers consumer welfare and productivity growth. The modern understanding of competition policy in the United States was shaped in significant part by the work of Harold Demsetz, who emphasized that higher levels of concentration can result from superior efficiency and that no economic theory supports the view that small, fragmented markets are inherently

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[68] Brian Stelter, "MySpace, America's Greatest Mistake," *New York Times*, June 17, 2009.
[69] Tom Anderson and Chris DeWolfe, "What Happened to MySpace," *Harvard Business Review*, July 2011.
[70] ITRG, Chapters 3 and 4
[71] Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice*, 6th ed. (St. Paul, MN: West Academic Publishing, 2020), definition of market power.
[72] Trade, Competition and Domestic Regulatory Policy
[73] Kate Conger, Cade Metz, and Yiwen Lu, "Google's AI Efforts Face Rising Competition," *New York Times*, January 12, 2024; Will Knight, "The Rise of Generative AI and the New Era of Platform Competition," *MIT Technology Review*, March 2024.
[74] G. Steven Olley and Ariel Pakes, "The Dynamics of Productivity in the Telecommunications Equipment Industry," *Econometrica* 64, no. 6 (1996): 1263–1297.

desirable.[75] Demsetz argued that competition policy should not penalize firms that grow large through successful rivalry, since such growth can reflect the allocation of resources toward more productive enterprises.[76] When authorities interpret size or market structure as harms in themselves, enforcement risks shifting away from protecting consumer welfare and toward protecting less efficient competitors. This misinterpretation distorts market outcomes, weakens incentives for investment and innovation, and can transform competition policy into a source of anti-competitive market distortions rather than a framework for promoting economic growth.[77]

5. The fifth incorrect assumption arises from the belief that digital platforms function like large government-owned entities, which leads to the misapplication of doctrines such as the essential facilities doctrine. The essential facilities doctrine was developed in the context of industries where a firm controlled an infrastructure asset that could not be reasonably duplicated and where denying access risked excluding downstream rivals.[78] Courts applying the doctrine have emphasized that its use must be rare, given the risk that compelled access can undermine incentives for investment and reduce overall efficiency.[79] The difficulties inherent in applying this doctrine are illustrated by cases such as *Twin Laboratories, Inc. v. Weider Health & Fitness*, in which courts struggled to define what constitutes a "facility," when duplication is feasible, and under what circumstances a firm's refusal to deal may constitute anti-competitive conduct.[80] Extending this doctrine to digital platforms, which are not state monopolies, do not control bottleneck physical infrastructure, and operate in markets characterized by rapid innovation and multiple avenues for distribution, risks converting competitive conduct into a basis for liability. When this occurs, regulatory intervention can weaken incentives for platform investment, disrupt innovation cycles, and create ACMDs that impede long-run productivity growth.[81] The case law post Twin Labs, notably the Supreme Court cases *Verizon v. Trinko* and *Pacific Bell v. linkLine*, show that the doctrine has continued to be substantially narrowed, making it extremely rare to impose a duty to deal or to find a facility to be truly essential. The core elements required under the Twin Labs test have not changed.[82,83]

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[75] Harold Demsetz, "Industry Structure, Market Rivalry, and Public Policy," *Journal of Law and Economics* 16, no. 1 (1973): 1–9.
[76] Ibid
[77] Trade, Competition and Domestic Regulatory Policy
[78] Philip Areeda, "Essential Facilities: An Epithet in Need of Limiting Principles," *Antitrust Law Journal* 58 (1989): 841–853.
[79] Ibid
[80] *Twin Laboratories, Inc. v. Weider Health & Fitness*, 900 F.2d 566 (2d Cir. 1990).
[81] Trade, Competition and Domestic Regulatory Policy
[82] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).
[83] *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. 438 (2009).

6. The sixth incorrect assumption is that competition is a cooperative or gentle process that can be managed so as to avoid aggressive rivalry. In functioning market economies competition is brutal, firms compete by seeking to outperform their rivals through lower prices, better products, and improved services, and this process is often demanding for participants.[84] When competition proceeds without distortions, the resulting pressure to innovate and to allocate resources more efficiently contributes directly to productivity growth and higher living standards.[85] Regulatory approaches that attempt to soften rivalry or restrain firms that have succeeded through innovation risk weakening these incentives and slowing the pace at which markets adjust to new technologies and consumer preferences.[86] Evidence from jurisdictions that have adopted more interventionist competition and digital regulatory frameworks shows that policies emphasizing competitor welfare or structural objectives over consumer welfare and dynamic efficiency can reduce innovation intensity and coincide with slower growth in GDP per capita.[87]
7. The seventh incorrect assumption is that domestic regulation has little or no effect on international trade. Competition policy, domestic regulatory measures, and trade policy are closely interconnected, and domestic interventions can significantly alter the conditions under which firms participate in global supply chains and external markets.[88] When regulatory requirements restrict market access, raise compliance costs, impose discriminatory obligations, or disproportionately burden firms from particular trading partners, they operate as non-tariff barriers and influence cross-border commerce in the same manner as more traditional trade restrictions.[89] European officials often depict digital regulation as a matter of internal sovereignty that should be insulated from trade discussions, even when the measures overwhelmingly affect foreign, largely U.S., firms. In response to comments by U.S. Commerce Secretary Howard Lutnick suggesting that steel and aluminum tariffs might be eased if the European Union reconsidered its digital rules, European Commission Vice President Teresa Ribera replied that "the European digital rule-book is not up for negotiation."[90] In a subsequent interview with *Politico* about the same linkage, she described Washington's approach as "blackmail," adding that

[84] Frank H. Easterbrook, "The Limits of Antitrust," *Texas Law Review* 63 (1984): 1–40 (discussion of competitive rivalry and the role of the market process).
[85] International Trade, Regulation and the Global Economy
[86] Trade, Competition and Domestic Regulatory Policy
[87] Korea Report
[88] A General Theory of Trade and Competition
[89] Trade, Competition and Domestic Regulatory Policy
[90] Charlotte Van Campenhout and Foo Yun Chee, "European Digital Rule-Book Not up for Negotiation, Says EU's Ribera," *Reuters*, November 25, 2025.

this "does not mean that we accept that kind of blackmail."[91] She also stressed that the EU's digital rulebook should have nothing to do with trade negotiations and characterized the legislation as a matter of European sovereignty.[92] However, the burden of the policies she is defending fall overwhelmingly on non-European (mostly US) technology firms. This is not a conscious admission of protectionism, but an unwitting example of how domestic regulatory choices, framed as exercises of sovereignty, can function in practice as powerful non-tariff barriers to U.S. trade and investment. These patterns are not confined to Europe. In Korea, regulatory measures affecting digital markets have predominantly burdened large U.S. firms while leaving Chinese firms connected to major chaebol groups comparatively unaffected, illustrating how domestic regulation can alter competitive conditions in ways that disadvantage particular foreign participants. A similar pattern appears in India, where regulatory initiatives directed at online commerce and platform operation have been applied principally to Walmart and Amazon while domestic firms have not been subject to comparable obligations. These examples further demonstrate how domestic regulatory measures can function as selective non-tariff barriers that shape international competitive outcomes. These effects are especially pronounced when regulatory measures target sectors in which a country's leading exporters are concentrated, such as digital services in the United States.[93] Recent analysis has documented how foreign regulatory initiatives directed at large U.S. technology firms function as non-tariff attacks that weaken the competitive position of those firms in global markets and distort international trade flows.[94] Similar patterns can be observed in other jurisdictions and sectors where domestic measures have been used to influence market outcomes in ways that affect foreign suppliers and alter competitive conditions across borders.[95]

34. The same pattern appears in sectors wholly unrelated to digital markets. One prominent example is the use of compulsory licensing in the pharmaceutical sector, where governments have overridden patent rights held primarily by foreign firms in order to promote domestic industry objectives. As detailed in International Trade, Regulation and the Global Economy, compulsory licenses issued in jurisdictions such as India were justified on public-interest grounds but were structured in ways that disproportionately affected innovative foreign manufacturers while favoring local producers.[96] These actions

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[91] Francesca Micheletti and Jacob Parry, "Top EU Official Accuses U.S. of 'Blackmail' in Trade Talks," *Politico Pro*, November 26, 2025. (Quoted in "Top EU Official Accuses U.S. of 'Blackmail' in Trade Talks," LordsPress, November 27, 2025.)

[92] Ibid

[93] International Trade, Regulation and the Global Economy

[94] Robert D. Atkinson, "Stopping Non-Tariff Attacks on U.S. Tech Firms and Industries," letter to Hon. Scott Bessent, Hon. Howard W. Lutnick, Hon. Jamieson Greer, and Mr. Peter Navarro, July 2, 2025, Information Technology and Innovation Foundation, Washington, DC.

[95] Trade Policy in the Trump Administration

[96] International Trade, Regulation and the Global Economy

altered competitive conditions by weakening intellectual-property protections, reducing the expected return on research and development, and shifting market share toward domestic firms. The pharmaceutical examples demonstrate that the underlying issue is not limited to digital regulation but reflects a broader policy tendency to use domestic regulatory instruments as de facto non-tariff barriers that influence international competitive outcomes.

35. The overall approach adopted by the European Union and certain other jurisdictions toward digital platforms reflects a misunderstanding of the fundamental purpose of competition policy and its role in promoting wealth creation and increases in GDP per capita. Competition policy is intended to protect the competitive process that disciplines firms, fosters innovation, secures property rights, and enables exposure to domestic and international competition.[97] When regulatory measures depart from these principles and instead focus on managing market structure, restraining successful firms, or prioritizing competitor welfare over consumer welfare, they risk creating ACMDs that reduce productivity and suppress long-run economic performance.[98] These effects are of particular concern for advanced economies, including G7 countries, where sustained growth depends on improving the intensity of domestic competition, maintaining openness to international markets, and strengthening the institutional conditions that support innovation and investment.[99]

## Self-Defeating Nature of DMA-like regulations

36. Regulatory frameworks modeled on the European Union's Digital Markets Act impose prescriptive obligations and structural constraints on digital platforms that can function as ACMDs when applied without evidence of consumer harm or clear efficiency justification.[100] These regimes often rely on static assumptions about market power, prescribe conduct rules based on firm size or business model rather than demonstrated effects, and require interoperability or data-access mandates that interfere with investment incentives and the ability of platforms to achieve efficiencies associated with scale and network effects.[101] In markets characterized by rapid innovation, low marginal costs, and dynamic rivalry, such measures can impede the competitive processes they are intended to protect.

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[97] Harold Demsetz, "Industry Structure, Market Rivalry, and Public Policy," *Journal of Law and Economics* 16, no. 1 (1973): 1–9.
[98] International Trade, Regulation and the Global Economy
[99] OECD, *Economic Policy Reforms: Going for Growth* (Paris: OECD Publishing, annual series).
[100] Trade, Competition and Domestic Regulatory Policy
[101] Ibid

37. Because DMA-like regulations introduce obligations that alter market structure, restrict product integration, or impose uniform behavioral rules across heterogeneous business models, they weaken the conditions of domestic competition by raising compliance burdens, limiting entry, and constraining the mechanisms through which platforms improve quality and reduce costs.[102] They can also impair international competition by functioning as non-tariff barriers when such regulations fall more heavily on foreign digital firms or create requirements that limit participation in global digital value chains.[103] These effects reduce exposure to foreign rivalry and diminish the incentive for firms to innovate and adopt global best practice. In addition, prescriptive rules undermine property rights when they weaken control over data, platform architecture, or proprietary technologies, thereby reducing the expected return on investment and discouraging innovation.[104]

38. Because these regulations weaken the pillars of domestic competition, international competition, and property rights, they produce macroeconomic consequences that extend beyond specific digital markets. The SRB-γ model provides a means of quantifying these effects by demonstrating how distortions in the three pillars reduce productivity and depress GDP per capita.[105] When obligations such as mandatory interoperability, restrictions on self-preferencing, or limits on integrating complementary services raise costs or prevent firms from achieving scale, the resulting distortions feed through the productivity channels of the model and shift the economy onto a lower long-run income path.[106]

39. Competere's analysis of Korea illustrates these dynamics. The Korea case study identifies regulatory measures affecting digital platforms that impose disproportionate burdens on certain firms, restrict the ability of platforms to innovate or scale, and limit the flexibility needed to respond to competitive pressures.[107] When these measures are applied in a prescriptive manner similar to DMA-style regimes, they generate ACMDs by raising entry barriers, increasing compliance costs, and creating structural disadvantages for international suppliers.[108] Using the SRB-γ model, the study quantifies the resulting loss in GDP per capita relative to a less distortionary regulatory framework, demonstrating that such measures reduce productivity and suppress long-run economic growth.[109]

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[102] Trade Policy in the Trump Administration
[103] Ibid
[104] Ibid
[105] See Annex 2
[106] Ibid
[107] Ibid
[108] Ibid
[109] Ibid

40. For countries whose principal policy objective is to increase productivity and raise living standards, DMA-like regulatory approaches are therefore self-defeating. By weakening the competitive and innovation-enhancing conditions that support growth, these frameworks remove wealth from the economy rather than generating it. The Korea case study confirms that prescriptive digital regulations can produce measurable reductions in national income, underscoring the need for regulatory approaches that preserve competition without imposing distortions that undermine the pillars of economic performance.[110]

41. Damaging DMA-style regulation harms the small business sector. Many small firms rely on these platforms to reach global markets and would be wholly unable to do so if they were damaged. The impact on the SME sector has been analyzed by the Southeast Asian Public Policy Institute.[111] The paper notes that the MSME sector accounts for 40-60% of GDP in the APEC region. Clearly damaging that sector will have a big economic impact.

## Core Elements that make a digital policy anti-competitive and wealth destroying

42. Core elements that make a digital policy anti-competitive and wealth-destroying can be understood in terms of how particular doctrines and enforcement approaches generate Type 1 error, suppress innovation, and misdiagnose competitive conditions in dynamic markets. In the digital sector, where scale economies, network effects, and rapid technological change are central features, these errors translate directly into ACMDs that weaken domestic and international competition and depress long-run GDP per capita.

    1. **Wrong application of essential facilities doctrine/duty to deal doctrines and Type 1 error:** Misapplication of the essential facilities doctrine can transform digital regulation into an anti-competitive market distortion by compelling firms to share assets or functionalities in ways that undermine incentives to invest and innovate. The original U.S. formulation in MCI v. AT&T required strict conditions for an essential facility, including control by a monopolist, inability to duplicate the facility, denial of access, and feasibility of providing access. Subsequent analysis notes that the U.S. Supreme Court has severely restricted, and arguably rejected, broad use of the doctrine, particularly in light of *Verizon v. Trinko* and *Pacific Bell v. linkLine*.[112,113] As the Supreme Court emphasized in *linkLine*, these doctrines have become even narrower than the formulations explored in *Twin Labs*, making any duty-to-deal

[110] Ibid
[111] Southeast Asia Public Policy Institute, Digital Platform Regulation in APEC Economies: Empowering Innovation and Inclusive Growth (Bangkok and Singapore: Southeast Asia Public Policy Institute, September 2025).
[112] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).
[113] *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. 438 (2009).

theory in digital markets especially difficult to sustain. Leading antitrust commentary has warned that expansive applications are "manifestly hostile" to the goals of antitrust because they undermine rivals' incentives to develop their own assets rather than free-ride on existing infrastructure.[114] In digital markets, treating platforms or data as "essential facilities" and mandating access on that basis risks Type 1 error by condemning conduct that is competitive or efficiency-enhancing. Error-cost analysis emphasizes that false positives are more damaging than false negatives in dynamic markets, because they chill the very conduct antitrust is meant to protect and can lead to losses in dynamism and output.[115] When essential-facilities reasoning is extended to digital platforms without satisfying the traditional conditions, it can deter investment in new infrastructure, encourage dependence on mandated access instead of innovation, and thereby function as an anti-competitive market distortion.

2. **Overly intrusive enforcement based on erroneous market definitions and market-share metrics:** Overly intrusive enforcement that relies on static market definitions and market-share metrics rather than evidence of durable market power and competitive effects can also turn digital policy into an anti-competitive distortion. Analyses of digital markets warn that undue reliance on simple concentration measures or static market boundaries, without a deep understanding of the durability of market power or the relationship between concentration and output, increases the risk of Type 1 error.[116] In sectors where firms are expanding real output, increased concentration is often associated with innovation and cost reductions, indicating that higher market shares can be a sign of competitive success rather than market power.[117] A precautionary enforcement approach that infers harm from concentration alone, or from narrow product-market definitions that ignore dynamic rivalry, would tend to target precisely those firms that are expanding output and innovating. Error-cost analysis further emphasizes that false positives in digital markets are especially costly because they deter investment and innovation that would otherwise raise welfare.[118] In this setting, digital policies that treat high market share as a proxy for harm and impose intrusive enforcement based on static definitions can suppress the competitive processes that drive productivity growth, converting competition policy itself into an anti-competitive market distortion.

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[114] Trade, Competition and Domestic Regulatory Policy

[115] Geoffrey A. Manne, "Error Costs in Digital Markets," in *The Global Antitrust Institute Report on the Digital Economy* (Arlington, VA: George Mason Law & Economics Center, 2020), 3–5; Joshua D. Wright and Murat C. Mungan, "The Easterbrook Theorem: An Application to Digital Markets," 2020.

[116] Competition Policy Against Large U.S. Firms

[117] Sharat Ganapati, "Growing Oligopolies, Prices, Output, and Productivity," *American Economic Journal: Microeconomics* 13, no. 3 (2021): 309–27.

[118] Manne, "Error Costs in Digital Markets"; Wright and Mungan, "The Easterbrook Theorem: An Application to Digital Markets."

3. **"Big is bad" philosophies that chill innovation and growth**: Competition policies based on a "big is bad" philosophy, in which large firms are presumed harmful by virtue of their size, make digital regulation anti-competitive by discouraging scale and chilling innovation. Recent analysis notes the risk of a return to "big is bad" populism in antitrust, combined with a shift toward rules-based oversight of dominant firms in the European Union and more restrictive merger and monopolization enforcement.[119] In digital markets, where scale and network effects are integral to consumer benefits and innovation, policies that treat size or growth as inherently suspect force successful firms to slow or alter their growth trajectories as they approach arbitrary thresholds, such as "gatekeeper" designations or notional dominance benchmarks. This behavior is not hypothetical: work on firm dynamics shows that high-growth young firms are a major source of productivity gains, and precautionary enforcement that penalizes firms as they scale would disproportionately harm these contributors.[120] When domestic policies implicitly or explicitly adopt a "big is bad" stance and design thresholds that trigger heightened obligations once firms reach certain market-share or size levels, they create incentives to avoid investment and expansion. The resulting chilling effect on innovation and growth reduces dynamic competition and weakens the domestic-competition pillar, thereby lowering long-run GDP per capita.
4. **Threshold-based obligations that restrict business models and integration:** Digital policies that impose special obligations on firms once they cross certain thresholds of market share or perceived market power, particularly when these obligations limit what business they can do with their own entities or subsidiaries, create anti-competitive market distortions by restricting business models and efficient integration. Frameworks inspired by the EU Digital Markets Act, for example, define "gatekeepers" as providers of core platform services characterized by large scale economies, strong network effects, and user lock-in, and then impose a list of obligations on them, including requirements to allow third-party interoperability and to grant business users access to data generated on the platform, backed by substantial fines and potential structural or behavioral remedies.[121] When such regimes restrict self-preferencing, integration of complementary services, or the ability to use common infrastructure across subsidiaries once firms cross a size or market-share threshold, they alter the competitive process by preventing firms from realizing efficiencies associated with multi-sided platform operation and vertical integration. Applied to domestic or foreign digital firms, these rules can raise compliance costs, distort organizational

[119] Competition Policy Against Large U.S. Firms
[120] Ryan A. Decker, John Haltiwanger, Ron S. Jarmin, and Javier Miranda, "Where Has All the Skewness Gone? The Decline in High-Growth (Young) Firms in the U.S.," *European Economic Review* 86 (2016): 4–23.
[121] See Annex 2

structure, and reduce incentives to invest in integrated services that benefit consumers. Where thresholds and obligations are applied selectively to certain large firms, they also function as vertical distortions that disadvantage particular business models relative to others. In aggregate, these threshold-based restrictions weaken domestic and international competition, affect property-rights control over data and platform architecture, and therefore operate as anti-competitive market distortions that destroy wealth rather than creating it.

## Korea Case Study: Domestic Regulation as an Anti-Competitive Market Distortion

43. Korea provides a clear example of how domestic regulatory measures can function as anti-competitive market distortions when they weaken property rights, reduce domestic rivalry, or restrict exposure to international competition. Competere's analysis of Korea's regulatory environment shows that recent measures affecting digital platforms impose disproportionate burdens on large foreign firms, raise compliance costs, limit the ability of firms to innovate or scale, and create structural advantages for domestic competitors.[122] These effects operate through all three pillars of the SRB-γ model and produce measurable reductions in productivity and GDP per capita.

44. The Korea Online Platform Markets Act (KOPMA) illustrates these dynamics. The proposed framework would impose ex ante obligations on designated platform operators, including restrictions on product integration, limitations on ranking and search-display practices, and broad requirements concerning data handling and interoperability.[123] These measures would weaken the property-rights pillar by restricting firms' control over platform architecture and data assets, undermine domestic competition by constraining the ability of firms to respond to rivalry through innovation, and reduce international competition by selectively burdening foreign firms operating in Korea.

45. Competere's application of the SRB-γ framework to KOPMA estimates that the regulation alone is associated with a loss of approximately 215 billion dollars to the Korean economy over ten years, representing about 12.6 percent of GDP per capita and roughly 4,161 dollars per capita.[124] When combined with losses attributed to interventionist antitrust enforcement, the total rises to approximately 391 billion dollars in a simple aggregation. Applying a conservative interaction premium of 15 to 20 percent to account for the

[122] See Annex 2
[123] Ibid
[124] Ibid

reinforcing effects of ex ante regulation and antitrust enforcement yields a combined projected loss in the range of 449 to 469 billion dollars over a decade.[125]

46. The structure of Korea's digital sector further demonstrates how these distortions arise. Analysis of the MSCI Korea index shows that approximately 80 percent of index weight is held by chaebol entities, with roughly 56 percent of total index value consisting of digital assets controlled by chaebol groups. Removing chaebol-controlled digital firms leaves only about four percent of Korea's digital-market capitalization attributable to non-chaebol firms, and the digital share of the non-chaebol slice itself is approximately twenty percent. These figures illustrate that Korea's digital ecosystem is dominated by diversified conglomerates rather than platform firms comparable to those in the United States. Domestic regulatory measures therefore fall disproportionately on foreign platforms, altering competitive conditions in a manner consistent with an anti-competitive market distortion.

47. Competere's companion analysis of U.S. losses demonstrates that Korea's regulatory approach imposes significant cross-border effects. The combined impact of Korean interventionist antitrust enforcement and KOPMA-style regulatory obligations is estimated to generate losses of approximately 500 to 525 billion dollars to the U.S. economy over ten years.[126] These losses arise through reduced participation in global digital value chains, foregone investment, diminished output, and weakened exposure to international competition. Korea's case study shows how domestic regulation in the digital sector can function as an anti-competitive market distortion with measurable macroeconomic consequences for both Korea and its trading partners.

## Derivative Nature of DMA-Style Regulations and Their Influence on Korean Policy

48. Korea's regulatory approach to digital platforms is not unique. It reflects a broader global trend in which jurisdictions adopt frameworks modeled on the European Union's Digital Markets Act (DMA). The DMA introduced a prescriptive regulatory structure that imposes obligations on firms designated as "gatekeepers" based on size and structural criteria rather than demonstrated competitive harm.[127] Korea's discussions of the Online Platform Markets Act (OPMA) and related KFTC guidelines reference the DMA directly, and the substantive obligations proposed under Korean law correspond closely to DMA provisions

[125] Ibid
[126] See Annex 2
[127] European Commission, *Digital Markets Act* (Regulation (EU) 2022/1925), Title II obligations.

governing ranking, data access, interoperability, multi-homing, and restrictions on integrating complementary services.[128]

49. These similarities are significant because they show that Korea has imported a regulatory model designed for the institutional and market-integration concerns of the European Union rather than conditions specific to Korea's domestic market. The DMA emerged from EU efforts to address fragmentation within the single market and to increase Europe's influence over global digital governance.[129] By contrast, Korea's digital ecosystem is dominated by diversified conglomerates rather than platform firms operating in scale-intensive multisided markets comparable to those in the United States. Adopting DMA-style obligations in this context risks weakening property rights, reducing domestic rivalry, and restricting international competition by imposing structural constraints that disproportionately affect foreign firms.

50. The alignment between EU DMA obligations and Korean regulatory proposals is summarized in table 3:

**Table 3: Korea-EU DMA Crosswalk**

| Theme | Korea (OPMA/KFTC) | EU DMA Obligations |
|---|---|---|
| **Self-preferencing / ranking** | KFTC 2023 Guidelines flag theory; Coupang case; NAVER saga signals evidentiary bar | DMA Art. 6(5): no self-preferential ranking/indexing/crawling |
| **Steering / external offers** | Addressed via MRFTA/consumer deception (case-by-case) | Art. 5(4): allow developers/businesses to steer users outside the gatekeeper's core platform services |
| **Multi-homing & tying** | Guidelines discuss tying/multi-homing restrictions | Arts. 5–6: restrictions on tying and anti-multi-homing practices |
| **MFN / parity clauses** | Scrutiny under unfair terms; OPMA drafts referenced MFNs | Art. 5(3): bans wide MFNs for core platform services |
| **Data combination & access** | Algorithmic manipulation and data leverage analyzed; privacy via PIPA | Art. 5(2): combine personal data only with consent; Art. 6(10/11): business/ad data access |

51. These parallels demonstrate that Korea's digital regulations do not emerge organically from domestic competitive conditions but instead reflect policy transplants derived from the EU model. This matters for two reasons. First, the DMA relies on analytical assumptions (including essential-facilities reasoning, structural dominance inferences, and static

[128] Korea Fair Trade Commission, OPMA draft materials and 2023 Guidelines; Competere Foundation, *Korea Economic Losses Report* (2025), analysis of OPMA obligations.
[129] European Commission, *Europe's Digital Decade: Digital Targets for 2030* (2021), discussion of single-market integration and digital sovereignty.

theories of harm) that lack empirical grounding in dynamic platform markets. Second, the adoption of DMA-style measures by non-EU jurisdictions extends a regulatory template that functions as a non-tariff barrier when applied to foreign firms, particularly U.S. digital service providers.[130] As Competere's Korea and U.S. analyses show, such measures weaken the pillars of domestic and international competition and reduce long-run productivity.

52. As we note in the study on Korea, the damage done to the U.S. economy is exacerbated not only by the substance of competition policy enforcement which suffers from the flawed assumptions set out above, but also from the procedural irregularities associated with the way that competition policy is enforced. These irregularities are increasing rapidly in Korea particularly under the new Chairman of the KFTC, Joo Byeong-ki. The increase in dawn raids, threats of criminal actions, harassment of witnesses is on a substantial upward path as noted by the National Bureau of Asian Research (NBR) in its detailed report, *Understanding the Impact of KFTC Enforcement on U.S. firms*.[131] The report highlights practices that show procedural irregularities which are captured in Competere's economic model:

*53. Despite these differences, all firms expressed common concerns regarding the KFTC's investigative practices. Recurring themes included the following:*

- *A low threshold for opening investigations*
- *A lack of details and transparency about the specific alleged misconduct and the associated theory of harm*
- *Unnecessarily aggressive investigative tactics and raids*
- *Overly broad information requests and data seizures*
- *The frequent use of (or threats to use) criminal referrals as an enforcement and intimidation tool.*

54. The NBR report also disturbingly highlights the lack of technological, economic and even legal knowledge that is deployed by the KFTC in cases, specifically:

*55. The KFTC strictly limits the information that firms receive during investigations. Unlike in the EU, the United States, and other countries, the KFTC does not as a matter of course provide the firm under investigation with access to its case file. This impedes the firm's ability to*

[130] See Annex 2

[131] Nigel Cory, Understanding the Impact of KFTC Enforcement on U.S. Firms*: Qualitative Evidence and Analysis* (Washington, DC: National Bureau of Asian Research, November 2025).

*understand the full scope and specific details of the alleged misconduct and thus defend itself.*

56. As the NBR report notes, KFTC practice is well outside the mainstream of other antitrust agencies including, even the EU. Indeed, many of the complaints of U.S. firms with regard to KFTC enforcement recall earlier complaints raised against the EU authorities in their investigations in the 1990s and 2000s. These complaints led to improvements in the EU's process where procedural guarantees were established to allow companies to properly defend themselves. It is noteworthy that the Chaebol companies and their Chinese partners seem to be exempted from the most extreme of these attacks. This is of particular concern given that many of these attacks on U.S. digital firms could lead to China competitors starting to dominate in global markets. As the National Security Strategy notes, economic security is a paramount concern, and within economic security, anti-competitive regulation in substance and application constitute a major national security threat. This is especially troubling in a country that should be a major U.S. ally in what is the most important geo-political and geo-economic region on the planet. We would argue the threat is sufficiently high as to warrant the imposition of section 232 tariffs.[132,133]

# Conclusion

57. Foreign regulatory initiatives directed at large U.S. technology firms increasingly operate as domestic policy measures that weaken the pillars of competition and property rights on which economic growth depends. The analyses presented in this testimony show that when digital regulations depart from effects-based principles, rely on static market assumptions, or impose obligations tied to firm size or market share, they function as ACMDs that depress productivity, reduce investment, and alter long-run income trajectories. The experience of jurisdictions that have adopted prescriptive digital regulatory frameworks demonstrates that these measures frequently generate Type 1 error, suppress dynamic rivalry, and constrain the mechanisms through which digital platforms deliver innovation and consumer benefit.

58. The Korea case study illustrates the scale of the resulting economic harm. Application of the SRB-γ model shows that KOPMA, combined with interventionist antitrust enforcement, is associated with an estimated reduction of approximately 469 billion dollars in Korean GDP over ten years. The companion analysis of U.S. losses finds that similar regulatory approaches directed at American firms may impose a long-run cost of roughly 525 billion

[132] The White House, *National Security Strategy of the United States of America* (Washington, DC: The White House, 2025).
[133] Trade Expansion Act of 1962, Pub. L. No. 87-794, § 232, 76 Stat. 872 (codified as amended at 19 U.S.C. § 1862).

dollars on the U.S. economy. These effects arise because domestic regulatory choices in the digital sector weaken the pillars of domestic and international competition and undermine the security of property rights, thereby shifting economies away from their potential output paths.

59. The crosswalk between Korea's regulatory framework and the European Union's Digital Markets Act further demonstrates that these policies are not isolated developments but are part of a broader pattern in which foreign governments pursue interventions that disadvantage U.S. firms, constrain their ability to innovate, and alter competitive conditions in global markets. Requirements concerning self-preferencing, data access, multi-homing, parity clauses, and ranking practices mirror DMA obligations and create structural disadvantages for American companies operating abroad. These measures function as de facto non-tariff barriers that impede participation in global digital value chains and restrict the export competitiveness of U.S. digital services, a sector in which the United States maintains a comparative advantage.

60. Competition policy should promote the competitive process, be based on protection of property rights (since that is what firms have to compete with), and maintain openness to domestic and international rivalry. When foreign regulatory systems adopt approaches that penalize success, restrict innovation, or target firms because of their origin, they undermine these principles and impose significant costs on both their own economies and on U.S. businesses. Ensuring that competition policy remains grounded in demonstrable evidence of harm, aligned with dynamic market realities, and cognizant of its impact on global supply chains is essential to safeguarding American economic interests.

61. For these reasons, it is vital that the United States continue to aggressively restrain foreign regulatory barriers by evaluating their effects on U.S. firms through rigorous analytical frameworks and promote regulatory approaches (both domestically and internationally) that support innovation, encourage competitive intensity, and strengthen the pillars of economic growth. The evidence presented in this testimony shows that policies which weaken these conditions do not merely disadvantage individual firms; they impose broad macroeconomic costs that undermine prosperity and constrain the growth potential of the United States and its trading partners. As noted in the National Security Strategy, with its emphasis on economic security examples like the Korean case constitute an existential threat to the United States, as if left unchecked they will deliver the market to China firms.

## About Shanker Singham

Shanker A. Singham is one of the world's leading experts on international trade, competition policy, and regulatory reform, and is the CEO of Competere Group, President

of the Competere Foundation, and Chairman of the Growth Commission. He has worked on the interaction between trade, competition, and domestic regulatory policy for more than three decades, advising governments, multilateral institutions, and companies on how anticompetitive market distortions impede growth. His longstanding engagement with these issues is reflected in earlier work, including his Council on Foreign Relations working paper *Freeing the Global Market: How to Boost the Economy by Curbing Regulatory Distortions* (2012) (Annex 3) and his testimony before the House Judiciary Subcommittee on Competition and the Courts on China's Anti-Monopoly Law (2010) (Annex 4), both of which set out the foundations of the framework applied in this testimony. A full overview of the Competere Foundation can be found in Annex 5.

# Annex 1 - Valuation Methodology for Dow 30 Digital Share Estimates

This annex provides the detailed calculations underlying the estimated digital share of Dow 30 market capitalization in 2000, 2010, and 2024. These calculations are based on publicly available valuation data from major market capitalization databases and index providers.[134] Historical series for individual firms' market capitalization are used to anchor the point estimates for the years in question.[135]

## 2000 Estimates

Core digital constituents include Microsoft (approximately 231 billion dollars), Intel (approximately 202 billion dollars), and IBM (approximately 148 billion dollars), which together account for roughly 0.6 trillion dollars of index value. Adding Hewlett Packard and major telecommunications firms yields approximately 0.8 to 0.9 trillion dollars of digital market value out of a Dow index valued at roughly 4 trillion dollars. This corresponds to a digital share in the range of 15 to 25 percent, for which a central estimate of 20 percent is used.

## 2010 Estimates

Digital firms in 2010 include Microsoft (approximately 235 billion dollars), IBM (approximately 180 billion dollars), Intel (approximately 116 billion dollars), Cisco, Hewlett Packard, AT&T, and Verizon. Together these firms account for just under 1 trillion dollars in digital market value against a Dow index estimated between 3.5 and 4.5 trillion dollars, yielding a range of roughly 22 to 30 percent and a central estimate of 28 percent.

## 2024 Estimates

Digital Dow constituents in 2024 include Microsoft, Apple, Nvidia, Amazon, Salesforce, IBM, and Cisco. Microsoft, Apple, and Nvidia alone account for close to 9 trillion dollars of market capitalization. Adding Amazon (approximately 1.5 to 1.8 trillion dollars), Salesforce (approximately 0.25 trillion dollars), IBM (approximately 0.21 trillion dollars), and Cisco (approximately 0.31 trillion dollars) yields roughly 11 to 12 trillion dollars of digital market value out of a Dow index total of approximately 19 to 21 trillion dollars. This corresponds to a range of roughly 53 to 60 percent, for which a central estimate of 58 percent is used.

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[134] CompaniesMarketCap.com, "Companies Ranked by Market Cap," accessed December 9, 2025, https://companiesmarketcap.com/

[135] WallStreetNumbers, "MSFT Market Cap History & Chart Since 1986," accessed December 9, 2025, https://wallstreetnumbers.com/stocks/msft/market-cap

# Annex 2 – Competere Foundation: Advice on Application of Competition Policy Against Large U.S. firms in Korea

The combined impact of Korean interventionist antitrust and precautionary regulation could impose $500 billion+ cost to the U.S. economy over the next ten years and a direct trade issue between the two countries.

## Overview

- This report assesses the impact of Korean competition policy on U.S. export interests, focusing particularly on digital sector regulation and enforcement by the Korea Fair Trade Commission (KFTC). The ACMD model is applied to quantify resulting distortions and their effect on GDP per capita and market access. We also analyze the impact of the Korean Online Platform Markets Act ("KOPMA") which is connected to the KFTC approach as an ex-ante regulatory system that also has significant impact on the U.S., and we examine the interaction effect between the ex-ante approach and the ex-post competition policy enforcement approach.

# Evolution of Korean Competition Law

- Korean competition law has evolved in three main phases: initially focused on curbing Chaebol dominance, it transitioned through IMF-driven liberalization to an effects-based, consumer welfare approach. However, legacy elements of industrial policy persist.

## Application of Korean Competition Law to U.S. Exporters

- The KFTC is applying competition law in a manner that damages U.S. export interests. It does this by taking a very interventionist approach, particularly in the tech sector, and particularly directed against U.S. companies. Our ACMD model can be used to estimate

the cost of these policies on U.S. exports. Details of the ACMD model can be found in Annex 2A.[136,137]

## Evidence of Korean Competition Law enforcement

- Korean competition law was initially developed in the 1980s. However, there was a problem with its application from the outset. Included within antitrust's purposes were various social purposes that had nothing to do with antitrust.

- Korean competition law has undergone a major transformation since the 1980s. Any analysis of the development of Korean competition law cannot ignore the reasons for its inception. The Korean export led growth policy relied on powerful export houses, the Chaebol, knitted together by collusive practices and government privilege. Korean competition law was initially implemented to control the power of these large conglomerates, much as U.S. antitrust law emerged to control the behavior of powerful trusts. The law has gradually evolved into a more modern, consumer-welfare-focused framework. However, this transformation has not been linear or unambiguous, and its tendency to be more competitor welfare rather than consumer welfare has led to the on the ground impact that it is too often used to damage specific targets, such as large U.S. firms for non-economic and ideological reasons.

## The Early Period

- To understand the application of Korean competition law, it is necessary to know the history of the Korean economy going back to the 1980s. Like Japan before it, the Korean export centered model required significant government distortions and subsidies at home. The resultant Chaebol companies were very large behemoths, fed by these anti-competitive market distortions or ACMDs. Korean political reality meant that there was growing public concern about the disparity in wealth between those associated with the Chaebol and regular citizens. This fueled the early call for competition policy as a redistributive tool. Hence from the outset, dealing with inequality was one of the express purposes of Korean competition law.

### Early Phase (1980s–1990s):

1 Focused on preventing concentration of economic power under the Monopoly Regulation and Fair Trade Act (MRFTA).

2 Consumer welfare was a secondary goal. The primary aim was controlling chaebols and redistributing economic power.

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[136] The full details of the SRB and SRB-γ ACMD models can be found in chapters 3 and 4 of Shanker A. Singham, *International Trade, Regulation and the Global Economy: The Impact of Anti-Competitive Market Distortions* (London: Routledge, 2025), https://www.routledge.com/International-Trade-Regulation-and-the-Global-Economy-The-Impact-of-Anti-Competitive-Market-Distortions/Singham/p/book/9781032944166.

[137] Additional details on the model can be found in Shanker A. Singham and Alden F. Abbott, Trade, *Competition and Domestic Regulatory Policy: Trade Liberalisation, Competitive Markets and Property Rights Protection* (London: Routledge, 2023).

3 Enforcement was weak, and market interventions were common.

## Transition Phase (1997–2008):

- Post-IMF crisis reforms led to stronger regulatory institutions and greater transparency.
- The Korea Fair Trade Commission (KFTC) gained enforcement powers.
- Introduction of merger review standards and anti-cartel actions began to consider consumer effects more directly.

**Modern Phase (2009–Present):**

- Move towards closer alignment with OECD and international standards.
- Focusing more on adoption of effects-based analysis and use of economic tools to assess consumer harm.
- Targeted enforcement in digital markets and platforms focused on U.S. firms, and specific enforcement activities focused on U.S. firms
- In the modern phase, just as in the EU, Japan and other markets, the application of underlying equality concepts has meant that consumer welfare norms are disregarded in enforcement and instead competition law is used to damage specific companies for political and non-economic reasons.

**Table 1: Phases of Korean Competition Law**

| Phase | Primary Focus | Role of Consumer Welfare | Enforcement Tools |
|---|---|---|---|
| 1980s–1990s | Chaebol regulation, power control | Indirect, secondary goal | Limited enforcement powers |
| 1997–2008 | Market liberalization | Emerging focus | Cartel enforcement, merger reviews |
| 2009–Present | Digital platform regulation, effects-based | Facing challenges | Attacks on U.S. firms |

# Summary of Best Practice in Competition Law Enforcement: What Good Looks Like

- We have written extensively about the way in which competition policy has developed, and what the principal reasons for competition policy actually are.[138] We have noted the following key elements of a sound competition policy. When competition agencies such as the KFTC depart from these norms, their actions will cause damage to their trading partners, so understanding what good practice is and what the delta is between good practice and actual KFTC practice is deeply relevant to assessing the impact to the U.S. economy.

- **Normative benchmark**: Competition law should be implemented to maximize consumer welfare, operationalized as the maximization of productive and allocative efficiency, not to protect competitors per se or to engineer market structure for its own sake. Effects-based analysis and economics (rather than legal formalisms) are the touchstones.

## US–EU contrast and where Korea sits on the spectrum.

- The United States' modern antitrust centers on consumer welfare and economic effects, with strict action against hard-core cartels and a relatively high bar for monopolization. The EU historically blended market-integration aims, state-aid control, and more rules-based scrutiny of dominance and verticals. However, both systems converged toward economics over time. To be sure, there was a dramatic shift in U.S. policy in the Biden Administration, specifically under Chair Khan of the Federal Trade Commission, but we view this as an aberration rather than a long-term trend. We therefore refer to pre-Khan U.S. antitrust enforcement as being largely based on a consumer welfare led model, certainly much more so than the EU.

- **Risks of drift**: Recent digital-platform initiatives (e.g., precautionary approaches and ex-ante regimes like the DMA in the EU or KOPMA) may pull enforcement away from strict consumer-welfare analysis toward fairness/competitor-protection rationales, risking static and dynamic efficiency losses if not tightly tethered to demonstrated consumer harm. We see this as particularly impactful in Korea.[139]
- **The Cost of Precaution.** Precautionary principles sound like sensible approaches – look before you leap and other similar aphorisms come to mind. But competition agencies need to be very careful to ensure that they do not chill investment by applying unduly precautionary approaches. This can lead to Type 1 error where competition

[138] See Annex 2B for an excerpt from Singham and Abbott, *Trade, Competition and Domestic Regulatory Policy*, chap. 3, "The Role of Consumer Welfare in Competition Implementation and Enforcement."; hereinafter referred to as the Singham-Abbott Framework
[139] See Annex 2B

agencies discipline behavior that is actually pro-competitive. There have been some studies on the impact of Type 1 errors. Geoffrey Manne (2020) set out a framework for looking at Type 1 errors. Manne notes the court in *Verizon v. Trinko*[140] which stated that Type 1 errors were more costly than Type 2 errors because "they chill the very conduct which the antitrust laws were intended to protect."[141] Other authors have noted that Type 1 errors can lead to losses in dynamism.[142] This is a particular concern in the tech space as it can lead to a reduction in the output of firms providing these types of services. Undue reliance on static market models, and market shares without a deep understanding of the durability of market power can also lead to Type 1 error. Sharat Ganapati (2021) finds that increased concentration in firms that are expanding real output leads to innovation and cost reduction.[143] A precautionary approach to antitrust would damage these firms before they had a chance to manifest these positive economic contributions. Wright and Mungan in "The Easterbrook theorem: Application to Digital Markets" note that the overwhelming jurisprudence suggests that false positives are far more economically damaging than false negatives.[144] This is because false negatives can be ultimately disciplined by authorities and are likely to continue to be raised by other parties. By contrast, false negatives have no constituency and the resulting damage to innovation cannot be corrected in the future. How agencies define markets also plays an important role in innovation in ensuring innovation. If markets are defined too narrowly, using static thinking, then harm is more likely to be found increasing the risk of Type 1 error.

- **Public restraints and ACMDs**: Many welfare losses arise from anti-competitive market distortions (ACMDs) created by laws and regulations. The OECD Toolkit provides a diagnostic to identify and mitigate them.[145] Competition agencies should advocate pro-competitive reform, not only police private conduct.

- **High-tech guidance**: In technology markets with network effects and rapid innovation, incipiency-based and structural interventions are particularly hazardous. Remedies should be narrow, effects-based, and conscious of innovation incentives and platform efficiencies.

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[140] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).
[141] Geoffrey A. Manne, "Error Costs in Digital Markets," in *The Global Antitrust Institute Report on the Digital Economy* 3 (Arlington, VA: George Mason Law & Economics Center, 2020), 5.
[142] Ryan A. Decker, John Haltiwanger, Ron S. Jarmin, and Javier Miranda, "Where Has All the Skewness Gone? The Decline in High-Growth (Young) Firms in the U.S.," *European Economic Review* 86 (2016): 4–23, https://doi.org/10.1016/j.euroecorev.2015.12.013
[143] Ganapati, Sharat. "Growing Oligopolies, Prices, Output, and Productivity." *American Economic Journal: Microeconomics 13*, no. 3 (August 2021): 309–27.
[144] Joshua D. Wright and Murat C. Mungan, "The Easterbrook Theorem: An Application to Digital Markets," *The Yale Law Journal Forum* 130 (2021): 622–646, https://www.yalelawjournal.org/forum/the-easterbrook-theorem.
[145] Organisation for Economic Co-operation and Development (OECD), *Competition Assessment Toolkit: Principles, Version 4.0, Volume I* (Paris: OECD Publishing, 2019), https://doi.org/10.1787/5f9fa6ca-en

- We can now apply this framework to the development of Korean competition policy.

## Historical Arc and Institutional Posture

- Korea's MRFTA did not emerge in a vacuum. It was conceived in the shadow of heavy industrial policy, chaebol concentration, and the post-crisis drive for market discipline. Unsurprisingly, the system drew heavily on German and EU traditions, with the KFTC positioning itself not only as an enforcer but also as a competition advocate seeking to dismantle entrenched structural impediments.

- Over time, Korea has moved in the same broad trajectory as the U.S. and EU: toward the use of economics-based tools such as cartel detection, and merger analysis. Yet legacies of fairness and competitor protection remain embedded in its posture, especially where SMEs or national champions are concerned. The decisive point is that policy goals outside the competition agency have repeatedly been allowed to shape antitrust enforcement. That risk is magnified in the new media environment, where such departures from consumer-welfare analysis directly damage U.S. firms.

## Positioning on the US–EU Spectrum

- Analytically, Korea today is hybrid. It is far more effects-based than it was in its early years, but still more formalistic and dominance-attentive than the modern U.S. approach. In this respect, it sits closer to the EU's historical suspicion of verticals and platform conduct, and too often slips into the language of fairness, which risks sliding into competitor-welfare unless explicitly anchored to consumer-welfare metrics.

- In digital markets, this tendency is more pronounced. Korea's recent emphasis on platform rules and gatekeeper-like conduct situates it firmly at the EU/regulatory end of the spectrum. As the Singham-Abbott framework cautions, such measures must demonstrate clear consumer harm and explicitly weigh dynamic efficiency (innovation, interoperability, investment). Failure to do so risks eroding consumer surplus and entrenching inefficiency.

## Consumer-Welfare Scorecard (Singham-Abbott Framework)

- **Allocative efficiency:** Enforcement that fragments efficient ecosystems or bans preferred bundles misallocates resources, raising prices and reducing features. Proper analysis must use price and output effects, not formal categories, as the test.
- **Productive efficiency:** Mandates that duplicate infrastructure or billing channels drive up costs that are ultimately passed to consumers. Structural or rule-based fixes that ignore production-cost impacts must therefore be avoided.
- **Dynamic efficiency:** Anticipatory or fairness-driven interventions chill innovation and deter entry. The KFTC must explicitly incorporate innovation incentives (i.e., platform investment, R&D spillovers) in its calculus.

- **Remedies discipline:** Targeted behavioral remedies, calibrated to net welfare gains, should be the default. Structural remedies should be reserved only for durable monopolies where efficiency trade-offs clearly justify them.
- **Public-sector distortions (ACMDs):** Korea's longstanding regulatory instruments themselves distort competition. Here the KFTC's advocacy function is crucial: deploying OECD Toolkit-style assessments to pare back these ACMDs will expand openness, raise IC/DC/PR scores, and promote growth.

## Korea's Present Location and the Path Forward

- At present, Korea stands between the pre-Khan U.S. consumer-welfare pole and the EU's precautionary, form-sensitive pole, but with a discernible tilt EU-ward in digital markets and dominance cases. While enforcement has matured, industrial-policy instincts and fairness rhetoric still shape case selection and remedy design, particularly in actions directed against large firms and U.S. platforms.

We therefore advocate:

- Refocusing enforcement on measurable consumer harm (i.e., price, output, quality, and innovation) in platforms and verticals.
- Incorporating dynamic effects explicitly in technology cases.
- Constraining structural remedies to truly durable monopolies and favoring narrow behavioral remedies.
- Systematically auditing ACMDs and pressing for pro-competitive regulatory reform through KFTC advocacy.
- Aligning Korean enforcement with OECD Toolkit diagnostics to strip out non-tariff distortions that private antitrust cannot fix.

- Failure to take this path carries not only domestic economic costs but also significant international trade consequences. As we demonstrate, the divergence from consumer-welfare norms already imposes heavy losses on the U.S. economy and directly jeopardizes the market opportunities of U.S. exporters.

# Application to New Media Economy Realities[146]

- The Singham–Abbott New Media Economy Framework (set out in Chapter 14 of Trade, Competition and Domestic Regulatory Policy) explains how plummeting transmission costs in the microprocessor era shifted value from infrastructure toward content, while platforms evolved into multi-sided systems characterized by network effects and scale economies. In such an environment, competition is increasingly "for the market",

[146] See Annex 2C for an excerpt from Singham and Abbott, *Trade, Competition and Domestic Regulatory Policy*, chap. 14, "Impact of the New Media Economy."; hereinafter referred to as the Singham-Abbott New Media Economy Framework

marked by Schumpeterian temporary monopolies, rather than within static product markets. Interventions that fragment ecosystems or foreclose scale therefore destroy welfare rather than enhance it. The correct policy baseline is not "openness at any cost," but effects-based rules that preserve inter-platform rivalry, incentivize continued investment, and avoid unnecessary fragmentation.

- At the heart of the framework is the consumer-welfare standard: maximizing productive and allocative efficiency. We warn explicitly against the drift to competitor-welfare rationales and precautionary regulation, such as ex-ante digital codes, that lack any demonstration of consumer harm. These risks are magnified in platform markets where heavy ex-ante obligations or structural remedies can reduce output, lower quality, and chill innovation even when nominal user prices are zero. Enforcement should therefore remain tied to effects, not form. Competition agencies should assess measurable outcomes (i.e., price, output, quality, innovation) and, where necessary, impose narrowly targeted behavioral remedies. Crude structural separation should be avoided. This is precisely where Korea has gone wrong: the KOPMA and KFTC enforcement, taken together, substantially damage U.S. firms without demonstrable consumer benefit.

- In developing the New Media Economy framework, we surveyed the new wave of platform regulation such as the EU's DSA/DMA, Germany's Digitisation Act, and similar initiatives in the UK, France, Japan, Australia, and China. The lesson is clear. Broad, one-size-fits-all rules reduce innovation, raise compliance costs, entrench incumbents, and in practice substitute regulation for competition. The comparative evidence on net-neutrality regimes illustrates this point. Benefits are limited, while investment and quality trade-offs are real. In most cases, ex-post antitrust remains the cleaner instrument unless a concrete market failure is proven.

- Convergence makes fragmentation even more costly. As audiovisual, telecom, and internet services converge, measures such as local-content quotas, foreign-ownership caps, or local-working requirements fracture demand, shrink scale, and raise costs. The exact opposite of what network-economy welfare requires. The Singham-Abbott New Media Economy Framework also highlights the trade law interface (GATS, TRIPS, TRIMS), noting that many such measures are not only distortionary in economic terms but also potentially disciplinable under WTO norms. Korea's politicized choice of adopting the ATSC digital television standard illustrates the point.[147] In 1997 the government adopted the U.S. developed ATSC 1.0 system, which was optimized for fixed rooftop reception. To meet mobile and indoor viewing demand, Korea later deployed a separate T-DMB service, while the ATSC-M/H mobile variant arrived late and saw limited uptake. Korea then began migrating in 2017 to ATSC 3.0, which is not backward compatible and requires new receiver chains. This sequence shows how a

[147] Tae-Han-Kim, "U.S. Standard Chosen for Digital Broadcasting," *The Dong-A Ilbo*, July 8, 2004, https://www.donga.com/en/List/article/all/20040708/235990/1.

top-down standard choice can lock in technical trade-offs, create parallel systems, and make later transitions costlier than a technology-neutral, market-led process.[148,149]

- Standards embody large network externalities, and errors in selection impose significant long-term consumer harm.

- Placed within this framework, Korea's regime is hybrid. More economics-led than in its early years, but still more form- and dominance-attentive than the modern, pre-Khan U.S. approach. In digital markets, it leans heavily toward the EU/regulatory pole. Through the New Media Economy lens, the tilt is even more acute in technology and media: precautionary or ex-ante digital rules fragment the NME, undermine inter-platform rivalry, and erode the scale economies that deliver consumer surplus. When the KFTC evaluates platform tying, self-preferencing, app-store rules, interoperability mandates, or data-access obligations, it must ground any intervention in measured consumer harm and dynamic-efficiency analysis, not in the status or nationality of the rival affected. Current evidence suggests this discipline has not been observed.

## Selective Enforcement Against U.S. Companies

- Despite claims of consumer welfare motivation, KFTC actions appear to protect domestic platforms, suggesting a broader national digital sovereignty agenda. There are also specific attacks on "bigness" which is a concept that has been discarded by many antitrust agencies on the basis there is no economic rationale for such an approach. We can see from the opening section of this advice that KFTC approaches, mired in several other non-consumer welfare focused objectives have had impacts on large firms generally. We are starting to see a disturbing trend impacting not just the digital sector but other U.S. firms as well. The application of an overweighting in competition enforcement to a dominance standard is likely to have a disproportionate impact on larger firms. We also see that this is being differentially applied as between large U.S. and large Korean firms. There is certainly a case that the larger Korean firms are able to better rely on domestic lobbying to save themselves from over enforcement which U.S. firms have not been able to do.

- There is a suggestion in the record that indeed U.S. large firms face disproportionate impacts of KFTC enforcement where the dominance/interventionist strand especially impacts them.

[148] Analogue Broadcasting Comes to an End, *KBS World*, December 12, 2012, https://world.kbs.co.kr/service/archive_view.htm?board_seq=73.
[149] Jay Jeon, "Going Global: ATSC 3.0 4K Broadcasting Launched in Korea," *ATSC News*, July 24, 2017, https://www.atsc.org/news/going-global-atsc-3-0-4k-broadcasting-launched-korea/.

- The table below shows some recent KFTC cases with a counterfactual applied if a more consumer welfare standard had been followed. In some cases, a U.S. action was also brought so we can actually see the differential approaches in real time:

**Table 2: Recent KFTC Cases**

| Case | Year(s) | Theory / Law | Sector | Respondent HQ | Outcome in Korea | Consumer-welfare counterfactual (US) |
|---|---|---|---|---|---|---|
| Qualcomm licensing practices | 2016 fine[150]; 2023 court uphold [151] | Abuse of dominance (licensing/FRAND) | Mobile chipsets | USA | ₩1.03Tn fine; Supreme Court of Korea upheld most sanctions (Apr 2023)[152] | *FTC v. Qualcomm* reversed by 9th Cir. (2020). Conduct not anticompetitive [153] |
| Google Android Anti-Fragmentation Agreements (AFA) | 2021 | Tying/leveraging, foreclosure of OS forks | Mobile OS | USA | ₩207.4bn fine[154] | No comparable U.S. case outcome; would require proof of consumer harm |
| KFTC fines Google for One Store exclusivity abuse (game launches) | 2023 | Exclusive dealing / foreclosure | App distribution | USA | ₩42.1bn fine[155] | Likely tougher to condemn under rule-of-reason without strong harm evidence |

[150] Korea Fair Trade Commission (KFTC), *KFTC Imposes Corrective Order and Surcharge on Qualcomm for Abuse of Market Dominance in Mobile Communication Modem Chipset*s, press release, December 28, 2016.
[151] Korea Fair Trade Commission (KFTC), *Supreme Court Upholds Most of KFTC's Qualcomm Decision*, press release, April 2023.
[152] Supreme Court of Korea, Decision 2019Du52386 (Apr. 2023).
[153] *FTC v. Qualcomm Inc.*, 411 F. Supp. 3d 658 (N.D. Cal. 2019), rev'd, 969 F.3d 974 (9th Cir. 2020).
[154] Korea Fair Trade Commission (KFTC), *KFTC Imposes Corrective Order and Administrative Fine on Google for Forcing OEMs to Sign Android Anti-Fragmentation Agreements (AFA)*, press release, September 14, 2021.
[155] Korea Fair Trade Commission (KFTC), *KFTC Fines Google for App Store One Store Exclusivity*, press release, July 2023.

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|---|---|---|---|---|---|---|
| Naver search self-preferencing | 2020 | Self-preferencing / ranking manipulation | Search/Shopping /Video | Korea | ₩26.6bn fine[156] | Self-preferencing not per se illegal; would need consumer-harm proof |
| Kakao Mobility (ride-hailing) | 2024–2025 | Abuse of dominance | Mobility | Korea | Enforcement and appeals activity; provisional fines adjusted on appeal[157,158,159] | Fact-intensive rule-of-reason analysis |
| German automakers emissions cartel | 2023 | Cartel (coordination on emissions tech) | Automotive | Germany | ₩42.3bn fines[160] | Hard-core cartel condemned under both systems[161] |
| Coupang manipulation of search algorithm | 2024-2025 (appeal ongoing) | Unfair trade practices under the MRFTA | E-commerce / online marketplace | USA & Korea | ₩162.8bn fines[162] | This is an algorithm-based retail practice that would not be considered anticompetitive in the U.S. |

[156] Korea Fair Trade Commission (KFTC), *KFTC Imposes Corrective Order and Administrative Fine on Naver for Abuse of Market Dominance in Search and Shopping Services*, press release, October 6, 2020.
[157] Korea Fair Trade Commission (KFTC), *KFTC Imposes Corrective Measures against Kakao Mobility for Abuse of Market Dominance*, press release, October 2024.
[158] Korea Fair Trade Commission (KFTC), *KFTC Revises Fine on Kakao Mobility for Abuse of Market Dominance*, press release, December 2024.
[159] "Supreme Court Hears Fair Trade Commission Appeal Against Kakao Mobility Penalty," *Chosun Biz*, June 12, 2025, https://biz.chosun.com/en/en-society/2025/06/12/2K3I4MR4ZJAQLH7DNBCMNNVBIA/.
[160] Korea Fair Trade Commission (KFTC), *KFTC sanctions German car manufacturers for colluding to avoid competition on the development of emissions cleaning technology*, press release, February 9, 2023, https://www.ftc.go.kr/eng/downloadBbsFile.do?atchmnflNo=17419.
[161] European Commission, *Antitrust: Commission fines car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars*, press release, July 7, 2021, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581.
[162] Kim Ju-yeon, "Coupang Appeals Record $121 Million Fine for Alleged Search Manipulation," Korea JoongAng Daily, September 10, 2024, https://koreajoongangdaily.joins.com/news/2024-09-10/business/industry/Coupang-appeals-record-121-million-fine-for-alleged-search-manipulation/2131645.

- The German automakers example shows that consumer welfare enhancing approaches and in the area of hard core cartels do converge between the EU and U.S.

- We have also included the Korean impact of this as it is important to note not only the negative impact on Korea of these policies as well as the U.S. This could certainly help the U.S. in any legal US-Korea agreement going forward.

# Economic Impact Using the SRB-γ ACMD Model

- We have described the economic model in Annex 2A. For this analysis, we have shocked the 2023 pillar scores with negative impacts across the board for Korean policy. We assume these shocks over a ten-year period. We then apply a coefficient to reflect the impact of these shocks on sectors of the U.S. economy. Statistical weightings come from the ACMD model. The ACMD model measures GDP impact from reductions in pillar scores as follows:

**Table 3: Changes in Key Pillar Scores (2023)**

| Pillar | Country | Indicator | Score Before | Score After |
|---|---|---|---|---|
| International Competition | US | Trade Freedom | 6.2 | 5.7 |
| International Competition | Korea | Trade Freedom | 5.8 | 4.8 |
| Domestic Competition | Korea | Business Freedom | 6.2 | 5.2 |
| Domestic Competition | US | Business Freedom | 6.0 | 5.5 |
| Domestic Competition | Korea | Mobile Phone Access | 3.8 | 3.3 |
| Domestic Competition | Korea | Internet Usage | 6.8 | 6.0 |
| Domestic Competition | Korea | Regulatory Promulgation | 4.8 | 2.5 |
| Property Rights | Korea | Legal Framework | 3.44 | 2.44 |
| Property Rights | Korea | Legal Efficiency | 4.2 | 3.2 |
| Property Rights | Korea | IP Protection | 4.6 | 3.2 |
| Property Rights | Korea | Contract Enforcement | 6.5 | 4.5 |

## Applying Coefficient to U.S. Pillar Score Shock

- IC – Trade freedom: 6.2 → 5.7 (Δ = −0.5), weight = 29%
- DC – Business freedom: 6.0 → 5.5 (Δ = −0.5), weight = 25%

- Elasticities from ACMD model (unchanged): βIC=6.37, βDC=8.03
  A drop in the score produces a loss of |Δ|×weight×β which is then attenuated by the coverage coefficient α.

# US coverage coefficients (α)

### (a) IC — Trade exposure coverage (αIC,Trade)

- OECD TiVA 2023 edition (United States country note, 2020 values) reports:[163]
  - Foreign value-added content of U.S. exports: 7.5%
  - Domestic value added driven by foreign final demand: 7.8%
  - Imported intermediates subsequently embodied in exports: 12.2%

- We combine these exposures using a set-union:
  αIC,Trade=1−(1−0.078)(1−0.075)(1−0.122)=0.2511977

### (b) DC — Business freedom coverage (αDC,BF)

- We use “share of market producers” measured with the OECD public employment statistic: U.S. public employment share = 15.0% (2021) ⇒ market share = 1 − 0.150 = 0.85.[164]

- These are directly published figures (no assumed values). The TiVA edition’s latest year is 2020. Government at a Glance uses 2021 for public employment. Both are the most recent data.

## Denominators (2023, official)

- GDP per capita (current US$), 2023: $82,304.62043 (World Bank WDI via FRED series PCAGDPUSA646NWDB).[165]

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[163] Organisation for Economic Co-operation and Development (OECD), *ICIO-TiVA Highlights: GVC Indicators for the United States*, November 2023, https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/trade-in-value-added/tiva-2023-USA.pdf.
[164] Organisation for Economic Co-operation and Development (OECD), *Government at a Glance 2023* (Paris: OECD Publishing, 2023), https://www.oecd.org/en/publications/government-at-a-glance-2023_c4200b14-en/united-states_015a6beb-en.html?.
[165] Federal Reserve Bank of St. Louis (FRED), “PCAGDPUSA646NWDB” [GDP per capita (current US$), United States], accessed August 19, 2025, https://fred.stlouisfed.org/series/PCAGDPUSA646NWDB.

- Population, 2023: 336,806,231 (World Bank WDI via FRED series POPTOTUSA647NWDB).[166]

Table 4: Results (U.S., 2023 USD)

| Pillar | Component | Δ score | Weight | Elasticity (%/pt) | Coverage α | Raw impact (% GDPpc) | Attenuated impact (% GDPpc) | Loss $/capita | Total loss (billion $) |
|---|---|---|---|---|---|---|---|---|---|
| IC | Trade freedom | −0.5 | 0.29 | 6.37 | 0.2511977 | −0.923650 | −0.232019 | −$190.96 | −$64.32 |
| DC | Business freedom | −0.5 | 0.25 | 8.03 | 0.85 | −1.003750 | −0.853188 | −$702.21 | −$236.51 |
| Total | | | | | | −1.927400 | −1.085206 | −$893.17 | −$300.83 |

**Under our specified score declines and official coverage measures, the U.S. experiences an attenuated loss of −1.085% of GDP per capita, or about $893 per person, totaling roughly $300.8 billion over a ten-year period. In addition, U.S. losses from KOPMA amount to $128 billion over a ten-year period**

- In addition, there are significant losses to U.S. Industry from Korean Online Platform Monopoly Act (KOPMA) which we note below. We derive this number in the following way.

KOPMA targets the following six sectors:

1. Online platform intermediary services (e-commerce marketplaces)
2. Online search engines (e.g., Naver, Google)
3. Social networking services (e.g., KakaoTalk)
4. Digital content services (e.g., video/music streaming)
5. Operating systems (e.g., Android/iOS in Korea)
6. Online advertising services

- The full digital economy spans nearly a third of GDP (~$600–650B today). E-commerce, including marketplaces, forms a significant subset (~$170–230B currently). Enterprise digital spending and ICT exports & services also make major contributions.

- Most of the publicly available data suggests that the size of the six sectors impacted by KOPMA is between $150-170 billion now for on-line market, impacted by KOPMA and as much as $600 billion for the total digital economy. We use $170 billion as the starting market size, which is in the mid-range of the estimates.

[166] Federal Reserve Bank of St. Louis (FRED), "POPTOTUSA647NWDB" [Total population, United States], accessed August 19, 2025, https://fred.stlouisfed.org/series/POPTOTUSA647NWDB.

### Korean Regulated Platform Market Projection with GDP Share (2024–2034)

- The table below presents projections of the Korean regulated platform market from a baseline of USD 170 billion in 2024. This is 8.7% of Korean GDP. It also includes estimated shares of Korea's GDP in 2034, assuming GDP grows at a compound annual growth rate of 2.5% to reach approximately USD 2496.2 billion.

**Table 5: Korean Regulated Platform Market Projections**

| Scenario | CAGR (%) | 2034 Market Size (USD Billion) | 2034 Share of GDP (%) |
|---|---|---|---|
| Conservative | 4.5 | 264.0 | 10.6 |
| Moderate | 6.0 | 304.4 | 12.2 |
| Aggressive | 8.0 | 367.0 | 14.7 |

- Using moderate CAGR prediction, we find the market growing to $304 billion by 2034.

## US Firm Share in KOPMA Implicated Sectors

- The table below summarizes estimated U.S. firm participation in the six sectors targeted under KOPMA.

**Table 6: Estimated U.S. Firm Participation in Sectors Targeted by KOPMA**

| Sector | Total Market Size (USD) | Estimated U.S. Firm Share (%) |
|---|---|---|
| E-commerce Marketplaces | $160B | 20–30% |
| Online Search Engines | $6–7B | 43% |
| Social Networking | Part of ~$10B+ digital | 20–30% |
| Digital Content Services | $5–10B+ | 25–35% |
| Operating Systems / App Platforms | $40B+ | 90–100% |
| Online Advertising | $10B | 60–70% ($6–7B) |

- We will use an aggregate 50% for U.S. share based on these different elements, understanding this is an approximation.

## Application of SRB-γ ACMD Model

- We have applied our model (described in Annex 2A) to tell U.S. about potential changes to the scale of the market in Korea and its impact on the U.S. firms as a result of the application of the policy. More information can be found about the ACMD model at www.shankersingham.com and in the four academic books and numerous peer reviewed research articles we have authored on the topic.

- We have calculated the impact of the bill on international competition (IC), domestic competition (DC) and property rights (PR) pillars for Korea and the U.S., evaluating the losses to the market and loss of market opportunity for U.S. players.

- The advantage of the ACMD model is it picks up total economic impacts and dynamic effects across the whole of the economy, enabling U.S. to compute a more accurate figure on the damage done to the market and to U.S. players.

### Korea Market Impact (significantly concentrated in the relevant market but with nationwide trans-economy dynamic effects) based on KOPMA

- We have estimated the impact of the bill on the sub-pillar scores from our model:

**Table 7: Estimated Impact of KOPMA on Sub-Pillar Scores**

| Pillar | Indicator | Score Before | Score After | GDP Per Capita % Drop | GDP Loss |
|---|---|---|---|---|---|
| Property Rights | Investor Protection | 5.3 | 4.4 | 4.6% | $83.26bn |
| Property Rights | Challenging Regulation | 3.4405 | 2.5 | | |
| Domestic Competition | Economic Freedom | 6.0 | 4.5 | 6.048% | $107.47bn |
| Domestic Competition | Internet Score | 6.8 | 4.8 | | |
| Domestic Competition | Government Integrity/ Regulatory Promulgation | 5.1 | 4.1 | | |
| International Competition | International Shipment | 4.5 | 3.0 | 3% | $54.29bn |

| | | | | | |
|---|---|---|---|---|---|
| International Competition | Regulatory Promulgation | 5.4 | 4.0 | | |
| International Competition | Trade Freedom | 5.8 | 4.0 | | |

- Total GDP loss because of the policy on the Korean market's potential growth is approximately $250 billion. As a result of the policy, U.S. players will be impeded from access to this market, and so the loss correlates to the loss of opportunity for U.S. firms.

- The share of the relevant market as a percentage of overall Korean GDP is estimated to move from 8.7% to 12% of GDP over the next ten years. U.S. players, including Coupang currently account for around 50% of the six sectors of the market implicated by the DMA, as noted above.

- The estimated loss of opportunity for U.S. players is given by the table below

**Table 8: Estimated U.S. Losses from KOPMA Impact on Sub-Pillar Scores**

| Year | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 (end) |
|---|---|---|---|---|---|---|---|---|---|---|
| US Loss/ $bn | 10.9 | 11.31 | 11.72 | 12.13 | 12.53 | 12.94 | 13.36 | 13.78 | 14.19 | 15 |
| Percentage of GDP implicated | 8.72 | 9.048 | 9.376 | 9.704 | 10.03 | 10.358 | 10.69 | 11.02 | 11.35 | 12 |

- Total losses over a ten-year period could be as much as $128 billion (using 2024 USD). This could translate into $192 billion in U.S. GDP drag, and $70 billion in lost market cap across U.S. tech firms.

- This $300 billion hit to the U.S. economy is also supplemented by the impact of the KOPMA and its cousins on the U.S. economy. We have already found that this ex-ante approach to tech platforms costs the U.S. economy $128 billion. The total impact on the U.S. economy could therefore be as high as $428 billion**.** Moreover, this may well understate the impact of the cost to the U.S. economy as both of these policies interacting together are likely to create a vicious circle of negative economic effects.

# Capturing the Interaction Between Ex-Ante Regulation and Interventionist Antitrust

- In our memo, we separated the costs into two components: roughly $300 billion from interventionist antitrust enforcement (applicable to all sectors as this is applied in general to large U.S. firms) and $128 billion from KOPMA-style ex-ante regulation, which is much more specific to the large tech platforms. These standalone figures are significant, but they do not capture the full magnitude of the economic harm. The reason is that these policies are not independent, they are mutually reinforcing.

    - Ex-ante regulation locks in rigid obligations and asymmetric burdens, raising compliance costs and freezing market structures before any evidence of consumer harm is established. This makes the market appear less competitive, creating the very conditions antitrust authorities then cite as evidence of dominance or abuse.
    - Interventionist antitrust enforcement then interprets these distorted structures as confirmation of harm, making infringement findings more likely and remedies more intrusive.

- This creates a vicious circle in which regulation distorts the market and enforcement validates the distortion. The consequence is a compound effect: allocative inefficiency from higher prices and fewer features; productive inefficiency from duplicated compliance costs; and dynamic inefficiency as investment, interoperability, and innovation are chilled.

**The combined effects of interventionist antitrust enforcement and KOPMA regulations may cause a total economic loss of $525 billion to the U.S. economy over ten years.**

- If antitrust alone leads to GDP loss of $300 billion, and ex-ante regulation a further $128 billion, the naïve sum is $428 billion. But the interaction multiplies these losses. Using the ACMD elasticity logic, we apply a conservative interaction premium of 15–20% to reflect the additional deadweight loss from uncertainty, fragmented standards, and foregone innovation. On that basis, the true combined loss is closer to $500–525 billion.

## Policy Implication

- This is not simply a matter of two parallel policies each causing harm. It is a systemic interaction, and it means that addressing one distortion without addressing the other will not resolve the problem. Only by re-anchoring both enforcement and regulation to the consumer-welfare standard can Korea avoid compounding the losses it is imposing on the U.S. economy. Left unchecked, the combined drag of interventionist antitrust

and precautionary regulation threatens to become a persistent $500 billion+ cost to the U.S. economy and a direct trade issue between the two countries.

# Annex 2A: The Singham-Rangan-Bradley (SRB) and the SRB-γ Models

The following annex provides an overview of the Singham-Rangan-Bradley (SRB) and SRB-γ models. The content in this section includes direct excerpts, as well as summarized and rewritten information from *International Trade, Regulation and the Global Economy: The Impact of Anti-Competitive Market Distortion*s by Shanker Singham.[167] For a full, comprehensive explanation of the models, consult chapters 3 and 4 of the cited book.

## Overview of the SRB ACMD Model

The Singham-Rangan-Bradley (SRB) model is an econometric framework designed to quantify the impact of anti-competitive market distortions (ACMDs) on a country's economic performance. It is the first model of its kind to provide a basis for evaluating how policy-induced distortions in key areas affect GDP per capita. "The SRB model is founded on the notion that there are three fundamental pillars of economic development through which anti-competitive policies affect market outcomes: property rights protection, domestic competition, and international competition." In other words, distortive government interventions in the economy ultimately operate by undermining one or more of these three pillars, which are all essential to productivity and growth. The SRB model's purpose is to measure and predict how improvements or degradations in these pillars translate into changes in a country's GDP per capita, thereby giving policymakers an objective gauge of the cost of distortive policies and the benefits of pro-competitive reforms.

## Structure and Inputs of the SRB Model

**Composite Pillar Indices**: To capture each pillar quantitatively, the SRB model uses composite indices for Property Rights, Domestic Competition, and International Competition. Each index is constructed from numerous measurable sub-factors reflecting policy conditions and institutional quality in that area. For example, the Property Rights Protection index follows the Heritage Foundation's criteria for grading legal protection of property rights (including enforcement of contracts, expropriation risk, intellectual property protection, judicial effectiveness, etc.). The Domestic Competition index similarly aggregates indicators of regulatory freedom and market conditions such as business

[167] Shanker A. Singham, *International Trade, Regulation and the Global Economy: The Impact of Anti-Competitive Market Distortions* (New York: Routledge, 2024), https://www.routledge.com/International-Trade-Regulation-and-the-Global-Economy-The-Impact-of-Anti-Competitive-Market-Distortions/Singham/p/book/9781032944166?srsltid=AfmBOoqXzFG_ToNS1-Dl6VPYsMYz6ttsNaWOkFYlXlVoLCvIEQ-LKICr.

freedom, labor market flexibility, financial freedom, infrastructure and utilities access (e.g. electricity availability, logistics performance), and market openness measures to reflect the extent to which government policies enable or restrict competitive behavior in the domestic economy. The International Competition index comprises factors like tariff and non-tariff barriers and trade facilitation metrics (logistics performance indicators on customs efficiency, timeliness of shipments, etc.). Each pillar index is thus an aggregate score that captures how conducive a country's policy environment is to competition and property rights in that domain, independent of direct economic outcomes.

**Econometric Model Structure**: The SRB model links these policy indices to economic outcomes through a two-stage econometric structure grounded in growth theory. First, it identifies a set of fundamental factors that directly determine productivity (and thereby GDP per capita) in an economy. In the initial SRB specification, these factors included the stock of foreign direct investment per capita, domestic credit availability (financial capital from the banking sector), public health expenditures, educational attainment, and the presence of natural resource exports (e.g. fuel, ores, and metals). Together, such variables represent the channels through which policy distortions affect productivity. The model then posits that a country's performance in each of these areas is influenced by the policy "pillar" scores (i.e., by the degree of property rights protection, domestic market competition, and openness to international competition in that country). In other words, the SRB framework models GDP per capita (productivity) as a function of key input factors (investment, credit, human capital, etc.), which in turn are functions of the three pillar indices that reflect the policy environment. This approach follows the insight of Solow-type growth models that emphasize factor accumulation and total factor productivity, while explicitly incorporating institutional quality through the competition and property rights indicators.

**Data Inputs and Calibration**: The SRB model is calibrated on cross-country data and uses standard controls to ensure robustness. GDP per capita is measured in comparable international-dollar terms (PPP) so that countries can be evaluated on an equal footing. The model deliberately excludes outcome-driven metrics from the construction of its pillar indices, focusing on policy and institutional inputs. This avoids circularity and ensures that the indices are truly exogenous explanatory variables. In the regression analysis, additional control variables such as human capital (e.g. expected years of schooling) and population size (log of population) are included to account for differences in labor force quality and economic scale, to isolate the impact of policy distortions on income. Thanks to its rich specification, the original SRB model achieved a very high goodness-of-fit. In sample, it could explain roughly 90% of the cross-country variation in GDP per capita, with a mean prediction error of only ~4% (i.e. 96% accuracy in estimating income levels from the input

variables). This far exceeds the explanatory power of previous single-index measures. Such results underscore that the SRB approach, by assigning appropriate weights to myriad policy factors across the three pillars, captures the true drivers of productivity more effectively than simpler metrics.

**Purpose and Use**: By quantifying the relationships between policy-induced competition metrics and economic outcomes, the SRB model allows analysts to simulate the effect of reforms. For example, one can estimate how a given improvement in a country's Domestic Competition score or Property Rights score would feed through to greater investment, credit, and productivity, ultimately increasing per-capita GDP. Indeed, SRB model projections indicate that reducing anti-competitive market distortions yields substantial gains in GDP per capita, in line with findings from other studies (e.g. OECD research on growth impacts of regulatory reform). In practical terms, the model can be used to produce estimates such as "a one-point increase (on a 1–7 scale) in a country's domestic competition index is associated with a double-digit percentage increase in GDP per capita", illustrating the large payoff to pro-competitive policy improvements. These quantitative insights provide an evidence-based rationale for regulatory and trade policy reforms by showing the order-of-magnitude impact on economic welfare.

## The SRB-γ Model

As the SRB model was further developed and tested, refinements were made to address certain econometric concerns and to simplify its application. SRB-γ (the SRB "gamma" model) refers to the final, refined version of the SRB econometric model. This version retains the same foundational pillars and purpose but introduces adjustments to improve the model's robustness and usability for policymakers. The main impetus for developing the SRB-γ variant was to resolve endogeneity issues identified in the original specification. In the first SRB model, the three pillars were in effect combined into a single overall policy index (through interaction terms and the multi-stage regression structure), which raised the possibility of multicollinearity and made it harder to discern each pillar's distinct effect. There was also a potential feedback issue insofar as a single composite score might be influenced by GDP itself or by unobserved country traits, complicating causal interpretation.

**Refinements in SRB-γ**: "This model refines and simplifies the model and correlates the three different pillars separately with GDP per capita." In practical terms, this means the revised model abandons the single-index reduced-form in favor of a clearer specification where each pillar enters as an independent variable in the regression (rather than being multiplied together in complex interactions). By breaking down each pillar and evaluating its relationship with GDP per capita individually, the model eliminates the endogeneity

concern that arose from using one combined score. The SRB-γ model is implemented as a panel data regression (covering multiple countries over time) with appropriate fixed effects. Specifically, it models (logged) GDP per capita as a function of the Property Rights, Domestic Competition, and International Competition index values for each country-year, along with several control variables (e.g. human capital, population, fiscal factors) and includes an unobserved country-specific effect (to capture time-invariant national attributes) and a time-period effect (to capture global trends). This panel approach improves the rigor of the estimates by using within-country changes over time and controlling for country fixed effects, thereby mitigating omitted variable bias and better pinpointing the impact of policy changes.

The SRB-γ variant provides a rigorous, data-driven means to evaluate how anti-competitive distortions in property rights, domestic markets, and trade reduce a nation's economic output, and conversely how pro-competitive policy reforms can boost productivity and incomes. The SRB-γ framework's pillar structure and empirical calibration allow it to translate abstract concepts of competition and market health into concrete numerical estimates of GDP per capita impact. The refinement to the SRB-γ model has enhanced the clarity and reliability of these estimates, making the tool even more useful for guiding policy. This model forms a technically robust annex to policy analysis, enabling stakeholders to quantify the growth dividends of removing distortive regulations and strengthening the competitive foundations of an economy.

## Changes to SRB Model

"Initial projections from the SRB model suggest that a reduction in ACMDs does lead to a significant increase in GDP per capita in line with the projections from the agency based model and from other sources, such as OECD and other figures on the impact of anti-competitive regulation on growth.

In order to deal with the concerns which emanate from attempting a single correlation between a single pillar score covering IC, DC and PR we then attempted to break down each pillar or force to correlate that force with GDP per capita by itself. We found this eliminated the endogeneity concern. We also greatly simplified the model specifications as below, incorporating country and time fixed effects.

$$\ln(GDP\ per\ capita)_{it} = \beta_0 + \beta_1 Domestic\ Competition_{it} + \boldsymbol{X'_{it}\gamma} + v_t + \lambda_i + \epsilon_{it} \quad (1)$$

$$\ln(GDP\ per\ capita)_{it} = \beta_0 + \beta_1 Property\ Rights_{it} + \boldsymbol{X'_{it}\gamma} + v_t + \lambda_i + \epsilon_{it} \quad (2)$$

$$\ln(GDP\ per\ capita)_{it} = \beta_0 + \beta_1 International\ Competition_{it} + \boldsymbol{X'_{it}\gamma} + v_t + \lambda_i + \epsilon_{it} \quad (3)$$

We construct a panel data model of GDP as a function of each competition index, several observed control variables and an unobserved time invariant country specific effect and a country invariant time period specific effect." The initial panel data set of 2010-2019 was extended to 2023 and the OLS regressions re-run. The below table shows the coefficients applicable for a one-point increase in each individualized pillar score.

## Results of SRB-γ ACMD OLS Regression using longer set of 2010-2023 Panel Data

| Independent Variable | Coefficient | Standard Error. Clustered at the country level | t-stat | p-value | Observations |
|---|---|---|---|---|---|
| Property Rights | 0.0686 | 0.0283 | 2.42 | 0.017 | 1,852 |
| Domestic Competition | 0.0803 | 0.0373 | 2.15 | 0.033 | 1,798 |
| International Competition | 0.0637 | 0.0367 | 1.74 | 0.085 | 2,042 |

The dependent variable is the log of country GDP per capita, by year. Estimation results are based on annual data from 2010 to 2023. All regressions include country and year fixed effects. The most demanding specification.

**Interpretation**: For the Property Rights Index, which ranges from 2.2 to 6.2, the estimate suggests that when a country achieves a one-point increase in the property rights index, then its per capita income increases by 6.9%. A similar interpretation applies to the other two indices.

# Annex 2B: Excerpt from "The Role of Consumer Welfare in Competition Implementation and Enforcement"

Annex 2B reproduces an excerpt from Chapter 3, "The Role of Consumer Welfare in Competition Implementation and Enforcement," in Shanker A. Singham and Alden F. Abbott, *Trade, Competition and Domestic Regulatory Policy: Trade Liberalisation, Competitive Markets and Property Rights Protection* (London: Routledge, 2023). The excerpt is included to give readers the authors' treatment of the risk of drift of enforcement away from consumer welfare toward fairness and competitor-protection rationale referenced in the main text; for full context, consult the cited chapter.

## Possible Retreat from Consumer Welfare towards Interventionist Antitrust?

"In the last few years, the rise in economic importance of high-technology digital "platforms," such as Google, Amazon, Apple and Facebook, has led to aggressive EU competition cases against those entities, based on abuses of dominant position. The theories of competitive harm have focused primarily on producer welfare – they have centred on platform conduct that may disadvantage certain competitors, while neglecting to show any actual or plausible harm to consumer welfare. Cases of this sort not only move away from a consumer welfare approach, but they sanction potentially innovative conduct, thereby discouraging the sort of competition that drives dynamic economic welfare improvements. These EU prosecutorial initiatives have been dubbed a form of "precautionary principle" antitrust,[168] in that they condemn novel little understood business arrangements, merely because they might in the future enhance a dominant platform's market power.

Although the U.S. enforcers have not yet explicitly adopted a precautionary antitrust approach with respect to digital platforms, there are significant indications that American antitrust enforcement may also be wavering in its commitment to consumer welfare.[169] Beginning around 2016, a number of interventionist minded critics began to assert that current antitrust enforcement has become ineffective and needs to be redefined. To bolster their case, they cited an alleged rise in American market concentration and diminution in American competitive vigour (claims which have been contested but with

[168] See Aurelien Portuese, *European Competition Enforcement and the Digital Economy: The Birthplace of Precautionary Antitrust, in The Global Antitrust Institute Report on the Digital Economy* (Joshua D. Wright and Douglas H. Ginsburg, eds., 2020), at 597–651.
[169] See generally Alden Abbott, U.S. *Antitrust Laws: A Primer*, Mercatus Center at George Mason University (2021), https://www.mercatus.org/publications/antitrust-policy/us-antitrust-laws-primer.

little effect thus far on the public policy debate). Some analysts stressed abandoning antitrust's overarching consumer welfare goal and its replacement with a multifactor weighing of diverse interests, including those of fairness, democracy, small business, labour and the environment, among others. Research reports and congressional hearings in 2020 and 2021 prompted congressional introduction of legislative proposals to limit or prohibit acquisitions by large firms and impose far tougher monopolisation standards. Lawsuits filed in late 2020 by the Justice Department and the Federal Trade Commission ( joined by various states) against Google and Facebook, respectively, stressed harm to competitors, and were in tension with a truly consumer welfare-centric approach to antitrust.[170] Both federal complaints also raised the possibility of a corporate "breakup" to cure the claimed antitrust violations, a drastic remedy that has seldom been employed in American monopolisation cases.

These developments, combined with the rewrite of merger guidelines previously noted, suggest the real possibility of a return to a more restrictive approach to antitrust, perhaps featuring "big is bad" populism in the U.S. and a greater reliance on a rules-based oversight of dominant firms in the EU. Another possibility is the partial deemphasis of antitrust in favour of regulation in the case of dominant platforms.[171] Indeed, in December 2020, the European Commission issued the Digital Market Act (DMA),[172] a form of direct regulation of digital platforms. The DMA, which becomes effective in 2023, requires that digital "gatekeepers" (entities that provide digital "core platform services" characterised by huge scale economies, strong network effects and lock-in, among other factors) comply with a list of requirements, including, for example, allowing third-party interoperability with the gatekeeper services and enabling businesses access to data they generate in the platform.

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[170] See Thomas Lambert, "Why the Federal Government's Antitrust Case Against Google Should—and Likely Will—Fail," *Truth on the Market* (18 Dec 2020), https://truthonthemarket.com/2020/12/18/why-the-federal-governments-antitrust-case-against-google-should-and-likely-will-fail; Dirk Auer, "Facebook and the Pros and Cons of Ex Post Merger Reviews," *Truth on the Market* (11 Dec 2020), https://truthonthemarket.com/2020/12/11/facebook-and-the-pros-and-cons-of-ex-post-merger-reviews/.

[171] See generally Gabriella Muscolo and Alessandro Massolo, "Will the Biden Presidency Forge a Digital Transatlantic Alliance on Antitrust," in *The new U.S. antitrust administration* (Concurrences 2021), https://www.concurrences.com/IMG/pdf/03.concurrences_1-2021_on-topic_biden_antitrust-2.pdf?65669/bbc9e79042d0e1899a5ed1e956d8e80f210210d02629ba2d2678d5dabaf05.

[172] *Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)* (COM (2020) 842), European Commission (2020); see also, "Deal on Digital Markets Act: EU rules to ensure fair competition and more choice for users," Press Release, European Commission (24 Mar 2022), https://www.europarl.europa.eu/news/en/press-room/20220315IPR25504/deal-on-digital-markets-act-ensuring-fair-competition-and-more-choice-for-users (As discussed in the press release, the DMA will be enforceable six months after publication in the European Journal, which will occur 20 days following the finalization of DMA language and approval by the European Parliament and Council.)

Substantial fines and (as a last resort) behavioural and structural remedies are to be imposed for violation of DMA obligations.

During 2020, 2021 and 2022, other key jurisdictions, including France, Germany, the UK, Japan and Australia, among others, also pursued digital platform- related regulatory initiatives, leading a former Canadian Competition Commissioner to warn of an "emerging patchwork of digital regulation [that] further amplifies existing incoherence and uneven application of competition regimes on the technology sector and digital markets across the globe."[173] The existence of new regulation does not formally displace antitrust but it adds a new layer of obligations that may impose new and potentially inconsistent burdens on large digital companies, depending upon where they operate. While the U.S. has avoided the imposition of new competition-like regulatory requirements on top of antitrust obligations in recent decades, some influential American commentators are now calling for regulation as an adjunct to antitrust in dealing with "big tech" companies.[174] Also, in March 2021, the FTC served notice that it might consider promulgating rules to prohibit unfair methods of competition[175] and in December 2021, the FTC released a "Statement of Regulatory Priorities" that disclosed plans for competition-related rulemakings.[176] Furthermore, during 2022, legislative proposals to impose new antitrust limitations on large companies (including tight restrictions on mergers and various other requirements) remained under consideration in the U.S. House and Senate.

Despite these recent developments, it is still far too soon to proclaim the end of consumer welfare-based antitrust, at least as a general matter. Antitrust enforcement in the U.S. and the EU has come to rely heavily on economic analysis, which lends support to welfare-based measures. Furthermore, particularly in the U.S. (but to some extent in the EU as well, as demonstrated by the February 2022 EU General Court's Intel decision[177]), courts remain

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[173] John Pecman and Antonio Di Domenico, *In Comity We Trust: Utilizing International Comity to Strengthen International Cooperation and Enforcement Convergence in Multijurisdictional Matters*, 3 *Antitrust Chronicle* 2021, Issue 1, at 23.

[174] See Tom Wheeler, Phil Verveer, and Gene Kimmelman, "The Need for Regulation of Big Tech Beyond Antitrust," *Brookings Institution* (23 Sept 2020), https://www.brookings.edu/blog/techtank/2020/09/23/the-need-for-regulation-of-big-tech-beyond-antitrust/. On 21 January 2021, Kimmelman was named a Senior Counselor in the Biden Justice Department, "Senior Advisor Gene Kimmelman Resigns from Public Knowledge to Join Justice Department," *Public Knowledge* (21 Jan 2021), https://www.publicknowledge.org/press-release/senior-advisor-gene-kimmelman-resigns-from-public-knowledge-to-join-justice-department/.

[175] "FTC Acting Chairwoman Slaughter Announces New Rulemaking Group," Press Release, Federal Trade Commission (25 Mar 2021), https://www.ftc.gov/news-events/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group.

[176] "Statement of Regulatory Priorities," Federal Trade Commission (2021), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf.

[177] Judgment of the General Court, Case *T-286/09 RENV, Intel Corporation v. Commission* (2022), ECLI:EU:T:2022:19; General Court of the European Union, Press Release No. 16/22, "The General Court

in place as a major check on the quick abandonment of decades of doctrinal development focusing increasingly on economic efficiency and consumer welfare promotion. To be sure, the increased focus on public regulation in many jurisdictions (including potentially the US) and the contemplation of possible statutory revisions to American anti-trust law may counteract judicial limitations on changes in antitrust policy direction. Up to now, of course, big digital platforms have been the primary targets of those calling for a major competition law overhaul. Firms outside of "big tech" may be a bit less affected. In short, at this time, it is impossible to say whether market-oriented consumer welfare-based antitrust will "weather the storm" and remain more or less intact or be swept away in favour of expansive governmental micromanagement of the terms of competition.

The best weapon to combat the recent fascination with aggressive government antitrust interventionism (and thereby to successfully promote the global acceptance of economics-based consumer welfare analysis) may be a pragmatic focus on the policies that underlie innovation and economic dynamism. In recent decades, the U.S. advanced the most robust consumer welfare approach to antitrust in the world, and the least regulatory approach to the treatment of innovation. During this period, the U.S. brought forth the internet, leading digital technologies and standards, almost all of the world's great digital platforms, most of the world's successful new pharmaceuticals, and the world's greatest biopharma innovations (consider the mRNA technologies that underlie successful COVID-19 vaccines and will likely generate many other medical breakthroughs).[178] There is every reason to believe that this enviable record of welfare-enhancing discoveries owed much to the general American environment of relatively "permissionless innovation,"[179] which featured a far more market-friendly approach to regulation and to antitrust (embodied in the consumer welfare standard) than elsewhere. Hopefully, the marshalling of evidence pointing to this reality could do much to dampen the enthusiasm for sudden and dramatic pro-regulatory changes in antitrust policy."

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annuls in part the Commission decision imposing a fine of €1.06 billion on Intel," January 26, 2022, https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-01/cp220016en.pdf; plus analysis: Skadden, Arps, Slate, Meagher & Flom LLP, "EU General Court Overturns Intel Antitrust Fine," February 7, 2022, https://www.skadden.com/insights/publications/2022/02/eu-general-court-overturns-intel-antitrust-fine.

[178] Derek Thompson, "How mRNA Technology Could Change the World," *The Atlantic* (29 Mar 2021), https://www.theatlantic.com/ideas/archive/2021/03/how-mrna-technology-could-change-world/618431/

[179] Adam Thierer, *Permissionless Innovation: The Continuing Case for Comprehensive Technological Freedom*, 2nd ed. (Arlington, VA: Mercatus Center, 2016).

# Annex 2C: Excerpt from "Impact of the New Media Economy"

Annex 2C reproduces an excerpt from Chapter 14, "Impact of the New Media Economy," in Shanker A. Singham and Alden F. Abbott, *Trade, Competition and Domestic Regulatory Policy: Trade Liberalisation, Competitive Markets and Property Rights Protection* (London: Routledge, 2023). The excerpt is included to give readers the authors' treatment of the New Media Economy referenced in the main text; for full context, consult the cited chapter.

## Excerpt on the New Media Economy

"Big digital platforms unquestionably have conferred substantial economic benefits on society, reducing transactions costs (think of sales generated through Amazon and other platforms), generating instantaneous low-cost transfers of information, and promoting new market segments (consider telemedicine and other gains facilitated through platform improvements). Proposals to impose new far-reaching limitations on digital platform activities appear to ignore how regulation may diminish platforms' ability to continue to provide these benefits as effectively, let alone continue to generate the innovations for which the platforms are noted. Added to these costs must be the costs stemming from regulatory compliance; from reduced economic efficiency due to the regulation-induced propping up of unregulated enterprises; and from reduced competition when dominant platforms manipulate regulation to bolster their monopoly status by undermining rivals and potential entrants. These potential costs should be (but seemingly have not been) weighed by governments against the questionable benefits of the complex regulatory schemes being advanced. Broad-based regulation has had a disappointing track record in the U.S.,[180] and empirical research does not build a strong general case for the success of regulation.[181] Furthermore, the greater the complexity of regulatory proposals, the greater the possibility that error will intrude and undermine the hoped-for benefits of the regulatory scheme. Based on these considerations, it seems unlikely that comprehensive big data platform regulation will advance economic welfare – instead, it may well reduce it.

The net costs (or benefits) of digital platform regulatory oversight will be manifested over time and may be taken as a given. The welfare effects of platform regulation may, however, be considered separately from the legal treatment of the new media that platforms help promote. We turn now to a variety of considerations affecting the treatment of NME. In the

[180] See *Regulatory Breakdown: The Crisis of Confidence in U.S. Regulation* (Cary Coglianese, ed., University of Pennsylvania Press, 2012).
[181] David Parker and Colin Kirkpatrick, *The Economic Impact of Regulatory Policy: A Literature Review of Quantitative Evidence*, Expert Paper No. 3, Organization for Economic Co-operation and Development (2012).

context of NME, under the right circumstances narrowly and precisely focused regulation may be more justifiable than the broad-based regulation being imposed on platforms."

# Annex 3 – Freeing the Global Market: How to Boost the Economy by Curbing Regulatory Distortions

Working Paper prepared by Shanker Singham for the Council on Foreign Relations in October 2012

## Introduction

The U.S. economy faces major challenges competing internationally. One of the most worrisome is the growing use in China and other advanced developing countries of anticompetitive market distortions (ACMDs)—including regulatory protection that privileges specific companies—which put foreign competitors at a disadvantage.[1] ACMDs are government actions that give certain business interests artificial competitive advantages over their rivals, be they foreign or domestic, to the detriment of consumer welfare. These market distortions are especially damaging to the industries in which the United States enjoys the greatest comparative advantages, but they are also harmful to the long-term prosperity of developing economies and cost the global economy trillions of dollars.

To combat ACMDs, the conventional trade policy approach of focusing on the removal of narrow market access barriers is inadequate. Trade negotiations traditionally involve countries removing domestic barriers protecting import-sensitive industries in exchange for greater access abroad for successful export industries. Opposing trade ministries are the only parties at the negotiating table. Yet this approach does not build competitive markets and drive through regulatory reform. Instead, the United States and other countries should initiate new international negotiations that bring to the table those who advocate for exporters (typically trade ministries) and those who advocate for domestic consumers and competing firms (typically competition agencies). Such negotiations would have the goal of maximizing consumer welfare, using competition to deliver more and better goods and services at lower prices.

The United States should lead in this effort because these market barriers pose a considerable threat to the U.S. industries that today constitute the country's comparative advantage. To carry out this approach to international negotiations, the U.S. federal government needs to restructure its eco- nomic agencies around the goal of strengthening competitive markets at home and abroad. It will also need to develop new tools to reduce market distortions that have flourished largely outside the scope of the World Trade Organization (WTO) and other trade agreements.

## Threats to U.S. Comparative Advantage: Why Current Trade and Competition Negotiations Are Inadequate

U.S. innovation has thrived in large part due to an effective regulatory environment. The United States has emerged as a global leader in software, biotechnology, advanced manufacturing and ser- vices, and other sectors that depend on proprietary intellectual property (IP). Today, IP-intensive companies increasingly depend on overseas markets for growth. Yet the ability of these companies to realize their full market potential is being compromised by other countries' market-distorting regulatory measures. Such distortions are increasing in number and significance in many of the world's fastest-growing consumer markets, such as China, Brazil, India, and Russia.

IP-intensive industries are high-value ones that many countries seek to nurture, which is why they tend to be protected by foreign governments that want to see domestic firms move up the value chain. But the forms of protectionism are rarely traditional tariff barriers or quotas, most of which have been eliminated through successive rounds of international trade negotiations. Governments instead set product standards, limit entry by competitors, restrict advertising, and otherwise distort market competition in ways that benefit favored domestic firms. The competitive success of these

U.S. industries are therefore contingent on reducing market barriers, such as discriminatory standards and regulatory policies that secure advantages for domestic competitor firms in overseas markets.

The outcome matters greatly for the economic future of the United States. Take one example: the International Trade Commission (ITC) recently estimated that U.S. firms with collective global sales of $5.9 trillion were harmed by China's "indigenous innovation" policy, a basket of regulatory measures designed to benefit domestic companies at the expense of their foreign competitors.[2]

The best-paying U.S. jobs are at stake. Export jobs generally pay higher wages than domestic industry jobs. Wages in research-based industries that rely on proprietary intellectual property are higher still. The U.S. industries with the highest annual average wages are all IP-intensive, while the industries with the lowest wages are not (see Table 1).[3]

Table 1. Annual Average Wages, by Industry (2011)

| Industries | Annual Average Wages |
|---|---|
| Highest wages | |
| Information software | $110,052 |

| | |
|---|---|
| Petroleum, coal products | $70,855 |
| Communications equipment | $70,036 |
| Pharmaceuticals, medicines | $69,689 |
| Navigational, electro medical | $63,667 |

| | |
|---|---|
| Lowest wages | |
| Plastics, rubber products | $35,602 |
| Food, beverage, tobacco | $33,444 |
| Wood products | $30,816 |
| Furniture | $30,625 |
| Textiles, apparel, leather | $26,667 |

*Source:* Bureau of Labor Statistics.

High-wage, IP-intensive industries are the backbone of the U.S. economy. They accounted for 61 percent of total U.S. exports in 2010.[4] Two IP-intensive industries—the health-care sector (including medical devices) and the biopharmaceutical sector—currently account for roughly half, or $24 billion, of the United States' $56 billion in private sector research.[5] Exports from IP-intensive industries have the potential for rapid growth as millions of people in developing countries enter the middle class, consuming more advanced manufacturing and high-tech products.

The United States has established a dominant global position in many high-tech sectors largely as a result of robust intellectual property protection, federal research and development (R&D) support, and a generally supportive regulatory environment. The computer software industry in the United States took off in the 1970s in large part because software producers could protect their ideas through copyright. For centuries Europe was the unquestioned center of pharmaceutical R&D, challenged only by Japan in the postwar period. But in the 1990s, the United States began increasing its share of global pharmaceutical R&D thanks to regulatory changes, patent legislation, and court decisions.[6] A Milken Institute study found that in 1990 the global research-based pharmaceutical industry invested 50 percent more in Europe than in the United States, but by 2006 investment in the United States was 40 percent higher than in Europe.[7] A similar trend can be found in the global share of new chemical entities (NCEs), a proxy for gauging innovative capacity (see Table 2).[8] The United States' global share of NCEs leapt from one-third in the 1980s to nearly two-thirds in the 2000s.

Table 2. New Chemical Entities, by Headquarter Country of Inventing Firm (1971–2010)

| | 1971–1980 | | 1981–1990 | | 1991–2000 | | 2001–2010 | |
|---|---|---|---|---|---|---|---|---|
| | NCEs | % of total | NCEs | % of total | NCEs | % of total | NCEs | % of total |
| United States | 157 | 31% | 145 | 32% | 75 | 42% | 111 | 57% |
| France | 98 | 19% | 37 | 8% | 10 | 6% | 11 | 6% |
| Germany | 96 | 20% | 67 | 15% | 24 | 13% | 12 | 6% |
| Japan | 75 | 15% | 130 | 29% | 16 | 9% | 18 | 9% |
| Switzerland | 53 | 10% | 48 | 11% | 26 | 14% | 26 | 13% |
| UK | 29 | 6% | 29 | 6% | 29 | 16% | 16 | 8% |
| **Total NCEs** | 508 | | 456 | | 180 | | 194 | |

*Source:* The Milken Institute, *The Global Biomedical Industry.*

Access to venture and risk capital has also contributed to the U.S. edge in R&D. The United States captured 68 percent of the $8 billion total global venture capital in life sciences in 2007.[9] Regulatory structures have encouraged capital to flow into start-up companies, and the rewards derived from a strong patent environment stimulate investment and capital flows. When South Korea improved its patent environment, for example, venture capital inflows increased dramatically.[10]

Sound regulatory systems are essential for ensuring vibrant domestic innovation in high-value, IP- based industries. Conversely, distorted regulatory environments abroad can harm the export competitiveness of these industries.

Another leading high-value U.S. export—advanced service industries—is similarly affected by ACMDs. Telecom companies can be frozen out of big foreign markets if governments adopt specific national product standards that differ from prevailing global standards. Financial services firms can be restricted from using domestic electronic payment systems to process credit and debit card trans- actions.

Regulatory measures abroad are often designed to favor national champions or to carry out national industrial strategies that free ride off the innovation of others. The lower costs for favored firms are not secured through business competition, greater efficiency, or a labor cost advantage, but rather through a deliberate skewing of the market by the government to reduce their operating costs in comparison to their rivals.

## Shortcomings of Trade and Competition Rules

Regulatory market distortions, unlike more conventional trade barriers such as tariffs or import quotas, are hard to identify and lurk in the shadows of domestic regulation. They are designed to evade detection and are difficult to quantify.

Traditional trade negotiations have done little to remedy ACMDs. Since they are not necessarily discriminatory in the trade sense of establishing different rules for domestic and foreign companies, attempts to bring them under the jurisdiction of the WTO have not been met with great success.[11] Take, for example, U.S. efforts to alter the Canada Wheat Board's (CWB) anticompetitive activities. The CWB is a state trading enterprise that acts as a single seller for Canadian grain on the world market and for certain domestic markets, practices the United States says give Canada greater flexibility than any commercial seller to price below its competitors in certain markets. The United States brought a case before the WTO, but both the WTO Dispute Settlement Panel and the Appellate Body resisted attempts by the United States to read competition principles into Article XVII of the WTO Agreement, which covers state trading enterprises. The United States argued that state trading enterprises like the CWB should be required to act according to "commercial considerations," which should preclude price cutting in certain markets to expand market share. The WTO panels did not agree with that argument.[12] Efforts by the U.S. Congress to use existing U.S. anti-subsidy laws against some of the more systematic ACMDs in the Chinese market have not been effective either. WTO rules are written in such a way that broad regulatory measures are generally allowed, even if their effect is to block new competitors.

Domestic competition laws within advanced developing countries have been no more successful. They do not generally deal in a concrete way with government anticompetitive practices and focus much more on private practices, such as cartels and single-firm conduct. Government anticompetitive practices consist of laws or regulations that distort what would be otherwise competitive markets, and because they are government actions, most countries' competition laws either expressly exclude them from the law's disciplines or at best apply only hortatory nonbinding mechanisms to rein them in. The success of domestic competition laws depends on the credibility of the competition agency with the government's other branches. In many advanced developing countries where AC- MDs exist, competition agencies are relatively new and powerless.

ACMDs tend to fall between traditional trade disciplines and internal regulatory disciplines. Un- disciplined by existing statutes, ACMDs have been allowed to proliferate. Resources are not being allocated most efficiently, but rather in favor of a particular firm or firms because of an artificial cost advantage created by government regulations.

ACMDs artificially reduce costs for certain companies while raising costs for others who are often in direct competition and raising prices for consumers. Although the costs of

such distortions are difficult to measure precisely, they are far greater than remaining traditional trade barriers, such as tariffs and quotas. One widely cited assessment of the additional gains to the world economy from conventional trade liberalization measures puts the figure at $500 billion annually.[13] The gains from eliminating ACMDs are likely to be many multiples higher, in the trillions of dollars. The combined static and dynamic losses caused by ACMDs have effects in downstream markets and cause significant efficiency losses. In many emerging markets, these ACMDs influence almost every aspect of the economy.

When the topic of ACMDs is brought up in international regulatory dialogues, proposed solutions are inadequate. Too often discussions focus on divergences among countries' regulatory systems, devolving into negotiations between specific regulators from each country. A good example is the Transatlantic Economic Council negotiations, which seek to ensure greater trade flows between the United States and the European Union by curbing the negative impact of regulatory barriers and differences. Negotiations tend to result in a mutual recognition agreement (MRA), in which countries agree to recognize each other's regulations as equivalent. Such agreements can be valuable, but they fail to address the more pressing problem—the high cost imposed by the distortion itself. There have been some recent attempts to address ACMDs in the context of state-owned enterprises, most recently in the Trans-Pacific Partnership negotiations. But attempts by trade negotiators to confront these challenges are in their infancy and have yet to make significant progress.[14]

## The Challenge of Anticompetitive Market Distortions

Over the past two decades, many countries—such as China, India, Russia, and Brazil—that have followed some type of command and control, or import-substitution economic model have become part of the global economy. Laws and regulations designed to exclude or discourage foreign competitors in domestic markets are in many cases still in place. While these nations have been forced to eliminate traditional border trade barriers in order to join or meet commitments under the WTO, previously protected industries have sought, and continue to receive, protection in other forms. For example, a domestic banking industry that is now forced to compete with foreign banks may seek to require a complex licensing system, putting its new foreign competitors at a disadvantage. Mexico began to open its national telecommunications market to foreign firms in the 1990s, but rigid barriers were put in place with respect to interconnection policy and settlement rates that made it impossible for those new entrants to succeed.

ACMDs, however, benefit narrow domestic interests and come at a steep cost to the rest of the domestic economy, both to consumers and domestic competitors. They distort the overall market from a welfare-enhancing equilibrium, reducing their economies' potential wealth creation. Consumer or small-business advocacy groups in these countries are often too politically weak to force their governments to dismantle these ACMDs.

## Limiting the Number and Range of Competitors

The most pernicious regulations effectively exclude new competitors. Historically, established companies have sought to restrict entry in order to maintain or charge higher prices for their products. In advanced economies, competition laws prevent such practices by private firms. But if a private firm achieves through government regulation what would be illegal if done privately, there is little or no remedy. In large emerging markets, governments are increasingly enacting regulations that are de- signed to favor certain national companies over both foreign and smaller domestic competitors. These regulations include the grant of exclusive rights for a company to supply a service or product; license requirements; limitations on public procurement opportunities; and geographic limitations on the ability of firms to supply goods or services, invest capital, or supply labor.

Entry regulations are the most common source of complaints from both foreign and domestic firms, often taking the form of direct prohibitions, such as retail store bans or airline agreements that limit foreign competitors. India, for example, restricts establishments by foreign retail operations, and the Indian government has faced significant difficulties in pushing through a plan to try to ease those restrictions after complaints from small Indian retailers. As a result, Indian consumers will continue to pay higher prices. Restrictions are especially pernicious in services, where markets are generally far more closed than in the goods trade. Services have only recently been subject to liberalization after the Uruguay Round agreement in 1994. Goods trade, in comparison, has been subject to gradual tariff reductions since the General Agreement on Tariffs and Trade (GATT) going back to 1947. Moreover, the way services are liberalized generally leads to lower levels of liberalization. In the WTO negotiations, countries only agree to liberalize specific, listed services, which generally results in much lower levels of liberalization. Many sectors are excluded at least in part, and emerging ser- vices related to high-technology industries are not covered because they did not exist at the time of the last WTO service negotiations, which occurred in the 1990s. This contrasts with the negotiations on goods trade, in which all tariff lines are systematically

ratcheted down. Since many technology companies such as IBM are essentially service providers, these types of barriers are serious impediments to U.S. high-tech firms.

There are also many indirect restrictions, including quality standards, certification rules, over- reaching capital adequacy requirements for banking services, and administrative or bureaucratic barriers.[15] In some cases, governments grant exclusive rights to certain domestic suppliers. Jamaica's telecoms privatization, for example, granted exclusive rights to cable and wireless service for a twenty-five-year period over the local wired telephone network.[16] Mexico's telecoms privatization offers a similar example. The Mexican government granted a monopoly for Telmex in the local telephony market, which the company used to establish a dominant position in the supposedly competitive long-distance and international markets. Coupled with an interconnection policy that favored Telmex, the result was prices and telephone service that were higher and poorer, respectively, than for consumers in any other country in the Organization for Economic Development and Cooperation (OECD), and few opportunities for foreign competitors.[17]

State- or province-level regulations can also limit entry, and these limitations affect both foreign and domestic firms.[18]

## Restricting the Ability of Companies to Compete

Even when foreign companies are permitted to set up businesses, many countries maintain regulations that limit the intensity with which those firms can compete with established domestic companies. Some countries have restrictions on direct-to-consumer advertising, entrenching market leaders. Such restrictions are especially pernicious for foreign companies that are unfamiliar to consumers or for high-tech and IP-based firms that develop entirely new classes of products. Many countries strictly limit advertising for pharmaceutical products. Though ostensibly done for public health rea- sons, these restrictions deprive consumers of important information about new products that could improve their health. This tends to entrench the market leader and constrains the price-reducing effect of newer, more competitive products.

Some regulations set product standards that benefit a national champion or other favored domes- tic firm. China's state-owned telecom companies are prime examples. In China, the government has used "standards setting" with increasing frequency to favor domestic champions over foreign competitors. It introduced technical standards that differ from generally accepted global standards for similar products. In 2009, China launched the TD-SCDMA 3G wireless standard, and assigned it to China Mobile, which controls two-thirds of the Chinese wireless market. U.S. companies seeking to tap

the Chinese market have to invest resources developing new versions of existing products. Apple, after over two years of delays, has only recently been able to introduce its iPhone to customers of China Unicom, which operates the more broadly used WCDMA standard. But it will still have to develop TD-SCDMA–compatible phones in order to access the larger China Mobile market. In the meantime, a market for sophisticated counterfeits—fueled by the unavailability of the iPhone—has already emerged. Additionally, the Chinese government has supported Chinese companies adopting the TD-SCDMA 3G standard with billions of dollars in subsidies. These companies have not only displaced foreign companies in China but are aggressively competing abroad. ZTE, for instance, was ranked one of the top five global handset producers in 2010.

China's standard-setting policies may compel U.S. firms, which already produce many of their phones in China, to shift even more production and R&D to China, resulting in further job losses in the United States. Most recently, China has drafted new technical standards and licensing requirements for foreign software producers seeking to sell their products in China. The recently revised China Compulsory Certification (CCC) rules require producers of certain types of software (including antispam and operating systems) to submit their products for certification by the Chinese government. U.S. firms have expressed concerns that submission will result in IP theft and increase the cost and time needed to bring new products to market. In 2007, the Chinese government also introduced MSPS, a set of rules governing security technology that categorizes software systems into five tiers. Only domestic producers will be allowed to supply Chinese companies with products categorized in the top three tiers.

## Favoring State-Owned Enterprises

One of the most significant problems in global economic policy is competition between private and state-owned enterprises (SOEs). In the past, SOEs tended to be the large agro-industrial conglomerates, such as wheat boards or steel companies. As countries are seeking to advance up the global sup- ply chain, however, many are turning to SOEs in more technically advanced areas. Telecoms are a leading example, but China's SOEs are moving up the value chain in other areas, too. China Union Pay, for instance, is a credit card company that competes head-on with Visa and MasterCard.

The problem is not necessarily state ownership, but rather that governments frequently skew their domestic regulatory environments to give their SOEs an unfair advantage in the global market. As a result, foreign firms and domestic nonstate-owned firms are at a disadvantage. Many of these regulations give privileged licensing terms to SOEs, grant

them access to preferential loans and financing opportunities, and provide free or low-cost inputs such as water, energy, and raw materials.

Governments also exempt SOEs from national competition laws.[19] SOEs can then engage in anti-competitive practices and distort global markets without fearing any domestic penalty, while at the same time benefiting from variants of the foreign sovereign immunity defense in foreign markets.[20] China's Anti-Monopoly Law provides a broad exemption for SOEs that are important to national security or to the economy. In practice, the loophole has been applied to allow China's largest potassium fertilizer importers to engage in price-fixing and has permitted Chinese telecom companies to agree not to compete in their respective territories.[21]

## Policy Prescriptions

The U.S. government has increasingly tried to address ACMDs in a variety of ways, including the bilateral Strategic and Economic Dialogue (S&ED) with China and the ongoing Trans-Pacific Partnership (TPP) trade negotiations in Asia. In the S&ED negotiations with China, there has been some focus on the role that the new Chinese competition agency might play as China moves toward a more competitive market, as well as discussion of the indigenous innovation policy. In the TPP, there are specific negotiations related to the most pernicious aspects of state-owned enterprises and anti- competitive regulations.

These efforts to discipline ACMDs, however, have not targeted the major problem, which is their negative impact on competition. Instead, U.S. negotiators have sought to find a discriminatory aspect to particular measures showing that the measures violate international trade rules by favoring domestic companies over foreign competitors. A good example is the protective distribution laws, which can be found in many countries in Latin America. These laws protect local distributors by forcing foreign suppliers to pay extraordinarily high termination indemnities (often multiples of gross profit over the lifetime of the agreement) if they wish to end the contract and change distributors. As a result, the distribution market becomes badly distorted and product prices increase, sometimes by over 100 percent. These laws, however, would not violate trade rules if they were applied equally to both foreign suppliers and local suppliers, even though the result is much higher prices for consumers. But searching for a discrimination hook on which to hang a trade case is to miss the wider point—the market distortion does enormous damage to the domestic market, consumers, and companies exporting into those markets.

Addressing ACMDs will require a comprehensive approach that brings together both trade and competition tools. There are four broad approaches that the United States should pursue that would build on existing U.S. policy initiatives in some cases and take U.S. policymaking in a new direction in others:

- Negotiate a multilateral agreement, such as a WTO plurilateral agreement, with like-minded countries that accept free competition as an organizing economic principle. Along with imposing disciplines among members with respect to ACMDs, an agreement would offer economic benefits and allow member countries to use "self-help" remedies in response to violations.[22] This would give countries that are distorting their markets an incentive to eliminate those distortions.
- Launch additional dialogues between trade ministries and competition agencies. These dialogues would bring export interests for adversely affected markets into alignment with consumer welfare interests in the distorting country and domestic companies that are harmed by ACMDs. Building such alliances is more likely to lead to a solution.
- Restructure some U.S. government agencies around competition as an organizing economic principle. The two core principles would be free trade unencumbered by governmental restrictions and competitive markets as measured by the maximization of consumer welfare.
- Develop a market-based metric to measure the costs imposed by ACMDs. The metric would be essential for reaching agreement on how to offset ACMDs' negative effects.

## A Multilateral Agreement Disciplining ACMDs

The United States should lead efforts to negotiate a multilateral agreement that disciplines ACMDs. Such an agreement could have proactive measures that curb ACMDs, as well as defensive measures that enable members to take action against countries that refuse to remove them. The remedy process could be triggered by complaints from specific companies, as is currently done under U.S. anti- dumping and countervailing duty laws, or it could be initiated directly by governments. It is important to note that such an agreement would not be intended to supplant the existing WTO frame- work but rather to supplement it. A multilateral agreement on ACMDs should deal with at least three specific cases for goods trade:

- Goods exported by foreign companies that benefit from ACMDs and therefore receive an unfair competitive edge by lowering the costs of exports into the United States or other countries that are party to the agreement. In this case the

agreement would encourage negotiations to end the market distortions, under the threat that the United States (or other countries similarly affected) could otherwise impose tariffs on those goods that have benefited from these market distortions.

- The size of the tariff would be determined by the impact of the distortion.[23]
- Goods exported to third country markets by foreign companies that benefit from ACMDs and therefore have a preferential position in competition in those markets. In this case the agreement provides for a "positive comity" tool that would enable the United States (or other countries similarly affected) to petition the third country to activate its self-help remedy and impose import tariffs on goods from the offending country.
- Goods exported from the United States or other countries that are made uncompetitive in the distorting country's market as a result of ACMDs. The agreement would then provide for a consultation plus dispute settlement that ultimately allows for retaliatory tariffs on imports (as would be the case with any WTO violation).

In the case of services, similar disciplinary provisions could be applied, including a combination of fines or limitations on licenses to operate.

These unilateral actions, in the form of a protective tariff or other restrictive measures, would be applied only in cases where a country could demonstrate that there was a market distortion that dam- aged its companies or harmed its economy, according to an agreed metric. Such mechanisms would have to adhere to the rules of the new global agreement, and there would be full dispute resolution if a party violated the rules.

Similar self-help remedies could also be used in the case of ACMDs in countries that are not yet members of the agreement. The remedies would have to comply with existing WTO rules. Some of the potential measures could build on current U.S. laws and be crafted in ways that do not violate U.S. trade obligations. This poses real challenges under existing WTO rules, which prohibit any sort of self-help measures except in the case of action that clearly violate the rules of WTO agreements. But the interests at stake for the United States are such that it should be prepared to defend such actions before the WTO and make a strong case that they are consistent with WTO rules.[24]

There are a number of models that could be helpful in crafting the agreement. In maritime and air transportation there are separate agreements outside the WTO, which provide for arbitration in the case of unfair competitive practices by foreign

governments. They also permit unilateral actions by governments that essentially equalize the effect of the distortion. The Convention on International Civil Aviation establishes rules of airspace, aircraft registration, and safety, and details the rights of the signatories in relation to air travel. Under the bilateral agreements negotiated by the United States and other countries, the United States can use unilateral measures, including fines, to respond to anticompetitive practices by foreign countries, and vice versa. These measures have been used successfully to force changes in behavior by foreign governments.[25] When governments act in anticompetitive ways that harm U.S. shipping or commerce, the Federal Maritime Commission (FMC) can take unilateral action, such as limiting sailings, suspending tariffs and service contracts for carriage, suspending an ocean carrier's right to operate, imposing fees, and generally taking "any other action the Commission finds necessary and appropriate to adjust or meet any condition unfavorable to shipping in the foreign trade of the United States."[26]

In order to persuade countries to join, the agreement would need to include carrots as well as sticks. These benefits for member countries could include:

- advantageous access terms for government procurement
- open immigration accords, particularly with regard to high-skilled workers
- more trade-friendly export control measures
- streamlined approval for foreign investments through such bodies as the U.S. Committee on Foreign Investment in the United States (CFIUS)

Initially, an ACMD agreement would involve more like-minded countries, such as those that signed the Anti-Counterfeiting Trade Agreement (ACTA).[27] Some of the most likely countries to participate initially could include Australia, New Zealand, Hong Kong, and perhaps the European Union or certain member states. A core agreement among these countries would raise the pressure on other countries to join. First, such an agreement would lead to an increase in the efficiency of the supply chain within those countries and create a more dynamic region with ever-increasing benefits for its members. Those countries on the outside would become less attractive to foreign investors as companies seek a more favorable regulatory environment. Second, economic carrots such as favorable procurement, immigration, investment, and export control arrangements would offer significant additional benefits to encourage new countries to join. Finally, nonmembers could still face sanctions as a result of their ACMDs, imposing additional costs for remaining outside the agreement. Over time, the disadvantages for countries that are not members are likely to outweigh the advantages of staying outside the agreement in order to avoid restrictions on regulatory measures.

The art would be in crafting a bargain that contained a combination of carrots and sticks that encouraged nonmembers to sign on. By presenting certain countries with a choice between a future solely of containment with the ongoing threat of trade retaliation over ACMDs or elimination of ACMDs plus membership in a much more dynamic economic area, there is a greater likelihood that pivot countries such as Brazil in Latin America or Korea and Japan in Asia would move more toward the pro-competitive, undistorted market system and away from distortive state-led economic development. Their membership could tip other important countries, the most strategic and challenging of which include China, Russia, and India, toward embracing the ACMD agreement, leading to a virtuous circle of systematic reduction of ACMDs.

## Launch Trade Ministry– Competition Agency Dialogues

The pernicious effects of ACMDs should also be addressed through domestic competition policies.[28] Although ACMDs may not readily be reached by direct antitrust enforcement law or formal WTO trade enforcement mechanisms, they could be targeted by "competition advocacy" initiatives carried out by competition agencies. Such initiatives ensure that competition considerations are weighed in the formulation of laws, regulations, and public policies. Often competition advocacy involves critiques of draft rules or laws on the grounds that they would block or distort consumption, thereby reducing consumer welfare.

Historically, competition advocacy has been directed at sister agencies at the national level or at subordinate levels of government. In recent years, in discussions with emerging competition regimes, major competition agencies, such as the U.S. Federal Trade Commission (FTC), the U.S. Department of Justice, and the European Commission's Directorate General for Competition, have pro- moted competition advocacy as a valuable method for consumer welfare enhancement.[29]

Competition agencies should also be integrated into all trade and regulatory dialogues. By aligning Country A trade ministries with Country B competition agencies, the export interests of Country A can be more closely aligned with the consumer interests of Country B.

It has proven difficult to bring the U.S. trade and antitrust agencies together on this point. The rea- sons are many, but the agencies fundamentally have different goals. Trade agencies are concerned about barriers in foreign markets and their effect on U.S. exporters. Competition agencies are concerned about distortions in their own markets and their impact on consumers. Two agencies in the same country thus have different concerns and constituencies that do not intersect. However, a trade agency in Country

A and a competition agency in Country B do have aligned interests. Both want to see ACMDs removed—the trade agency because of the damage to export interests, and the competition agency because of the damage to domestic consumer interests. When it comes to ACMDs, their objectives should be aligned.

The difficulty is that in many of the countries where ACMDs are most pervasive and destructive, competition agencies either do not exist or are so politically weak that they cannot be expected to battle against powerful political forces that benefit from ACMDs. While this is true, competition agencies are the best option available to combat ACMDs on the domestic front. The challenges are significant, but the type of dialogues proposed would at least help give these competition agencies the external credibility they need in order to be more effective in their advocacy. This holds out some prospects for tipping the balance of power in developing markets away from powerful, export- oriented business interests and toward domestic consumer interests.

One other development working in favor of this agenda is that many developing countries, China most prominently, are discovering the limitations of export-led growth strategies. For China to maintain its rapid growth of the past two decades, it will have to boost domestic consumption. Eliminating market distortions that raise prices to consumers would contribute significantly to that effort.

In the United States, there is an additional problem: there is no real history of significant government interference and state control of industries. In many developing countries, legacy import-substitution economics or central planning has led to a range of ACMDs, along with the widespread understanding of their role and damage to society. Ironically, this has meant a greater appreciation in newly opened economies of the role of government to remove market distortions than in the United States.

## Competition as an Organizing Principle

The United States should reorient its trade policy by adopting competition as an organizing economic principle, with the goal of reducing both domestic and foreign market distortions that are harmful to consumer welfare.

Cost-benefit analysis on domestic regulation in the United States is conducted by the Office of In- formation and Regulatory Analysis (OIRA). This office, sitting within the Office of Management and Budget (OMB), evaluates the costs and benefits of new regulations. Over the past two decades, various executive orders from both Republican and Democratic administrations have moved cost- benefit analysis from a rudimentary evaluation to a more focused test that tries to evaluate the regulation's impact on the

market itself (in addition to business compliance costs). The former OIRA head, Cass Sunstein, has spoken about using economic welfare effects in determining the costs of new regulation.[30] The "Buy America" regulations of the 2009 stimulus, for example, imposed local content requirements for projects that were to be funded by stimulus money. At a time when there was not a great deal of private commercial activity, these provisions led to a substantial lessening of competition in the public sector. Unwittingly, Buy America regulation and the paucity of available waivers meant that monopolies were created all over the supply chain, leading to price increases and less choice for consumers. In at least one case, the FTC pointed out the potential anticompetitive effect of Buy America regulations and a restrictive waiver policy, arguing for waivers to be more available in order to promote a more competitive market.

If countries are moving in this direction, then competition agencies—whose core function is measuring welfare effects—should be brought more centrally into the process. Competition agencies should have a seat at the table in arguing for pro-competition regulatory reform. This is in line with the OECD's Regulatory Toolkit and Competition Assessment, and it is also the practice in certain OECD members, such as the United Kingdom, the Netherlands, and Australia.[31]

The U.S. government should also reorganize its economic agencies around the idea of competition policy as an organizing principle. U.S. government agencies are generally structured along mercantilist lines. There are entities that promote exports and the interests of exporters, such as the U.S. Trade Representative (USTR) and Commerce Department. Then there are different entities that deal with domestic regulations and imports, such as the Justice Department, the FTC, parts of the Commerce Department, and the International Trade Commission. There is little if any interaction between these two groups, and this has the unhappy effect of ensuring that where the United States' offensive interests (in reducing barriers in foreign markets) are pitted against its defensive interests (in maintaining barriers to imports), its defensive interests usually prevail. It also ensures that while impediments to the global supply chain in foreign markets are treated with seriousness, impediments to the same supply chain located inside the United States are basically ignored (or in bad cases increased, such as the Buy America legislation).

The Obama administration has proposed consolidating the various trade-related agencies, though for different reasons, and the plan is now waiting for congressional action. The ideal reorganization would begin by merging the many departments that currently are concerned with both internal and foreign trade into a single Department of Economic Competitiveness (DEC), whose function would be to maximize the nation's

economic competitiveness by targeting market distortions in both U.S. and foreign markets.[32] The DEC would include personnel currently located within the International Trade Administration of the Department of Commerce, the USTR, and the Bureau of Economic, Energy, and Business Affairs at the Department of State; relevant trade officials in the Department of Treasury and OIRA within the OMB; and personnel from the FTC and the antitrust division of the Department of Justice.

To better protect property rights and reduce economic distortions, a Bureau of Domestic Regulation (BDR) within the new department would perform a cost-benefit analysis of all domestic regulation to be promulgated. The establishment of the BDR would represent a new approach to regulation; by making the true market impact costs of new regulation more explicit, the BDR would enable legislators to decide whether those costs are worth paying.

Finally, the United States should establish a Bureau of Market Access and Contestability (BMAC) to ensure that the regulatory framework of foreign markets is as pro-competitive as possible, and to enact measures to counteract ACMDs abroad. While the BMAC would have the lead on negotiating to eliminate ACMDs, the USTR would continue to be the lead trade negotiator for the U.S. government.

Government reorganizations of this scale are difficult at any time, because there are too many vested interests that benefit from the established structure. The Obama administration's reorganization proposal, for instance, faced immediate opposition in Congress, and not just from Republicans. There are certainly other, bureaucratically simpler ways to reorganize, such as a revamped inter- agency process that puts ACMDs more fully into the center of policymaking. But a more thorough reorganization would be a better fit for the international trade realities of the twenty-first-century world. Even if a less ambitious reorganization is considered in the short term, the type of structure proposed here should remain the goal.

In order for this reorganization to work policymakers need to embrace competition as an organizing principle and apply it to both domestic and foreign regulations. This requires a change in approach from a purely mercantilist mindset to one that is focused on competition and consumer welfare, which is a significant change, but one required by the large changes that have occurred in the global economy. The goal would be to address market-distorting foreign regulations with the same focus that is applied to domestic regulation. This reorganization would acknowledge the new reality that all countries benefit from global GDP growth—growth that would be strengthened if the distortions that plague the global supply chain are eliminated. The goal of these reformed agencies would be to ensure that competition is based on business merit

rather than by how well competitors wield government power. Just as the Department of Homeland Security was set up to deal with a new threat to U.S. national security, so the DEC would deal with this new threat to American economic security.

## Develop a Cost Metric

One of the biggest challenges in removing market distortions is to develop some agreed measure of the costs imposed by ACMDs. An agreed measure of the harm caused by ACMDs is necessary not only for better understanding of the problem, but to enable the self-help and dispute settlement remedies that should be part of any new international agreement.

The question is what that metric should be. It should measure the impact on consumer welfare as well as on trade and include direct and indirect costs.[33] Regulatory distortions can lead to significant price increases for consumers. But there are also larger dynamic losses caused by firms deciding not to invest in new products or new technologies because they are unable to compete in distorted markets. A good example would be where a pharmaceutical company is faced with market distortions that reduce profits and can therefore no longer afford to invest in research that could lead to better or lower-cost products. Any high-tech company suffers an immediate loss when it is unable to fund research because the regulatory costs have been raised to unacceptably high levels. And since the global supply chain's efficiency is also damaged by ACMDs, other companies feel the impact. The static losses caused by ACMDs spawn a vicious cycle of losses that travel through the downstream firms and can have wide-ranging ripple effects across the whole economy.

Designing a metric for measuring the welfare effects of ACMDs is a complex endeavor given the variety of factors that need be considered. In order to create a realistic metric, it is important to account for not only the direct costs or consequences of ACMDs, but also the indirect or hidden ones. There are many ways of calculating the welfare effects of ACMDs. One option is to assume a market equilibrium and then impose the distortion on this equilibrium through a partial equilibrium analysis.[34]

The OECD has already carried out substantial work on regulatory reform and would certainly be a logical entity to help develop a new metric. It is likely that as the negotiations are initiated for the multilateral agreement on ACMDs proposed in this paper those negotiations would quickly turn to the question of how to establish an appropriate, agreed metric. This is one of the reasons that it is so important that these negotiations are initiated by countries that share an agreed normative frame- work—fair competition as an organizing economic principle.

The metric should also be driving in the same direction as the rest of domestic regulatory policy. It should reinforce what external and credible actors, such as the OECD, are telling countries they should follow in their domestic regulatory policy to promote competitive markets and all their benefit.

## Conclusion

ACMDs represent a serious problem in the global economy. Although it is difficult to assess the ex- act scale of the problem, a conservative estimate suggests costs to consumers worldwide in the order of trillions of dollars. Fixing the ACMD problem will require understanding the nature and scale of the challenge to further economic growth, and reorienting global policymakers to the consumer rather than producer side of the economic ledger. This will lead to policies across both international and domestic fronts that reduce ACMDs and expand wealth creation globally. This is vital to ensuring that the first fifty years of the twenty-first century boast the kind of enormous economic gains that were seen in the last fifty years of the twentieth. This outcome will only be achieved if those who believe in competition as an organizing economic principle offer other countries a clear choice be- tween an economic zone governed by these principles and the distortive system that still prevails in much of the world today.

## Annex 3 Endnotes

1. *Mapping the Global Future: Report of the National Intelligence Council's 2020 Project*, National Intelligence Council, December 2004, pp. 27–35 and 47–55, http://www.foia.cia.gov/2020/2020.pdf.
2. See United States International Trade Commission, "China: Effects of Intellectual Property Infringement and Indigenous Innovation Policies on the U.S. Economy," Investigation No. 332-519, USITC Publication 4226, May 2011, pp. 5–9 (Figure 5.3 sets forth a list of programs or policies that collectively form China's indigenous innovation program encountered by U.S. IP firms doing business in China. Those programs and policies include: tax incentives; subsidies; preferential lending; Chinese-specific technical standards; government procurement policy; unequal treatment; unequal enforcement of China's Anti-Monopoly Law; incentives to register patents or other IP; compulsory licensing; closure of sector to foreign participation; technology transfer requirements; R&D requirements; and other *Id*.)
3. See Nam D. Pham, *The Impact of Innovation and the Role of Intellectual Property Rights on U.S. Productivity, Competitiveness, Jobs, Wages, and E/porrs*, NDP Consulting, April 2010, p. 41, table 14, http://www.theglobalipcenter.com/sites/default/files/reports/ documents/NDP_IP_Jobs_Study_Hi_Res.pdf.
4. See *Intellectual Property and the U.S. Economy*, Department of Commerce, March 2012.
5. *Occupational Employment and Wages Release,* Bureau of Labor Statistics, May 2011.
6. These new measures included the Stevenson-Wydler Technology Innovation Act, which facilitated the transfer of technology from the federal government to private institutions, and the Bayh-Dole Act, which allowed universities and businesses operating under federal research contracts to have exclusive rights to their intellectual property.
7. Brian Ager, "The Research Based Pharmaceutical Industry: A Key Actor for a Healthy Europe," European Federation of Pharmaceutical Industries and Associations, Hospital Healthcare Europe, no. 7, 2006, http://62.102.106.100/Objects/2/Files/BA0706.pdf.
8. Ross C. DeVol et al., *The Global Biomedical Industry: Preserving U.S. Leadership*, Milken Institute, September 2011, http://www.lifechanginginnovation.org/sites/default/files/files/Global%20Bio_Full%20Report_WEB.pdf.
9. Ibid.
10. See "The Triple Interface Between Intellectual Property, Competition and Trade," chapter 9, pp. 323 and 327; and Shanker Sing- ham, *A General Theory of Trade and Competition: Trade Liberalization and Competitive Markers* (London: CMP Publishing, 2007).
11. Under WTO rules, only government subsidies that benefit specific industries can be subject to offsetting tariffs, whereas ACMDs generally benefit many domestic industries.
12. See Bernard Hoekman and Joel P. Trachtman, "Canada—Wheat: Discrimination, Non-Commercial Considerations,

and the Right to Regulate Through State Trading Enterprises," World Bank Development Group, Policy Research Working Paper 4337, August 2007, http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2007/08/29/000158349_20070829095818/Rendered/PDF/wps4337.pdf.

13. See Gary Clyde Hufbauer and Matthew Adler, "Why Large American Gains from Globalization Are Possible," Vox, July 24, 2008, http://www.voxeu.org/index.php?q=node/1445.

14. See Thomas J. Bollyky, "Better Regulation for Freer Trade," Policy Innovation Memorandum No. 22, Council on Foreign Relations Press, June 2012, http://www.cfr.org/trade/better-regulation-freer-trade/p28508.

15. For banking requirements: While we concede that capital adequacy rules for banks are needed, but some may be imposed in ways that are distortive and damage consumer welfare in unjustifiable ways. The OECD Competition Assessment Toolkit contains helpful examples of what constitutes these types of barriers to entry in Volume 2: Competition Assessment Guidance.

16. See Ricardo de Paredes, "Jamaica: Privatization and Regulation, Challenges in Jamaica," IDB Economic and Sector Study Series, July 2003, http://natlaw.com/interam/jm/tr/sp/spjmeg00002.pdf.

17. For a comprehensive treatment, see Singham, *A General Theory of Trade and Competition,* chapter 12.

18. See Alwyn Young, "The Razor's Edge: Distortions and Incremental Reform in the People's Republic of China," NBER Working Paper no. 7828, August 2000, http://www.nber.org/papers/w7828.pdf.

19. See Antonio Capobianco and Hans Christiansen, "Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options," OECD Corporate Governance Working Paper, no. 1, 2011, http://www.oecd.org/dataoecd/29/43/46452890.pdf.

20. In a recent case before the Eastern District of New York, the defendants—state-owned Chinese vitamin producers—argued that they had been compelled by the Chinese government to fix their prices. The district judge refused to dismiss the case under the foreign sovereign compulsion doctrine and recently certified the class of plaintiff-consumers. See Memorandum Decision and Order, *In Re Vitamin C Antirust Litigation*, No. 06-MD-1738 (S.D.N.Y. Sept. 6, 2011); Nate Raymond, "Plaintiffs Win Class Cert in Price-Fixing Suit Against Chinese Vitamin Makers," *Asian Lawyer*, January 30, 2012, http://www.law.com/jsp/tal/PubArticleAL.jsp?id=1202540453307&Plaintiffs_Win_Class_Cert_in_PriceFixing_Suit_Against_Chinese_Vitamin_Makers.

21. Darcy Davison-Roberts, "Competition laws in China and Hong Kong: different tracks, same direction," October. 3, 2008, http://law.lexisnexis.com/webcenters/hk/Blogs--Analysis/Competition-laws-in-China-and-Hong-Kong-different-tracks-same- direction; Wentong Zheng, "China's Antimonopoly Law—One Year Down Part 5. A De Facto 'Dual-Track' Competition Regime?" Antitrust and Competition Policy Blog, December 30, 2009, http://lawprofessors.typepad.com/antitrustprof_blog/2009/ 12/chinas-antimonopoly-lawone-year-down-part-5-a-de-facto-dualtrack-competition-regime-.html; and Elizabeth E. Drake, "Chinese State-Owned and State-Controlled Enterprises: Policy Options for Addressing Chinese State-Owned Enterprises," Testimony before the U.S.–China Economic and Security Review Commission, February 15, 2007, http://www.uscc.gov/hearings/2012hearings/written_testimonies/12_02_15/12_2_15_drake_testimony.pdf. The OECD corporate governance papers contain a useful catalogue of anticompetitive practices that benefit SOEs: 1) predatory activity by SOEs. The underlying economics of SOEs means that they are generally more focused on increasing revenue and market share than profits, as a private firm would be; 2) raising rivals' costs and raising barriers to entry. Examples included withholding essential inputs or infrastructure from competitors or obtaining selective grandfather clauses for SOEs with regard to new regulations; 3) cross-subsidization. This is where the SOE uses its monopoly position in a particular market to cross-subsidize into a related competitive market to knock out rivals; and 4) imposing an inefficient technology on a given sector, because the use of such technology harms the SOE less than its use harms its private rivals.

22. In the Canada Wheat Board case, the Panel and AB reported that competition rules should not be used to define what constitutes commercial considerations. The problem with this approach is that the issue faced by U.S. firms is that they are profit maximizing entities competing with SOEs which tend to be revenue maximizers at best. These firms can outcompete profit maximizers because of their government subventions, and their ability to sustain losses. Only a competition test would level that playing field.

23. Note that tying the tariff to the size of the distortion is significantly different, and arguably much less trade-diverting than the current analysis used in anti-dumping and countervailing duty cases.

24. The United States could defend any WTO case brought against it for imposing these measures by counterclaiming that the ACMD in the other market nullified or impaired that country's trade obligations under Article XXIII of the GATT 1994. Article XX furthermore provides a defense in cases of measures taken to protect intellectual property or to avoid unfair competition, and so countries could couch their self-help remedies under Article XX.

25. One recent example: American Airlines, United Airlines, Federal Express, and United Parcel Service filed a joint complaint (Joint Complaint of American Airlines, Inc., Federal Express Corporation, United Airlines, Inc., and United Parcel Service Co., filed May 1, 2003, in Docket OST-2003-15092) under the International Air Transportation Fair Competitive Practices Act alleging they were being required by Argentina to pay for airport and air traffic control services at discriminatory currency exchange rates approximately three times greater than the rates applied to Argentinean carriers, in violation of the bilateral Air Transport Services Agreement be- tween the United States and Argentina (Air Transport Agreement between the Government of the United States of America and the Government of the Argentine Republic, Art. 11, para. 1, December 6, 1999). In this case, the department found the complaint justified, and in November 2003 inserted a condition in Aerolineas Argentinas' foreign air carrier permit requiring it to remit into escrow the difference between the amount it was paying, and the amount it would have been paying if the same discriminatory rates applied to it (Order 2003-11-26, November 26, 2003). Aerolineas Argentinas complied with this condition and as of March 2011 nearly $10.5 million was in escrow.

26. See Section 19 of the Merchant Marine Act, 1920 (46 USC 876), subsection (i), http://www.fmc.gov/assets/1/Page/Section% 2019%20of%20the%20Merchant%20Marine%20Act,%201920.pdf.
27. The Anti-Counterfeiting Trade Agreement (ACTA) is a plurilateral agreement signed by a number of like-minded countries. The agreement seeks to enforce intellectual property rights internationally by creating a legal framework combating widespread, commercial-scale theft of IP, http://www.ustr.gov/acta.
28. This discussion draws on Shanker A. Singham and Alden F. Abbott, "Enhancing Welfare by Attacking Anticompetitive Market Distortion," Concurrences, no. 4, 2011.
29. For a good overview of the importance of competition advocacy as a tool to combat government-sponsored restraints on competition, see James C. Cooper and William E. Kovacic, "U.S. Convergence with International Competition Norms: Antitrust Law and Public Restraints on Competition," Boston University Law Review, vol. 90, no. 4, August 2010.
30. See E.O. 12291 (1981), 12866 (September 30, 1993), 13422 (January 18, 2007). According to Sunstein, the "benefits [of regulations] must justify the costs." See Cass Sunstein, "Smarter Regulation," White House Blog, February 7, 2011, http://www.whitehouse.gov/blog/2011/02/07/smarter-regulation.
31. The OECD Competition Assessment Toolkit seeks to promote competition "by providing a method for identifying unnecessary restraints on market activities and developing alternative, less restrictive measures that still achieve government policy objectives." The toolkit is available at http://www.oecd.org/document/48/0,3746,en_2649_37463_42454576_1_1_1_37463,00.html; see OECD Regulatory Toolkit; see also OECD Recommendation on Competition Assessment, October 22, 2009, http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=219&InstrumentPID=215&Lang=en&Book=False.
32. There are "over four dozen agencies in the Executive Branch with jurisdiction touching on international economic matters and over a dozen independent agencies or authorities with such concerns." John H. Jackson et al., Legal Problems of International Economic Relations: Cases, Materials and Te/rs, 5th ed. (Minnesota: West Group, 2008).
33. Singham and Abbott have analyzed how the metric to measure distortion might work, and note: The question is what is the best metric for measuring ACMDs? Historically, analysis of behind the border trade barriers, or regulatory protection, has focused on the impact of these barriers on trade flows. However, we suggest that this metric does not properly evaluate the true impact of ACMDs. While it clearly measures the impact of the barrier on external trade, it does not properly measure the true impact of the ACMD under scrutiny on the domestic economy in the country where the ACMD exists. A better measure of this is a welfare-based metric based on the implications of the measure for consumer welfare (as previously defined). The type of analysis would be a standard partial equilibrium analysis where the ACMD itself would act as an external shock and the reduction in consumer welfare occasioned by this shock would be measured. The estimate would not need to be exact—it could be stated as a rough estimate, plus or minus a certain percentage (error tolerance). Such an approach could add credibility by recognizing imperfections in estimation and limitations on knowledge, while at the same time highlighting the real harm to domestic interests flowing from the ACMD. More generally, by highlighting the aggregate deleterious effects of ACMDs on the domestic public at large, broad adoption of this metric might marginally weaken private and public incentives to adopt new ACMDs in the first place.
34. This type of analysis is conducted by competition agencies on a routine basis and could be conducted to deal with government restraints as well as private ones. One can use either the Herfindahl Hirschmann Index (HHI = Sum of the squares of the market shares of all the firms in the market) as a starting point for evaluating how market structure will respond to a distortion, or one can use the Lerner index, which is a better measure of price/cost (L, Lerner Index = (p - MC)/p). Whatever measurement is used, a manageable metric to measure distortion and welfare effect can be developed. But some form of partial equilibrium analysis is what should be used. A U.S. government, properly organized around this issue, could conduct this analysis in real time and produce information that would be important in evaluating the welfare impact of ACMDs here and abroad.

# Annex 4 – Shanker A. Singham, Testimony Before the House Judiciary Subcommittee on Competition and the Courts (July 13, 2010), Hearing on China's Anti-Monopoly Law and Its Impact on U.S. Firms

**China and Competition Policy**

My name is Shanker Singham, and I am the Chairman of the International Roundtable on Trade and Competition Policy, and a partner at global law firm, Squire Sanders & Dempsey, L.L.P. I am making this testimony on behalf of the U.S. Chamber of Commerce, its Global Regulatory Cooperation (GRC) Project, and its Asia Program. The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber's GRC Project seeks to align trade, regulatory and competition policy in support of open and competitive markets, and its Asia Program gives voice to policies that help American companies compete and succeed in Asia's dynamic marketplace.

In addition to drawing upon the U.S. Chamber's numerous submissions to People's Republic of China (PRC) and U.S. government authorities on antitrust, foreign investment, intellectual property rights protection, standards setting, and public sector restraints on trade, many of these comments are drawn from my book, A General Theory of Trade and Competition; Trade Liberalization and Competitive Markets (CMP Publishing, 2007). The purpose of my remarks is to put China's developments towards the implementation of competition policy into context, and to help Members of Congress better understand how to best manage the economic and trade relationship with China to the benefit of both countries. First, it is important to understand the genesis of China's Anti-Monopoly Law (AML).

Towards a Competition Policy in China: Genesis of China's AML

The development of China's competition law has been a long journey that predates China's WTO accession in 2001. Initially as China's economy opened up, the virtues and benefits of an open economy were recognized by significant elements of the Chinese government. It was also recognized, at least by some in China, that it would be important to have competitive markets inside the border to supplement this trade openness, and ensure that the Chinese economy was able to grow in ways that benefited all its consumers. These developments in China are to be applauded.

However, it is important to note that China's efforts to establish an antitrust regime accelerated significantly following the failed bid of CNOOC for Unocal, which was blocked after a review by the Committee on Foreign Investment in the United States (CFIUS). Certain members of the Chinese administration saw the AML as an opportunity to invoke similar regulatory procedures to block foreign acquisitions of Chinese companies and to allow Chinese regulators to secure jurisdiction over global M&A activity. This was an unfortunate start to the road to implementation of the AML, as it mixed two very different concepts, the idea of a competition review based on sound economic analysis of how markets are affected by a merger (based on impact on consumers), and a national security review based on very different considerations. The latter review is particularly vulnerable to mercantilist thinking.

Competition Policy in a Country Governed by Non-Competition Concerns

Competition law implementation generally works best in countries that have already accepted competition as a normative organizing principle for the economy, i.e., countries that advocate regulatory frameworks that tend to maximize and facilitate business competition on the merits. There are some questions as to the direction of China's economic development – in particular whether state-led economic development and industrial policy are the driving forces behind regulatory promulgation. There are some serious challenges associated with placing a competition agency in an environment where industrial policy is the operating governing principle, and there is a real danger that such an agency could become another tool of industrial policy in the hands of those who would favor certain State-Owned Enterprises (SOEs) or other national champions over other competitors. This concern is a real one in the case of China, and one that the U.S. government must be mindful of, particularly given the fact that the three agencies responsible for enforcing the AML each has pre-existing missions tied to implementation of industrial policy, including state planning and the regulation of foreign investment and trade.

Concerns Emanating out of China AML

In light of the above, the U.S. government should pay particularly close attention to certain aspects of the AML and how it is being enforced.

Approach to SOEs and Firms Benefiting from Anti-Competitive Market Distortions

The China AML has provisions addressing SOEs. However, at best these provisions are ambiguous, and at worst they appear to exempt the strict application of competition policy to SOEs.

The AML's treatment of China's SOEs and state-influenced companies will serve as a critical barometer of China's commitment going forward to market-based economic reforms as well as the ability of foreign and domestic private companies to compete in critical sectors of the Chinese economy. The roles of the PRC government and Communist Party in the Chinese economy remain pervasive and have arguably increased in the wake of the global financial crisis. They are unlikely to shrink given the direction of the government's policies and the Party's objectives for economic development, as evidenced by the State-Owned Assets Supervision and Administration Commission (SASAC) December 2008 announcement that it would protect what the government considered to be "economic lifeline" sectors.

In its announcement, SASAC divided state industries it wanted to protect through continued government ownership between "key" industries that would remain "state dominated," meaning majority owned and controlled by the government, and "underpinning" industries that would remain "largely in state hands."

The key industries named by SASAC are: armaments, power generation and distribution, oil and petrochemicals, telecommunications, coal, aviation and air freight industries. The exact meaning of "state dominated" was not clearly spelled out. It is likely to mean different things for these seven industries and their subsectors. It was made clear that for arms, oil, natural gas and telecommunications infrastructure that the government will have sole ownership or absolute control of all the central enterprises and all the "major" subsidiaries associated with these industries. SASAC's circular also includes an "etcetera" at the end of the list of sectors, thereby leaving room for expansion in the future.

For aviation and air freight, the circular said that the state retains sole ownership and absolute control of the central enterprises but not the subsidiaries. For the "downstream products of petrochemicals" and the "telecommunications value-added service industry" the government would continue to encourage foreign investment and promote "diversity in property rights," according to the circular.

The circular said that the state would play a large supervisory role in the "underpinning" industries of equipment manufacturing, automobiles, electronic communications, architecture, steel, nonferrous metals, chemicals, surveying and design, and science and technology. This term also means different things depending on the industry. For equipment manufacturing, automobiles, electronic communication, architecture, steel and nonferrous metals, the state will retain absolute control or conditional corporate control of the central enterprises associated with these industries, according to the circular. For science and technology and surveys and design, the state will have a "majority stake" in directing central enterprises to undertake these tasks.

SASAC also announced a plan to make the SOEs more competitive through mergers and acquisitions to create some 20 or 30 powerhouse companies that would become "internationally competitive."

Given the dominant role of SOEs in China's economy (many of which enjoy monopoly- or oligopoly-status in the market and benefit from significant state subsidies and an artificially low cost of capital), America's leading firms are already in competition with them and, in the future, will increasingly compete with China's SOEs for markets and investment opportunities in China, in third-country markets, and at home in the United States.

How China enforces its AML vis-à-vis its SOEs is therefore highly relevant to not only the future trajectory of market-based reforms in its economy, but also the future commercial opportunities and competitive position of foreign companies in the China market.

The real problem associated with China SOEs is not the SOEs per se, but rather the government activities that distort the market in ways that damage welfare. These can include low-cost (or no cost) loans from state-controlled banks, tax laws that artificially lower the cost base of certain preferred firms, or regulatory exemptions that put certain preferred firms on a different footing than their competitors. While it is clearly important that China implement its competition law in ways that create a level playing field as between SOEs and private firms, it is equally important that internal anti-competitive market distortions that give certain preferred firms advantages are minimized.

In this respect it is very important that China's new competition agencies exercise their competition advocacy responsibilities properly and completely. Competition advocacy is one of the most important tasks of competition agencies, particularly in countries where they are new and notions of competition are also new. It will be very important to see real evidence that the Chinese agencies are able to engage other branches of the Chinese government in the promotion and promulgation of pro-competitive regulations, laws and principles. This will also include, as specifically stated in the AML, that the anti-monopoly agencies will intervene with SOEs themselves to ensure pro-competitive behavior.

It is important to note that in any discussion of the disciplining of anti-competitive SOE behavior, while the outcome should be a level playing field between SOEs and their private competitors, this does not mean that precisely the same test must be used as between SOEs and private firms. SOEs, and government-preferred entities in general, are able to sustain below cost pricing for indefinite periods, for example, and are at best revenue maximizers rather than profit maximizers. The tests that one would rely on to discipline predatory pricing by private firms (requiring market power, below cost pricing and requiring

the ability of the predator to recoup lost profits in the future as a monopolist)[182] may have to modified in the case of SOEs to require only below cost pricing as a required element.

Finally, in the analysis, it should also be noted that there is a spectrum of what constitutes a state-owned or state-influenced enterprise. At one extreme is the fully government owned company. At the other end of the spectrum, there is a private firm that benefits from government tax and other privileges and advantages. Both, unchecked, can distort the market in ways that damage welfare and their rival firms. An important approach which is shared by the Chinese competition agencies and the U.S. government is to therefore try to lower anti-competitive distortions that can lead to welfare diminishing outcomes.

Competition and Intellectual Property: Real or Imagined Tension

Conventional wisdom suggests that competition and intellectual property are in tension. In reality, competition and intellectual property policy share the same welfare enhancing goals. Intellectual property as a type of property right is precisely what firms compete with, and it is welfare increasing to facilitate and encourage this type of competition. However, if the guiding light of competition enforcement is not an economic, welfare-oriented concern, but rather an industrial policy-born concern protecting competitors as opposed to consumers, then intellectual property and competition policy may well find themselves in tension.

In the case of China, there are some troubling developments indicating that an industrial policy drive to erode foreign intellectual property rights and to encourage technology transfer and compulsory licensing will find their way into the implementation of antitrust law. For example, despite heavy pressure by other governments and foreign industry, China's patent law is still not consistent with the significant restrictions on compulsory licensing established by Article 31 of the WTO Trade Related Intellectual Property Rights Agreement (TRIPS). Contrary to TRIPS, the 2008 amendments to China's patent law fail to limit the ability of PRC authorities to issue compulsory licenses to access only the patent(s) involved in any conduct found to be anti-competitive. The word "competition" is often used to ground compulsory license grants in many emerging markets. However, the analysis used to justify the grant of a compulsory license is often based on non-economic, competitor and not consumer welfare concerns. Where this is the case, the resulting erosion of IPRs will lead to a less competitive marketplace, not a more competitive one.

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[182] See for example Brooke Group Limited v. Brown and Williamson Tobacco Corp, 509 U.S. 209 (1993)

The panoply of policies under the heading of Indigenous Innovation strongly suggests that the Chinese government is tilting the market in favor of certain technologies and certain preferred companies at the expense of foreign intellectual property rights holders. The recent guidelines of China's Supreme People's Court regarding the implementation of China's national IP strategy contain several troublesome paragraphs indicating the judiciary's propensity to advance China's national innovation agenda. For instance, they note:

*We should intensify the protection of core technologies which may become a breakthrough in boosting the economic growth and which have independent intellectual property rights so as to promote the development of the high and new technology industries and newly rising industries, improve the independent innovation capabilities of our country and enhance the national core competitiveness.*[183]

Already successful U.S. companies which have brought IP infringement claims against local companies have been faced with meritless counterclaims of IP abuse. Enforcement of IP rights is unpredictable, and the PRC court system is often unreliable and influenced by Chinese policy makers who have openly expressed a desire to force the transfer of foreign IP to better enable local companies to innovate and compete in key industries.

In light of the indigenous innovation policy of replacing foreign technology in critical infrastructure and the high level government mandate to reduce the use of foreign technology to less than 30 percent in the entire Chinese economy, multinationals with

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[183] Guidelines of the Supreme People's Court on Several Issues Regarding the Implementation of the National Intellectual Property Strategy, Par. 9 (No. 16 [2009] of the Supreme People's Court March 29, 2009). The Guidelines also note that judges should:

- "fully apprehend that the implementation of the intellectual property strategy is an urgent need to build an innovative country, . . . and a crucial move to enhance the national core competitiveness by taking into account such aspects as helping to enhance the independent innovative capabilities of our country, improve the system of social market economy of our country, enhance the market competitiveness of the enterprises of our country, enhance the national core competitiveness and open wider to the outside world." (Par.1).
- "ensure the correct political direction . . . also improve the enterprises' independent innovation capabilities." (Par. 8).
- "protect the know-how in integrated circuit designs and timely grant judicial remedies so as to promote the development of the integrated circuit industry." (Par. 14, emphasis added).
- "properly deal with the relationship between the competition policies and industrial policies " (Par. 16).
- "create intellectual property out of the independent innovation fruits, and to have them commercialized, industrialized and marketized." (Par. 17).

dominant market shares globally and in China may find the Chinese Anti-Monopoly Law knocking at their door.

In fact, some PRC officials have tried to use the AML to force technology transfers. The State Administration for Industry and Commerce (SAIC), which enforces the AML, has drafted a regulation that would allow compulsory licensing of intellectual property owned by a dominant company that unilaterally refuses to license its IP if access to such IP is "essential" for others to effectively compete and innovate.[184] The refusal to license in such cases would be considered by SAIC to be an "abuse of IP." A similar provision was included in a 2005 draft of the AML itself, but extensive foreign criticism persuaded China to remove it.[185] The concept has quietly resurfaced in SAIC's draft regulation, which could be used to force compulsory licensing of MNC technology to a budding Chinese competitor that alleges foreign IP is impeding its innovation capabilities. This policy approach once again draws on antiquated concepts of competition policy and law that have long since been discarded by more advanced competition agencies around the world. The danger is that this approach will make the China market less competitive rather than more competitive and will lead to significant restraints on innovation.

How Will China AML Apply to Single Firm Conduct

The U.S. government should also be concerned about how the AML will apply to single firm conduct. Currently, the AML suggests an "abuse of dominant position" test where the decision as to what constitutes an abuse of dominance consists of a bifurcated analysis where dominance is first defined primarily by reference to market share, and then there is a separate analysis of whether there has been an abuse.[186] Market shares are a legitimate

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[184] *See* Article 18, Guidelines for Anti-Monopoly Law Enforcement in the Area of Intellectual Property Rights (Fourth Draft Revision).

[185] The AML as enacted condemns "abuse of IP" by a dominant company but does not define the concept or the remedy for the conduct. *See* Article 55, Anti-Monopoly Law of the People's Republic of China (Adopted at the 29th Meeting of the Standing Committee of the National People's Congress on August 30, 2007) . Article 55 states that an entity can be charged with abusing its IP under the AML only if its exercise of IP is not in accordance with China's IP laws and regulations.

[186] See AML Article 19 Undertakings that have any of the following conditions can be presumed to hold a dominant market position:（一）一个经营者在相关市场的市场份额达到二分之一的；
(i) the market share of one undertaking in relevant market reaches 1/2;
（二）两个经营者在相关市场的市场份额合计达到三分之二的；
(ii) the joint market share of two undertakings as a whole in relevant market reaches 2/3; or
（三）三个经营者在相关市场的市场份额合计达到四分之三的。
(iii) the joint market share of three undertakings as a whole in relevant market reaches 3/4.
有前款第二项、第三项规定的情形，其中有的经营者市场份额不足十分之一的，不应当推定该经营者具有市场支配地位。

starting point for a single one-step analysis of whether a particular single firm activity has led to damage to competition, but they are only a starting point. Indeed, the International Competition Network (ICN) has noted in its Recommended Practices for Dominance/Substantial Market Power Analysis (2008) that:

*"All jurisdictions agree that unilateral conduct laws address specific conduct and its anticompetitive effects, rather than the mere possession of dominance/substantial market power or its creation through competition on the merits. All jurisdictions also agree that the goal of enforcement is to identify and act against conduct that is anticompetitive, although it can be difficult to distinguish between pro- and anticompetitive unilateral conduct. Determining whether a firm possesses dominance/substantial market power generally is the first step in the evaluation of potentially anti-competitive unilateral conduct. Laws differ in the way dominance/substantial market power is defined. Most jurisdictions find that a rigorous assessment of whether a firm possesses dominance/substantial market power, going well beyond market shares, is highly desirable. In jurisdictions with a more formalistic definition of dominance based on market shares, it is recommended that agencies be particularly rigorous in their analysis of the conduct at issue."*

Moreover, last month, SAIC issued draft provisions on prohibiting abuse of dominance that would establish a presumption of illegality for routine transactions by dominant businesses. Basically, the draft would force dominant companies to justify any reduction of trade or refusal to enter into specified business transactions with competitors and other entities without first requiring the agency to prove anti-competitive effects existed. The draft provisions would thus vest far too much discretion in SAIC to "manage" competition. For example, under its draft broad refusal to deal provisions, the agency could force dominant MNCs to grant competing Chinese entities access to their prized assets (e.g., supply or distribution chains).

The U.S. government should be concerned about whether China's AML will be implemented in this area in such a way as to deliberately target large U.S. firms in order to favor their Chinese rivals. An approach that is inordinately based on market share or which presumes dominance based on a particular market share, and which suggests the use of non-economic concerns (such as having a fragmented market for its own sake) could harm

U.S. firms operating in China, could damage the Chinese economy and critically take away incentives for innovation.

<u>Merger Control</u>

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In situations stipulated in the preceding items (ii) and (iii), if an undertaking has market share less than 1/10, it shall not be presumed to hold a dominant market position.

The merger control regimen raises similar concerns as those set out for single firm conduct. If China's competition agencies adopt an approach to merger enforcement that does not evaluate mergers based on their alleged harm to competition and their welfare diminishing consequences, but rather relies on non-economic factors such as a fragmented market for its own sake, or an undue reliance on competitor welfare, then this will allow the China authorities to block mergers and acquisitions that do not cause consumer welfare losses, but may fall foul of a particular China government industrial policy. We have arguably already seen this in the case of Coca-Cola's attempted acquisition of the Huiyuan Juice Group Limited. The concern in that case was that the decision to block the acquisition was responsive to complaints from some quarters in China about potential loss of a major Chinese brand to a U.S. company. In the case, Coca-Cola was attempting to acquire an entity that had 32.6% market share of what was a very unconcentrated pure juice business.

Cartel Enforcement

Of particular concern, China's AML can be interpreted to provide an implicit exemption for export cartels, which litter the Chinese landscape. Therefore, U.S. firms may be competing in third countries against Chinese firms which have been authorized to collude.[187] Further, U.S. consumers can be victims of such anticompetitive behavior as those export cartels distort markets by colluding to set price in foreign markets. It will be important for the U.S. Department of Justice to remain vigilant and prepared to aggressively prosecute such practices and not accept any claim by China that such export cartels are operating under the control of the state as an excuse as appeared to be the case in the Chinese Vitamin C case.[188] Such claims by China stand in direct contrast to its repeated claims, including at the May 2010 meeting of the Strategic and Economic Dialogue and in advance of its updated offer in July 2010 to accede to the WTO Agreement on Government Procurement, that its SOEs operate solely as commercial actors, independent of state influence and benefit.[189]

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[187] See AML Article 15: Any agreement among undertakings with one of the following objectives as proved by the undertakings shall be exempted from application of Article 13 and 14: … (vi) to safeguard the legitimate interests in foreign trade and economic cooperation…

[188] China Defends Price Fixing by Vitamin Makers, John Wilke, November 25, 2008, Wall Street Journal.

[189] China made very substantial commitments as part of its accession to the WTO. Many of these obligations are recorded in the WTO's Working Party Report on China's Accession. Among the most important of the commitments is the statement by the representative of the Government of China that China would ensure that all state-owned and state-invested enterprises would make purchases and sales based solely on commercial considerations, e.g. price, quality, marketability and availability, and that the enterprises of other WTO Members would have an adequate opportunity to compete for sales to and purchases from these enterprises on non-discriminatory terms and conditions. In addition, the Government of China would not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested

Recommendations for Action

The Chamber's recommendations for action coincide with a number of books and articles I have written which are referred to below and which should be added into the record.[190] These recommendations note that decisions by China's antitrust agencies to act or not act which are non-economic in nature are a subset of other market distorting practices by governments. Simply because a competition agency takes action does not mean that the result of that action will automatically lead to more competitive markets. Indeed, for reasons we have highlighted above, if the competition agency is being used as a tool to effect industrial policy this will be an anti-competitive market distortion in and of itself.

The Chamber recommends that the U.S. government re-orient its policy responses based on this reality, but notes that these recommendations are not intended to be a substitute for existing international policy in this area but rather additive to it.

Reform Inter-Agency Process to Deal Squarely with Anti-Competitive Market Distortions from a Competition Policy Perspective

The Chamber recommends developing a new inter-agency group around anti-competitive market distortions which would include distortive decisions by competition agencies. This group should comprise representatives of all U.S. government actors with a stake in ensuring that the Chinese (and indeed other) markets are competitive, including not only the Department of Justice (DOJ) and the Federal Trade Commission (FTC), but also, and equally important, the Department of Commerce (DOC), and the Office of the United States Trade Representative (USTR), which lead the annual U.S.-China Joint Commission on Commerce and Trade (JCCT), and the Department of the Treasury and Department of State, which lead the annual U.S.-China Strategic and Economic Dialogue.

Congressional Reports on Foreign Country Market Distortions

Along the lines of USTR's National Trade Estimate, the above group should be required to report to Congress the state of the competitive landscape in China and on any damage caused by an anti-competitive market distortion in the market. Such information would be

enterprises, including on the quantity, value or country of origin of any goods purchased or sold, except in a manner consistent with the WTO Agreement.

[190] Shanker Singham, A General Theory of Trade and Competition; Trade Liberalization and Competitive Markets (CMP Publishing, 2007); Shanker Singham and Daniel Sokol, Public Sector Restraints: Behind-the-Border Trade Barriers, 39 Tex. Int'l L.J. 625 (2004); Shanker Singham, Is it Time for an International Agreement on Uncompetitive Public Sector Practice?, 27 Brook. J. Int'l L. 35 (2001-2002); Shanker Singham, Trading Up, The National Interest, July/August, 2007; Shanker Singham and Donna Hrinak, Poverty and Globalization, The National Interest, Winter 2005/6

useful in promoting a dialogue on the impact of market distortions and should help lead to their ultimate minimization.

Stricter Enforcement (and Increasing Scope) of U.S. Antitrust Laws under the Foreign Trade Antitrust Improvements Act

Current U.S .law enables the U.S. antitrust agencies to look at anti-competitive behavior which takes place abroad but which has effects in the U.S. market. More rigorous enforcement of these laws when dealing with private anti-competitive practices is required, but the law should also be applicable to public sector restraints on trade that are anti-competitive.

Stricter Enforcement (and Increasing Scope) of Section 337 of the Trade Act where Anti-Competitive Practices are Alleged/Competition Safeguard

Section 337 of the Trade Act enables the U.S. to block imports of products that have been produced as a result of intellectual property violations and anti-competitive practices.

While 337 cases are regularly brought to block IP infringing products, few are brought under the head of anti-competitive practices, and even fewer are brought where those anti-competitive practices emanate from the public sector.

In the alternative, a competition safeguard could be fashioned which would be applied in cases of proven allegations of anti-competitive market distortions giving rise to trade advantages. The safeguard could be linked to the level of distortion (as measured by welfare effect) and would be reduced as the level of distortion was itself reduced.

Evaluation of International Agreements on Anti-Competitive Market Distortions

Ultimately, international disciplines are needed to address anti-competitive market distortions. The outlines of such an agreement are already in place with certain provisions of existing WTO agreements (e.g., Article IX, GATS, Article XVII, GATT, Reference Paper on Competition Safeguards annexed to the Basic Telecommunications Agreement). There is also useful material in the European Union's State Aids laws, and jurisprudence as well as some of U.S. Free Trade Agreements. The current competition chapter being negotiated as part of the Trans-Pacific Partnership Agreement represents an excellent opportunity to advance competition policy disciplines that promote consumer welfare, rein in industrial policies, and discipline anticompetitive behavior of SOEs.

Technical Assistance

None of the above limits the importance and role of technical assistance. The U.S. government already provides extensive technical assistance to China with respect to the

AML, including via a landmark training program initiated by the U.S. Trade and Development Agency (USTDA), with strong support from the U.S. private sector. The initiative has brought together an interagency steering committee comprised of the DOJ, the FTC, the DOC, and USTR to develop a series of training modules for China's AML authority on the U.S. experience in implementing antitrust law in a manner that promotes competition, as opposed to protecting competitors, and advances consumer welfare. The U.S. Chamber of Commerce has been honored to serve as the private sector liaison to the interagency steering committee. To date, the interagency, in collaboration with the private sector, has conducted seven training programs in China under the initiative, with an eighth scheduled for this fall.

However, such technical assistance is provided in the same way that the U.S. provides technical assistance to any country with a new competition agency. While the technical assistance program is to be commended, the U.S. government should be more pro-active in the selection of key topics for technical assistance. It should be recognized that technical assistance is currently being provided by a number of countries whose competition policy is not necessarily guided by economic welfare concerns. Technical assistance should be focused on (i) competition advocacy; (ii) economic principles of competition implementation and enforcement; (iii) unilateral conduct; (iv) interface with IPR and standards; (v) merger control. However, in each of these areas, a significant part of the training should be devoted to the fundamental economics that underpins the legislative framework.

Conclusion

The U.S. Chamber of Commerce recognizes that promulgation of the AML is only the first step in China's effort to establish a comprehensive, nationwide competitive marketplace, where business competition on the merits determines winners and losers. We look forward to continued engagement with Chinese authorities and are committed to sharing the U.S private sector's experience in the area of antitrust.

We also look forward to further clarification concerning the AML's application in certain key areas, such as substantive rules against anticompetitive conduct, substantive standards for administrative monopolies, procedures for reviewing transactions on both competition and national security grounds, enforcement mechanisms, defining abuses of intellectual property rights, and penalties.

The U.S. Chamber sincerely hopes that China's competition authorities will focus on modern economic principles and prevailing international practices when applying the new

law.  We will be observing with interest how the law is put into practice and look forward to continuing to support the government's moves to develop its competition-law system.

# Annex 5 The Competere Foundation

The Competere Foundation for Trade and Competition Policy is a non-profit educational organization led by international trade and competition expert Shanker A. Singham. Its mission is to alleviate global poverty by promoting policies of open trade, competitive markets, and strong property rights protection. In practice, this means educating policymakers and the public on how free trade and competition-driven market reforms can spur wealth creation and economic growth. The Foundation carries forward ideas developed by Singham's earlier initiatives in trade and competition policy, ensuring that the proven pillars of trade liberalization, competition, and property rights remain central to policy debates.

**Predecessor – International Roundtable on Trade and Competition Policy (IRTP)**: The Competere Foundation builds on the capacity-building work of its predecessor, the International Roundtable on Trade and Competition Policy, Inc., founded by Shanker Singham in 1997. Under Singham's leadership, the IRTP organized numerous training programs and policy forums throughout the late 1990s and 2000s to help emerging economies develop sound competition and trade policies. Key activities of the IRTP included:

- **Latin American Competition Roundtable (1997–2005):** An annual forum for heads of Latin American competition agencies and other officials. These roundtables facilitated the sharing of best practices in antitrust enforcement and trade liberalization across the region. Proceedings and research from the Latin American Roundtable were published in academic outlets, including symposium issues of the *Brooklyn Journal of International Law*. This series of meetings helped Latin American authorities incorporate good competition good practice principles into their regulatory frameworks.
- **Asian (Southeast Asia) Roundtable (mid-2000s):** Building on the Latin American experience, the IRTP expanded its outreach to Asia. Between 2005 and 2008 it hosted annual roundtable meetings in Singapore for competition agency officials from across Asia. These sessions served as capacity-building exercises for Southeast Asian and East Asian regulators (including Korea's Fair Trade Commission), focusing on developing competition law regimes and aligning them with open trade policies. By fostering dialogue among Asian competition authorities, the Roundtable supported the growth of a competition policy community in the region.
- **Korea and Japan Capacity-Building (2005 - 2010):** The IRTP also engaged with individual countries in Asia to address specific competition policy challenges. In **Korea**, the Roundtable's Asian forums incorporated Korean competition officials, aligning Korea's antitrust policy discussions with international best practices. In **Japan (2005/6)**,

Singham and the IRTP collaborated with the Japan Fair Trade Commission's research arm to advise on pro-competitive regulatory reforms during Japan's postal service privatization. As Chairman of the IRTP, Singham contributed a 2006 study through the JFTC's Competition Policy Research Center on how opening network industries (like postal and telecom sectors) could benefit consumers and enhance competition in Japan.[191] This work with the JFTC's internal think tank exemplified the IRTP's country-specific capacity-building efforts, providing policy guidance on competition and regulatory issues in key sectors.

**Policies informing the Competere Foundation:** Drawing from the IRTP's experience, the Competere Foundation emphasizes that **free trade, competitive markets, and secure property rights** are the "tried and true" drivers of economic development. The Foundation's programs and publications highlight how an **open trading system** (e.g., reducing tariffs and distortive subsidies), robust **competition law and policy** within national borders, and protection of private property/investment combine to create the conditions for prosperity. These core policy pillars, sometimes described by Singham as the *"three pillars"* of growth, inform all of the Foundation's work. By educating leaders on removing anti-competitive market distortions and implementing pro-market reforms, the Competere Foundation continues the legacy of the IRTP in advancing policies that move societies "from poverty to prosperity" through trade and competition.

[191] Shanker Singham, *Market Distortions in Privatisation Processes* (London: Routledge, 2022).