Competition and Trade: The Rise of Competition Law in Trade Agreements and Its Implications for the World Trading System

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Since the failure of the Havana Charter in 1950, it has not been possible to agree upon a binding competition law at the global level. However, following the fiasco of the World Trade Organization (WTO) Ministerial Conference in Cancún in 2003, the number of bilateral and regional trade agreements containing competition law chapters, or at least competition-related rules, has increased noteworthy. This reflects that trade and competition are closely intertwined. In an ever more integrated, globalized, and digitized economy, the competition law framework needs to be internationalized. If a binding competition law is not possible at the global level, it is only logical that bilateral and regional trade agreements fill the gap. This article questions the extent to which these agreements contribute to the convergence of competition law. In this context, the development in Northeast Asia seems promising and may provide a guidepost for establishing international standards of competition law cooperation and enforcement. Presented here is the idea of localized harmonization, which takes advantage of closer affinity between bilateral and regional partners. With a sufficient degree of convergence, it is not excluded that efforts towards a multilateral competition agreement could be relaunched one day.

Keywords: competition law, world trade law, WTO, free trade agreement, regional trade agreement, bilateral cooperation, convergence, localized harmonization, Asian competition law, digital economy

1 INTRODUCTION

Trade law and competition law[1] share a common goal, which is the protection of the competitive process in open markets, thereby maximizing the welfare of the society,

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1 In most countries, competition law commonly refers to the law that aims to prevent anti-competitive business practices by undertakings, whereas this body of law is named antitrust law in the United States (US). *See* e.g. Alison Jones & Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials* 3 (Oxford University Press 6th ed. 2016); Brendan J. Sweeney, *The Internationalisation of Competition Rules* 11 (Routledge 2010).

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including the optimal allocation of international resources and the promotion of innovation.[2] There is a converging view that, without national competition law and policy, it is difficult to have free trade. In other words, the existence of private restraints on international trade[3] through the use of private economic power,[4] such as the collusive practices of discriminating foreign enterprises, generates market entry barriers: international and national cartels influence market access.[5] For example, cartels at the downstream level or vertical restraints have negative effects similar to those of import tariffs, and collusion at the upstream level or abuse of market dominance may have effects analogous to export tariffs.[6] Therefore, an appropriate legal framework to remove these private restraints on trade or barriers to market access plays an important role for international trade.[7]

The fields of trade and competition law are often considered to be complementary[8]; indeed, a common focus of trade law and competition law is to eliminate barriers to entry. Thus, competition law does not stand in opposition to but is consistent with free trade.[9] In particular, the globalization of commerce has prompted the adoption of competition laws when, after the increase in transactions across borders, potentially anti-competitive effects are observed.[10] Therefore, the spread of competition laws is an apparent reaction to the globalization of both national and international businesses.[11] The transition to a market economy system and rapid globalization have led to an increase in the number of

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2 Christian A. Conrad, *Strategies to Reform the Regulations on International Competition*, 26 World Comp. 101 (2003); Seema Gaur, *Competition Provisions in Trade Agreements: How to Realise their Potential?*, *Pursuing Competition and Regulatory Reforms for Achieving Sustainable Development Goals* 347–348 (CUTS International ed., CUTS International 2016); F. M. Scherer, *Competition Policies for an Integrated World Economy* 1–2 (Brookings 1994). Despite converging views on the ultimate goals of both laws, they often interpret certain business practices (such as price discrimination and predation) differently, indicating some divergence. *See* Christopher M. Barbuto, *Toward Convergence or Antitrust and Trade Law: An International Trade Analogue to Robinson-Patman*, 62 Fordham L. Rev. 2047, 2048–2049 (1994).

3 Jürgen Basedow, *Competition Policy in a Globalized Economy: From Extraterritorial Application to Harmonization*, in *The International Handbook of Competition* 33 (Manfred Neumann & Jürgen Weigand eds, Edward Elgar 2004).

4 *See* e.g. Lawrence A. Sullivan, Warren S. Grimes & Christopher L. Sagers, *The Law of Antitrust: An Integrated Handbook* 3 (3d ed., West Academic Publishing 2016).

5 Simon J. Evenett & Valerie Y. Suslow, *Preconditions for Private Restraints on Market Access and International Cartels*, 3 J. Int'l Econ. L. 593 (2000).

6 Frederic M. Scherer, *International Trade and Competition Policy*, in *Competition and Trade Policies: Coherence or Conflict?* 13–14 (Einar Hope & Per Maeleng eds, Routledge 1998). Cartels have long been considered harmful to trade. *See also* Joel Davidow, *Cartels, Competition Laws and the Regulation of International Trade*, 15 N.Y.U. J. Int'l L. & Pol. 351 (1983).

7 Kevin Kennedy, *Competition Law and the World Trade Organisation: The Limits of Multilateralism* 1 (Sweet & Maxwell 2001). International cartelization often creates complex issues for national competition authorities because they are responsible for investigations of cartel members in their own and other jurisdictions. *See also* Mark S. LeClair, *Cartelization, Antitrust and Globalization in the US and Europe* 89 (Routledge 2013).

8 *See* Kennedy, *supra* n. 7, at 4.

9 Leonard Waverman, *Competition and/or Trade Policy?*, in *Competition and Trade Policies: Coherence or Conflict?* 33 (Einar Hope & Per Maeleng eds, Routledge 1998).

10 *See* Jones & Sufrin, *supra* n. 1, at 1207; Kennedy, *supra* n. 7, at 1.

competition regimes, recently reaching more than 130 jurisdictions,[12] demonstrating the importance of competition law with regard to the business conduct of multinational enterprises (MNEs).[13]

Despite the growing importance of competition law for trade, there are disparities or divergences among competition regimes that may impede the progress of trade because of their distinctive backgrounds, such as different cultures, legal systems, politics and levels of economic development.[14] For instance, a certain type of business practice may create a competition concern in some countries, despite not being perceived as a violation of competition law in other jurisdictions.[15] This leads to tensions between competition authorities, particularly when they apply their competition law extraterritorially to foreign companies.[16] In effect, harmonizing competition laws may represent a solution,[17] although perfect harmonization seems rather idealistic.[18] However, a moderate level of harmonization seems feasible.[19]

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[11] David J. Gerber, *The U.S. – European Conflict Over the Globalization of Antitrust Law: A Legal Experience Perspective*, 34 New Eng. L. Rev. 124, at 125 (1999).

[12] Richard Whish & David Bailey, *Competition Law* 1 (8 ed., Oxford University Press 2015).

[13] *See* Thomas K. Cheng, *Convergence and Its Discontents: A Reconsideration of the Merits of Convergence of Global Competition Law*, 12 Chic. J. Int'l L. 433, at 436–438 (2012); Yo Sop Choi, *Convergence of Competition Laws in Northeast Asia, and the Role of the EU Competition Regime* (4 Aug. 2016), http://www.klri.re.kr/viewer/skin/doc.html?fn=rpt_7037161239242851671_GLI_2016_01.pdf&rs=/doc_convert/FILE_000000000020971usKBF (accessed 4 Nov. 2020); Maher M. Dabbah, *International and Comparative Competition Law* 1 (Cambridge University Press 2010); Sweeney, *supra* n. 1, at 1; Whish & Bailey, *supra* n. 12, at 518.

[14] Leela Cejnar & Rachel Burgess, *The Globalization of Competition Law: Yes or No?*, in *Comparative Competition Law* 9 (John Duns, Arlens Duke & Brendan Sweeney eds, Edward Elgar 2017). For example, South Korea has experienced a high degree of economic concentration in large conglomerates, the so-called *chaebol*, which have influenced its competition policy on large firms. *See* e.g. Steve Harris, *Korea*, in *Global Antitrust Compliance Handbook* 456 (D. Daniel Sokol, Daniel Crane & Ariel Ezrachi eds, Oxford University Press 2014).

[15] Chris Noonan, *The Emerging Principles of International Competition Law* 1 (Oxford University Press 2008).

[16] The principle of the extraterritorial application of national competition law usually relies on concepts developed in the competition regimes of the US and the EU. Both jurisdictions apply the effects doctrine, thereby applying domestic competition law to business practices, having an effect in their respective territories. *See* e.g. David S. Evans, *Why Different Jurisdictions Do Not (and Should Not) Adopt the Same Antitrust Rules*, 10 Chi. J. Int'l L. 161, at 162 (2009); Ariel Ezrachi, *EU Competition Law: An Analytical Guide to the Leading Cases* 627–628 (5th ed., Hart Publishing 2016); James J. Friedberg, *The Convergence of Law in an Era of Political Integration: The* Wood Pulp *Case and the* Alcoa *Effects Doctrine*, 52 U. Pitt. L. Rev. 289 (1991); Jones & Sufrin, *supra* n. 1, at 1222–1224; Mark S. Popofsky, *Extraterritoriality in U.S. Jurisprudence*, in *Issues in Competition Law and Policy* 2147 (ABA Section of Antitrust Law, ABA 2008).

[17] Harmonization is often regarded as a process of creating similar outcomes in different countries. *See* Noonan, *supra* n. 15, at 14.

[18] Daniel A. Crane, *Substance, Procedure, and Institutions in the International Harmonization of Competition Policy*, 10 Chi. J. Int'l L. 143 (2009).

[19] *See* the concept of 'loose harmonization' as conceived by Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 Am. J. Int'l L. 1, at 13 (1997).

Bilateral and regional trade agreements may be used for this purpose.[20] The parties to these agreements may progress by mutual learning and comparative competition law studies, defining the various local experiences involved in each competition regime. On this basis, 'localized harmonization' may be achieved, building on the specific features of the partners to the bilateral or regional agreement and taking advantage of the greater similar backgrounds of states prepared to enter into a special relationship or belonging to the same world region. Localized harmonization may mitigate the problem of clashes in competition law and reduce the cost of compliance for MNEs.[21] In general, competition law convergence can play a crucial role in the development of trade.[22] Given the rapid proliferation of national competition laws and the evolution of global market integration, it has even become imperative to find common ground.[23]

Convergence is facilitated by the fact that most competition regimes, especially in the developing world, have been modelled on other examples, such as those from the US, the EU, or respective neighbouring countries.[24] In particular, several Asian countries seem to have accepted competition law ideas from Europe. One of the factors behind the significant influence of EU competition law seems to be the fact that legal systems in these countries are based on continental European civil law. For example, the relatively advanced competition regimes in Northeast Asia (including South Korea, China and Japan), all of which have vigorously enforced their competition laws, reveal a preference for legal certainty that is similar to the approach in the EU.[25] In a second step, the early adopters of competition regimes appear to have encouraged their trading partners – which initially only had unfledged competition regimes – to accept the European competition law framework.[26] In a third step, growing convergence has led to

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[20] For competition rules in trade agreements, *see* e.g. the mapping and classification exercises by Oliver Solano & Andreas Sennekamp, *Competition Provisions in Regional Trade Agreements*, OECD Trade Policy Papers, No. 31 (OECD Publishing 2006); François-Charles Laprévote, *Competition Policy within the Context of Free Trade Agreements*, OECD Document DAF/COMP/GF (2019) 5 (OECD, 2019). *See also* two events of the OECD Global Forum on Competition, one on regional competition agreements in 2018 (29 Nov. 2018), http://www.oecd.org/competition/globalforum/benefits-and-challenges-of-regional-competition-agreements.htm (accessed 4 Nov. 2020) and the other on competition provisions in trade agreements in 2019 (5 Dec. 2019), http://www.oecd.org/competition/globalforum/competition-provisions-in-trade-agreements.htm (accessed 4 Nov. 2020)

[21] *See* Cheng, *supra* n. 13, at 454.

[22] *See* Basedow, *supra* n. 3, at 321.

[23] *See* Noonan, *supra* n. 15, at 1.

[24] *See* Cheng, *supra* n. 13, at 447; William E. Kovacic, *The United States and Its Future Influence on Global Competition Policy*, 22 Geo. Mason L. Rev. 1157, at 1158 (2015). One of the recent examples of foreign influence, especially by neighbouring countries, is the competition legislation in China of 2008. Its substantive provisions are very similar to those of South Korea and Japan.

[25] Yo Sop Choi, *The Choice of Competition Law and the Development of Enforcement in Asia: A Road Map towards Convergence*, 22 Asia Pac. L. Rev. 131, at 144 (2014).

[26] *See* Noonan, *supra* n. 15, at 81.

comparable forms of competition chapters in bilateral free trade agreements (FTAs) in this region. This process is an example of localized harmonization as described above.

So far, the analysis has dealt with bilateral and regional agreements that regulate trade in general and provide for a special chapter on competition or that contain competition rules scattered across chapters concerning other topics such as services, intellectual property, investment or telecommunications. These trade agreements have in common the fact that they only provide for certain principles regarding substantive competition law or enforcement. They normally do not specify details regarding the coordination of national competition procedures or the cooperation of national competition authorities. However, there is a growing demand for practical cooperation between authorities. In particular, close coordination involving competition law enforcement between trading countries can improve the collection of evidence regarding international cartel agreements concluded abroad and thereby the sharing and use of evidence to pursue international cartel members. Moreover, a higher probability of being caught renders leniency programmes more effective,[27] even if investigations over many jurisdictions meet certain practical problems.[28] Therefore, a fourth step may be useful for countries exposed to transnational cartels: they may seek to conclude a bilateral agreement specifically devoted to the cooperation of their respective authorities in competition matters. The first example of such an agreement was the US – Germany Antitrust Accord of 1976.[29] Many others have followed.[30]

This article aims to explore recent developments in competition cooperation between competition authorities around the world, focusing on bilateral and regional cooperation in FTAs. It will be shown that, in the absence of binding multilateral rules, competition chapters or rules in FTAs are not only practically

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27 Leniency programmes usually grant undertakings that are involved in cartels full immunity or partial reductions of fines imposed for the violation of competition laws, if the firm voluntarily informs national competition authorities about undetected cartels or assists the agencies in initiating investigations and collecting evidence about such cartels. Most competition regimes have leniency programmes in order to expose undiscovered cartels.

28 Andrew T. Guzman, *Antitrust and International Regulatory Federalism*, 76 N.Y.U. L. Rev. 1142, at 1145 (2001); Sweeney, *supra* n. 1, at 406.

29 *See* e.g. Scherer, *supra* n. 2, at 40; Noonan, *supra* n. 15, at 494.

30 *See* e.g. the 1991/1995 EU/US Competition Cooperation Agreement; 1999 EU/US Positive Comity Agreement; 1995 US/Canada Agreement Regarding the Application of Their Competition and Deceptive Marketing Practices Laws; 1999 US/Australia Mutual Antitrust Enforcement Assistance Agreement; 1999 Agreement between the Government of the United States of America and the Government of Japan Concerning Cooperation on Anticompetitive Activities; 2003 Agreement between the European Community and the Government of Japan Concerning Cooperation on Anti-Competitive Activities; 2009 Agreement between the European Community and the Government of the Republic of Korea Concerning Cooperation on Anti-Competitive Activities; 2014 Agreement between the European Union and the Swiss Confederation Concerning Cooperation on the Application of Their Competition Laws.

important, but pathbreaking for future development in the digital era.[31] Bilateral and regional competition rules favour convergence, thereby reducing potential conflicts between competition regimes. This article tackles the underlying issues as follows. Section 2 examines recent issues of international competition law by determining the divergence between national legislation and by identifying contemporary approaches to competition law. In Section 3, the article notes that the harmonization of competition laws is increasingly pertinent, as cooperation between authorities cannot solve all problems. Therefore, one of the tasks of bilateral and regional trade agreements is the approximation of substantive provisions, thus reducing the potential of conflicts between national regimes. Finally, Section 4 provides the summary and conclusions of this article.

2 CRITICAL ISSUES RELATING TO COMPETITION LAW AND INTERNATIONAL TRADE

2.1 Various backgrounds of national competition laws and their impact on trade

The establishment of an international competition regime has been discussed since the 1920s.[32] The first specific result was Chapter V ('Restrictive Business Practices') of the Havana Charter adopted by the United Nations Conference on Trade and Employment in 1948, although it was never ratified and was abandoned in 1950 after the loss of the US support.[33] Since then, a number of international organizations, such as the Organization for Economic Co-operation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), the World Trade Organization (WTO) and the International Competition Network (ICN) have dealt with the issue of international competition law and have provided meaningful improvements for developed and developing countries alike.[34] There is no doubt that these organizations have facilitated discussions and have considerably contributed to the convergence

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[31] With respect to regional cooperation, *see* Gaur, *supra* n. 2, at 358–359: 'One common trend that seems to emerge is that RTAs are a means of opening communication channels, which may be subsequently expanded by the competition authorities until a satisfactory level of cooperation has been achieved'.

[32] Allard D. Ham, *International Cooperation in the Anti-Trust Field and in Particular the Agreement between the United States of America and the Commission of the European Communities*, 30 CML Rev. 571. 572 (1993).

[33] David J. Gerber, *Global Competition Law: Law, Markets, and Globalization* 48 (Oxford University Press 2010); Kennedy, *supra* n. 7, at 122 ff.; Noonan, *supra* n. 15, at 405–407; Scherer, *supra* n. 2, at 38. Article 46 of the Charter stipulated that each member should cooperate with the proposed international regime to prevent any business conduct affecting trade which prevents competition, inhibits market entry, and promotes monopolistic control. However, the Havana Charter did not provide for meaningful cooperation regarding competition.

[34] Harvey M. Applebaum, *The Interface of the Trade Laws and the Antitrust Laws*, 6 Geo. Mason L. Rev. 479 (1998); Dabbah, *supra* n. 13, at 78–79; Benoît Durand, Andrés F. Galarza & Kirtikumar Mehta,

of substantive and procedural rules.[35] There was also significant hope that one day a multilateral answer would be given in order to react to the fundamental challenge of coordinating national competition policies. The WTO Doha Round, launched in 2001 and comprising as one of the 'Singapore Issues' the interaction between trade and competition policy, initially strengthened expectations in this respect. However, with the provisional abandonment of the competition law topic within the WTO after the failure of the Cancún Ministerial Conference in 2003, more modest approaches have taken a centre stage. Indeed, competition provisions in regional trade agreements (RTAs) or FTAs might play an important role in harmonizing competition laws and their implementation.[36] Moreover, a positive feedback loop could be generated: combining extraterritorial application and bilateral cooperation may not only enhance the enforcement of competition law in the global market[37] but also influence the further development of multilateral cooperation.[38]

In the context of international cooperation, it is important to take into consideration the political background of national competition policies. The motivation for adopting a national competition law has an impact on enforcement and on cooperation. If, for example, there is no meaningful application of national competition law, it is not probable that international cooperation will prove fruitful. Moreover, there is the risk of protectionism. The non-discriminatory treatment of foreign enterprises is contingent on the existence of an effective and objective competition law system.[39]

This context is particularly important for developing countries that essentially have two types of competition legislation. One is the result of the influence of foreign pressure to adopt competition rules,[40] and the other is voluntary competition legislation emerging from public demand and insights into the benefits of competition. The first case is represented by the adoption of competition laws in numerous Southeast Asian countries, particularly the Association of Southeast Asian Nations (ASEAN) Member States.[41] Examples of the adoption of voluntary

The Interface Between Competition Policy and International Trade Liberalisation. Looking into the Future: Applying a New Virtual Anti-Trust Standard, 27 World Comp. 3, at 3–4 (2004).

35 *See* Whish & Bailey, *supra* n. 12, at 1.

36 Furthermore, bilateral methods may prove less costly than multinational negotiations. *See* e.g. Noonan, *supra* n. 15, at 50; Spence Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U.L. Rev. 344, at 349–352 (1997).

37 *See* Dabbah, *supra* n. 13, at 7.

38 *See* e.g. Eleanor M. Fox, *Competition Law*, in *International Economic Law* 464 (2nd ed., Andreas F. Lowenfeld ed., Oxford University Press 2008).

39 *See* Choi, *Convergence of Competition Laws*, *supra* n. 13, at 21.

40 *See* Dabbah, *supra* n. 13, at 290. When a country adopts competition law due to foreign pressure, the competition regime is understood as a mere response to the pressure; it is then difficult to expect the same level of enforcement as that in competition regimes with voluntary legislation.

41 *See* Choi, *The Choice of Competition* Law, *supra* n. 25, at 134–37.

competition law legislation include South Korea, China, and recently, Hong Kong. Different reasons behind legislation can affect attitudes towards the enforcement of competition law. When, on the other hand, there is intrinsic motivation for legislation, the public will recognize the benefits of open and competitive markets, thus supporting a strong competition culture[42] that will promote effective enforcement by public authorities and eventually result in a vigorous application of the law.[43] Under such conditions, the country is willing to establish a legal framework for cooperation with the competition regimes of other countries characterized by strong enforcement. This is fundamentally different from the situation involved in the first category.

Therefore, an important prerequisite for international competition enforcement is a robust national competition law culture that buttresses competition law and policy.[44] However, the strong link between competition and trade may compensate the absence of an effective competition regime at home. In particular, where a bilateral agreement includes effective cooperation in the field of competition, a weak competition regime in one of the partner countries may take advantage of the enforcement cooperation provided for in the agreement in cases relating to the conduct of foreign undertakings.[45] This may have an overall effect on competition law enforcement in that country.

To summarize, the motives underlying competition legislation are crucial for the success of international cooperation. Without genuine conviction as to the usefulness of competition law, the competition culture in a given country will not thrive. However, international cooperation may have a beneficial influence on national competition culture because advanced experiences in partner countries may spill over to countries lagging behind. A positive side effect of convergence may be that discrimination against foreign enterprises comes to an end, making conditions for market entry friendlier.[46] On the other hand, there is the risk that the over-enforcement of competition law in one jurisdiction spreads to the trading

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[42] Culture plays a pivotal role in the development of competition legislation and enforcement. *See* Choi, *The Choice of Competition Law*, *supra* n. 25, at 146–147; Dabbah, *supra* n. 13, at 62–70.

[43] The low level of enforcement in developing countries stems from the weakness of their competition law culture. *See* Michal S. Gal, *Regional Competition Law Agreements: An Important Step for Antitrust Enforcement*, 60 U. Toronto L. J. 239, at 247–248 (2010).

[44] *See* Gerber, *supra* n. 33, at 267. Gerber argues that there are some factors that influence the development of competition law, such as public knowledge about competition law norms, the predictability of the law, the independence of the competition authorities, and the perception of the statutes. These factors are strongly related to the overall competition law culture, which will eventually lead to the improvement of public enforcement and legal certainty.

[45] *See* Noonan, *supra* n. 15, at 510.

[46] *See* Yo Sop Choi, *Competition Laws and Policies Against International Cartels in Northeast Asia: International Cooperation for Effective Enforcement*, in *Cartels in Asia: Law & Practice* 150–151 (Thomas Cheng, Sandra Marco Colino & Burton Ong eds, Kluwer 2015).

partners, which might have a chilling effect.[47] Therefore, additionally in a trade context, the appropriate design of competition law is fundamental.

2.2 Convergence of substantive competition rules: Basic principles

Most countries' competition regimes contain three substantive sets of rules, including the prohibition of anti-competitive agreements, the abuse of a dominant position or monopolization,[48] and the control of mergers with respect to their effects on competition. The analogous architecture of substantive provisions in the field of competition law demonstrates impressive convergence on a worldwide level, distinctive from a comparative perspective.[49] However, there are many variations regarding details. With respect to anti-competitive agreements, many competition regimes treat hardcore restrictions, such as agreements regarding price-fixing, output restrictions, market sharing, and bid-rigging, as *per se* or quasi-*per se* illegal, thus demonstrating their common philosophy of zero tolerance for hardcore cartels. Nonetheless, there are diverging views on the issue of tacit collusion. In some competition regimes, such as that of the EU, the sharing of critical information, such as individual and future prices or output, between competing undertakings is deemed to constitute illegal concerted practices. By contrast, this view has not been accepted by other jurisdictions, despite their adoption of provisions prohibiting concerted practices.[50]

With regard to provisions prohibiting the abuse of a dominant position or monopolization, the divergence among competition regimes is even more notable.[51] Regarding dominance, some competition regimes have adopted the concept of collective dominance, which originates in European competition law. By contrast, some competition regimes, despite their considerable

[47] Anu Bradford, *The Brussels Effect*, 107(1) Nw. U. L. Rev. 19–22 (2012); Damien Geradin, *The Perils of Antitrust Proliferation: The Globalization of Antitrust and the Risks of Overregulation of Competitive Behavior*, 10 Chi. J. Int'l L. 189, at 192 (2009).

[48] In US antitrust law, s. 2 of the Sherman Act prohibits monopolization or attempts to monopolize, while most competition regimes – including those of the EU and many Asian countries – prohibit the abuse of a dominant position.

[49] *See* Basedow, *supra* n. 3, at 322; Dabbah, *supra* n. 13, at 13.

[50] *See* e.g. Supreme Court of Korea Judgment 2013du25924 (24 Dec. 2015). The Supreme Court of Korea held that the South Korean competition authority failed to provide evidence of the existence of agreements in a case involving the sharing of critical information. *See also* Yo Sop Choi, *The Evolution of Fair and Free Competition Law in the Republic of Korea*, *Research Handbook on Asian Competition Law* 65, 73 (in Steven Van Uytsel, Shuya Hayashi & John O. Haley eds, Edward Elgar 2020).

[51] In particular, US and EU competition regimes have – in spite of some convergence – clear differences regarding unilateral conduct, *see* Einer Elhauge & Damien Geradin, *Global Competition Law and Economics* 1137–1141 (2d ed., Hart Publishing 2011); Evans, *supra* n. 16, at 187.

willingness to adopt EU concepts, have not accepted the concept of collective dominance.[52]

Regarding abuse, there are differences with respect to the fundamental distinction between exploitative and exclusionary abuse: exploitative abuse refers to conduct with respect to the other market side (suppliers or customers), for example excessive pricing, whereas exclusionary abuse addresses business conduct that obstructs or eliminates competing firms. In particular, US antitrust law does not cover exploitative abuse, as the US regime assumes that excessive pricing or high prices induce more competition in the market, whereas the competition regimes of the EU and other jurisdictions that have accepted the European approach prohibit exploitative abuse because this type of conduct leads to results that do not correspond to competitive conditions. Moreover, the unilateral conduct rules of the various competition regimes have different aims. Whereas in the US they are essentially aimed at consumer welfare and efficiency, other jurisdictions have adopted the idea of competitive fairness.[53] In particular, the concept of fairness recently influences the development of a competition rule of abuses of a superior position in the digital economy. Therefore, in jurisdictions other than the US, the term anti-competitiveness often embraces the broad concept of unfairness.[54]

With respect to merger control, there is considerable diversity regarding the conditions of notification. Many jurisdictions provide for an obligation to notify linked to certain thresholds (often but not always based on turnover); in other jurisdictions notification is provided on a voluntary basis. Regarding the substantive appraisal test, the US merger control regime uses the 'substantial lessening of competition' (SLC) test, while the EU regime has adopted the 'significant impediment to effective competition' (SIEC) test. Although the terminology in the two tests differs, varying outcomes in practice owe less to different concepts than to the appreciation of facts in the single case.

In conclusion, there is a lot of convergence in the areas of anti-competitive agreements and merger control, whereas the rules on unilateral conduct (abuse of a dominant position or monopolization) are characterized by considerable divergence. One of the major reasons for this observation is the fact that rules on unilateral conduct

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[52] For example, China has adopted the rule of abuse of market dominance, whose context is very similar to Art. 102 TFEU, but its legal provision does not include collective dominance.

[53] Eleanor M. Fox & Daniel Crane, *Global Issues in Antitrust and Competition Law* 94–95 (West 2010); Gerber, *supra* n. 33, at 313; Jae Ho Sung, *Some Reflections on Competition and Subsidies Under the EU–Korea FTA*, in *The European Union and South Korea: The Legal Framework for Strengthening Trade, Economic and Political Relations* 90 (James Harrison ed., Edinburgh University Press 2014).

[54] Yo Sop Choi & Kazuhiko Fuchikawa, *Comparative Analysis of Competition Laws on Buyer Power in Korea and Japan*, 33 World Comp. 499 (2010); Eleanor M. Fox, *We Protect Competition, You Protect Competitors*, 26 World Comp. 149, at 163 (2003). *See also* European Commission, *Single Market – New Complementary Tool to Strengthen Competition Enforcement* (2 June 2020), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool (accessed 4 Nov. 2020).

are frequently influenced by the fundamental objectives of competition law. In many developing countries, various socio-political goals, such as fair competition, seem important.[55] A current task of developing countries' competition regimes is therefore to harmonize these general objectives and blend them with the goal of economic efficiency, while the US antitrust regime seems to focus more on improving the concept of efficiency.

With respect to free trade agreements, it is important to note that countries must make efforts for the convergence of their substantive competition rules in order to pave the way for common competition chapters in their FTAs. This is only possible if countries study the competition law of their trading partners. In the absence of knowledge about others' domestic economic policies, it is impossible to achieve successful cooperation.[56]

2.3 Bilateralism and the choice of standards: The design of a common framework

One of the most popular models for competition chapters in FTAs is the European standard text, as the EU regularly demands that competition chapters be integrated into its trade agreements.[57] As explained in the introduction, there are two leading competition regimes: US antitrust and EU competition rules. For developing countries, the European approach is often more familiar because it fits better with these countries' civil law backgrounds.[58] The cases of South Korea and China demonstrate this clearly.

In fact, the South Korean government has entered into a number of FTAs that contain competition chapters. However, these texts often content themselves with confirming competition law aims and emphasizing the importance of cooperation in this field.[59] It would be wrong, however, to qualify these texts as mere soft law

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55 The concept of fairness has become quite popular. Indeed, one of the tasks of competition law is the protection of markets guaranteeing advantageous outcomes for everyone. However, it is highly debatable whether the concept of fairness should be referred to when it comes to the interpretation and application of specific competition law rules. The fairness concept has influenced not only European countries, but also Asian developing countries, including South Korea. For further details on fairness or other popular values in competition law, *see* Jones & Sufrin, *supra* n. 1, at 28; Sullivan, Grimes & Sagers, *supra* n. 4, at 18–19.

56 *See* e.g. Noonan, *supra* n. 15, at 22.

57 *See* Gerber, *supra* n. 33, at 109. *See also* Mark R. A. Palim, *The Worldwide Growth of Competition Law: An Empirical Analysis*, 43 Antitrust Bull. 106, at 121 (1998); Anestis S. Papadopoulos, *The International Dimension of EU Competition Law and Policy* 215 (Cambridge University Press 2010).

58 Yo Sop Choi, *A Critical Review of Competition Law on Abuse of Market Dominance in the Southeast Asian Developing Countries: A Comparative Perspective*, 41 Kangwon L. Rev. 1043, at 1051 (2014); Gerber, *supra* n. 33, at 161. In particular, a stronger party often has the power to spur harmonization based on its own provisions. *See also* Eleanor M. Fox, *Harmonization of Law and Procedures in a Globalized World: Why, What, and How?*, 60 Antitrust L. J. 593, at 596 (1992).

59 *See* Sung, *supra* n. 53, at 91; Kennedy, *supra* n. 7, at 41.

declarations.[60] A bilateral trade agreement has a binding effect that can ensure domestic compliance with its competition chapter.[61] For example, the competition chapter in the Korea–EU FTA (Chapter 11) may instigate the South Korean legislature to adopt the European competition law model.[62] Although it does not oblige the Parties to a significant level of cooperation, it establishes voluntary mechanisms for improving investigations and encourages each Party to intensify its competition law practice.[63]

In particular, the competition chapter of the Korea–EU FTA[64] duplicates the EU competition rules of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), which prohibit anti-competitive agreements and the abuse of dominance, respectively.[65] In addition, the third provision, especially the use of the terms 'concentration' and 'SIEC', is modelled on European merger control.[66] It is fascinating to see that the same terminology has been used in the competition chapter of the Korea–China FTA. Article 14.3 of this Agreement provides definitions of the three anti-competitive business practices, which are identical to the Korea–EU FTA competition chapter.[67] The Korea–China FTA thus represents an example of the Europeanization of competition law, which at the same time leads to localized harmonization in Asia on the basis of the European competition law model.[68]

In particular, the experience with the Korea–China FTA illustrates two requisites for the convergence of competition law. The first pertains to substantive law. South Korea's competition act, i.e. the Monopoly Regulation and Fair Trade Act (MRFTA), as well as the Chinese competition act, i.e. the Anti-Monopoly

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60 *See* e.g. Noonan, *supra* n. 15, at 495.

61 *See* Choi, *The Choice of Competition Law*, *supra* n. 25, at 151–154; D. Daniel Sokol, *Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements*, 83 Chicago-Kent L. Rev. 232 (2008), at 259–260.

62 Regarding hardcore cartels, *see* e.g. Choi, *Competition Laws and Policies*, *supra* n. 46, at 152–153.

63 *See* Gerber, *supra* n. 33, at 109.

64 Article 11.1(3) mentions the following business practices: first, agreements between undertakings, decisions of business associations and concerted practices that have as their object or effect the prevention, restriction or distortion of competition; second, abusive conduct by one or more undertakings that have a dominant position; and third, concentrations between undertakings that significantly impede effective competition in particular as a consequence of creating or strengthening a dominant position.

65 Yo Sop Choi, *A Study on the Bilateral Cooperation of Competition Law Enforcement Under the Korea–EU FTA*, 34 J. Eur. Union Stud. 3, at 15 (2013).

66 For a discussion of the European influence, *see* Papadopoulos, *supra* n. 57, at 105.

67 The Korea–China FTA defines the prohibited conduct as agreements between undertakings, decisions of business associations, and concerted practices that have as their object or effect the prevention of competition. It also covers one or more abuses by undertakings, rendering it clear that collective dominance is also covered. For merger control, it adopts the SIEC test and mentions competition concerns due to the creation or strengthening of a dominant position, thus adopting the European conception.

68 *See* Choi, *Convergence of Competition Laws*, *supra* n. 13, at 22.

Law (AML), both accept the presumption of market dominance and the SIEC test in merger control. The second element is the fact that instead of using the national law of one of the Parties to the agreement (either the MRFTA or the AML), the law of a third jurisdiction (i.e. the EU) is given preference. The choice of a 'neutral' model is facilitated by the fact that both the South Korean and Chinese competition laws were largely influenced by the EU competition regime when they were drafted.[69] Of course, the framework must be tailored to the local socio-political background.[70] However, a similar background certainly promotes the convergence of national competition laws and facilitates effective enforcement cooperation.[71]

Indeed, including a competition chapter in an FTA is not sufficient to achieve a significant level of cooperation between competition regimes. Nevertheless, it is essential for the implementation of national competition law to agree upon a common definition of anti-competitive conduct. A mutual understanding of the language of each competition law arises, improving the development of national competition law enforcement. At the same time, a localized standard emerges. Of course, it is not always easy to achieve an effective application of certain provisions. For instance, although some competition regimes such as South Korea address collective dominance, it is difficult to find a meaningful application of the relevant provisions in practice.[72]

To conclude, the bilateral model is more than a simple declaration of cooperation between competition regimes. For the developing world, the definitions in the competition chapters of FTAs can be used as a standard.[73] Moreover, FTAs can deliver an important platform for competition investigations, eventually improving market access and trade flows as a result.[74] Bilateral cooperation is especially useful for competition authorities in small and developing countries, which face limited enforcement due to the lack of resources for investigations.[75] In addition,

69 *See* Gerber, *supra* n. 33, at 207; Vivien Rose & David Bailey, *Bellamy & Child European Union Law of Competition* 53 (7th ed., Oxford University Press 2013).

70 *See* Cheng, *supra* n. 13, at 489–490.

71 A further example is the Korea–New Zealand FTA. Article 12.2, which includes definitions similar to those in the Korea-China FTA. Furthermore, the language is almost identical to the European provisions.

72 In South Korea, contrary to the EU, the concept of collective dominance has been discussed intensively, but the Supreme Court has established high standards for proving the existence of collective dominance, e.g. Supreme Court of Korea Judgment 2003du6283 (9 Dec. 2005). Moreover, there has not been a single case of collective dominance in other Asian countries, *see* Choi, *Convergence of Competition Laws*, *supra* n. 13, at 23–24.

73 For the EU, this bilateral method may be a part of a strategy aimed at strengthening its international influence. *See* e.g. Dabbah, *supra* n. 13, at 201–204.

74 *See* Dabbah, *supra* n. 13, at 597.

75 Michal S. Gal, *Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and Developing Jurisdictions*, 33(1) Fordham Int'l L. J. 39, at 39–40 (2009).

bilateralism is a crucial means to overcome problems of extraterritoriality. Finally, the process of convergence[76] improves legal certainty by helping MNEs to predict the consequences of anti-competitive conduct in the countries in which they operate.[77]

3 HARMONIZATION OF COMPETITION LAWS: TOWARDS EVOLUTIONARY REFORMS

3.1 Bilateral and regional cooperation as the basis for further development

For close to a century, there have been proposals to establish an international competition law.[78] These proposals reached a preliminary peak when the WTO added the topic of competition policy to its agenda, but ended in disillusionment when the WTO Ministerial Conference failed in 2003, with the competition topic being removed from the WTO agenda in 2004.[79] In fact, organizations like UNCTAD, OECD and WTO have contributed considerably toward implanting modern competition rules all over the world, including in developing countries. However, experience has shown that – due to substantive differences and to concerns regarding sovereignty – the time is not yet ripe for a sole monitoring authority at the global level.[80] Reaching consensus regarding an international competition law regime is challenging, because each country is at a different stage of economic and socio-cultural development and has varied interests or goals.[81] Therefore, convergence in a bilateral or regional way may be easier to achieve than a multilateral approach, considering the specific interests or aims of competition policies in each jurisdiction.[82] Against this background, it does not come as a surprise that the number of FTAs providing for competition rules has

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[76] *See* e.g. Maher M. Dabbah, *Future Directions in Bilateral Cooperation: A Policy Perspective*, in *Cooperation, Comity, and Competition Policy* 297 (Andrew T. Guzman ed., Oxford University Press 2011); Sweeney, *supra* n. 1, at 277.

[77] Deborah Platt Majoras, *Convergence, Conflict, and Comity: The Search for Coherence in International Competition Policy*, in *2007 Fordham Competition Law Institute: International Antitrust Law & Policy* 7 (B. Hawk ed., Juris Publishing 2008).

[78] William Oualid, *Les ententes industrielles internationales et leurs conséquences sociales – la défense des travailleurs et des consommateurs* (League of Nations 1926). The French professor requested the incorporation of rules on anticompetitive conduct into the legal system of the League of Nations.

[79] For a background on these events, *see* Robert D. Anderson et al., *Competition Policy, Trade and the Global Economy: Existing WTO Elements, Commitments in Regional Trade Agreements, Current Challenges and Issues for Reflection*, Staff Working Paper ERSD-2018-12 6 (WTO 2018).

[80] The most ambitious proposal for an 'International Antitrust Authority' was the 'Munich Code' published in 1993. *See Draft International Antitrust Code* (Wolfgang Fikentscher & Ulrich Immenga eds, Nomos 1995).

[81] *See* Jones & Sufrin, *supra* n. 1, at 1241.

[82] *See* Gerber, *supra* n. 33, at 9.

increased considerably, especially since the activities of the WTO Working Group on the Interaction between Trade and Competition Policy were suspended in 2004.[83]

One of the advantages of bilateral cooperation is the fact that it is less costly than multilateral coordination, because multilateral efforts cause high monitoring and enforcement costs.[84] Contenting oneself with bilateral and regional cooperation may also reduce the risk of international conflicts. In effect, one of the main reasons for international cooperation is the reduction of potential conflicts among competition regimes.[85] In particular, where there is strong disparity in the ultimate objectives or priorities of the laws,[86] different decisions by the respective competition authorities are possible. The concept of fairness may serve as an example. Bilateral and regional cooperation may mitigate this risk.

Although there is worldwide convergence in the substantive rules, considerable divergence exists with regard to the philosophical foundations of competition law.[87] For example, the South Korean competition regime has developed its law and policy based on the goal of fair and free competition, and in its enforcement, the concept of fairness has become paramount. On the other hand, Chinese competition law is aimed at supporting its socialist market economy, which is different from the goals of competition regimes in other countries. When there is a lack of consistency in the interpretation of the objectives of the law,[88] the gap between the different competition regimes becomes wider. The insight that the goals of competition laws affect their implementation can be seen nowhere more clearly than in the field of abuse of dominant positions.[89] Another important element of bilateral and regional FTAs are non-discrimination rules.[90] It is essential that competition rules are conceived and applied in the same way with respect to both domestic and

[83] Anderson et al., *supra* n. 79, at 31.

[84] *See* e.g. John O. McGinns, *The Political Economy of International Antitrust Harmonization*, 45 Wm. & Mary L. Rev. 549, at 560–562 (2003).

[85] *See* Dabbah, *supra* n. 13, at 516. For further discussion on problems of extraterritoriality in competition law enforcement and possible solutions, *see* Seung Wha Chang, *Extraterritorial Application of U.S. Antitrust Laws to Other Pacific Countries: Proposed Bilateral Agreements for Resolving International Conflicts Within the Pacific Community*, 16 Hastings Int'l & Comp. L. Rev. 295 (1993).

[86] *See* Noonan, *supra* n. 15, at 7–8. National competition laws may – among other things – aim for consumer welfare, total welfare, market access protection of the competitive process, or for non-competition goals.

[87] *See* Scherer, *supra* n. 6, at 17.

[88] Michael Faure & Xinzhu Zhang, *Towards an Extraterritorial Application of the Chinese Anti-Monopoly Law that Avoids Trade Conflicts*, 45 Geo. Wash. Int'l L. Rev. 501, at 514 (2013).

[89] *See* Noonan, *supra* n. 15, at 63.

[90] Alan O. Sykes, *Externalities in Open Economy Antitrust and Their Implications for International Competition Policy*, 23 Harv. J. L. & Pub. Pol'y 89, at 94 (2000).

foreign entities. In particular, one of the tasks of transnational cooperation is to prohibit the foreclosure of foreign companies.[91]

Therefore, bilateral and regional agreements need to provide guidance on the values and objectives of competition law and policy, including the consequences for practical enforcement. For instance, many competition laws in Asian developing countries outline the goals of their laws. However, most of these statements contain rather broadly formulated terms emphasizing the public interest and invoking the socio-political context, resulting in a lack of clarity. Instead, it would be important to develop the concept of efficiency and to specify its relationship with the goal of fairness.[92] Moreover, some have argued that trade law is not focused solely on efficiency, for example in dumping cases.[93]

Even if it is unrealistic that competition rules and their enforcement will become uniform in different jurisdictions, a comparison of the goals of competition law and a common solution in bilateral or regional FTAs may facilitate convergence.[94] In other words, clearer guidance regarding efficiency and fairness as well as on the role of economic analysis may create a sound level of convergence, which would reduce tensions in the implementation of the respective competition laws.[95] This process may be promoted by the fact that an approximation as to the underlying objectives of competition law seems to have occurred: the goals of protecting the competitive process and of maximizing consumer welfare are apparently no longer being opposed as sharply as in the past.[96]

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91 For example, there were some international cases regarding market foreclosure in the WTO disputes, such as the Structural Impediments Initiatives (SII) to resolve the vertical foreclosures in the Japanese market (the *Kodak/Fuji* dispute) and *Mexican Telecom*. For further case analyses, *see* William H. Barringer, *Competition Policy and Cross Border Dispute Resolution: Lessons Learned from the U.S. – Japan Film Dispute*, 6 Geo. Mason L. Rev. 459 (1998); Dabbah, *supra* n. 13, at 266; Eleanor M. Fox, *The WTO's First Antitrust Case – Mexican Telecom: A Sleeping Victory for Trade and Competition*, 9 J. Int'l Econ. L. 271 (2006); John O. Haley, *Competition and Trade Policy: Antitrust Enforcement: Do Differences Matter?*, 4 Pac. Rim L. & Pol'y 303 (1995); Patricia Isela Hansen, *Antitrust in the Global Market: Rethinking 'Reasonable Expectations'*, 72 S. Cal. L. Rev. 1601 (1999); Mitsuo Matsushita, *The Structural Impediments Initiative: An Example of Bilateral Trade Negotiation*, 12 Mich. J. Int'l L. 436 (1991); Scherer, *supra* n. 2, at 76.

92 Edward M. Graham & J. David Richardson, *Issue Overview*, in *Global Competition Policy* 8 (Edward M. Graham & J. David Richardson eds, Institute for International Economics 1997). The authors further assert that the fairness concept in competition policy is vague and culturally distinctive. Fairness is often related to differences in bargaining power. *See* e.g. Phillip Areeda, Louis Kaplow & Aaron Edlin, *Antitrust Analysis: Problems, Text, and Cases* 22 (7th ed., Wolters Kluwer 2013); Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* 70 (5th ed., West Academic Publishing 2016).

93 Donald I. Baker, *The Proper Role for Antitrust in a Not-Yet-Global Economy*, 9 Cardozo L. Rev. 1135, at 114 (1988).

94 *See* e.g. Jonathan Galloway, *Moving Towards a Template for Bilateral Antitrust Agreements*, 28 World Comp. 589, at 613 (2005).

95 *See* Noonan, *supra* n. 15, at 68.

96 *See* Evans, *supra* n. 16, at 168–169; Gerber, *supra* n. 33, at 4.

This process is of great importance under another angle. Many observers take the view that trade barriers based on borders such as tariffs and quotas are rapidly diminishing,[97] while technical or other types of barriers, such as the disparities in competition law, have become a potential threat to free trade. To successfully react to this challenge, it is crucial to gain mutual understanding regarding the objectives of competition law. For this purpose, an important obstacle must be removed: the individual characteristics of each competition regime are based on distinctive experiences, and external pressure towards convergence may not be suitable to achieve greater consistency.[98] By contrast, the bilateral or regional approach allows common ground to be found, for example with respect to the treatment of competition law cases that are of mutual interest.[99] In addition, discussions of the objectives of competition law may reduce divergence in the implementation of the laws, for example regarding unilateral conduct.

To summarize, consideration of the deeper reasons behind the respective competition legislation, along with a discussion of its goals including the weight of fairness and of the protection of the competitive process, may lead to convergence of the substantive rules and their enforcement.[100] Although it cannot be denied that there are differing enforcement priorities in each jurisdiction,[101] the recent development of cooperation narrows the differences. Regarding the level of coordination, bilateral and regional cooperation is better suited at present, at least as regards the adoption of binding rules. By contrast, the multilateral level is the ideal forum for discussion and for adopting soft law.

3.2 Possible elements in FTAs relating to substantive competition law

Although FTAs should reflect the specific interests of each trading country, it is crucial to establish a model competition chapter that includes the basic substantive

[97] *See* Graham & Richardson, *supra* n. 92, at 3.

[98] Kfir Abutbul, *The U.S. and E.U. Approaches to Competition Law: Convergent or Divergent Paths?*, 17 Colum. J. Eur. L. 102, at 106 (2011).

[99] The former chairman of the US Federal Trade Commission, Majoras, pleaded in favour of bilateral cooperation and exchange of ideas, e.g. regarding monopolization or the abuse of market power, *see* Deborah Platt Majoras, *Convergence, Conflict, and Comity: The Search for Coherence in International Competition Policy*, in *2007 Fordham Competition Law Institute: International Antitrust Law & Policy* 19 (B. Hawk ed., Juris Publishing 2008).

[100] The adoption of similar key ideas can reduce conflicts in enforcement between countries, eventually leading to a coherent and consistent implementation of national competition law. *See* Noonan, *supra* n. 15, at 1.

[101] *See* e.g. Ken Heyer, *A World of Uncertainty: Economics and the Globalization of Antitrust*, 72 Antitrust L. J. 376, at 421–422 (2005).

provisions.[102] Especially for developing competition regimes, it is important to have a similar framework in order to achieve comparable implementation and thus to reduce conflicts in the simultaneous application of competition law.[103] Moreover, such a competition chapter has the task of guaranteeing the fundamental principle of non-discrimination: foreign firms must not be discriminated in the application of competition law. In order to reach this outcome, it is necessary to harmonize substantive rules as set forth below.[104]

First, in the field of restrictive agreements, with the exception of the US antitrust regime, most competition laws do not include a *per se* rule according to which certain practices are always and without exception unlawful. For the purpose of FTAs, the European approach, which is characterized by the consistent availability of the efficiency defence, should therefore be preferred. The rigorous approach towards hardcore cartels is guaranteed by the distinction between restrictions by object and by effect, as well as by the fact that exemptions are not very probable when obviously harmful agreements are involved. However, there is no automatic *per se* illegality, which in the transnational context has the advantage that each competition regime may consider the possibility of an exemption for public interest reasons.

Second, one of the most controversial areas in competition law is the design of rules regarding unilateral conduct, such as the rule on abuses of a superior power or bargaining position by online platforms or gatekeepers. In effect, the competition rules regarding the abuse of market positions may be influenced by the particular aims of the competition law in a given country. Therefore, it seems difficult to achieve perfect harmonization in this area. In particular, US antitrust law does not cover exploitative abuse nor the concept of collective dominance, whereas most competition regimes modelled on the EU's competition provisions have endorsed these two concepts. Considering the difficulty in achieving the convergence of such rules, we suggest renouncing on such rules while also maintaining the principle of non-discrimination in this contested area.

In addition, rules on the abuse of market power should be accompanied by an explicit presumption of dominance. In effect, quite a number of jurisdictions

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102 By underlining the desirability of a competition chapter, it shall not be ignored that FTAs regularly contain competition-related provisions in chapters dealing with other trade problems, e.g. sector-specific rules, intellectual property, subsidies and state-owned enterprises. *See* Laprévote, *supra* n. 20, at 4–5.

103 Generally on the benefits and obstacles of regional competition law with respect to developing countries, *see* Michal S. Gal & Inbal Faibish Wassmer, *Regional Agreements of Developing Jurisdictions: Unleashing the Potential*, in *Competition Policy and Regional Integration in Developing Countries* 291 (Josef Drexl et al. eds, Edward Elgar 2012).

104 The harmonization of substantive competition law is often understood as the basic level of harmonization of competition laws and policies. *See* Richard O. Cunningham & Anthony J. LaRocca, *Harmonization of Competition Policies in a Regional Economic Integration*, 27 L. & Pol'y Int'l Bus. 880, at 881 (1996).

(although not the US and the EU), especially in Asia, have adopted a presumption of market dominance based on market share. The precise percentage starting from which dominance is presumed varies between competition regimes. In the competition chapters of FTAs, for the sake of harmonization, a market share of 40% could be chosen (with respect to a single undertaking). When an undertaking holds a market share of at least 40%, it can be presumed to be dominant, although other factors such as entry barriers and relative market shares may be considered. Such a presumption would facilitate the creation of common standards in the field of unilateral conduct.

Third, merger control is more complex than the two provisions mentioned above because it is often influenced by political considerations, for example by the goal of strengthening national champions. Therefore, the risk of a discriminatory application of competition law with respect to domestic and to foreign firms is particularly high. Against this backdrop, it is important to reach convergence as to the substantive appraisal test. With the transition of the EU from a classical dominance test toward the SIEC test in 2004, the distinction from US antitrust law with its SLC test has considerably diminished. It seems secondary how the test is labelled. It is much more important to adopt a common approach based on sound economic principles and considering both the coordinated and the unilateral effects.

To summarize, the suggestions regarding substantive rules in FTAs seek to create a common understanding of the role of competition law and policy between the contracting parties. The adoption of similar substantive rules is certainly an ambitious project, but it seems necessary in order to implement the more general consensus on the goals of competition policy. The harmonization of substantive competition rules in an FTA will undoubtedly have an impact on the enforcement of competition law in the partner countries. In sum, meaningful convergence requires an understanding of the objectives of competition law as well as a common framework of substantive provisions.

4 CONCLUSIONS

Today, there are hundreds of FTAs (both bilateral and regional) that contain competition chapters or at least competition rules incorporated in other free trade contexts.[105] Competition law in FTAs has different functions.[106] First, there is an

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[105] *See* Laprévote, *supra* n. 20, at 4, who has analysed 267 of such FTAs included in the WTO's Regional Trade Agreements database. For regional integration associations in developing countries, *see* the contributions in *Competition Policy and Regional Integration in Developing Countries* (Josef Drexl et al. eds, Edward Elgar 2012).

[106] *See* Anderson et al., *supra* n. 79, at 27–28.

integration function. The abolition of state barriers to trade shall not be undermined by private restraints, for example by the partitioning of sales territories in distribution agreements.[107] Second, the general purposes of any national competition law, be it consumer welfare and efficiency, the protection of the competitive process, or economic and social development and fairness, are sought.[108] Third, the protectionist use of competition law is banned by prohibiting discriminatory enforcement with respect to domestic and foreign firms.[109] However, clashes between states do not only occur because of discriminatory enforcement, but due to differences regarding substance.[110] This leads to the fourth – and most underestimated – function of bilateral and regional competition law: harmonization. The creation of common competition rules by FTAs can lessen disagreement and reduce clashes and the probability of trade wars.[111] This last point is particularly important in a time where more than 130 jurisdictions have adopted a competition law.

Compared to the ideal of an international competition agreement, bilateral and regional competition rules have often been considered second-best. This article has aimed to correct this misunderstanding as well as upgrade the significance of transnational competition rules restricted to a limited number of states.[112] The elaboration of such rules obligates the trading partners to study the other parties' competition regimes and to learn from each other. This process creates spillover effects of the competition law of one country on other countries.[113] Certainly, such rules are important for international trade, as traditional 'across the border' matters are complemented by 'behind the border' issues,[114] a phenomenon

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[107] *See* e.g. Art. 11.1(1) Korea–EU FTA: 'The Parties undertake to apply their respective competition laws so as to prevent the benefits of the trade liberalization process in goods, services and establishment from being removed or eliminated by anticompetitive business conduct or anti-competitive transactions'.

[108] *See* e.g. Art. 15.2(1) Korea–Peru FTA: 'Each Party shall maintain competition laws that promote and protect the competitive process in its market by proscribing anti-competitive business conducts. Each Party shall take appropriate action with respect to anti-competitive business conducts with the objective of promoting economic efficiency and consumer welfare'.

[109] *See* e.g. Art. 11.3(2) Korea–EU FTA: 'The Parties recognize the importance of applying their respective competition laws in a transparent, timely and non-discriminatory manner, respecting the principles of procedural fairness and rights of defence of the parties concerned'.

[110] In effect, certain types of competition law enforcement have produced conflicts between national authorities due to their different approaches to unilateral conduct and mergers, *see* e.g. the *GE/Honeywell* merger and the *Microsoft* case. For case discussions, *see* Eleanor M. Fox, *GE/Honeywell: The U.S. Merger that Europe Stopped – A Story of the Politics of Convergence*, in *Antitrust Stories* 343–347 (Eleanor M. Fox & Daniel A. Crane eds, Foundation Press 2007); John J. Parisi, *Cooperation Among Competition Authorities in Merger Regulation*, 43 Cornell Int'l L. J. 55, at 56–59 (2010).

[111] *See* Fox, *supra* n. 110, at 356.

[112] *See also* Gerber, *supra* n. 11, at 126.

[113] *See* e.g. Benoît Durand, Andrés F. Galarza & Kirtikumar Mehta, *The Interface Between Competition Policy and International Trade Liberalisation. Looking into the Future: Applying a New Virtual Anti-Trust Standard*, 27 World Comp. 3 (2004).

[114] *See* Fox, *Toward World Antitrust*, *supra* n. 19, at 3; Kennedy, *supra* n. 7, at 5.

that is frequently described as 'deep bilateralism'.[115] For our context, it is crucial though that the new intensity of bilateralism leads to convergence in the field of competition law. This process has been described here as localized harmonization. The close relationship between selected trading partners facilitates progress on a bilateral and regional level that, for the time being, is not feasible at the global level. The second wave is effective cooperation between competition authorities based on formal agreements. Bilateral and regional cooperation allows effective enforcement in the absence of a single international regime having legally binding force,[116] especially when it can satisfy a competition agency's need to have access to information and to collect necessary evidence beyond its competition jurisdiction.[117]

Seen from a wider perspective, bilateral and regional cooperation contributes to the development of global standards in competition law and thus prepares the next step, which is a binding international competition agreement. Organizations like the OECD, UNCTAD, WTO and ICN have already achieved tremendous progress in international cooperation, the latest steps being the ICN's Framework on Competition Agency Procedures (CAP) of 2019[118] and UNCTAD's Guiding Policies and Procedures (GPP) to be adopted at the Eighth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices in July 2020.[119] However, these texts are non-binding commitments of a soft-law nature and therefore do not reach the same intensity as a formally binding multilateral agreement.[120] Due to the close link between competition and trade, the WTO would be the appropriate place to incorporate such an agreement. The existence of an abundant competition law in FTAs illustrates that international efforts in this area are indispensable. This bilateral and regional body of law may help to sketch out a global standard for competition law rules and international cooperation.[121] The WTO Working Group on the Interaction between Trade and Competition Policy, whose

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[115] *See* e.g. Debra Johnson & Colin Turner, *European Business* 351 (3d ed., Routledge 2016).

[116] Anu Bradford, *International Antitrust Negotiations and the False Hope of the WTO*, 48 Harv. Int'l L. J. 383 (2007); Scherer, *supra* n. 6, at 17.

[117] *See* Choi, *Competition Laws and Policies*, *supra* n. 46, at 144–147; Kennedy, *supra* n. 7, at 40.

[118] International Competition Network, *ICN Framework for Competition Agency Procedures (CAP)* (2018), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/04/ICN_CAP.pdf (accessed 4 Nov. 2020).

[119] UNCTAD, *Eighth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices* (2020), https://unctad.org/en/pages/MeetingDetails.aspx?meetingid=2364 (accessed 4 Nov. 2020).

[120] Regarding 'the medium- and long-term shortcomings of a soft law approach', *see* Laprévote, *supra* n. 20, at 36.

[121] *See* Choi, *Convergence of Competition Laws*, *supra* n. 13, at 20–21.

activities have been suspended, might be reactivated and serve as a basis for further reflections.[122] Independently from the prospect of such an endeavour, the increasing importance of competition law in bilateral and regional FTAs clearly reveals that trade and competition belong together. It is only a question of time before this insight will lead to new attempts regarding the integration of binding competition rules into the world trading system at a global level.

[122] Anderson et al., *supra* n. 79, at 60.