European Yearbook of International Economic Law

Katia Fach Gómez
Anastasios Gourgourinis
Catharine Titi
Editors

Special Issue:

International Investment Law and Competition Law

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European Yearbook of International Economic Law

Special Issue

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International Investment Law and Competition Law

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Editorial

This special issue brings together a selection of chapters that were presented and discussed at the *Colloquium* on "International Investment Law and Competition Law", which took place at the University of Zaragoza (Spain) on 27 and 28 September 2018.[1] Although international investment law and competition law coexist regularly in international praxis, scholarly analysis has largely treated them as parallel universes, and as a result their actual and potential overlap was not sufficiently explored. This edited book *International Investment Law and Competition Law* aims to redress this issue by focusing on the commonalities and synergies between the two legal fields, thus encouraging a scholarly debate that lays the foundations for future interdisciplinary legal studies.

The book opens with a chapter authored by Friedl Weiss and entitled "Quest for a Sustainable International Investment Regime: Leveling Up Through Competition (Policy) Rules?". The chapter corresponds to the *Colloquium*'s Opening Keynote Lecture. In it, the author explores the functioning of trade, investment and competition law and the interface between them, both at the national and international level. He documents international cooperation in competition policy and the failed attempts to negotiate multilateral rules in trade and investment law and argues in favour of a multilateral system in order to redress inequalities on a worldwide scale.

Marc Bungenberg and Fabian Blandfort co-author a chapter on "International Investment Law and Public Procurement: An Overview". The authors ask the question of whether international investment law can serve as a gap-filling regime

[1]This *Colloquium* was generously sponsored by both the Department of Innovation, Research and University of the Aragon Government (ORDEN IIU/1000/2018, de 30 de mayo, por la que se convocan subvenciones para la realización en Aragón, durante el año 2018, de eventos y actividades de promoción, divulgación y difusión de la ciencia, la investigación, el desarrollo tecnológico y la innovación) and the Vice-rectorade of Scientific Policy of the University of Zaragoza (Convocatorias de Ayudas a la organización de congresos de carácter científico). In addition, the *Colloquium* received financial support from an important number of local and national sponsoring institutions, all of them mentioned in the conference programme and on the registration website.

to protect foreign tenderers against harmful state conduct during procurement proceedings. The chapter therefore examines whether international investment agreements (IIAs) are applicable to the procurement process and whether a tender and pre-award expenditures qualify as protected investments. After observing that the question is neither adequately regulated in IIAs nor has arbitral practice developed a concrete approach, the authors consider that while successful bidders can claim compensation for damages arising from the pre-award phase, the protection of unsuccessful bidders must be answered in a differentiated manner depending on whether the award procedure is open or pre-elective. Assuming that international investment law is applicable, the authors conclude that the ordinary business risks of being part of a tender procedure should be taken into account when assessing liability.

Lukas Vanhonnaeker canvasses the "Impacts of Local Equity Requirements on Competition". Local equity requirements tend to oblige foreign investors to join forces with a local partner in order to access the national market while preventing them from acquiring a majority stake in the local entity. The chapter explains the notion of local equity requirements and gives an overview of their historical and ideological underpinnings and context. Ultimately, the chapter analyses the far-reaching and potentially harmful impact of local equity requirements on the competitive state of markets.

Phil Baumann addresses the topic "When State Enterprises Have Deeper Pockets: Ensuring Competitive Neutrality in Cross-Border M&A". The author argues that state enterprises may have undue competitive advantages over their private competitors, which may result in market inefficiencies, and that the current legal framework does not address this concern adequately. In order to overcome this unsatisfactory status quo, the chapter critically discusses viable approaches to securing competitive neutrality in cross-border mergers and acquisitions and ultimately a level playing field.

Gustavo Prieto's chapter on "The Review of National Competition Authorities' Acts in Investment Arbitration: Setting Limits to 'Economic Lawfare' in the 21st Century" looks into what would constitute an appropriate standard of review for investment arbitrators when evaluating the lawfulness of acts of national competition authorities in the context of the contemporary notion of "economic lawfare". The author argues in favour of a three-principle standard of review, taking into account arbitrariness, denial of justice and proportionality, in order to take account of current standards of treatment contained in IIAs.

Belen Olmos Giupponi's addresses the question "Are Market Competition and Investment Protection Incompatible in the EU Energy Sector?". Her contribution underscores recent developments in the European Union's investment policy and unveils the intricacies of the EU state aid regime. At the centre of her critical analysis lies the legal nature of the Energy Charter Treaty as an international investment agreement. Whereas the Commission's role in international investment law has increased over the last few years, the author considers that internal obstacles operate as a resistance to the implementation of an authentic EU investment policy**.** The chapter draws on a joint examination of the evolution of case law of arbitral

investment tribunals, the Court of Justice of the European Union (CJEU) and the European Commission's position on intra-EU investment treaty and state aid in the energy sector.

Karsten Nowrot and Emily Sipiorski co-author a chapter entitled "Stipulating Investors' Obligations in Investment Agreements as a Suitable Regulatory Approach to Prevent and Remedy Anti-Competitive Behaviour?". The authors assess the feasibility and potential benefits of introducing investor obligations in IIAs targeting anti-competitive behaviour by foreign investors. While similarities between the policy goals of competition law and international investment law argue in favour of a potential "cooperation" between the two regimes, the chapter also stresses the difficulties in ensuring the respect of such obligations once inserted in IIAs.

Elena Belova pens the following chapter entitled "Investors' Anti-Competitive Behaviour and Illegal Investments in Investment Treaty Arbitration". The chapter discusses the legal consequences of investors' anti-competitive behaviour in the context of investment treaty arbitration and argues that anti-competitive strategies may lead to breaches not only of competition law but also of a variety of host state laws and regulations. The author advocates the adoption of a functional definition of anti-competitive actions that taint investments with illegality and explores ways in which such investments may be excluded from IIA protection.

Paschalis Paschalidis considers "The Impact of EU State Aid Law on International Investment Law and Arbitration". The author focuses on the manner in which legitimate expectations have been applied by arbitral tribunals in relation to state aid measures and examines whether award of damages to foreign investors can constitute unlawful state aid. He studies in particular whether arbitral awards can constitute an economic advantage and whether they are attributable to the member state involved. The chapter further considers the fate of arbitral awards granting damages to investors in relation to state aid and studies the remedies available to member states against such awards.

Millán Requena Casanova's chapter addresses "The Complex Relationship between Competition Law and Investment Arbitration after *Achmea*: The *Novenergía v. Spain* Case". Within the framework of the investor-state arbitrations initiated against Spain under the Energy Charter Treaty (ECT), this chapter focuses on the *Novenergía* arbitration, highlighting the difficult relationship between competition law and investment arbitration in intra-EU investment disputes. After analysing Spain's position in *Novenergía*, the author reflects on new issues that the Judgements rendered in *Achmea* and *Micula* may open. He further highlights the difficulties that investors attempting to obtain recognition and enforcement of the awards issued in the renewable energy arbitrations against Spain may encounter.

In "Using GATS Article II to Resort to Investment Arbitration", Sébastien Manciaux focuses on a recent arbitration, the *Menzies v. Senegal* case. In *Menzies v. Senegal*, an investor from Luxembourg attempted to establish the jurisdiction of an investment tribunal by combining the most-favoured-nation clause provided in Article II of the General Agreement on Tariffs and Trade (GATS) and the investor-state arbitration clause contained in a bilateral investment treaty (BIT) between the host state and a third country. The author critically discusses this case in order to

shed some light on the links between the law of the World Trade Organization (WTO), seen as global competition law, and international investment law.

The chapter co-authored by Krystle M. Baptista and Bianca M. McDonnell on "The Use of Evidence Obtained through a State's Special Antitrust Powers in Investment Arbitration" explores the use of evidence obtained by states in investment arbitration. The authors consider whether a state may use information it obtains through the special powers of supervision, investigation and seizure granted to its antitrust agency in order to defend itself against an investment arbitration. They argue that such a use of a state's special powers would constitute a misuse of power under domestic law and a violation of due process in investment arbitration and that, as a consequence, states should resort instead to document production.

Putting the finishing touches to this book, Thomas Cottier discusses "Competition and Investment: The Case for 21st Century WTO Law". This chapter corresponds to the *Colloquium*'s Concluding Keynote Lecture. The author addresses the close relationship between trade regulation, competition and investment law. He argues in favour of integrating these three areas within WTO law, thus returning to conceptual foundations laid out in the Havana Charter. Global value chains and an increasing need to address behind-the-border issues call for enhanced common and approximated rules in international economic law and, according to the author, reveal the need for an integrated dispute settlement system within the WTO covering trade, investment and competition law issues.

The editors would like to thank Munia El Harti Alonso and Vanessa Manzin for their editorial assistance with some aspects of this volume.

Zaragoza, Spain — Katia Fach Gómez
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Contents

Quest for a Sustainable International Investment Regime: Leveling Up Through Competition (Policy) Rules?

Friedl Weiss

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Abstract Competition (policy) rules are ubiquitous as well as an essential element of the legal and institutional framework for the global economy. It is widely recognized that, linked to inclusive and sustainable development, they can best harness foreign direct investment (FDI)'s potential benefits as drivers of economic transformation. Against the background of politically regressive skepticism and growing protectionist retreat from the institutionalized and rule-based liberal practice initiated after the Second World War, this article seeks to retrace the role, utility, design, and interface of the legal regimes governing trade, investment and competition, at the national level and as main pillars and governance ideas of global economic law. It also documents international cooperation in the field of competition policy, as well as proposals for and failed attempts to establish multilateral rules, for trade and FDI. The article concludes with a plea for such rules in an effort to redress existing worldwide inequalities.

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1 Browsing Documents for "Competition"

Competition has weakened, is a common lament. Markets have become more concentrated as firms prefer to merge than to compete, forming monopolies which limit production and restrain their investment to keep prices and profits high. Evidence of some of the pernicious consequences of less competition include markups associated with less investment in physical capital and a smaller share of economic value created being paid to workers, eroding their purchasing power. These, in a nutshell, are the key findings of a couple of recent International Monetary Fund (IMF) studies.[1] Conversely several "industrialized" economies experience de-industrialization, de-unionization and rising global competition for the export of industrial goods, factors which contribute to higher levels of income inequality. Yet, a recent World Trade Organization (WTO) Staff Working Paper tersely asserts that "competition policy, today, is an essential element of the legal and institutional framework for the global economy".[2]

The inaugural issue of the World Bank Group's Global Investment Competitiveness Report 2017/2018[3] presents analytical insights and empirical evidence on foreign direct investment (FDI) drivers and contributions to economic transformation. It is focused on developing countries (DCs) given their growing role as both sources and recipients of FDI, and explores how policy makers and local companies can best harness FDI's potential benefits for inclusive and sustainable development.[4] Moreover, work undertaken by the Organisation for Economic Co-operation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), the World Bank and at the WTO has identified overarching links between competition policy and development, including an economy's ability to attract and maximise the benefits of investment.[5] More generally, the World

[1] The rise of corporate market power and its macroeconomic effects. International Monetary Fund, World Economic Outlook, April 2019, www.imf.org/en/Publications/WEO/Issues/2019/03/28/world-economic-outlook-april-2019, pp. 55–76.

Díez FJ, Leigh D, Tambunlertchai S, Global Market Power and its Macroeconomic Implications. International Monetary Fund, WP/18/137, 15 June 2018, www.imf.org/en/Publications/WP/Issues/2018/06/15/Global-Market-Power-and-its-Macroeconomic-Implications-45975, pp. 3–5.

[2] Anderson RD, Kovacic WE, Müller AC, Sporysheva N, Competition Policy, Trade and the Global Economy: Existing WTO Elements, Commitments in Regional Trade Agreements, Current Challenges and Issues for Reflection. WTO, ERSD-2018-12, 21 October 2018, www.wto.org/english/res_e/reser_e/ersd201812_e.htm, p. 1.

[3] Foreign Investor Perspectives and Policy Implications. World Bank Group, Global Investment Competitiveness Report 2017/2018, 2018, https://openknowledge.worldbank.org/handle/10986/28493.

[4] "Competition" does not feature in the most recent advanced unedited version of the Report of the Committee for Development Policy of the United Nations' ECOSOC on its 21st session, E/2019/33, 11–15 March 2019, https://undocs.org/en/E/2019/33.

[5] Conference on Investment for Development: Making it Happen. OECD, 25–27 October 2005, www.oecd.org/investment/investmentfordevelopment/conferenceoninvestmentfordevelopmentmakingithappen.htm.

Economic Forum's contemporaneous Global Competitiveness Report 2017–2018, concludes that goods market efficiency and thus business productivity, depends on healthy market competition, both domestic and foreign, as important drivers of market efficiency, so that the most efficient firms, producing goods demanded by the market, are those that thrive.[6]

For many DCs, the World Bank's Report claims, FDI has become the largest source of external finance, surpassing official development assistance (ODA), remittances, or portfolio investment flows. But the financing required to achieve the Sustainable Development Goals (SDGs) remains prohibitively large and largely unmet by current FDI inflows. To maximize the development impact of FDI and thus help meet the SDGs, private investment will have to expand into areas where it has not yet ventured, notwithstanding the associated risks. The Report also recalls that the benefits of FDI extend well beyond attracting needed capital. FDI also confers technical know-how, managerial and organizational skills, and access to foreign markets and has a significant potential to transform economies through innovation, enhancing productivity, and creating better-paying and more stable jobs in host countries. Importantly, foreign investors are becoming increasingly prominent players in delivering global public goods, addressing climate change, improving labor conditions, setting global industry standards, and delivering infrastructure to local communities and more generally, in increasing competitiveness and stability. Despite abundant evidence on the development benefits of FDI, the global economic outlook remains uncertain, clouded by risks of trade and investment protectionism—whether in form of investment screening,[7] strategic industrial policies[8]—and geopolitical risk.

[6]Schwab K, The Global Competitiveness Report 2017–2018. World Economic Forum, 2017, www.weforum.org/reports/the-global-competitiveness-report-2017-2018, p. 318. The idea of "market efficiency" underlies EU competition law, a regulatory system ensuring that competition in the internal market is not distorted (Protocol No. 27 to the Lisbon Treaty) and which aims at "effective" (or workable) rather than perfect competition, designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such: ECJ Case C-8/08, T-Mobile, June 4, 2009.

[7]In its briefing on "FDI screening. A Debate in light of China-EU FDI flows", of 17 May 2017 the EP pointed to screening mechanisms operated by Australia, Canada, Japan and the USA and that their deterrence effect on Chinese investors in a growing protectionist climate is likely to have an impact on the EU, Grieger G, PE 603.941, www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI%282017%29603941.

[8]See e.g. "A Franco-German Manifesto for a European industrial policy fit for the 21st Century" of 19 February 2019: recognizing that "competition rules are essential", but also calling for a necessary adaptation of the Merger Control Regulation 139/2004 and current merger guidelines so that European companies are enabled to "successfully compete on the world stage", Bundesministerium für Wirtschaft und Energie, Ministère de l'Économie et des Finances, Paris, www.gouvernement.fr/en/a-franco-german-manifesto-for-a-european-industrial-policy-fit-for-the-21st-century; this manifesto echoes of course Jean-Jacques Servan-Schreiber's "The American Challenge", today, probably rebranded "The Chinese Challenge". See Servan-Schreiber (1967).

2 By Way of Introduction

Adam Smith, remembered as the proverbial father of economics, lived at a time of great change, when the industrial revolution got under way, while people began to question the authority of religion. To him both free trade and free thinking were forces for good.[9] Yet both are still ideologically though perhaps not theoretically embattled. Smith also praised the virtues of competition as a way to ensure both allocative and productive efficiency.

Today, once again, we witness great change—political, societal, economic—and the surge and spread of multiple discontents in civil societies. Uncannily, like in the days of Adam Smith, people also question the authority of established scientific certainties underpinning contemporary socio-economic governance systems and practices. People's belief in the ability of managed or heavily guided capitalism[10] based on these to deliver economic welfare and sustainable development has become brittle. Science itself has become suspect; and the stories that experts tell about scientific discoveries, whether readily embraced, anxiously hedged against, or rejected, are ultimately subject to the scrutiny of fickle markets and increasingly irascible public opinion.

Amongst many challenges facing designers of policies as well as regulatory regimes today two are rarely mentioned at all: their weakened ability or willingness, both to eschew the temptations to yield to populist or group-specific demands for all kinds of protection—mostly against import competition—and, proverbially, to learn from egregious past policy mistakes, notably the Great Depression, shattering many people's faith in unmanaged capitalism.

Fortunately, however, proven scientific insights or even certainties tend to be resilient, not up for grabs as it were, by willful manipulation and exploitable populist prejudice or merely whimsical esoteric obscurantism.

Can the same be claimed to hold for the prevalent science of socioeconomic political economy, such as it is, supporting the legal regimes governing trade, investment and competition, the main pillars of global economic law? Role, utility and design of each of these governance ideas and implementing rules, once thought settled, i.e. accepted, have slipped again into the mode of politically regressive skepticism, even retreat.[11]

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[9] Adam Smith, An enlightened life, book review, The Economist, July 28th 2018, p. 64f, www.economist.com/books-and-arts/2018/07/26/rescuing-adam-smith-from-myth-and-misrepresentation.

[10] Friedrich Hayek: intellectual godfather of free-market Thatcherism v. John Maynard Keynes as the patron saint of heavily guided capitalism; Was he a liberal?, The Economist, 18th August 2018, p. 54f. www.economist.com/schools-brief/2018/08/18/was-john-maynard-keynes-a-liberal.

[11] See e.g. the US Foreign Investment Risk Review Modernization Act 2018, giving the Committee on Foreign Investment in the United States (CFIUS) greater authority to examine deals where foreign investors gain control of critical infrastructure or technology or of personal data.

3 Linkages and Fissures: Interactions of Trade, Investment, Competition

3.1 Sketching Antecedents

Recent scholarly preoccupation with the International Law Commission (ILC)'s report on the fragmentation of international law,[12] triggered, somewhat surprisingly, intense discussions of strategies and policies of reconceptualization of coherence in international economic law.[13] How come? Had the separate institutionalized tenets of the New Post Second World War Order been overlooked, simply forgotten, deemed obsolete, one might ask? After all, with the exception of the comprehensive mandate under the abortive Havana Charter of 1948, stewardship and administration of specific rules for the conduct of international economic relations had been entrusted to separate intergovernmental institutions of limited jurisdictional scope. It is also noteworthy that initial imperfections of rule-based governance systems and/or their rejection for political or ideological reasons (Havana Charter) and incremental misalignment with newly emerging and diversified interests and regulatory needs—General Agreement on Tariffs and Trade (GATT)/WTO producer bias[14] (favouring producers in rich countries) and lack of competition culture v. health and welfare of consumers (though Technical Barriers to Trade & Sanitary and Phytosanitary measures are more sensitive to social concerns)—further compounded existing inadequacies, thereby boosting calls for supplementary or updated rules. Still, in order to overcome such fragmentation and the resulting overlap and potential conflict in policy-making and standard-setting, scholars and institutions attempted to piece together seemingly disparate concerns within and between organizations through a variety of devices including interlinkages of complementary aspects of economic policymaking,[15] their "constitutionalization",[16]

[12]Koskenniemi M, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law. United Nations, A/CN.4/L682, 13 April 2006, http://legal.un.org/docs/?symbol=A/CN.4/L.682, p. 8.

[13]See e.g. the Ministerial Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking adopted by the Trade Negotiations Committee on 15 December 1993, www.wto.org/english/docs_e/legal_e/32-dchor_e.htm.

[14]The protection of foreign consumer interests by trade negotiators demanding access to foreign markets was indirect and likewise driven by producer interests (export industries), Petersmann EU, Preparing the Doha Development Round: Challenges to the Legitimacy and Efficiency of the World Trading System. European University Institute, May 2004, http://cadmus.eui.eu/handle/1814/2531, p. 14.

[15]See e.g. the Ministerial Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking adopted by the Trade Negotiations Committee on 15 December 1993, www.wto.org/english/docs_e/legal_e/32-dchor_e.htm. Also para. 36 of the Doha WTO Ministerial Declaration of 20 November 2001 on a mandate for a Working Group on trade, debt and finance, WT/MIN(01)/DEC/1, www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

[16]Kingsbury et al. (2005).

integration, reconciliation through "balancing"[17] or "spill-over" adjudicative interpretation or bridging conceptual innovation, to name but the most common. However, none of these papering-over- the-cracks or gap-filling efforts could conceal the fact that more standard setting is needed to keep up with the pace of changes in the global economy.[18]

"Wettbewerb ist eine staatliche Veranstaltung", principally a domestic function, legal scholars once proclaimed.[19] Indeed, it is enforced at the national level by national authorities. This holds true since Roman legislators first sought to control price fluctuations and unfair trade practices, Medieval kings cracked down on monopolies and the English common law doctrine of restraint of trade evolved as the precursor to modern competition law, notably the US antitrust statutes.[20] Multilateral cooperation in competition policy remains limited, much of it in bilateral arrangements. Increasingly, though the focus has moved to international competition enforcement in a globalized economy, despite setbacks and unsuccessful efforts to establish a general agreement on competition policy through multilateral standard setting.[21] Clearly, competition today is everywhere,[22] transparent and impartial competition law enforcement a pervasively international phenomenon.[23] However, despite an enormous amount of cross-fertilization, harmonizing different competition laws continues to present a major challenge due to rooted differences in countries' preferences indicative of a low feasibility of convergence.[24]

[17] See Knill et al. (2008).

[18] International/global economic law is the ideal habitat for scientific (comparative) interdisciplinarity, there being no room for pure theorists: (international) lawyers, political scientists and (political) economists, once reciprocally regarded as "invasive species", extend their prowess to each others domains.

[19] Hopt (1985), Meessen (2004), p. 228.

[20] The Sherman Act of 1890 is the oldest antitrust law of the US making it illegal for competitors to make agreements with each other that would limit competition; The Clayton Act of 1914 helps American consumers by stopping mergers or acquisitions that are likely to stifle competition; the Federal Trade Commission Act (FTC) of 1914 gave a new federal agency authority to investigate and stop unfair methods of competition and deceptive practices; and the 1982 Foreign Trade Antitrust Improvements Act extends US jurisdiction to restraints overseas that have a "direct, substantial, and reasonably foreseeable effect" on US imports or domestic commerce, or on the export commerce of US exporters; see Address by Wood DP (former Deputy Assistant Attorney General, Antitrust Division, US Department of Justice), The Internationalization of Antitrust Law: Options for the Future, DePaul Law Review Symposium on Cultural Conceptions of Competition: Antitrust in the 1990s, 3 February 1995, www.justice.gov/atr/speech/internationalization-antitrust-law-options-future.

[21] Cf. Chapter V of the Havana Charter on restrictive business practices.

[22] Sauvant (2016), p. 9.

[23] Anderson RD, Kovacic WE, Müller AC, Sporysheva N, Competition Policy, Trade and the Global Economy: Existing WTO Elements, Commitments in Regional Trade Agreements, Current Challenges and Issues for Reflection. WTO, ERSD-2018-12, 21 October 2018, www.wto.org/english/res_e/reser_e/ersd201812_e.htm, pp. 37, 53.

[24] Richardson et al. (1998), pp. 375, 376. See also the discussion of the historical arguments for and against a WTO multilateral agreement on competition policy, in Kennedy (2001), p. 610; and by Stiglitz (2000), pp. 31–60.

3.2 *Trade-Investment "Interface Economics"*

Much has been written about the relationship between investment and trade, or the lack thereof.[25] Less about the role of competition regarding both of them[26] and about the erstwhile study of them in WTO Working Groups.[27] Generally, though there is growing awareness of the links between FDI policy, trade policy and competition policy as a means of maintaining contestable and competitive markets.[28] The link, more specifically, between investment and competition is regarded one of the most important relationships to examine in economics.[29] For more than two centuries economists have had conflicting views on the question which market structures create the most favourable environment for economic growth, particularly whether the presence of large firms capable of extensive investment should be promoted or discouraged to protect small firms and preserve competition.

The fundamental purpose of bilateral investment treaties (BITs) remains to encourage FDI flows between pairs of countries. However, empirical evidence that BITs are effective is ambiguous. Yet the numbers of BITs and other international investment agreements (IIAs) and preferential trade agreements (PTAs) with investment provisions continue to grow, as ever more host DCs apparently race to accept stricter bilateral and plurilateral FDI-related provisions, notably with regard to investor-state dispute settlement (ISDS) and pre-establishment national treatment of foreign investors.[30] While the argument is not new, strands in economic literature have advanced different theories explaining the phenomenon.[31]

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[25]Lal Das B, Dangers of Negotiating Investment and Competition Rules in the WTO. Third World Network (TWN), 16 TWN Trade & Development Series, 2001.

[26]See, however, the essays of The Weimar Symposium of October 1998 on "The Competition Law of Deregulation" in vol.23 Fordham International Law Journal 2000.

[27]See, e.g. the 1997 Report to the General Council of the Working Group on the Interaction between Trade and Competition Policy, especially Item III of the Work Programme for Meetings at Annex 2 which includes "the relationship between investment and competition policy", Working Group on the Interaction between Trade and Competition Policy – Report (1997) to the General Council. WTO, WT/WGTCP/1, 28 November 1997, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=43538,42759,58169,18158,45943,19500,33826&CurrentCatalogueIdIndex=6&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True, p. 4.

[28]Roffe (1999), p. 145.

[29]Mathis J, Sand-Zantman W, Competition and Investment: What do we know from the literature?. Institut d'Economie Industrielle, March 2014, http://idei.fr/sites/default/files/medias/doc/by/sand_zantman/Competition_and_Investment.pdf.

[30]Kingsbury et al. (2005).

[31]Allee and Peinhardt refer to legal scholars who have singled out ISDS clauses in BITs; Simmons concurs, adding that host DCs are more likely to agree to strict ISDS provisions in harder economic times; Baldwin points to DC's concern about trade diversion when their competitors engage in closer economic integration; Lupu and Poast corroborate that host countries conclude BITs with specific source countries in order to divert FDI away from competing hosts of FDI by this specific source country.

3.3 Role of Competition in Trade & FDI Policy

The vigorous debate about the balance between investor protection and the right to regulate in over 3000 existing investment treaties concerns mainly four areas: types of regulation potentially at issue in investment treaty claims by covered investors; types and levels of investor protection; the degree of impact of treaties on regulation; and the processes and institutions that may be involved in balancing interests in investor protection and the right to regulate.[32] As is well known, critics of the alleged impact of treaties on the right to regulate include the international law scholar Koskenniemi[33] and the Nobel-prize winning economist Stiglitz, who even suggested that FDI treaty provisions are no longer designed to protect property rights in exchange for FDI but have instead become a weapon to fight regulation, to impede health, environmental, safety, and even financial regulation.[34] Cases and claims such as *Vattenfall*[35] are used to illustrate how the right to regulate in key areas is now excessively subject to the rulings of arbitrators in ISDS. Defenders contend that the right to regulate can be exercised to the detriment of investor rights and that existing treaties protect covered investors from government misrule and can have a positive impact on the quality of government regulation. It has been argued, and disputed by others, that some extended versions of fair and equitable treatment (FET) which encompass issues of stability of regulation and due process can make positive contributions to governance and the rule of law, policy goals largely absent from early treaty policy.[36] Governments strive to create an environment which is attractive to investors, both foreign and domestic, while identifying and eliminating unwanted and to reduce unnecessary barriers to entry. Barriers, structural and behavioral,

[32]Gaukrodger D, The balance between investor protection and the right to regulate in investment treaties: A scoping paper. OECD, OECD Working Papers on International Investment 2017/02, 24 February 2017, www.oecd-ilibrary.org/finance-and-investment/the-balance-between-investor-protection-and-the-right-to-regulate-in-investment-treaties_82786801-en, p. 3.

[33]In his view, "essentially, it's a transfer of power from public authorities to an arbitration body, where a handful of people would be able to rule whether a country can enact a law or not and how the law must be interpreted."

[34]["...investors who want to protect themselves can buy insurance from the Multilateral Investment Guarantee Agency, a World Bank Affiliate (the US and other governments provide similar insurance)"], cited by Gaukrodger D, The balance between investor protection and the right to regulate in investment treaties: A scoping paper. OECD, OECD Working Papers on International Investment 2017/02, 24 February 2017, www.oecd-ilibrary.org/finance-and-investment/the-balance-between-investor-protection-and-the-right-to-regulate-in-investment-treaties_82786801-en, p. 6.

[35]Vattenfall against Germany under the Energy Charter Treaty, Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12, https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB%2f12%2f12.

[36]Gaukrodger D, The balance between investor protection and the right to regulate in investment treaties: A scoping paper. OECD, OECD Working Papers on International Investment 2017/02, 24 February 2017, www.oecd-ilibrary.org/finance-and-investment/the-balance-between-investor-protection-and-the-right-to-regulate-in-investment-treaties_82786801-en, p. 11.

consist in a wide array of factors which discourage investment. The subject is broad, ranging across practically the entire range of government regulatory activity. Does it include competition laws, though? It has been reported that this may not be enough and that even relatively open trade and investment regimes, whether in developed countries or DCs, need to complement them with the implementation and active enforcement of competition laws.[37]

One of the challenges faced by governments has been to sort out, between various structural and behavioral market barriers, those that do not unduly harm competition and those that can and should be eliminated.[38]

3.3.1 Brief Recap 1: Evolution of Liberating Rules for the Global Marketplace

GATT originally focused on direct barriers to trade, tariffs and quotas, although it had also modest provisions addressing non-trade barriers (NTBs),[39] and in successive rounds of tariff negotiations achieved ever-greater tariff cuts. Increasingly NTBs required serious attention and took center stage in the Uruguay Round.[40] "Each step along this road – from high to lower tariffs, from tariffs in any form to other direct trade restrictions (such as quotas), from direct restrictions to innumerable trade barriers (NBs), and finally government policies that affect the international trading system (such as intellectual property rules and investment regimes) – has had one thing in common: they all dealt with governmental rules and regulations."[41] However, do antitrust rules contribute to the problem of private restraints affecting international trade and investment?

At a time of mounting social and environmental challenges, all countries recognize that economic growth for sustainable development is imperative and that they need to mobilize, even compete for investment as a primary driver of such growth and to ensure that it contributes to sustainable development.[42] As a result, the

[37]Study on Issues Relating to a Possible Multilateral Framework on Competition Policy. WTO, T/WGTCP/W/228, 19 May 2003, www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm.

[38]Gaukrodger D, The balance between investor protection and the right to regulate in investment treaties: A scoping paper. OECD, OECD Working Papers on International Investment 2017/02, 24 February 2017, www.oecd-ilibrary.org/finance-and-investment/the-balance-between-investor-protection-and-the-right-to-regulate-in-investment-treaties_82786801-en, op. cit., fn.4, p. 5.

[39]E.g. on discriminatory customs valuation, government procurement practices and subsidies.

[40]See the Anti-Dumping Codes of the Kennedy and Tokyo Rounds, www.wto.org/english/docs_e/legal_e/prewto_legal_e.htm.

[41]Address by Wood DP (former Deputy Assistant Attorney General, Antitrust Division, US Department of Justice), The Internationalization of Antitrust Law: Options for the Future, DePaul Law Review Symposium on Cultural Conceptions of Competition: Antitrust in the 1990s, 3 February 1995, www.justice.gov/atr/speech/internationalization-antitrust-law-options-future.

[42]Zhan J, G20 Guiding Principles for Global Investment Policymaking: A Facilitator's Perspective. The E15 Initiative, December 2016, http://e15initiative.org/publications/g20-guiding-principles-for-global-investment-policymaking-a-facilitators-perspective/.

defining characteristic of national FDI policies has been investors. As was pointed out by the eminent scholar Sauvant, "95% of all FDI policy changes around the world during the 1990s involved the liberalization of national investment regimes or otherwise facilitating inward FDI". Typically, he noted, governments have reduced entry barriers, especially by opening up sectors to foreign investors, but also by facilitating the operations of such investors in their countries, and by offering various kinds of incentives. Investment promotion agencies (IPAs) established in virtually every country complement such policy measures and are mandated to attract investment by foreign investors in competition with other IPAs,[43] sometimes to match or even surpass offers by competing countries to compensate[44] for adverse geography, small size, or distance to markets, in order to remain attractive for foreign investors.

This kind of competition has evolved over time. In a first generation of investment promotion, countries simply opened up to FDI, by liberalizing their FDI regimes. In a second generation of investment promotion, countries generally advertised being open for FDI. In a third generation, IPAs focused on targeting foreign investors fitting their development priorities, such as transfer of technology and the establishment of innovative capacities including research and development (R&D) facilities. All the while competition among IPAs to attract FDI has become more sophisticated, for instance by paying more attention to policy advocacy and focusing more on after-investment services. As national FDI regulatory frameworks have become similar worldwide, investment promotion gains in importance.

Nonetheless, investment policymaking is manifestly faced with a dilemma, as there appears to be a dichotomy between simultaneous moves to liberalize and promote investment and to regulate and restrict it.[45] Evidently, national policies toward FDI have become more nuanced as is reflected in the increasing share of national policy measures that make the investment climate less welcoming. While recent national investment policy measures mostly favoured liberalization and promotion,[46] regulatory or restrictive measures such as strengthened review mechanisms for incoming FDI, have been on the rise,[47] as have concerns that some of

[43]Some 10,000 such agencies operate at national, sub-national even city levels.

[44]IBRD, Foreign Investor Perspectives and Policy Implications. World Bank Group, Global Investment Competitiveness Report 2017/2018, 2018, https://openknowledge.worldbank.org/handle/10986/28493, p. 6ff.

[45]Zhan J, G20 Guiding Principles for Global Investment Policymaking: A Facilitator's Perspective. The E15 Initiative, December 2016, http://e15initiative.org/publications/g20-guiding-principles-for-global-investment-policymaking-a-facilitators-perspective/, p. 1.

[46]Investment facilitation and promotion do not feature in 90% of existing IIAs, only in some of the most recent treaties, Zhan J, G20 Guiding Principles for Global Investment Policymaking: A Facilitator's Perspective. The E15 Initiative, December 2016, http://e15initiative.org/publications/g20-guiding-principles-for-global-investment-policymaking-a-facilitators-perspective/, p. 6.

[47]Industrial policies, tighter screening/monitoring procedures, closer scrutiny of cross-border M&As. Restrictive administrative measures often apply to extractive industries and infrastructure or are based on national security considerations, Zhan J, G20 Guiding Principles for Global Investment Policymaking: A Facilitator's Perspective. The E15 Initiative, December 2016, http://e15initiative.org/publications/g20-guiding-principles-for-global-investment-policymaking-a-

these measures may be taken for protectionist purposes. "While red tape has not replaced red carpet for incoming FDI, governments are taking a more differentiated approach towards such investment."[48] More broadly, government expectations concerning inward FDI are changing. "After all, for them such investment is just a tool to contribute to economic growth and development of their countries. This influences not only their attitude towards the benefit of mergers and acquisitions (M&As), but governments are now beginning actively to encourage more sustainable FDI, investment that makes a maximum contribution to the economic, social and environmental development of host countries."[49] In short, sustainable FDI for sustainable development. Ultimately, this may give rise to a fourth generation of investment promotion, i.e. efforts to attract sustainable FDI, concerned with the quality of investment not simply its quantity. "At the same time, governments are paying more attention to competing objectives, especially national interests, essential security, the promotion of national champions and the protection of certain national industries."[50]

3.3.2 Brief Recap 2: Competition, Competition Policy, Competition Law

Competition, the process of rivalry between firms striving to gain sales and make profits is the central driving force behind the operation of markets and fosters innovation, productivity and growth, all of which create wealth and reduce poverty.[51] Competition guarantees, more than other market structures, where the consumers' needs are best satisfied and minimizes the rents left to the firms, providing consumers with the entire surplus created by trade. The main objective of competition law is to preserve and promote competition as a means to ensure the effective allocation of resources in an economy, resulting in the best possible choice of quality, the lowest prices and adequate supplies for consumers. In addition many competition laws make reference to other related objectives, such as controlling the concentration of economic power, stimulating innovation, supporting SMEs and encouraging regional integration.[52]

According to this approach, the state (or existing competition authorities) should both help small firms to survive and prevent the development of dominant firms, in

facilitators-perspective/, p. 1.; Chapter IV, Investment and New Industrial policies, World Investment Report 2018, UNCTAD, https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2130.

[48]Sauvant (2016), p. 9.

[49]Sauvant (2016), p. 9.

[50]Sauvant (2016), p. 9.

[51]Godfrey N, Why is Competition Important for Growth and Poverty Reduction?. OECD, OECD Global Forum on International Investment, March 2008, www.oecd.org/investment/globalforum/session13competitionpolicy.htm, p. 3.

[52]See generally Wagner-von Papp (2009).

order to promote the greatest number of firms on the market.[53] This vision was developed at Harvard and is known as the structure-conduct-performance paradigm (SCP), but was viewed critically by Hayek of the Austrian school claiming that the competitive process not the number of firms per se is the most important aspect of competition; and by Schumpeter who deemed concentrated, in particular monopolistic market structures in many situations optimal.[54] Clearly, various traditions and studies suggest that one can look at this issues from different perspectives. Yet the most "natural" one amounts to searching for the market structure most likely to foster investment.[55] Be that as it may, but effective and fair competition is not automatic. It can be harmed and weakened both by inappropriate government policies and legislation and by anti-competitive conduct of firms,[56] both of which can distort trade and investment flows. Competition policy includes the full range of governmental measures to suppress or deter anti-competitive behavior the combined effect of which promote the efficient and competitive operation of markets (which is itself influenced by many factors) including, but not limited to, the enforcement of competition law per se.[57] It deals with anti-competitive or restrictive business practices of companies which reduce the efficiency of the market mechanisms thereby diminishing opportunities for innovation and growth and making consumers worse off.[58] It is aimed at preventing firms from forming cartels or monopolies and from abusing a dominant market position and at ensuring that mergers and

[53]Mathis J, Sand-Zantman W, Competition and Investment: What do we know from the literature?. Institut d'Economie Industrielle, March 2014, http://idei.fr/sites/default/files/medias/doc/by/sand_zantman/Competition_and_Investment.pdf, p. 3.

[54]Mathis J, Sand-Zantman W, Competition and Investment: What do we know from the literature?. Institut d'Economie Industrielle, March 2014, http://idei.fr/sites/default/files/medias/doc/by/sand_zantman/Competition_and_Investment.pdf, p. 4.

[55]Mathis J, Sand-Zantman W, Competition and Investment: What do we know from the literature?. Institut d'Economie Industrielle, March 2014, http://idei.fr/sites/default/files/medias/doc/by/sand_zantman/Competition_and_Investment.pdf, p. 4.

[56]US antitrust laws are there to protect US consumers, US businesses, and US markets, see Address by Wood DP (former Deputy Assistant Attorney General, Antitrust Division, US Department of Justice), The Internationalization of Antitrust Law: Options for the Future, DePaul Law Review Symposium on Cultural Conceptions of Competition: Antitrust in the 1990s, 3 February 1995, www.justice.gov/atr/speech/internationalization-antitrust-law-options-future.

[57]Anderson RD, Kovacic WE, Müller AC, Sporysheva N, Competition Policy, Trade and the Global Economy: Existing WTO Elements, Commitments in Regional Trade Agreements, Current Challenges and Issues for Reflection. WTO, ERSD-2018-12, 21 October 2018, www.wto.org/english/res_e/reser_e/ersd201812_e.htm, p. 5.

[58]Markets are often dominated by big business with close ties to government, and more effective competition reduces opportunities for corruption and creates more space for entrepreneurs and SMEs to grow, Godfrey N, Why is Competition Important for Growth and Poverty Reduction?. OECD, OECD Global Forum on International Investment, March 2008, www.oecd.org/investment/globalforum/session13competitionpolicy.htm, p. 4.

acquisitions are subjected to proper scrutiny.[59] An effective competition policy should safeguard the rights of entrepreneurs to enter and leave markets.

3.3.3 Competition, Competition Law, Competition Policy and FDI

There are two confronting views on the link between competition and investment. On the one hand, conventional arguments extol the virtues of competition in ensuring both allocative and productive efficiencies (Smithian view) and also providing firms with the incentives to invest in innovation to escape from competition (pre-innovation incentives). On the other hand, the tradition stemming from Schumpeter puts monopoly rents at the heart of the innovative process (post-innovation incentives). The main interface between competition law and FDI occurs when a foreign affiliate is established by means of a significant merger, acquisition or joint venture.

Competition law is concerned with FDI not only at the entry stage but also post-establishment since it may result in anti-competitive behavior. In fact, even in a national framework in which trade and investment are fully liberalized, the possibility of anti-competitive practices justifies competition laws. In other words, the removal of international barriers to trade and investment would not by itself ensure competitive behavior in all instances. Therefore, while the initial FDI may not raise concerns from a competition point of view, or may even be beneficial in itself, it could, nevertheless raise competition problems in the longer term. Nonetheless, competition authorities may also have to deal with direct investments by foreign government-controlled investors, which could be of several types: state-owned enterprises (SOEs), pension funds or other state-controlled entities such as sovereign wealth funds (SWFs). Whether a company is foreign or domestic matters little to competition authorities, except inasmuch as it raises issues of jurisdiction.[60] But officials will be interested in determining the exact nature of a foreign government-controlled investor, both with respect to their impact on competition and to enforcement actions. These characteristics will interact with recipient country competition laws in complex ways to determine whether and which actions might be taken by competition authorities.[61]

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[59] Paasman BR, Multilateral rules on competition policy: an overview of the debate. International Trade Unit, Division of Trade and Development Finance, CEPAL, Santiago, December 1999, https://repositorio.cepal.org/bitstream/handle/11362/4369/1/S9890697_en.pdf, p. 5.

[60] When asserting anti-trust jurisdiction, most OECD countries require that illegal conduct has some anti-competitive effect within the country: "effects doctrine".

[61] Antonio Capobianco, Competition Law and Foreign-Government Controlled Investors, Nineth OECD Freedom of Investment Roundtables, Investment Division, Directorate for Financial and Enterprise Affairs, January 2009; www.oecd.org/daf/inv/investment-policy/41976200.pdf; built on the OECD's Guidelines on Corporate Governance of State-Owned Enterprises, some OECD countries have also introduced competitive neutrality arrangements to mitigate or eliminate competitive advantages of SOEs, see Anderson RD, Kovacic WE, Müller AC, Sporysheva N,

An important effect of FDI liberalization has been greatly to reduce the role of traditional mechanisms used by host countries, especially DCs, such as screening at the time of entry.[62] The central assumption underlying these controls was that FDI should only be allowed if it is beneficial to the host economy and subject to approval of host governments. The opening of countries across the world to FDI and increasing competition to attract it have challenged the ability to apply such controls. Thus, the priority has become ensuring and increasing inward FDI flows, efficiency gains for the host economy and, ultimately, a positive impact on welfare.

Competition policy can in this respect be an essential component of the process of liberalization, notably to ensure that markets are kept as open as possible to new entrants, both foreign and local, and that firms do not frustrate this by engaging in anti-competitive practices. In this manner, a strong competition law and enforcement can provide reassurance that FDI liberalization will not leave a government powerless against anti-competitive transactions.[63]

The remaining question resurfaces, however, whether the international community requires a strengthened framework of regulatory arrangements governing restrictive business practices, in an era of deep integration and globalization of markets and structures of production. This has, in turn, aroused renewed interest in exploring options for strengthening international cooperation in competition policy. Indeed, it is widely recognized that the liberalization of FDI policies could promote competition among firms provided that, as legal obstacles to market entry are reduced, they are not replaced by anti-competitive practices by international firms.[64] The internationalization of competition issues has given rise to trade tensions which stem from a perception that countries are not enforcing their competition laws.[65]

Competition Policy, Trade and the Global Economy: Existing WTO Elements, Commitments in Regional Trade Agreements, Current Challenges and Issues for Reflection. WTO, ERSD-2018-12, 21 October 2018, www.wto.org/english/res_e/reser_e/ersd201812_e.htm, p. 52.

[62]Entry barriers can be classified in 3 groups. 1. Regulatory, imposed by government policies (including investment licensing, tariff and non-tariff measures, antidumping); 2. Structural, barriers due solely to conditions outside the control of market participants, e.g. costs of production (when firms must attain a minimum size to have average cost as low as possible. If the minimum efficient scale is so large that only one firm of that size can serve the entire market, there will be a monopoly, which often occurs with public utilities such as distribution of water, electricity, gas; 3. Behavioral, abuse of dominant position where "relatively large" firms engage in anti-competitive conduct by preventing entry or forcing exit of competitors through various kinds of monopolistic conduct including predatory pricing and market foreclosure (horizontal: barriers imposed through collaborating actions by firms that sell in the same market, often referred to as "naked" restraints of trade, cartel behavior, or collusion, e.g. price-fixing, bid rigging, allocation of territories or customers, output restriction agreements; vertical: restrictions imposed through restrictive contractual agreements between supplier and purchasers/retailers, both in up-and downstream markets, e.g. resale price maintenance.

[63]Roffe (1999), p. 146.

[64]Roffe (1999), p. 147.

[65]Janow (2005), p. 491.

4 International Cooperation in the Field of Competition Policy

4.1 Proposals for Multilateral Rules

Proposals to control restrictive business practices by private enterprises date back to Chapter V of the Havana Charter and to the initial GATT negotiations on the subject in the 1960s. The abortive Havana Charter dealt with such practices affecting international trade which restrain competition, limit access to markets or foster monopolistic control in a surprisingly comprehensive manner.[66] Generally, GATT/WTO agreements focus of course on governmental measures and action and do not regulate anti-competitive practices by firms. Some of them, however, are relevant for competition policy, in as much as they deal with practices of enterprises that may distort or impede international trade and the actions that governments are allowed or required to take to regulate or remedy such practices.[67] Some core GATT provisions, particularly those of national treatment (Article III), most-favoured-nation treatment (Article I) and transparency (Article X) are also inherently essential for impartial competition regimes. Indeed one of the earliest GATT cases involved a discriminatory Italian domestic credit scheme which applied only to purchasers of domestically produced tractors.[68] Moreover, in several WTO cases differential taxation of imported alcohol was found to be "directly competitive or substitutable" to like domestic products, in violation of Article III GATT.[69] Provisions of some specific

[66]Nine articles (46–54) of the Charter deal with competition issues; Art. 50(1) referred to practices such as: price-fixing, discriminating against particular enterprises, limiting production or fixing production quotas, preventing by agreement the development or application of technology or inventions, extending the use of intellectual property rights etc. Final Act and Related Documents, UN documents E/Conf 2/78, www.wto.org/english/docs_e/legal_e/havana_e.pdf.

[67]Art. VI GATT; several WTO agreements prohibit "less favorable treatment" to imported relative to domestic "like" products and services: Arts III:4 GATT; 2.1 TBT; XVII GATS; the Appellate Body examines whether a measure results in a modification of the conditions of competition between them: AB Report, US-Clove Cigarettes (Panel Report, United States—Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406/R, adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R), para. 87; AB Report, US-COOL (Panel Reports, United States—Certain Country of Origin Labelling (COOL) Requirements, WT/DS384/R/WT/DS386/R, circulated to WTO Members 18 November 2011), para. 267; and related case law directly address private parties' restrictive business practices: TBT, AGP, Articles VIII, IX GATS, Article 9 TRIMS, Articles 8, 31, 40 TRIPS, cf. Roffe (1999), p. 149; Kennedy (2001), p. 12, 602.

[68]GATT Panel Report, Italian Discrimination Against Imported Agricultural Machinery, L/833, adopted 23 October 1958, BISD 7S/60.

[69]Japan—Taxes on Alcoholic Beverages, WT/DS8, 10, 11/AB/R (1996); Korea-Taxes on Alcoholic Beverages, WT/DS75,84/AB/R (1999); Chile-Taxes on Alcoholic Beverages, WT/DS87,110/AB/R (1999).

WTO agreements too contain principles supportive of an effective competition policy regime.[70]

Despite the failure to reach consensus on multilateral competition rules, there are evidently complementarities between trade liberalization and the suppression of anti-competitive practices or arrangements: Both private and state-designed arrangements are apt to undermine gains from trade liberalization in many ways, namely rising living standards, sustainable development and growth, through trade and international investment.[71]

The rationale for multilateral rules on competition policy in bilateral and multilateral trade agreements can be summarized as follows: first, such agreements may effectively prevent businesses from distorting competition through exports; secondly, they can prevent companies from erecting new trade and investment barriers after theses have been reduced or abolished in the liberalization and integration processes; and thirdly, an international agreement on competition could replace anti-dumping legislation which is often misused with protectionist intent. After many other protective measures have been outlawed in various trade negotiating rounds, however, governments may be tempted to allow restrictive business practices or to not enforce existing competition rules or only leniently, which may lead to extra profit for domestic industry and a transfer of welfare into the country. According to game theory, however, the best situation for world welfare is that in which both countries adopt strict legislation.[72] Furthermore, because territorial jurisdiction and relevant market are no longer identical, a multilateral agreement on competition policy is necessary to avoid associated jurisdictional problems. "Relevant market", i.e. the geographical arena in which companies compete on more or less equal costs and terms, is a central concept in the theory on competition policy. For most companies the relevant market used to coincide with a country's national

[70]Provisions of the WTO Basic Telecommunications Services Agreement, known as the Fourth Protocol to the GATS, stipulate competitive safeguards to prevent major suppliers from engaging in anticompetitive conduct; Art. VIII:1, and VIII:2 of the GATS provide that monopoly service providers must not act inconsistently with the national treatment obligation of Art. XVII GATS or with their scheduled commitments; and require WTO Members to ensure that domestic monopolies do not abuse their monopoly positions. Art. 9 TRIMs requires the Council for Trade in Goods to review the operation and to propose possible amendments to it including provisions on competition policy by the end of 1999; the proscription approach in these agreements differs from that in the TRIPS agreement which imposes affirmative obligations to introduce intellectual property laws and to provide for minimum levels of protection and for their effective enforcement.

[71]See preambles of the Marrakesh Agreement establishing the WTO and of the Agreement on Trade-Related Investment Measures (TRIMS); commitments to competition policy also feature in WTO Accession Protocols and in the work of the WTO's Trade Policy Review Body (TPRB); see also treatment of competition issues relating to State trading enterprises (STEs), dual pricing practices and government procurement in WTO Accession Protocols, Marhold and Weiss (2018).

Kireyev and Osakwe (2018), pp. 299–319.

[72]Paasman BR, Multilateral rules on competition policy: an overview of the debate. International Trade Unit, Division of Trade and Development Finance, CEPAL, Santiago, December 1999, https://repositorio.cepal.org/bitstream/handle/11362/4369/1/S9890697_en.pdf, p. 26.

boundaries, before it shifted to regional and global markets giving rise to several potential sources of conflict.[73]

4.2 *Failed Attempts to Establish Multilateral Rules*

Most countries agree that a strong relationship exists between trade and competition, and that a fundamental purpose of the WTO system is to open markets to fresh competition.

However, countries diverge on the merits, potential modalities, and even the necessity of adopting competition law in the WTO. Different approaches in early state practice dealing with international competition problems[74] and all attempts in almost seven decades to establish strong multilateral rules on competition have failed. The story of the reasons for these failures has been retold many times.[75] Suffice it to recall that these failures are primarily attributable to opposition from the United States where businesses were afraid that enforcement in other countries would be less stringent than in the United States, leading to a comparative disadvantage.[76] By contrast, the EU has strongly advocated the integration of competition policies into international institutions. DCs on the other hand resolutely oppose an international competition regime in the framework of the WTO, concerned that its rules will constrain their ability to utilize infant industry policies, social policies and other development tools.[77] While WTO negotiations on an international competition regime have stalled, some countries have addressed competition policy issues in their bilateral or regional agreements.

These attempts include the OECD Guidelines for Multinational Enterprises adopted in 1976 as updated in 2011 as well as, more pertinently, the Recommendation of the OECD Council concerning International cooperation on Competition Investigations and Proceedings.[78] In 1980 the UN General Assembly adopted

[73]Paasman lists: 1. Difficulty of enforcing laws against foreign-based companies; 2. Cross-border mergers and acquisitions; 3. Extraterritoriality; 4. Anti-competitive behavior of state-owned companies, Paasman BR, Multilateral rules on competition policy: an overview of the debate. International Trade Unit, Division of Trade and Development Finance, CEPAL, Santiago, December 1999, https://repositorio.cepal.org/bitstream/handle/11362/4369/1/S9890697_en.pdf, pp. 29–30.

[74]Ernst-Ulrich Petersmann, The Need for Integrating Trade and Competition Rules in the WTO World Trade and Legal System 7, Occasional Paper, The Graduate Institute of International Studies, Geneva, WTO Series No. 3 (1996).

[75]Weiss (1999), passim.

[76]Paasman BR, Multilateral rules on competition policy: an overview of the debate. International Trade Unit, Division of Trade and Development Finance, CEPAL, Santiago, December 1999, https://repositorio.cepal.org/bitstream/handle/11362/4369/1/S9890697_en.pdf, p. 5.

[77]Janow (2005), p. 31.

[78]Recommendation concerning International Co-operation on Competition Investigations and Proceedings. OECD, C(2014)108 – C/M(2014)10, 16 September 2014, www.oecd.org/competition/international-coop-competition-2014-recommendation.htm.

UNCTAD's Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.[79] Sectoral and regional liberalization agreements also include competition policy provisions, though few are as strong as those in the EU.

In chapter 15 of the NAFTA, members agreed to maintain national measures to prohibit anti-competitive behavior by firms, but not on mutually agreed competition rules. Likewise, the Energy Charter Treaty calls for the adoption of competition laws and policies, and for cooperation on exchange of information and consultation among signatory countries. The competition law and policy group (CLPG) of the Asia-Pacific Economic Cooperation promotes understanding of regional competition laws and policies, examines their impacts on trade and investment flows, and identifies areas for technical cooperation and capacity building among member economies.[80]

Certain provisions in the Comprehensive Economic and Trade Agreement (CETA) as well as other free trade agreements (FTAs) and regional trade agreements (RTAs) prohibit and sanction practices which distort competition and trade,[81] specifically in investment chapters.[82] In practice approaches differ.[83] However, recent FTAs such as the Comprehensive Agreement for Trans-Pacific Partnership

[79]General Assembly resolution 35/63, Restrictive Business Practices, A/RES/35/63 (5 December 1980), www.un.org/documents/ga/res/35/a35r63e.pdf.

[80]At CPLG's annual meetings member economies update each other about their respective competition policies and laws, including recent cases and discuss challenges to competition policy and advocacy efforts.

[81]Of the total of 280 RTAs notified to the WTO, 155 have chapters or provisions on competition policy, cf. Appendix Table 1. The Treatment of Competition Policy in RTAs: Basic Coverage of Agreements with Dedicated Chapters, Anderson RD, Kovacic WE, Müller AC, Sporysheva N, Competition Policy, Trade and the Global Economy: Existing WTO Elements, Commitments in Regional Trade Agreements, Current Challenges and Issues for Reflection. WTO, ERSD-2018-12, 21 October 2018, www.wto.org/english/res_e/reser_e/ersd201812_e.htm, p. 28ff.

[82]For a detailed discussion of regional approaches to addressing competition policy in RTAs see Anderson RD, Kovacic WE, Müller AC, Sporysheva N, Competition Policy, Trade and the Global Economy: Existing WTO Elements, Commitments in Regional Trade Agreements, Current Challenges and Issues for Reflection. WTO, ERSD-2018-12, 21 October 2018, www.wto.org/english/res_e/reser_e/ersd201812_e.htm.

[83]Provisions based on the NAFTA model require both the adoption or maintenance of "competition laws that prescribe anticompetitive business conducts" and the taking of "appropriate action with respect to such conduct"; most of those in RTAs involving EU or EFTA countries contain an obligation to adopt or maintain competition laws which also "effectively address anticompetitive practices"; only about 34% of RTAs with dedicated provisions provide for RTA dispute settlement, most merely for consultations, Anderson RD, Kovacic WE, Müller AC, Sporysheva N, Competition Policy, Trade and the Global Economy: Existing WTO Elements, Commitments in Regional Trade Agreements, Current Challenges and Issues for Reflection. WTO, ERSD-2018-12, 21 October 2018, www.wto.org/english/res_e/reser_e/ersd201812_e.htm, pp. 31, 33.