

**NEGOTIATING COMPETITION POLICY IN
MULTILATERAL TRADE AGREEMENTS:
EUROPEAN UNION OVERTURES
TO WEST AFRICA AND THE WTO**

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INTRODUCTION

Competition Policy¹ has been proposed by the European Union (EU) as a subject-matter for inclusion in the Economic Partnership Agreements (EPA) that the EU is currently negotiating with the African Caribbean and Pacific (ACP) Group of States.² An agreement in the EPAs covering competition would include not only the traditional prohibitions against agreements and practices in restraint of competition and monopolies and regulation of mergers,³ but also, as proposed by the EU, it would incorporate

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¹ Competition policy refers to the legislative framework or to the set of regulations which control practices by both private and public firms which are deemed to restrict competition in the market. SOUTH CTR., COMPETITION POLICY IN ECONOMIC PARTNERSHIP AGREEMENTS (CARIFORUM TEXT): FACT SHEET NO. 8, ¶ 4 (2008) [hereinafter SOUTH CENTRE FACT SHEET NO. 8].

² The European Union is negotiating Economic Partnership Agreements (EPAs) with 75 of its former colonies in Africa, the Caribbean and the Pacific (ACP). SOUTH CTR., UNDERSTANDING THE ECONOMIC PARTNERSHIP AGREEMENTS (EPAs): FACT SHEET NO. 1, ¶ 1 (2007) [hereinafter SOUTH CENTRE FACT SHEET NO. 1]. The EPAs are essentially free trade agreements (FTA) that envisage the creation of a free trade area between the EU and ACP countries. *Id.* A free trade refers to a group of countries that have eliminated tariff and most non-tariff barriers affecting trade among themselves, while each participating country applies its own independent schedule of tariffs to imports from countries that are not members. *See generally id.*

³ A basic competition law framework typically includes the following:

core principles of the World Trade Organization (WTO), such as transparency, non-discrimination, and procedural fairness.⁴

Governments throughout the world have designed and implemented competition policies as fundamental instruments in the promotion of more transparent, more efficient, and more open markets as well as the promotion of consumer protection and welfare.⁵ There is the expectation that effective competition in the market place would result in the most effective use of national resources, provide incentives for innovation and enable consumers to benefit from lower prices, better quality and a variety of goods and services.⁶ In this context, therefore, competition policy can contribute to economic growth and thereby complement government policies aimed at poverty reduction.⁷

However, despite the proliferation of national competition rules,⁸ there are no legally binding international disciplines on competition policy. Developing countries have vigorously opposed initiatives to create such frameworks fearing potential restrictions on their policy space to adopt appropriate strategies for development.⁹ The small and vulnerable economies have also

[i] [t]he prohibition of cartels or agreements among rival firms to stop competing by fixing prices, allocating or sharing markets and fighting outsiders (non members of the cartel); [ii] [t]he control of vertical anti-competitive practices and the prohibition of abuses of dominant market power by large firms or monopolies; [and] [iii] [t]he control and review of mergers and acquisitions which may lead to the creation of a dominant player in the market

SOUTH CENTRE FACT SHEET NO. 8, *supra* note 1, ¶ 425. A document prepared by the World Trade Organization lists the national laws on competition in force in more than 50 countries. See *Overview of Members' National Competition Legislation*, *infra* note 8, at 3–18.

⁴ See *infra* notes 74–93 and accompanying text.

⁵ SOUTH CENTRE FACT SHEET NO. 8, *supra* note 1, ¶ 5.

⁶ John Preston, *Implementing Competition Policy in Developing Countries: The Role of Donors*, at 3 (Dec. 1, 2005), available at <http://www.businessenvironment.org/dyn/be/docs/80/Session3.4PrestonDoc.pdf>.

⁷ *Id.* at 3.

⁸ For an outline of national competition laws, see Working Group on the Interaction Between Trade and Competition Policy, *Note by the Secretariat: Overview of Members' National Competition Legislation*, WT/WGTCP/W/128/Rev.3 (Nov. 27, 2003) [hereinafter *Overview of Members' National Competition Legislation*], available at http://www.wto.org/english/tratop_e/comp_e/wgtcp_docs.e.htm.

⁹ Working Group on the Interaction Between Trade and Competition Policy, *Background Note by the Secretariat: Core Principles, Including Transparency, Non-Discrimination and Procedural Fairness*, WT/WGTCP/W/209, ¶ 31 (Sept. 19, 2002).

been concerned about the challenges the proposed disciplines would create, particularly regarding the heavy costs of implementing and enforcing them.¹⁰ This Article examines the debate on international competition policy in the context of the negotiations of the EPA between the EU and West Africa.

Section One of the Article identifies as background information, the basic goals of competition policy. Section Two traces how the subject of competition was introduced in international trade negotiations while Section Three discusses the implications of a multilateral agreement on competition policy proposed by the EU in the WTO and based on principles of transparency, non-discrimination and procedural fairness. A description in Section Four of the discussions on competition policy in the context of the EPA negotiations with West Africa is followed in Section Five with an examination of alternative regional schemes with special reference to the ECOWAS Supplementary Act on Competition Rules.

1. BACKGROUND INFORMATION ON COMPETITION POLICY

1.1. *The Goals of Competition Policy*

The most basic goals of competition policy are to promote and maintain healthy inter-firm rivalry in markets¹¹ by regulating anti-competitive market structures and enterprise activities that impede circulation¹² and also promote consumer welfare by regulating practices or structures that could have a detrimental impact on the

See also Martin Khor, *Analysis of the Doha Negotiations and the Functioning of the World Trade Organization* 16 (South Ctr., Research Paper No. 30, May 2010) (observing that “[i]n December 2003, several leading developing countries proposed to the WTO . . . that . . . the three issues of investment, competition, and government procurement . . . be dropped from the Doha agenda”).

¹⁰ Martin Khor, *The “Singapore Issues” in the WTO: Implications and Recent Developments*, THIRD WORLD NETWORK (2004), at 5, available at http://www.policyinnovations.org/ideas/policy_library/data/01284/_res/id=s_a_File1/.

¹¹ See generally MASSIMO MOTTA, *COMPETITION POLICY: THEORY AND PRACTICE* (2004).

¹² Working Group on the Interaction Between Trade and Competition Policy, *Background Note by the Secretariat: The Fundamental Principles of Competition Policy*, WT/WGTC/W/127, at 5 (June 7, 1999) [hereinafter *Fundamental Principles*].

prices charged to and/or the array of choices available to consumers.¹³ A third major goal aims at the promotion of economic efficiency¹⁴ in the sense of allocative efficiency,¹⁵ productive efficiency or dynamic efficiency.¹⁶

Other secondary goals reflected in varying degrees in some competition laws and policies include the promotion of equity and fairness, the promotion of opportunities for small and medium-sized businesses, market integration, promotion of technological development, local production and employment, and the protection of economic and political pluralism.¹⁷

By advancing these objectives, competition policy would contribute to the overall process of economic development and poverty alleviation. For example, this could result from promoting an efficient allocation of resources,¹⁸ protecting the welfare of consumers,¹⁹ preventing or addressing excessive concentration levels and resulting structural rigidities,²⁰ and addressing anti-competitive practices of enterprises that have a trade dimension.²¹ Economic development would also be enhanced under competition policy by increasing the economy's ability to attract foreign investment and to maximize the benefits of such

¹³ *Id.*

¹⁴ *Id.* ¶ 18.

¹⁵ See WTO, Working Group on the Interaction Between Trade and Competition Policy, *Note by the Secretariat: Study on Issues Relating to a Possible Multilateral Framework on Competition Policy*, WT/WGTCP/W/228, ¶¶ 16–18 (May 19, 2003) (Part I) (discussing the different types of efficiency and defining allocative efficiency). “‘Allocative efficiency’ is achieved when society’s scarce resources are allocated to produce the goods and services that are most desired by consumers. This requires that price be equal to the marginal costs of production and distribution from the social point of view.” *Fundamental Principles*, *supra* note 12, ¶ 11.

¹⁶ “‘Productive efficiency’ is achieved when goods are produced using the most cost-effective combination of productive resources available under existing technology. ‘Dynamic efficiency’ is achieved through an optimal rate of invention, development, and diffusion of new products and production processes.” *Fundamental Principles*, *supra* note 12, ¶ 17 (citation omitted).

¹⁷ *Id.* ¶ 20.

¹⁸ See generally Working Group on the Interaction Between Trade and Competition Policy, *Note by the Secretariat: Synthesis Paper on the Relationship of Trade and Competition Policy to Development and Economic Growth*, WT/WGTCP/W/80, ¶ 9 (Sept. 18, 1998). See generally *Fundamental Principles*, *supra* note 12, ¶ 19.

¹⁹ *Id.* ¶ 9.

²⁰ *Id.* ¶ 11.

²¹ *Id.* ¶ 12.

investment,²² reinforcing the benefits of privatization and regulatory reform or deregulation initiatives,²³ and establishing an institutional focal point for the advocacy of pro-competitive policy reforms and a competition culture.²⁴

Given the potential welfare benefits of competition policy, it is not surprising that competition rules have mushroomed and are now a staple of the business laws in many jurisdictions.²⁵ Provisions on competition can also be found in numerous bilateral agreements and regional free trade agreements.²⁶ However, the goal of the international community to develop a global instrument has proved to be elusive, as described in the next section.

2. INTERNATIONAL INITIATIVES ON COMPETITION POLICY: FROM HAVANA TO CANCUN

2.1. *The Havana Charter*

The earliest major multilateral trade instrument to contain references to competition policy was the Havana Charter signed in March 1948 by some fifty-three countries setting up the International Trade Organization (ITO).²⁷ During negotiations on

²² *Id.* ¶¶ 18–20.

²³ *Id.* ¶¶ 1–26.

²⁴ *Id.* ¶ 27.

²⁵ *Overview of Members' National Competition Legislation, supra* note 8.

²⁶ See e.g., UNCTAD, COMPETITION PROVISIONS IN REGIONAL TRADE AGREEMENTS: HOW TO ASSURE DEVELOPMENT GAINS (Philippe Brusick et al. eds., 2005), available at http://unctad.org/en/Docs/ditclp20051_en.pdf (analyzing provisions found in different types of RTAs, and making a number of policy recommendations and identifying institutional arrangements needed to promote synergies between trade and competition at the regional level); Sanoussi Bilal, *Trade and Competition Policy: Perspectives for Developing Countries* 7 (2001), available at <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4709.pdf> (reviewing the current debate on competition policy, analyzing the implementation and enforcement capacity of developing countries, and assessing the relevance of a global competition policy framework for developing countries).

²⁷ The Havana Charter incorporated special provisions to enhance the contribution of investment to economic development. For example, Article 12 of the Havana Charter captioned “International Investment for Economic Development and Reconstruction” provided that “international investment, both public and private, can be of great value in promoting economic development and reconstruction, and consequent social progress,” and that “the international flow of capital will be stimulated to the extent that Members afford nationals of other

the Havana Charter, the United States had argued for a “multilateral code focussed on protecting foreign investment from discrimination and nationalization by host countries.”²⁸ However, many of the developing countries – the majority of them now classified as developed countries²⁹ – opposed this, fearing their sovereignty would be compromised under the proposed code.

In the end, the Havana Charter provided for the right of each member to “determine whether and to what extent and upon what terms it will allow future foreign investment”³⁰ and to “take any appropriate safeguards necessary to ensure that foreign investment is not used as a basis for interference in [a country’s] internal affairs.”³¹ It also recognized the right of Member States to take action by statute or decree to prevent restrictive business practices including monopolies or restraints of trade.³² Significantly, the Havana Charter did not prohibit discrimination against foreign direct investment, merely requiring that States “give due regard to

countries opportunities for investment and security for existing and future investments.” Havana Charter for an International Trade Organization art. 12, Mar. 24, 1948, in U.N. Conference on Trade & Employment, Final Act and Related Documents 8-9, U.N. Doc. E/Conf. 2/78 [hereinafter Havana Charter], available at http://www.wto.org/english/docs_e/legal_e/havana_e.pdf.

²⁸ Riyaz Dattu, *A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment*, 24 *FORDHAM INT’L L.J.* 275, 287, 291-92 (2000).

²⁹ As one author explains,

by this time, the hitherto great world powers such as the United Kingdom, France and Germany had ceased to be capital exporting countries and were faced with an upsurge in American foreign investment after the war. They therefore had to erect, or leave space for, formal and informal mechanisms to ensure that their national interests were protected. During this time the formal mechanisms that these countries used included foreign exchange controls and regulations against foreign investment in sensitive sectors, such as defense and cultural industries. Informally, they used mechanisms such as ‘takeover restrictions, undertakings and voluntary restrictions by transnational corporations in order to restrict foreign investment and impose performance requirements.’

Victor Mosoti, *Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between?*, 26 *NW. J. INT’L & BUS.* 95, 109 (2005) (footnotes omitted).

³⁰ Havana Charter, *supra* note 27, art. 12(1)(c)(iii).

³¹ *Id.* arts. 12(1)(c)(ii), 12(1)(c)(i).

³² Article 52, entitled “Domestic Measures against Restrictive Business Practices,” provides that “[n]o act or omission to act on the part of the Organization shall preclude any Member from enforcing any national statute or decree directed towards preventing monopoly or restraint of trade.” *Id.* art. 52.

the desirability of avoiding discrimination as between foreign investments.”³³ There was also no obligation for national treatment or right of establishment in the ITO provisions, and neither did the provisions cover investment incentives or performance requirements.³⁴

However, the provisions on competition in the Havana Charter, limited as they were, never entered into force. Other parts of the Charter, including provisions that envisaged strong enforcement powers for the ITO, had raised concerns in the US, and the United States Congress rejected the Charter.³⁵ Without American support, the ITO was doomed³⁶ and the Havana Charter that sought to create it never came into effect except for the trade provisions of General Agreement on Tariffs and Trade which were applied on a provisional basis until the establishment in 1994 of the WTO.³⁷

2.2. UNCTAD's Work Program

Under the auspices of the United Nations Conference on Trade and Development, the international community engaged in protracted negotiations during the 1970s and 1980s on a Code of Conduct for Transnational Corporations (TNCs).³⁸ The formulation of such a code³⁹ was part of a plan to establish a New

³³ *Id.* art. 12, ¶ 2(a)(ii).

³⁴ EDWARD M. GRAHAM, *GLOBAL CORPORATIONS AND NATIONAL GOVERNMENTS* 101 (1996).

³⁵ Gary Clyde Hufbauer & Jisun Kim, *International Competition Policy and the WTO*, PETERSON INST. FOR INT'L ECON. (2008), available at <http://www.iie.com/publications/papers/paper.cfm?ResearchID=930>.

³⁶ PAUL B. STEPHAN, DON WALLACE, JR. & JULIE A. ROIN, *INTERNATIONAL BUSINESS AND ECONOMICS: LAW AND POLICY* 74 (2d ed. 1996), available at <http://www.iie.com/publications/papers/paper.cfm?ResearchID=930>.

³⁷ LUISA E. BERNAL ET AL., *THE DOHA TRADE NEGOTIATIONS AND LOCAL COMMUNITIES: THE INVESTMENT AGENDA AND THE SERVICES NEGOTIATIONS IN THE WTO*, ¶ 22 (2003).

³⁸ *UNCTC Origins*, United Nations Conference on Trade and Development [UNCTAD], <http://unctc.unctad.org/asp/UNCTCOrgins.aspx> (last visited Mar. 6, 2014) (noting that the development of the Code of Conduct on Transnational Corporations was one of the four main tasks comprising UNCTAD's work program).

³⁹ Draft UN Code of Conduct on Transnational Corporations, May 1983, 23 I.L.M. 626 (1984) [hereinafter Draft UN Code], available at

International Economic Order centered on “controlling the political [and] economic activities of TNCs, out of the concern of developing countries about their sovereignty.”⁴⁰ The draft Code contained provisions on competition and restrictive business practices.⁴¹

However, the negotiations were hampered by a climate of confrontation and mistrust⁴² and differing perspectives about the objectives, nature and scope of the proposed Code. While the developing countries argued for a binding code, the developed countries preferred an instrument containing non-binding guidelines.⁴³ It was also difficult to develop a consensus on how to treat the transnational corporations,⁴⁴ especially as regards the power of States to regulate their rights of entry and establishment,⁴⁵ to nationalize their interests and the scope of compensation payable⁴⁶ as well as to subject them to national dispute settlement procedures.⁴⁷ According to the United Nations Conference on Trade and Development (UNCTAD), the 1980s witnessed a change in its focus to the positive, rather than the negative, effects of foreign direct investment and TNCs and that such change in attitude “contributed to the stalling of the Code negotiations”⁴⁸ In the end, there was no agreement and the draft code was shelved.

<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2891> (last visited Apr. 7, 2015).

⁴⁰ UNCTC *Evolution*, UNCTAD, available at <http://unctc.unctad.org/asp/UNCTCEvolution.aspx> (last visited Mar. 15, 2014).

⁴¹ Draft UN Code, *supra* note 39, ¶ 35.

⁴² UNCTC *Evolution*, *supra* note 40.

⁴³ The text of the draft Code reveals this tension. Many of the obligations to be imposed on transnational corporations offer two alternatives: “shall” or “should,” denoting binding and non-binding obligations, respectively. See, e.g., Draft UN Code, *supra* note 39, ¶ 45:

Transnational corporations should/shall supply to the competent authorities in each of the countries in which they operate, upon request or on a regular basis as specified by those authorities, and in accordance with national legislation, all information required for legislative and administrative purposes relevant to the activities and policies of their entities in the country concerned.

⁴⁴ Paul Kuruk, *Controls on Technology Transfer: An Analysis of the Southern Response to Northern Technological Protectionism*, 13 MD. J. INT’L L. & TRADE 301, 320 (1989).

⁴⁵ Draft U.N. Code, *supra* note 39, ¶ 47.

⁴⁶ *Id.* ¶ 54.

⁴⁷ *Id.* ¶¶ 55–58.

⁴⁸ UNCTC *Evolution*, *supra* note 40.

Although UNCTAD failed in its bid to develop a code of conduct for TNCs, it was successful in developing the Set of Multilaterally Approved Equitable Principles and Rules for the Control of Restrictive Business Practices (Set of Principles).⁴⁹ The UN General Assembly adopted the instrument on December 5, 1980.

Objectives of the Set of Principles are stated to include the attainment of

greater efficiency in international trade and development . . . through . . . [t]he creation, encouragement and protection of competition; [the] [c]ontrol of the concentration of capital and/or economic power; [and the] [e]ncouragement of innovation.”⁵⁰ Additional objectives include the promotion of social welfare and the interests of consumers;⁵¹ and the “eliminat[ion of] the disadvantages to trade and development which may result from the restrictive business practices of transnational corporations.”⁵²

The Set of Principles defines restrictive business practices as:

acts or behaviour of enterprises which, through an abuse or acquisition and abuse of a dominant position of market power, limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, . . . or which through formal, informal, written or unwritten agreements or arrangements among enterprises, have the same impact.⁵³

Restrictive business practices specifically condemned include

⁴⁹ U.N. Conference on Trade and Development (UNCTAD), The United Nations Set of Principles and Rules on Competition, U.N. Doc. TD/RBP/CONF/10/Rev.2 (2000), *available at* <http://unctad.org/en/docs/tdrbpconf10r2.en.pdf>.

⁵⁰ *Id.* at A2(a)-(c).

⁵¹ *Id.* at A3.

⁵² *Id.* at A4.

⁵³ *Id.* at B(i)(1).

price-fixing agreements, collusive tendering, market or customer allocation arrangements⁵⁴ and predatory behavior towards competitors.⁵⁵

While the adoption of the Set of Principles marked an important milestone in the efforts to develop a multilateral framework on competition policy, the non-binding nature of the instrument has limited its usefulness. As noted in its preamble, the principles “take the form of recommendations”⁵⁶ only, and therefore are hortatory, and not intended to create directly enforceable rights and obligations.

2.3. WTO Ministerial Conferences

At the first session of the WTO ministerial conference held in Singapore in 1996, some members called for negotiations in the WTO for agreements on competition policy,⁵⁷ a request which the developing countries opposed.⁵⁸ As a compromise, the Singapore Ministerial created⁵⁹ the Working Group on the Interaction Between Trade and Competition Policy (Working Group on Competition Policy) “to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework.”⁶⁰ The Ministers directed the General Council to monitor the work under review for two years before determining “how the work of [the]

⁵⁴ *Id.* at D3(a), (b), (c).

⁵⁵ *Id.* at D4.

⁵⁶ *Id.* at 9.

⁵⁷ Initial proposals for a WTO framework on competition came from the European Union and the United States. *See* Khor, *supra* note 10, at 2 (noting that despite a lack of consensus, “the four Singapore issues were brought onto the Singapore Ministerial agenda through the device of a cover letter written by the WTO Director General to the Trade Ministers”).

⁵⁸ India, Indonesia, Malaysia and Tanzania were among the developing countries that opposed the initiatives on international competition policy. *Id.*

⁵⁹ World Trade Org., Singapore Ministerial Declaration of 13 December 1996, WT/MIN(96)/DEC, 36 I.L.M. 218, ¶ 20 (1997) [hereinafter Singapore Ministerial Declaration], *available at* http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm.

⁶⁰ *Id.* ¶ 20.

body should proceed.”⁶¹ However, they underscored their clear understanding “that future negotiations, if any, regarding multilateral disciplines in these areas, will take place only after an explicit consensus decision is taken among WTO Members regarding such negotiations.”⁶²

The declaration issued at the next ministerial conference in Geneva⁶³ on May 20, 1998 did not contain specific references to competition policy, although it called for recommendations to ensure expeditious conclusion of the work program set out during the Singapore conference.⁶⁴ In the lead up to the Third Ministerial conference in Seattle, concrete proposals for the launching of WTO negotiations on competition policy were submitted in July and August 1999 by several countries. Despite protracted discussions, the conference was unable to narrow gaps that had emerged on a number of critical issues and the Ministers resolved to “take a time out, consult with one another, and find creative means to finish the job” of the conference.⁶⁵ As a result, no concrete decisions were taken in Seattle with respect to future work on competition policy in the WTO.

At the Fourth Ministerial Conference in Doha, however, the Ministers on November 14, 2001 “[r]ecogniz[ed] the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area.”⁶⁶

⁶¹ *Id.*

⁶² *Id.*

⁶³ World Trade Org., Geneva Ministerial Declaration of 20 May 1998, *available at* http://www.wto.org/english/thewto_e/minist_e/min98_e/mindec_e.htm.

⁶⁴ The General Council’s work program included recommendations concerning “other possible future work on the basis of the work programme initiated at Singapore.” *Id.* ¶ 9(b). Specifically, the Ministers required the General Council to submit at the third session of the ministerial conference “on the basis of consensus, recommendations for decision concerning the further organization and management of the work programme arising from [the terms of the declaration], including the scope, structure and time-frames, that will ensure that the work programme is begun and concluded expeditiously.” *Id.* ¶ 10.

⁶⁵ See Press Release, World Trade Org., WTO Briefing Note: 3 December – The Final Day and What Happens Next (Dec. 3, 1999), *available at* http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/resum03_e.htm (quoting a statement by Conference Chairperson Charlene Barshefsky, who also noted the difficulties presented by the differences of opinion).

⁶⁶ World Trade Org., Ministerial Declaration of 14 November 2001,

They agreed that negotiations would take place after the next ministerial conference “on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.”⁶⁷ The Ministers instructed the Working Group on Competition Policy to focus until the next ministerial conference “on clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hard core cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building.”⁶⁸ The Working Group on Competition Policy was also to take “[f]ull account . . . of the needs of developing and least-developed country participants and [provide] appropriate flexibility . . . to address them.”⁶⁹

Even after the Fifth Ministerial Conference in Cancun in 2003, there was still no consensus on modalities for negotiations on competition policy, although the Ministers had reaffirmed their “Doha Declarations and Decisions and recommit[ted themselves] to working to implement them fully and faithfully.”⁷⁰ The Chairperson of the conference noted on September 14, 2003 that despite considerable movement in consultations, members remained entrenched particularly on the Singapore issues, such as competition.⁷¹

Shortly after, some WTO members moved that the issue of competition be dropped from the Doha agenda.⁷² On August 1, 2004, the WTO General Council decided that competition policy “will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations

WT/MIN(01)/DEC/1, 41 I.L.M. 746, ¶ 23 (Nov. 20, 2001) [hereinafter Doha Declaration], *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

⁶⁷ *Id.* ¶ 20.

⁶⁸ *Id.* ¶ 25.

⁶⁹ *Id.* ¶ 25.

⁷⁰ World Trade Org., Cancun Ministerial Conference Summary of 14 September 2003, ¶ 6, *available at* http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm#statement (last visited Jan. 30, 2015).

⁷¹ World Trade Org., Cancun Ministerial Statement, WT/MIN(03)/20, *available at* https://www.wto.org/english/thewto_e/minist_e/min03_e/min03_e.htm (last visited Jan. 30, 2015).

⁷² Khor, *supra* note 9, at 16.

on . . . [that] issue[] will take place within the WTO during the Doha Round.”⁷³ Accordingly, the Working Group on Competition Policy ceased to be active.

3. IMPLICATIONS OF A MULTILATERAL FRAMEWORK ON COMPETITION POLICY

3.1. *EU Proposals Regarding a Multilateral Framework on Competition*

The EU was the principal proponent in the WTO for the adoption of a multilateral framework on competition.⁷⁴ In submissions to the Working Group on Competition Policy, the EU proposed elements of a multilateral framework based on core principles, cooperation and support for developing countries.⁷⁵ Specifically,

WTO negotiations on competition should . . . [focus] on three key issues: core principles on domestic competition law and policy; cooperation modalities, including both case-specific cooperation and more general exchanges of experiences; and support for the reinforcement of competition institutions in developing countries, including through a more coherent and enhanced approach to technical assistance for capacity building.”⁷⁶

Regarding the core principles, the EU explained that they “would relate to the domestic legislative framework”⁷⁷ and “could

⁷³ See Doha Work Programme: Decision Adopted by the General Council on 1 August 2004, WT/L/579, ¶ 1(g), available at http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm.

⁷⁴ Julien Moiroux, *The Internationalisation of Competition Policy: The EU and the WTO Between Boldness and Rally*, 2 GLOBAL ANTITRUST REV. 38, 38 (2009).

⁷⁵ Working Group on the Interaction Between Trade and Competition Policy, *Communication from the European Community and Its Member States*, WT/WGTCP/W/152 (Sept. 25, 2000), at 5 [hereinafter *Communication from the European Community* (Sept. 25, 2000)], available at https://docs.wto.org/dol2fe/Pages/FE_Search.S.S001.aspx.

⁷⁶ *Id.* at 4.

⁷⁷ *Id.* at 5.

be largely based on transparency and non-discrimination.” The EU argued the core principles were “both central to the multilateral trading system and to domestic competition law regimes.”⁷⁸ Elaborating on these concepts, the EU contended that “competition law should be based on the principle of non-discrimination *on grounds of the nationality of firms*” (emphasis added),⁷⁹ a view it considered to be self-evident:

[t]he importance of non-discrimination – both MFN and National Treatment – for both the multilateral trading system and national competition laws hardly needs stressing. Indeed, it is difficult to imagine any situation in which a competition law regime would establish any distinction on the basis of the nationality of firms.⁸⁰

Thus, application of the principle of non-discrimination in the context of competition law and policy “would mean an obligation not to formally discriminate against firms on the basis of their corporate nationality.”⁸¹ The EU argued that the prevalence of unique discriminatory treatment, such as discriminatory use of taxation, justified the “inclusion of the principle of non-discrimination in a WTO framework agreement on competition by way of a separate, specific provision . . . [to] take into account the particularities of competition law and policy.”⁸² Although competition-related provisions already exist in other WTO agreements,⁸³ the EU contended they were too “area and/or issue

⁷⁸ *Id.*

⁷⁹ *Id.* at 6 (emphasis added).

⁸⁰ *Id.*

⁸¹ Working Group on the Interaction Between Trade and Competition Policy, *Communication from the European Community and Its Member States*, WT/WGTCP/W/160 (Mar. 14, 2001), at 2 [hereinafter *Communication from the European Community* (Mar. 14, 2001)], available at https://docs.wto.org/dol2fe/Pages/FE_S_S001.aspx.

⁸² *Id.*

⁸³ For example, both the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS) contain rules on monopolies and exclusive service suppliers while the Agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPS) recognizes the right of governments to act against anti-competitive practices. See *Understanding the WTO: Cross-Cutting and New Issues: Investment, Competition, Procurement, Simpler Procedures*, WORLD TRADE ORG., available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm

specific”⁸⁴ to be useful in tackling competition issues with international dimensions.

In terms of scope, the principle of transparency would apply to laws, regulations and other government measures taken in application of domestic competition law, including “not only to publications of relevant laws and regulations, but also, perhaps more importantly, to guidelines, as appropriate, for their future application and interpretation, as well as possible exclusions and exemptions.”⁸⁵

It would also extend to notions of “due process” and the availability of effective domestic remedies⁸⁶ and in that sense would include “procedures through which private parties can have access to the competition authorities, guarantees of due process in competition investigations and enforcement, basic standards of protection of confidential information, a right of appeal against administrative decisions and the role of the judiciary in the enforcement process.”⁸⁷ Because the due process guarantees resemble requirements of the principle of procedural fairness, they can also be used to illustrate the scope of that principle.⁸⁸

(last visited Jan. 30, 2015).

⁸⁴ As the EU argues,

despite the competition-related provisions in a number of existing WTO agreements such as TRIPS and GATS (including the reference paper on basic telecommunications), all of these are area and/or issue-specific. The globalisation of our economy calls for a horizontal, generally applicable framework. Clearly, principles on interconnection for telecommunication would alone offer little help in tackling international cartels.

Communication from the European Community (Mar. 14, 2001), *supra* note 81, at 2.

⁸⁵ *Id.* For a survey of exemptions and exclusions in national laws, see generally Working Group on the Interaction Between Trade and Competition Policy, *Note by Secretariat: Exceptions, Exemptions and Exclusions Contained in Members’ National Competition Legislation*, WT/WGTCP/W/172 (July 6, 2001).

⁸⁶ *Communication from the European Community* (Sept. 25, 2000), *supra* note 75, at 7.

⁸⁷ *Id.*

⁸⁸ Working Group on the Interaction Between Trade and Competition Policy, *Provisions on Procedural Fairness in Existing WTO Agreements: Background Note by the Secretariat*, ¶ 16, WT/WGTCP/W/231 (May 22, 2003) [hereinafter *Provisions on Procedural Fairness in Existing WTO Agreements*].

Underscoring the relevance of the core principles, the EU noted that

they ensure a level playing field and equal competitive opportunities for firms, their products and services, and help bring about a higher degree of predictability to enable firms to familiarise themselves with existing rules and regulations before making major business decisions, just as consumers may become more familiar with their rights.⁸⁹

Specifically, they will ensure “a level playing field *between domestic and foreign operators (and their goods and services)* as well as between all foreign operators.”⁹⁰ (Emphasis added).

According to the EU, “affirming such principles as WTO commitments would reinforce their value in the domestic legal system and establish a stronger basis for mutual trust and cooperation among competition authorities.”⁹¹ In addition, “for those WTO Members who have not yet adopted domestic competition laws, a WTO agreement would provide important principles to be incorporated in the drafting of domestic competition law.”⁹² Furthermore, “a WTO Agreement would help lock Members into the principles of transparency and non-discrimination, making their legal regimes transparent and predictable and limiting the possibility of recourse to formal discriminatory treatment at a later point in time.”⁹³

3.2. *The WTO Principles of Non-Discrimination, Transparency and Procedural Fairness*

As noted by the EU, the principles of non-discrimination (national treatment and most favored nation treatment) and

⁸⁹ *Communication from the European Community* (Mar. 14, 2001), *supra* note 81, at 2.

⁹⁰ *Id.* (emphasis added).

⁹¹ *Id.* at 3.

⁹² *Id.*

⁹³ *Id.*

transparency constitute core principles of the WTO.⁹⁴ For example, the principle of national treatment is found in the three main WTO agreements dealing with trade in goods,⁹⁵ trade in services,⁹⁶ and intellectual property rights,⁹⁷ as well as other agreements that form annexes to the WTO Agreement.⁹⁸ In each agreement, the national treatment principle is expressed in terms of a no less favorable treatment standard as exemplified by the language in GATT Article III(4):

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.⁹⁹

⁹⁴ For example, in their directives to the Working Group on Competition Policy, the Ministers at the Doha Ministerial Conference referred to the need to “focus on the clarification of [the] core principles, including transparency, non-discrimination and procedural fairness.” Doha Declaration, *supra* note 66, ¶ 25.

⁹⁵ General Agreement on Tariffs and Trade 1994 art. III, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153, available at http://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm. Of particular relevance is Article III, which requires national treatment in respect of all laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of goods.

⁹⁶ Agreement on Trade in Services art. XVII, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167, available at http://www.wto.org/english/docs_e/legal_e/26-gats.pdf.

⁹⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299; 33 I.L.M. 1197, available at http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm.

⁹⁸ These include Agreement on Technical Barriers to Trade, Dec. 15, 1993, 1868 U.N.T.S. 120, available at http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf; Agreement on the Application of Sanitary and Phytosanitary Measures, Dec. 15, 1993, 1867 U.N.T.S. 493, available at http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm; and the Agreement on Government Procurement, Apr. 15, 1994, 1869 U.N.T.S. 508, available at http://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm.

⁹⁹ General Agreement on Tariffs and Trade art. III(4), Oct. 30, 1947, 55 U.N.T.S. 194.

Therefore, the principle of national treatment imposes on a WTO Member an obligation not to put the goods or services or persons of other WTO Members at a competitive disadvantage vis-a-vis its own goods or services or nationals. However, it does not preclude the WTO Member from granting to foreign goods and services terms that are *more favorable* than are given to domestic goods and services.¹⁰⁰

Similarly, the principle of the most-favored-nation treatment requires a WTO Member not to discriminate between other WTO Members. It is also reflected in the three main WTO agreements,¹⁰¹ but in varying language. While two of the agreements use traditional language in referring to the obligation to extend “immediately and unconditionally” to all WTO Members “any advantage, favour, privilege or immunity” granted by a Member,¹⁰² the third uses a “treatment no less favourable” standard for expressing its most favored nation obligation.¹⁰³

The concept of transparency as a core principle of the WTO has two key components. First is the obligation to publish, or at least make publicly available, all relevant regulations, and, as a general rule, not to apply or enforce them until this has been done.¹⁰⁴

¹⁰⁰ Explaining the term “national treatment” with reference to section 337 of the US Tariff Act of 1930, a WTO publication notes:

The words ‘treatment no less favourable’ in paragraph 4 call for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, . . . purchase, transportation, distribution or use of products. This clearly sets a minimum permissible standard as a basis. On the other hand, contracting parties may apply to imported products different formal legal requirements if doing so would accord imported products more favourable treatment.

Working Group on the Interaction Between Trade and Competition Policy, *Background Note by the Secretariat: The Fundamental WTO Principles of National Treatment, Most-Favoured-Nation Treatment and Transparency*, WT/WGTC/W/114, ¶ 31 (Apr. 14, 1999) [hereinafter *The Fundamental WTO Principles of National Treatment*].

¹⁰¹ Provisions requiring a WTO Member not to discriminate between other WTO Members can be found in other agreements relating to trade in goods that form part of Annex IA of the WTO Agreement.

¹⁰² Agreement on Trade-Related Aspects of Intellectual Property Rights, *supra* note 97, art. 4; General Agreement on Tariffs and Trade 1994, *supra* note 95, art. I.

¹⁰³ Agreement on Trade in Services, *supra* note 96, art. II.

¹⁰⁴ With regard to publication, the provisions of the three main WTO

Often linked to this is the obligation to provide for the impartial administration of such regulations and the right of review of decisions taken under them.¹⁰⁵ The second component comprises provisions on the notification of various forms of governmental action to the WTO and other Members.¹⁰⁶

The term “procedural fairness” is not defined in any WTO agreement.¹⁰⁷ However, many of its requirements are closely related to the principle of transparency.¹⁰⁸ The principle of

Agreements containing this obligation are: (i) General Agreement on Tariffs and Trade, *supra* note 95, art. X; (ii) Agreement on Trade in Services, *supra* note 96, art. III; (iii) Agreement on Trade-Related Aspects of Intellectual Property Rights, *supra* note 97, art. 63. Many of the other agreements that make up Annex IA of the WTO Agreement, relating to trade in goods, also contain a publication obligation. See generally Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144, available at http://www.wto.org/english/docs_e/legal_e/04-wto.pdf.

¹⁰⁵ Article X of the General Agreement on Tariffs and Trade contains provisions on the uniform, impartial and reasonable administration of trade measures and the right of review of action taken pursuant to them. Provisions of this nature can be found in many other WTO Agreements, including the General Agreement on Trade in Services (in particular Article VI), the Agreement on Trade Related Aspects of Intellectual Property Rights (in particular Articles 41–42 and 62) and in various Annex IA Agreements, such as those on Subsidies and Countervailing Measures, Anti-Dumping Measures, Customs Valuation, Import Licensing Procedures and Pre-Shipments Inspection.

¹⁰⁶ As described in a WTO publication:

The notification provisions contained in the [General Agreement on Tariffs and Trade] and other agreements relating to trade in goods are numerous and diverse Some of these are of broad application; for example, most WTO rules-based agreements require the notification of implementing legislation and any changes to such legislation. Some of these provisions call for notifications on a periodic basis, such as biannual reports on countervailing and anti-dumping actions. Some notifications only have to be made when a particular trade action is taken or contemplated, such as a safeguard action. Still others only have to be made on a “one-time” basis, for example at the time of the coming into force of the WTO Agreement. Apart from such notification provisions, use is also made of other devices for ensuring that the WTO and its Members have adequate information about the practices of Members; these include requirements to make available enquiry or contact points, the possibility for “reverse” notifications to be made by an affected Member about another Member’s practices, and obligations to provide information on request.

The Fundamental WTO Principles of National Treatment, *supra* note 100, ¶ 56.

¹⁰⁷ *Provisions on Procedural Fairness in Existing WTO Agreements*, *supra* note 88, ¶ 5.

¹⁰⁸ *Id.* ¶ 21.

procedural fairness calls for the publication of governmental measures of general application and requires that these measures are published, as a general rule, before they are applied.¹⁰⁹ In addition, the measures should be administered “in a uniform, impartial and reasonable manner or in a fair and equitable way”¹¹⁰ with the possibility for appeal or review of decisions on the application of such measures.¹¹¹

Proposals by the EU to incorporate these core principles in a multilateral framework on competition were opposed strongly by many developing countries that were concerned about the potential negative implications of the suggestions.¹¹² They questioned the propriety of such incorporation, pointing out that the “principles [are] not universally applicable to all issues, developed as they were in the context of the original purpose of the GATT as an agreement to facilitate reduction of barriers to international trade in goods.”¹¹³

There were concerns that extending the national treatment principle to a competition framework “may mean that ‘national treatment’ has to be ensured for foreign firms (and their goods and services) vis-à-vis local firms in the domestic market”¹¹⁴ and that “[s]uch ‘equality’ would only accentuate the inequality in market outcomes, since local firms are generally smaller than the large foreign firms and transnational corporations (TNCs).”¹¹⁵ Moreover, “[i]t would curb the right of developing country governments to provide advantages to local firms, and local firms themselves may be restricted from practices, which are to their advantage.”¹¹⁶

Some commentators consider the proposals on non-discrimination to have been part of an attempt to link competition policy “to market access, in which foreign firms and their products and services should have the right to ‘free competition’ vis-à-vis

¹⁰⁹ *Id.* ¶ 16.

¹¹⁰ *Id.* ¶ 16(a)(ii).

¹¹¹ *Id.*

¹¹² Khor, *supra* note 10, at 29.

¹¹³ Cecilia Oh, TWN Briefing Paper No. 18: Trade and Competition Policy in the WTO, THIRD WORLD NETWORK, at 3 (2003) [hereinafter TWN Briefing Paper No. 18], available at http://www.twn.my/title2/briefing_papers/No18.pdf.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 2.

local firms in markets of developing countries.”¹¹⁷ Under that approach, “[f]ree competition’ would . . . mean that the preferences given to local firms, and any advantages or assistance they enjoy, should be curtailed or eliminated, so that the foreign firms can compete on a level playing field.”¹¹⁸ This would make it possible for “the transnational corporations of the US, Europe, Japan, etc, . . . to compete on ‘equal ground’ as local companies in the local markets.”¹¹⁹

However, that would be problematic and inequitable because the “transnational corporations already enjoy great advantages, including big size, large financial resources, high technology, marketing networks, and brand names.”¹²⁰ Therefore,

there is no ‘level playing field’ to begin with [and w]ithout some assistance, preferential treatment, or home-ground advantages (such as being familiar with the local language and customs, and having a distribution system built over generations), the local companies of developing countries will not be able to survive the competition from foreign firms.”¹²¹

Developing countries also took issue with the EU proposal that the transparency principle cover “all aspects of competition regime

¹¹⁷ Third World Network, *EU EPAs: Economic and Social Development Implications: The Case of the CARIFORUM-EC Economic Partnership Agreement 33* (Feb. 2009) [hereinafter *EU EPAs*], available at <http://www.normangirvan.info/wp-content/uploads/2010/01/twn-cariforumfeb09.pdf>. As one commentator notes:

Policy-makers in major developed countries are advocating the introduction of a new agreement on competition policy in the World Trade Organisation so that their big corporations will be better able to over a large share of the markets of developing countries. Ironically, competition policy was originally understood as a means to help small companies not to be overwhelmed by the big firms. But now it is sought to be used by the rich countries to help their gain corporations compete with the local firms in the developing countries.

Martin Khor, *Developing Countries Resist WTO Agreement on ‘Competition’*, THIRD WORLD NETWORK, Apr. 1999, available at <http://www.twn.my/title/1889-cn.htm>.

¹¹⁸ *EU EPAs*, *supra* note 117, at 33.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

- from legislation, rules and institutional structures to decision-making processes, including decisions on sectoral exclusions and exemptions.”¹²² They found this to represent an unwarranted extension of the transparency requirement in the WTO, which is “limited only to the publication of trade regulations and does not extend to decision-making.”¹²³

Finally, the principle of procedural fairness was seen to pose significant difficulties because “developing countries with dissimilar legal systems to developed countries, or with insufficient resources will run the risk of not meeting the requisite standard of procedural fairness,”¹²⁴ which under the EU proposal would guarantee “rights of access to the system of appeal, including right to reasoned final decision providing detailed grounds on which such decisions were based, and the right of parties to be heard.”¹²⁵ Moreover, “[n]otions of fundamental fairness differ among legal systems and political and legal cultures, and there is as yet no broad consensus on the meaning of procedural fairness in the context of competition law enforcement.”¹²⁶

3.3. Policy Space of Developing Countries

The talks on competition policy in the WTO collapsed largely due to developing country concerns that a multilateral framework on competition was not likely to enhance the development prospects of their economies and could even have detrimental effects due to perceived restrictions the framework would have on their policy space to adopt appropriate measures to promote economic development.¹²⁷ As pointed out:

Under the EU’s proposals, a series of policy instruments would no longer be available to ACP governments

¹²² TWN Briefing Paper No. 18, *supra* note 113, at 3.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ See generally Michael Bailey, Oxfam et al., *Unwanted, Unproductive and Unbalanced: Six Arguments Against an Investment Agreement at the WTO* (2003).

including: monopolies granted by the state, preventing resellers from setting prices independently, requiring that unrelated products be sold as a package (product sale bundling), promoting cartel behavior by a few state-supported firms, putting high barriers to entry such as technical, financial or nationality requirements, geographical market restrictions, arbitrary blacklisting, price fixing, tied purchasing arrangements, product and price dumping.¹²⁸

In an environment where domestically sourced capital is scarce but would be needed to grow a strong and competitive sector,¹²⁹ the proposals would have limited the ability of developing country governments to support public enterprises through the provision of subsidies or adoption of regulatory measures to protect the enterprises from premature or undue competition.¹³⁰

Moreover, the enforcement of the competition frameworks proposed by the EU relies “on the existence of a strong state, with adequate institutional, human and financial capacity to conduct investigations, monitor markets and sanction prohibited practices.”¹³¹ Many developing countries simply lack the institutional capacity to implement such policies and it would have been “unfair, if not absurd”¹³² and an unnecessary administrative and fiscal burden¹³³ to subject them to the competition disciplines of the developed countries. Thus, for the developing countries, it made practical sense to have “far fewer and simpler competition rules which are capable of being enforced.”¹³⁴

Therefore, it was no surprise that developing countries rejected the “one size fits all” approach to competition policy that underpinned the proposals brought by Western countries in the

¹²⁸ Vicente Paolo B. Yu III, South Ctr., *Development Challenges of Competition Policy in the Economic Partnership Agreements 2* (2007).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ SOUTH CENTRE FACT SHEET NO. 8, *supra* note 1, ¶ 17.

¹³² Ajit Singh & Rahul Dhumale, *Competition Policy, Development and Developing Countries* 11 (Indian Council for Research on Int'l Econ. Relations, Working Paper No. 50, 1999), available at <http://www.twinside.org.sg/title2/FTAs/Singapore%20Issues/Competition/CompetitionPolicy,DevelopmentandDevelopingCountries%20Ajit%20Sin.pdf>.

¹³³ Yu III, *supra* note 128.

¹³⁴ Singh & Dhumale, *supra* note 132, at 11.

WTO. Instead, they preferred a competition framework tailored to their development needs,¹³⁵ and which would provide sufficient policy space to implement measures affecting trade and competition, in line with such developmental needs and objectives. For example, as one commentator has counseled:

in the early stages of industrialisation, governments may wish to promote 'national champions', that is, large industrial groups which are likely to compete with foreign firms both in domestic and possibly in regional markets. Hence, governments may want to encourage, at least initially or temporarily, some market concentration. A competition policy primarily concerned only with the obsessive quest for maximum competition is likely to prevent mergers leading to market concentration whereas industrial policy objectives might encourage the same mergers. A classic example of a mix of competition policy alternating market concentration and rivalry can be found in the promotion by the Korean government of national *chaebols*.¹³⁶

Furthermore, "depending on the stages of development and productive capacity of a developing country, governments may decide to increase or reduce the level of intra-firm competition, hence enforcing more or less strictly competition principles."¹³⁷ This happened in China, "where industrial policies have alternated the promotion or restriction of intra-firm rivalry depending on the perception of the vulnerability or strength of firms in the context of a strategy for the promotion of a 'team' of national champions."¹³⁸

Accordingly, it was prudent for developing countries to reject the EU proposals and thereby preserve their policy options with respect to intra-firm rivalry and restrictive business practices such

¹³⁵ For a discussion on the elements of a competition policy framework for developing countries, see Sanoussi Bilal, *supra* note 26, at 9-16; see also Pradeep S. Mehta, *Competition Policy in Developing Countries: An Asia-Pacific Perspective* 75-87 (Mar. 7, 2010), available at <http://e.unescap.org/pdd/publications/bulletin2002/ch7.pdf>.

¹³⁶ SOUTH CENTRE FACT SHEET NO. 8, *supra* note 1, ¶ 18.

¹³⁷ *Id.* ¶ 19.

¹³⁸ *Id.*

as dominant position.¹³⁹ Specific developmental objectives which they are at liberty to pursue as part of their policy space and which may be suitable for small and vulnerable economies include: creating an *optimum* level of domestic competition, as opposed to a *maximum* level of competition;¹⁴⁰ ensuring coordination between competition authorities and legislators and other stakeholders active in development promotion;¹⁴¹ safeguarding the propensity of firms to invest at high levels;¹⁴² and regulating the behavior of multi-national corporations which frequently enjoy a dominant position in developing country markets.¹⁴³ Other suitable developmental objectives are regulating how public (state) aid can be attributed;¹⁴⁴ securing the policy space needed to support national firms or sectors by reserving the right to discriminate against foreign economic operators;¹⁴⁵ and ensuring that the

¹³⁹ *Id.* ¶ 20.

¹⁴⁰ According to the South Centre, “[t]his optimum level of competition has to be balanced against and reflect other policy objectives, such as the promotion of local industries and incentives for innovation and R&D.” *Id.* ¶ 20(a).

¹⁴¹ These stakeholders include “agricultural or industrial producers, trade unions, agencies responsible for industrial policies or export promotion, as well as all other agencies in charge of sectoral policies, e.g. education, fisheries, transports, etc.” *Id.* ¶ 20(b).

¹⁴² This will entail “protecting [and] encouraging the growth of profits, including by coordinating investment decisions and guaranteeing protected markets. In these instances, a certain degree of market concentration may be encouraged, rather than punished by competition policy.” *Id.* ¶ 20(c).

¹⁴³ Because such dominant position can be used to restrict, delay or hinder the establishment of national industries, it would be necessary to control any abuse of dominant position in a value chain (standards or inputs). *Id.* ¶ 20(d).

¹⁴⁴ This will involve

enumerating the public policy objectives that may justify the use of such instruments or identifying priority sectors that need government support and encouraging transparency in the attribution and use of such aid – but not generally prohibiting the use of state aid, including in cases where it encroaches on social policies or the promotion of small and medium enterprises.

Id. ¶ 20(e).

¹⁴⁵ As has been pointed out,

[w]hile non-discrimination is a legitimate request among equal business players, the reality in most [developing country] economies is that markets are already tilted in favour of foreign firms, to the detriment of much smaller local entrepreneurs. . . . For developing countries, however, there are sound arguments why discrimination on the basis of nationality may be useful.

Id. ¶ 20(f).

competition framework does not require the prohibition or privatization of state monopolies or the deregulation and liberalization of sectors considered strategic from a developmental perspective.¹⁴⁶

4. COMPETITION POLICY IN THE EUROPEAN UNION- WEST AFRICA EPA NEGOTIATIONS

4.1. *Competition as an Issue in the EPA Negotiations*

African, Caribbean and Pacific (ACP) countries are involved in negotiations with the EU to replace the existing trade agreement governing trading relations between the EU and the ACP (the Cotonou Agreement)¹⁴⁷ with new trade agreements to be called Economic Partnership Agreements (EPAs).¹⁴⁸ Unsurprisingly, the EU has sought to introduce into the negotiations the same elements of a multilateral framework on competition that were rejected at the WTO. For example, in its recommendations on June 17, 2002 authorizing the European Commission to negotiate economic partnership agreements with the ACP countries and regions, the EU General Affairs Council noted that the EU was seeking a regulatory framework based "on principles of non-discrimination, openness, transparency and stability and on general principles of protection, which will endorse the best results agreed in the competent international fora or bilaterally."¹⁴⁹ This section surveys the evolution of the competition policy debate in the EPA negotiations between the EU and one of the regions, West Africa.¹⁵⁰

¹⁴⁶ These include education, energy, health, transportation, and finance. *Id.* ¶ 20(g).

¹⁴⁷ Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its Member States, of the Other Part, Signed in Cotonou on 23 June 2000, Dec. 15, 2000, L317 O.J. 3 [hereinafter Cotonou Agreement], available at <http://www.acp.int/sites/acpsec.waw.be/files/Cotonou2000.pdf>.

¹⁴⁸ See generally SOUTH CENTRE FACT SHEET NO. 1, *supra* note 2.

¹⁴⁹ Memorandum by Traidcraft Exchange PLC, § 10, WWW.PARLIAMENT.UK, <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldecom/104/104we13.htm> (last visited Mar. 27, 2015) (delineating memorandum to the UK Parliamentary Select Committee on the European Union).

¹⁵⁰ The ACP countries have been divided into six regional groups with each group negotiating a separate EPA with the EU. These regional groups consist of: West Africa; East and Southern Africa; Southern African Development

The EPA negotiations with West Africa were launched in Cotonou in October 2003.¹⁵¹ In their preliminary talks to set the agenda for the negotiations, while the EU and West Africa seemed to agree on the general objectives for the negotiations, some differences emerged regarding the content of the negotiations.¹⁵² A key point of divergence concerned the order and prioritization of the negotiation themes, with West Africa contending there was need to first consolidate the integration process and create a regional market with EU assistance, before negotiating the content of the free trade agreement between the two regions.¹⁵³ The EU, however, had no intention of linking the opening of trade negotiations with the completion beforehand of the West African integration process.

Another stumbling block concerned consistency with the multilateral negotiations at the WTO, particularly as regards the opening of discussions on the Singapore issues,¹⁵⁴ such as investment and competition policy. West Africa rejected the EU proposal to negotiate those issues, pointing to the stalemate in the WTO regarding the opening of negotiations on those matters.¹⁵⁵

A roadmap setting the timetable for the negotiations was adopted¹⁵⁶ on August 4, 2004, which reflected some compromises in the divergent positions that had emerged. While the consolidation of West African regional integration remained a priority,¹⁵⁷ completion of the process was not to be made a

Community (SADC); Central Africa; the Caribbean (CARIFORUM); and the Pacific.

¹⁵¹ Econ. Cmty. of West African States & Eur. Comm'n, *Road Map for Economic Partnership Agreement Negotiations Between West Africa and the European Community* (2004), ¶ 3 [hereinafter ROADMAP], available at http://trade.ec.europa.eu/doclib/docs/2004/october/tradoc_118923.pdf.

¹⁵² *State of the EPA Negotiations [sic] Between West Africa and the European Community*, THIRD WORLD NETWORK (2005) [hereinafter *State of the EPA Negotiations*], available at http://hubrural.org/IMG/pdf/twn_africa_ecowas_eu_epa_status_report.pdf (presenting an unpublished memorandum prepared by West Africa's negotiators summarizing key developments after the adoption in August 2004 of a road map for the negotiations).

¹⁵³ *Id.* at 1.

¹⁵⁴ *Id.* at 12.

¹⁵⁵ See *infra* notes 57-73 and accompanying text for a brief discussion of the WTO initiative to open negotiations on the Singapore issues.

¹⁵⁶ ROADMAP, *supra* note 151, ¶ 5.

¹⁵⁷ *Id.* ¶ 7.

precondition to the trade negotiations. On the matter of the Singapore issues, West Africa agreed only to discuss with the EU its regional integration process and to explore arrangements concerning competition and investment that would be relevant to such process.¹⁵⁸ Significantly, barely 3 days *before* the adoption of the roadmap, the WTO had resolved on August 1, 2004 to drop the issue of competition from the Doha agenda, and therefore, not to pursue discussions for the adoption of a multilateral framework on competition. Apparently, the WTO decision had a predictable effect on the scope of the EPA negotiations.

The roadmap identified two objectives relevant to discussions on competition policy within the framework of EPA negotiations. The first was "facilitation of an enabling environment for investment to mobilise internal resources and also promote the inflow of foreign capital, particularly by ensuring transparent, stable and feasible conditions"¹⁵⁹ and the second, "[t]he adoption of a Community legal framework on competition to remedy the issue of anti-competition practices in the region."¹⁶⁰ Preparatory activities ahead of the EPA negotiations were identified to include the "definition, at the appropriate time, of objectives and procedures for investment, competition and intellectual property"¹⁶¹ and the "formulation of proposals for capacity building and other support measures in... competition... policies."¹⁶²

¹⁵⁸ *State of the EPA Negotiations*, *supra* note 152, at 2.

¹⁵⁹ ROADMAP, *supra* note 151, ¶ 22.

¹⁶⁰ *Id.* ¶ 22.

¹⁶¹ *Id.* ¶ 45.

¹⁶² The other preparatory activities for the negotiations involved:

[i] definition of the EPA reference framework with regard to the technical barriers to trade and SPS measures, customs procedure and trade facilitation, with a view to ensuring free movement of goods within the region and between the region and the European Union; [ii] harmonisation of the policies on standardisation, certification and SPS measures; [iii] definition of a reference framework for border protection measures (customs tariffs and other measures); . . . [iv] definition of the general structure of the EPA (areas to be covered by the EPA); [v] conduct of the analyses of different liberalisation options for trade in goods and services; [vi] formulation of proposals for capacity building and other support measures in the various areas open to negotiation [such as] border protection measures, technical barriers to trade and SPS measures, . . . competition and intellectual property policies; and [vii] negotiation of the timeframe for liberalisation and the conclusion of the EPA.

An indicative schedule for the negotiations designated the period April 2005–September 2005 for work on the definition of the objectives and procedures related to investments, competition and intellectual property.¹⁶³ Two technical meetings were to be organized to identify objectives and implementation procedures with regard to investment, competition and intellectual property policies, as well as their link with the harmonization process in the West African region.¹⁶⁴ It was also agreed that a Regional Preparatory Task Force¹⁶⁵ would meet to make proposals on capacity building in these areas and the support needed for the successful completion of the harmonization process, in line with the objectives of the EPA.¹⁶⁶ In accordance with this plan, five thematic groups, including one on Investment and Competition, were established after the adoption of the roadmap to work out negotiation strategies for the EPAS.

In April 2006, a West African regional body comprising trade ministers and representatives from the West African countries resolved that competition issues should be removed from the EPA process and instead, the focus should be on harmonizing the competition policies of ECOWAS member states into a common

Id.

¹⁶³ *Id.* ¶ 63.

¹⁶⁴ *Id.*

¹⁶⁵ The Regional Preparatory Task Force (RPTF) is a joint structure between West Africa and the European Union created “to facilitate the links and coherence between cooperation for development funding and the EPA.” ROADMAP, *supra* note 151, ¶ 53. “On the West African side, the RPTF comprises the representatives of the ECOWAS Executive Secretariat, the UEMOA Commission and the National Authorising Officers responsible for [the European Development Fund].” *Id.*

¹⁶⁶ The specific objectives of the RPTF are to

contribute to the efficient delivery of support to the West African region in its preparation, negotiation and implementation of the EPA and notably for the: [a] [i]dentification and evaluation of existing support measures that can respond to needs that are jointly agreed by the negotiators; [b] [p]reparation of pre-identification projects/programme sheets to be forwarded to the structures in charge of development cooperation financing, in accordance with the provisions of the Cotonou Agreement, based on the different support measures agreed upon by the negotiators, and particularly those needed to implement the EPA reference framework for the region and the West African countries; [c] [s]uggestions for the sourcing of financing from the European Union for the projects and programmes and proposals for their effective implementation.

Id. ¶ 54.

code, as was envisaged in the roadmap.¹⁶⁷ In accordance with this decision, the West African strategy now centered on seeking cooperation from the EU in regards to the region's own program on competition, rather than the establishment and enforcement of a common competition regulatory framework under the EPA.

4.2. *EU Proposals to West Africa*

On April 4, 2007, the EU formally presented its proposals for the EPA negotiations to West Africa.¹⁶⁸ The chapter on competition provided that the parties would "recognise the importance of free and undistorted competition in their trade relations . . . [and] acknowledge that anti-competitive business practices have the potential to distort the proper functioning of markets and generally undermine the benefits of trade liberalization."¹⁶⁹ Consequently, they would agree that the certain practices restricting competition would be incompatible with the proper functioning of the EPA Agreement.¹⁷⁰ The first group was identified to include "agreements and concerted practices between undertakings, which have the object or effect of substantially preventing or lessening competition in the territory of the European Community or of the West African Party as a whole or in a substantial part thereof."¹⁷¹ The second type concerned the "abuse by one or more undertakings of market power in the territory of the European Community or of the West African Party as a whole or in a substantial part thereof."¹⁷²

In addition, the Parties would be required to maintain laws addressing restrictions on competition within their jurisdictions, and designate a body for the implementation of such laws and regulations.¹⁷³ A Party that did not have such laws or body in place as of the entry into force of the EPA agreement, would have

¹⁶⁷ ROADMAP, *supra* note 151, ¶ 22.

¹⁶⁸ Eur. Comm'n, *EC Working Document: Economic Partnership Agreement Between the West African States, ECOWAS and UEMOA, of the One Part, and the European Community and Its Member States, of the Other Part* (Apr. 4, 2007).

¹⁶⁹ *Id.* art. 2(1).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* art. 2(1)(a).

¹⁷² *Id.* art. 2(1)(b).

¹⁷³ *Id.* art. 3(1).

five years to do so.¹⁷⁴ Significantly, the EU proposals incorporated by reference, as part of the definition of competition laws, “[a]rticles 81, 82 and 86 of the Treaty establishing the European Community, and their implementing regulations or amendments.”¹⁷⁵

With regard to public enterprises and enterprises to which special or exclusive rights have been granted, the Parties would

ensure that . . . there is neither enacted nor maintained any measure distorting trade in goods or services between the Parties to an extent contrary to the Parties interest, and that such enterprises shall be subject to the rules of competition in so far as the application of such rules does not obstruct the performance, in law or in fact or the particular tasks assigned to them.¹⁷⁶

Also, the Parties would

progressively adjust . . . any State monopolies of a commercial nature character, so as to ensure that, by the end of the [fifth] year following the entry into force of [the EPA] Agreement, no discrimination regarding the conditions under which goods are procured and marketed [would] exist[] between nationals of the EU Member States and those of the West African States.¹⁷⁷

Furthermore, the Joint EPA Council would be informed about the measures adopted to implement this objective.¹⁷⁸

The EU proposals contained provisions for the exchange of information and cooperation in connection with enforcement and capacity building. For example, the competition authority of one Party could inform its counterpart in the other Party about its willingness to co-operate with respect to enforcement matters, but

¹⁷⁴ *Id.* art. 3(2).

¹⁷⁵ *Id.* art. 1(3)(a).

¹⁷⁶ *Id.* art. 5(2).

¹⁷⁷ *Id.* art. 5(3).

¹⁷⁸ *Id.*

such cooperation would not compromise their independence.¹⁷⁹ The competition authorities could also exchange non-confidential information, subject to the standards of confidentiality of each Party.¹⁸⁰

4.3. Draft Joint Text

The working document used as the basis for the EPA negotiations is referred to as the Draft Joint Text,¹⁸¹ and it is the text of the original EU proposals which was revised to delete provisions with respect to which there was no mutual agreement to proceed with negotiations as well as to capture West Africa's proposals. The chapter on competition in the Draft Joint Text is captioned "cooperation on competition"¹⁸² instead of "competition" as contained in the EU's original proposals. It retains as "incompatible with the smooth operation of [the EPA]"¹⁸³ the two groups of anti-competitive activities previously identified in the EU proposals¹⁸⁴ and adds two new ones concerning "[a]ny state aid leading to a distortion to competition or threat thereof by favouring some companies over others,"¹⁸⁵ and "[a]nti-trust practices imputable to the member states of their respective communities."¹⁸⁶ However, no obligation is imposed on the Parties to prohibit such anti-competitive acts within the framework of the EPA.

Significantly, the EU proposal for the adoption of competition rules and establishment of a competition authority within 5 years of the entry into force of the EPA has been dropped from the Draft Joint Text. Instead, there is provision to the effect that: "[w]ith a

¹⁷⁹ *Id.* art. 4(1).

¹⁸⁰ *Id.* art. 4(2).

¹⁸¹ EPA Draft Text: Economic Partnership Agreement (EPA) Between the West African States, ECOWAS and UEMOA, on the One Part and the European Community and Its Members States, on the Other Part (Sept. 17, 2010) [hereinafter Draft Joint Text] (on file with Author) (presenting the draft text that is the result of negotiations in Brussels, Belgium, referred to as the Draft Joint Text).

¹⁸² *Id.* tit. IV, ch. 1 (discussing trade in Title IV: Trade-Related Areas, in chapter 1, entitled "Cooperation on Competition").

¹⁸³ *Id.* tit. IV, ch. 1, art. 1.

¹⁸⁴ See *supra* notes 170-72 and accompanying text.

¹⁸⁵ Draft Joint Text, *supra* note 181, tit. IV, ch. 1, art. 1(1)(iii).

¹⁸⁶ *Id.* tit. IV, ch. 1, art. 1(1)(iv).

view to limiting the adverse effects and repercussions of the anti-competitive practices . . . , the two Parties [would] strive to set up a cooperation framework for the promotion and implementation of healthy and effective anti-competitive policies and rules.”¹⁸⁷

The specific areas of cooperation agreed to in the Draft Joint Text include the EU’s support to the West Africa region for the establishment of national and regional competition regulatory frameworks,¹⁸⁸ capacity building of national and regional authorities,¹⁸⁹ and the training of judicial and other personnel responsible for the regulation and control of competition in the West Africa region.¹⁹⁰ Other areas of cooperation involve the management of disputes arising from the application of competition rules,¹⁹¹ exchange of information on official aid regimes such as subsidies,¹⁹² and information on anti-competitive practices observed on their respective territories¹⁹³ as well as assistance to combat the anti-competitive practices of multinationals.¹⁹⁴

The Draft Joint Text also excludes the rules regarding State enterprises introduced in the original EU proposals.¹⁹⁵ Instead, it notes that “[n]o provision [in the EPA] may be interpreted as prohibiting a Party from granting special or exclusive rights, delegating or maintaining state or private monopolies in conformity with legislation.”¹⁹⁶ However, the Parties are to “ensure that state enterprises and those accorded special rights are subjected to competition rules, insofar as their application does not impinge on the *de facto* and *de jure* accomplishment of the special tasks assigned them.”¹⁹⁷

Significantly, the provisions of the Draft Joint Text on competition focus exclusively on a cooperation framework and do not include the core principles of non-discrimination and

¹⁸⁷ *Id.* tit. IV, ch. 1, art. 1(2).

¹⁸⁸ *Id.* tit. IV, ch. 1, art. 2(a).

¹⁸⁹ *Id.* tit. IV, ch. 1, art. 2(b).

¹⁹⁰ *Id.* tit. IV, ch. 1, art. 2(c).

¹⁹¹ *Id.* tit. IV, ch. 1, art. 2(d).

¹⁹² *Id.* tit. IV, ch. 1, art. 2(e).

¹⁹³ *Id.* tit. IV, ch. 1, art. 2(f).

¹⁹⁴ *Id.* tit. IV, ch. 1, art. 2(g).

¹⁹⁵ See *supra* notes 176–78 and accompanying text.

¹⁹⁶ Draft Joint Text, *supra* note 181, tit. IV, ch. 1, art. 3(1).

¹⁹⁷ *Id.* tit. IV, ch. 1, art. 3(2).

transparency originally proposed by the EU in the WTO for incorporation in multilateral competition policies and subsequently endorsed in the EU's initial EPA proposals. Therefore, if the competition-related provisions of the Draft Joint Text were to be adopted in a final EPA without modification, they would not adversely affect the policy space of West African governments to implement competition policies that reflect their specific developmental needs.

5. ALTERNATIVE SOLUTION: A REGIONAL COMPETITION FRAMEWORK

5.1. *Regional Priorities*

With the refusal of West African negotiators to discuss substantive commitments on competition policy, priority in the region turned to the harmonization of the policies of ECOWAS Member States "within the context of the formulation of a community regulatory framework on competition."¹⁹⁸ This stemmed from the recognition that on-going efforts to promote regional economic growth would be enhanced by the adoption of a sound regional framework for competition.¹⁹⁹ Indeed, regional policy makers characterized competition policy as a "necessary complement to trade policy and as such should be a central part of the ECOWAS system."²⁰⁰ They justified the adoption of a regional competition policy as follows:

A well designed and vigorously enforced regional competition regulation framework will help to concretely deliver on the goals of the ECOWAS integration strategy, by reducing the risk of trade disputes and policies of trade defences, contributing to increased productivity and economic growth, and ultimately raising the standard of living of the citizens of the Community. Furthermore, the

¹⁹⁸ ECOWAS, *Regional Competition Policy Framework* (2007), at 2, available at http://www.ecowas.int/publications/en/actes_add_commerce/1.Regional_Competition_Policy_Framework-final-P.pdf.

¹⁹⁹ *Id.* at 3.

²⁰⁰ *Id.* at 5.

development of a region-wide competition policy and regulation will enhance the Community's ability to confront and address anti-competitive behavior by foreign firms, provide a basis for involvement and cooperation on negotiations regarding competition matters at the multilateral level, and establish a basis for the development of institutional competence on competition law for the region.²⁰¹

Thus, even though West Africa was not keen about negotiating competition policy in the context of the EPA, it nevertheless found a competition policy specifically adapted to regional needs priorities to be useful and supportive of the regional integration programs instituted by ECOWAS. In furtherance of these objectives, work on a regional instrument was begun and resulted in draft text, which was adopted on December 19, 2008 by the ECOWAS Heads of State as the Supplementary Act Adopting Community Competition Rules and the Modalities of their Application Within ECOWAS²⁰² (Supplementary Act).

5.2. Provisions

The objectives of the Supplementary Act are to promote competition and enhance economic efficiency, prohibit anti-competitive business conduct, promote consumer welfare and expand opportunities for domestic enterprises to participate in world markets.²⁰³ The Supplementary Act prohibits as incompatible with the ECOWAS Common Market "all agreements between enterprises, decisions by associations of enterprises and concerted practices which may affect trade between ECOWAS Member States and the object or effect of which are or may be the prevention, restriction, distortion or elimination of competition

²⁰¹ *Id.*

²⁰² ECOWAS, Supplementary Act A/SA.1/06/08 Adopting Community Competition Rules and the Modalities of Their Application Within ECOWAS (2008), *available at* http://www.ecowas.int/publications/en/actes_add_commerce/2.Supplementary_Act_on_competition_rules-final-P.pdf.

²⁰³ *Id.* art. 4(2)(d).

within the Common Market.”²⁰⁴ These include price fixing and measures that limit or control production, share markets, customers, or sources of supply, applying dissimilar conditions to equivalent transactions with other trading parties, or “mak[ing] the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”²⁰⁵ Any agreement or decision prohibited as being in restraint of trade is “automatically void and of no legal effect in any Member State of the ECOWAS Community.”²⁰⁶

Also prohibited is any abuse²⁰⁷ of a dominant position by enterprises within the ECOWAS Common Market.²⁰⁸ Under the Supplementary Act, enterprises hold a dominant position in a relevant market if, “singularly or collectively, it/they possess a substantial share of the market that enables it/them to control prices or to exclude competition.”²⁰⁹ Similarly, there is a prohibition of mergers, takeovers, joint ventures, or business combinations where the resultant market share in the ECOWAS Common Market attributable to any good, service, line of commerce, or activity affecting commerce leads to an abuse of dominant market position resulting in a substantial reduction of competition.²¹⁰ Although such structures would automatically be void and of no effect in any Member State of ECOWAS,²¹¹ they could qualify for exemption “if the transaction concerned [was] in

²⁰⁴ *Id.* art. 5(1).

²⁰⁵ *Id.* art. 5(1)(e).

²⁰⁶ *Id.* art. 5(2).

²⁰⁷ The prohibited abuses include:

(a) limiting access to a relevant market or otherwise unduly restraining competition; (b) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (c) limiting production, markets or technical development to the prejudice of consumers; (d) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Id. art. 6(2).

²⁰⁸ *Id.* art. 6(2).

²⁰⁹ *Id.* art. 6(1).

²¹⁰ *Id.* art. 7(1).

²¹¹ *Id.* art. 7(2).

the public interest.”²¹²

Unless exempted under the Supplementary Act, aid granted by a Member State that “distorts or threatens to distort competition by favoring certain enterprises or the production of certain goods”²¹³ is considered to be incompatible with the ECOWAS Common Market. However, State aid would be considered compatible if it is of a social character and is granted to individual consumers without discrimination as to the origin of the products concerned,²¹⁴ or if it is for the purpose of remedying damage caused by natural disasters or exceptional occurrences.²¹⁵

State aid that *may* be considered to be compatible includes aid given to promote socio-economic development in areas with exceptionally low standard of living or serious underemployment; to support culture and heritage conservation efforts and important projects of Community interest; to facilitate the development of certain economic activities or areas; or to remedy a serious disturbance in the economy of a Member State.²¹⁶ It also includes other categories of aid designated as compatible by decisions of the Authority of Heads of State and Government on the recommendation of the Council of Ministers acting on proposals from the ECOWAS Competition Authority.²¹⁷

Public enterprises granted special or exclusive rights are subject to the competition rules, and Member States are therefore to refrain from enacting or maintaining in force any measure with regard to such enterprises that are contrary to the provisions of the Supplementary Act.²¹⁸ However, an exception is made for “enterprises entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly” which would be subject to the competition rules, only in so far as their application “does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.”²¹⁹ In addition, to trigger the competition rules, the adverse effects of the activities of the public enterprises on the “development of trade

²¹² *Id.* art. 7(3).

²¹³ *Id.* art. 8(1).

²¹⁴ *Id.* art. 8(2)(b).

²¹⁵ *Id.* art. 8(2)(b).

²¹⁶ *Id.* art. 8(3).

²¹⁷ *Id.* art. 8(3).

²¹⁸ *Id.* art. 9(1).

²¹⁹ *Id.* art. 9(2).

must be . . . [to] such an extent as would be contrary to the interests of ECOWAS Community.”²²⁰

Finally, the Regional Competition Authority created to oversee the implementation of the Supplementary Act²²¹ has power to exempt from the competition rules, agreements, decisions or practices otherwise in restraint of trade which contribute “to improving the production or distribution of goods or to promoting technical or economic progress”²²² and to authorize mergers, acquisitions, or business combinations otherwise prohibited by the competition rules “if the transaction . . . [was] in the public interest.”²²³ The Regional Competition Authority also has power to authorize persons to enter into agreements or engage in practices that would violate the competition rules,²²⁴ and victims of anti-competitive practices may apply to it for compensation for losses they have suffered.²²⁵

CONCLUSION

This paper has traced the competition policy issue from its introduction by the EU in the WTO to its resurrection in the context of the EPA negotiations. The paper also noted the refusal of West Africa to negotiate specific commitments on competition. However, in the interim, and as part of a bid to enhance its program of regional integration, ECOWAS has adopted a regional competition framework that improves the regulatory environment and preserves sufficient policy space for governments to pursue suitable development objectives.

The ECOWAS Supplementary Act covers the traditional areas reflected in the antitrust laws of the US and the competition policy of the EU, including agreements and concerted practices in

²²⁰ *Id.*

²²¹ *Id.* art. 13(1).

²²² *Id.* art. 11(1)(iii). However, to qualify for exemption, the measures must not allow consumers a “fair share of the resulting benefit,” and not “impose on the concerned enterprises, restrictions which are not indispensable to the attainment of these objectives;” or “afford such enterprises the possibility of eliminating competition in respect of a substantial part of the products in question.” *Id.* art. 11(1)(iii).

²²³ *Id.* art. 11(2).

²²⁴ *Id.* art. 11(3).

²²⁵ *Id.* art. 10(1).

restraint of trade,²²⁶ abuse of dominant position²²⁷ and mergers and acquisitions.²²⁸ However, unlike those regulatory frameworks, the ECOWAS Supplementary Act contains additional provisions on state aid²²⁹ and public enterprises²³⁰ which are couched in flexible language that preserves sufficient policy space for West African governments to pursue developmental policies that may require the grant of special preferences to individuals and groups. Thus, state aid of a social character given without discrimination as to origin of products, or for development in economically depressed areas or for other priority regional economic projects, would be considered compatible with the Supplementary Act.²³¹ Furthermore, the provisions on public enterprises exempt such enterprises from the application of competition rules where such application would “obstruct the performance, in law or in fact, of the particular tasks assigned to them.”²³² In effect, enforcement of ECOWAS competition rules can be relaxed where they would interfere with the performance of the public enterprises. Moreover, the Regional Competition is empowered to exempt certain anti-competitive acts that are desirable²³³ or considered to be in the public interest.²³⁴

Significantly, the Supplementary Act does not mention the principles of national treatment, most-favored nation treatment, transparency or fairness of procedures. The omission is a stark rejection of the arguments that were made to support incorporating the WTO core principles into a binding multilateral competition policy.²³⁵ The Supplementary Act permits the governments of ECOWAS countries to craft economic policies that aim at specific developmental objectives including creating an *optimum* as opposed to a *maximum* level of competition;²³⁶ regulating the behavior of multinational corporations; supporting

²²⁶ *Id.* art. 5.

²²⁷ *Id.* art. 6.

²²⁸ *Id.* art. 7.

²²⁹ *Id.* art. 8.

²³⁰ *Id.* art. 9.

²³¹ *Id.* arts. 8(2), (3).

²³² *Id.* art. 9(2).

²³³ *Id.* art. 11(1)(iii).

²³⁴ *Id.* art. 11(2).

²³⁵ *Infra* notes 73–93 and accompanying text.

²³⁶ *EU EPAs*, *supra* note 117, at 30.

national firms or sectors by reserving the right to discriminate against foreign economic operators; or resisting demands to prohibit or privatize state monopolies or deregulate and liberalize sectors considered strategic from a developmental perspective such as education, energy, health, transportation, or finance.²³⁷

As of the time of writing, West Africa and the EU are reported to have agreed on the text of a partial EPA agreement covering goods only, after compromises were found on a number of outstanding critical issues, such as degree of market opening by West Africa, development assistance, most favored nation treatment for European goods, rules of origin and EU agricultural subsidies.²³⁸ During the negotiations, the EU proposed a specific rendez-vous clause that envisaged future negotiations sometime after the adoption of the partial EPA on the content of binding commitments on competition policy. However, West Africa rejected the EU proposal, and countered with a far more general provision that would simply require the parties to reconvene after the adoption of the partial EPA to discuss whether to pursue negotiations in additional areas, including competition and if so, to determine at such future time the scope and modalities for the negotiations.

Given that the areas covered by the ECOWAS Supplementary Act are quite comprehensive and adequately cover the well-established competition rules recognized in most of the jurisdictions in the world including the US and the EU, it does not appear that there are any benefits to be gained by holding

²³⁷ The following examples are quite instructive.

For instance, a case where two large domestic companies are allowed to merge so that they reach economies of scale to compete with other firms at the regional or international level, whereas the same merge involving one domestic firm and a multinational firm may need to be prohibited to avoid a concentration of market power. An additional example is where a government seeks to promote small and medium enterprises through specific benefits and defines an eligibility criteria based on sales or profit thresholds that *de facto* exclude foreign firms (although *de juris* such firms were not facially excluded on the basis of nationality). Finally, another example concerns the promotion of export activity, where, by definition, only domestic firms may be targeted, since foreign competitors are already international.

Id. at 31 (internal quotations omitted) (footnote omitted).

²³⁸ EPA: *West Africa and the EU Conclude a Deal*, INT'L CTR. FOR TRADE & SUSTAINABLE DEV. (ICTSD) (Feb. 6, 2014), available at <http://www.ictsd.org/bridges-news/bridges-africa/news/epa-west-africa-and-the-eu-conclude-a-deal>.

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negotiations on competition policy in the context of the EPA. It may therefore not be useful for West Africa to pursue discussions on matters that go beyond the areas of cooperation in respect of competition policy already identified in the Draft Joint EPA.