COMPETITION POLICY-RELATED ASPECTS OF FOREIGN DIRECT INVESTMENT

Keywords: Competition Policy, Competition Law, Foreign Direct Investment, Market Access, Investment Promotion.

COMPETITION POLICY-RELATED ASPECTS OF FOREIGN DIRECT INVESTMENT

ABSTRACT

Foreign Direct Investment (FDI) is one of the basic components of international trade and the proportion thereof within aggregate multilateral trade has been getting larger over the course of time. Consequently, foreign direct investment and FDI-related domestic policies have recently become a hot topic of debate in a major part of the world.

The goal of this study is to identify a set of competition policy-related opportunities and challenges raised by the FDI inflow. This study argues that a well-functioning competition policy renders foreign direct investment beneficial for the host economy and a well-managed set of policies to attract FDI enhances the competition climate in that economy. Certainly, competition policy is not the sole discipline related to FDI and, accordingly, inflow of Foreign Direct Investment into any country raises a number of challenges in addition to certain opportunities. In order to focus on the proper scope, the monetary and balance of payments aspects of the issue are not covered. The most remarkable but quite controversial phase of the issue is also excluded, namely the globalization corollary of FDI.

The first part of the paper articulates the main dynamics motivating host countries to engage in a competition to attract FDI under the titles of “Contribution to Development and Competitiveness”, “Evolving Nature of Certain Industries”, and finally “The Impact of FDI on Competition”. The following part, namely “Motivation to Invest Abroad” gives an insight into the perspectives of mainstream foreign direct investors. The third part of the study mentions the approaches of multilateral bodies in the field.

INTRODUCTION

As the statistics demonstrate, the inflows of foreign direct investment (FDI) have expanded by a factor of 25 from1980 to 2000, much faster than the growth rate of trade in goods. To analyze their motivations and conduct separately, the parties to an FDI can be categorized as the government of the investor's home country (the home country), that of the host country where the investment is launched (the host country), and finally the private party investing abroad (multinational enterprise, or MNE). Manufacturing in those countries where production factors are relatively abundant and cheaper has always been attractive for large-scale enterprises. Several changes in various fields within the last two decades have rendered investing abroad even further attractive for an increasing number of enterprises (motivation for FDI) so that nearly 65,000 multinational enterprises, 90% of which are headquartered in OECD countries, have established some 850,000 foreign affiliates.[1] Certain recent worldwide developments (motivation to attract FDI) have simultaneously augmented the impact of FDI on the process of development in developing and least developed countries. FDI inflow may cause various effects on a host economy depending upon the competitiveness thereof. This study will focus on this differential affects where relevant.

International organizations, namely the World Bank, the World Trade Organization, United Nations Conference on Trade and Development (UNCTAD) and Organization for Economic Cooperation and Development (OECD) *inter alia*, have achieved a consensus that FDI promotes the development of the host country unless incorrect policies are employed. Lately, certain multilateral organizations focused their attention on “Encouraging Foreign Direct Investors to Responsible Business

[1] Ferrarini, 2003, p. 4.

Conduct" in order to balance the benefits of FDI between home and host economies. However, not exclusively in developing countries but in developed countries, too, a strong opposition to foreign investors still exists. This article assumes that FDI is development-friendly, provided that the host country adopts a reasonable FDI strategy and implements the proper policies accordingly.

This paper involves certain opinions as to what attracts FDI and discusses some measures applicable to this end. Certainly, none of these opinions or measures contains or suggests a more favorable treatment to foreign investors. However, the distinguishing feature of typical foreign investors is the fact that they can invest anywhere, while a local enterprise has to establish the investment in its home country even in absence of these measures, unless it achieves an adequate size to invest abroad. Consequently, investment climate-friendly measures are not exclusively for foreigners; on the contrary, local enterprises are likely to benefit from them as well; however, FDI – as compared to the local investor – will be more attracted by an ameliorated investment climate because the latter mostly does not have an alternative.

The leading motivation to conduct this study has been the author's observation that the mutual interaction between competition policy and FDI has been underestimated by the parties to FDI transaction. Many surveys claim that foreign direct investors value access to raw materials and essential services (banking, insurance, information technology, transportation, etc.) in exchange for reasonable prices in a potential host country. In accordance with the modern perception of competition, we can claim that the availability of essential services and that of raw materials in exchange for reasonable and reliable prices can be attained in the presence of a sound competition policy.

1. MOTIVATION TO ATTRACT FDI

1.1. Competition among Host Economies

The competition among potential host economies in attracting foreign direct investment probably constitutes the most complicated and a bit controversial aspect of the topic. Controversial, because no commonly accepted criteria to measure the achievement of an economy or to compare more than one economy currently exists. The most frequently cited criteria are quantity of the FDI inflow (generally measured by the nominal amount, FDI *per-capita* or proportion thereof within the GDP), the composition of the FDI (allocation between acquisitions and green field investments or allocation between high-tech and traditional industries), and finally the quality of the FDI, which is evidently very subjective. The measurement of success and comparison are difficult also because a high level of fluctuation in FDI inflow is "the rule of the game." Some acquisitions, in particular, such as those of the national telecommunications operator or national flag-carrier Airlines Company, are very large scale transactions and the FDI inflow in a particular year would appear to be very high but the acquisition will not be repeated in following years, thereby skewing the data for that year.

The issue is also complicated because academia and commentators are far from achieving a consensus on the answer of the very basic question, "what attracts FDI in a host economy?" Several researches conclude in different ways. The overall cost of production in a certain economy, besides the market size (and/or distance to larger markets) is among the most frequently cited factors. However, not all the foreign investors attach primary importance to cost-savings. Especially in high-tech businesses, the quality of the labor force can become more important than its cost. A rough classification accepted by the Multilateral Investment Guaranteeing Agreement

(MIGA) gives a brief answer to the question: “Manufacturers aim to lower costs and service companies highlight innovation.”[2]

1.2. Contribution to Development and Competitiveness

1.2.1. Development

The amount of direct government aid inflow (alternatively called Official Development Assistance Flow) to developing and least developed countries is diminishing rapidly. Most economies need short-term remedies for their current account deficits. The OECD report on "Trends and Recent Developments in Foreign Direct Investment"[3] compared two sources of development finance, namely Official Development Assistance and FDI, as identified within the Monterrey Consensus of March 2002. An alternative source of foreign capital inflow is portfolio investments, which refers to the cases where the foreign investor acquires the shares of a local enterprise but does not acquire the control of the corporate. Paez[4] compared the reliabilities of portfolio investment versus FDI and concluded that the latter is more reliable by far. Most recently, UNCTAD Policy Brief No: 7 (March, 2009) announced that Official Development Assistance flow has been threatened by the contemporary financial crisis.[5]

1.2.2. Competitiveness

Foreign direct investment may have a dual effect on competitiveness. As a direct effect, the investors may be more productive than the incumbents. The FIAS Report on Competitiveness and Regulation in Turkey[6] refers to empirical data indicating that the average labor productivity in FDI companies was 35% higher than

---

[2] Foreign Direct Investment Survey, p. 10.
[3] OECD, 2004/a.
[4] Laura Paez, "Investment Protection in the Americas: The Legal, Economic and Policy Implications of the Investment Chapter in the NAFTA" unpublished dissertation, p. 5; Bern 2003.
[5] Released at the Internet site of the UNCTAD; http://www.unctad.org/en/docs/presspb20092_en.pdf.
[6] FIAS, 2005, p. 11.

the average for overall manufacturing plants. As an indirect effect, the newcomers are supposed to force the incumbent local firms to adopt more efficient techniques and new technologies to make them more competitive. As generally presumed, the foreign direct investment inflow stimulates the competition in the host country so that the local enterprises need to develop new strategies and to become more efficient in production and marketing.

Although its level varies dramatically from one business to other, FDI inflow also leads to a transfer of technology and know-how to the host country. The potential host economies may or may not have precise FDI policies or they may modify their existing policies according to their needs and experiences. Motohashi and Yuan argue that "In the process of shifting China's FDI policy from a quantitative to qualitative orientation, it has been increasingly important to more precisely understand the mechanism of FDI technology spillovers to local economies". This recent empirical study conducted by Motoyashi and Yuan[7] assesses the data collected in two businesses, namely automotives and electronics industries in China. The authors conclude that in the automotive industry multinationals in the assembly industry affect vertical spillovers to domestic parts suppliers, horizontal spillovers also exist between domestic parts suppliers; in contrast, no any vertical spillover effect has been detected in the electronics industry whereas there exist horizontal spillover effects from multinationals to domestic suppliers. The authors further conclude that "A different pattern of technology spillover suggests the importance of customization of FDI policy by industry".

Within the same article the authors emphasize the interrelation between FDI and transition process from state-controlled economy to free market:

[7] Motoyashi&Yuan, RIETI Discussion Paper Series 09-E-005.

As well as attracting foreign capital to this industry, the Chinese government has made every effort to improve the competitiveness of domestic companies. In a series of high-tech industry development programs such as the 863 Plan, Torch Program, and Character "Gold" project, information technology development has always been a priority area. An important difference between domestic electronics companies and automobile companies is the ownership structure. Before the 1990s most electronics firms were collective-owned firms, while most auto firms were state-owned firms and more strictly controlled by the government. Recently, private industry firms have been emerging in this industry, such as Huawewi Technology, an internationally competitive communications equipment manufacturer. In the computer industry, Lenovo acquired IBM's personal computer division and has now become the third largest PC company in the world.

1.3. Evolving Nature of Certain Industries

The significance of high-tech industries within the whole global economy and overall multilateral trade is rapidly increasing. Two distinguishing common features of the high-tech industries are deemed to be high infrastructure costs and the necessity for cost-demanding research and development (RD) activities, both of which refer to the presence of an extreme type of "economies of scale. "According to Morse, five features of hi-tech sectors are: the rapid innovation cycles, significance of intellectual property, network externalities, aggressive competition and diminishing prices.[8] As a normal flow of trade, consequently, those companies, which achieve an economy of scale and have obtained competitive know-how, acquire smaller-sized enterprises lacking an adequate level of technology and such financial resources to achieve

[8] H.M. Morse, "Antitrust Issues in High-Tech Industries", The Antitrust Review of the Americas 2000, Global Competition Review Special Report, pp. 64-67.

thereto, especially those operating in the developing countries. Acquisitions of the national telecommunications operators in developing countries by a set of global telecommunications operators beginning in the early 1990s prove the trend. Even though it is not deemed to be a high-tech industry, the car industry – holding the distinguishing features mentioned above – too, experienced a similar phenomenon, with almost all of local manufacturers in several developing countries being acquired by global manufacturers. The partial existence of the above-mentioned features leads to the occurrence of a similar trend in relatively conventional services, e.g. airlines.

1.4.The impact of FDI on Competition

1.4.1. Pro-Competition Potential

The crucial question of whether local companies can catch up with the international competitors once an economy becomes the host of FDI determines the answer to the question of whether the inflow of FDI would enhance the competition in a given economy. In most cases, especially as witnessed in the concrete example of the Central and Eastern European transition economies (Hungary, Czech Republic, Slovakia, *inter alia*), local enterprises in the host country become more competitive upon the arrival of multinational companies, provided that the competition between and among two sets of companies runs on a 'level playing field.' A competition between multinational(s) and local(s) contains certain anti-competitive risks. According to the comparative financial and structural positions of the competitors, those risks may be in favor of local enterprises or in favor of foreign enterprises; however, the nature of the anti-competitive behavior remains identical in two situations. Ferrarini[9] articulates four types of risks, i.e. transfer pricing,[10] price-fixing, market allocation agreements and tied-selling. Certainly, the frequency of occurrence

[9] Ferrarini, 2003, p. 42.
[10] "Transfer Pricing" concept constitutes a concern mainly for fiscal authorities; however the method chosen by the relevant multinational company may also generate competition law concerns.

of price-fixing and market allocation agreements diminish upon the appearance of a greater number of enterprises. The risks of tied-selling and exclusive dealing agreements are more significant in cases where MNEs from developed home countries compete with the local enterprises of a developing country.

Briefly, the consumer in the host country will benefit from the direct consequence of the enhanced competition in the relevant market upon the arrival of foreign investors; meanwhile, the local competitors will have the opportunity to advance their competitive skills and experience a competitive environment, which will enable them to better compete in foreign commerce in the long run.

1.4.2. Anti-Competition Risks

Against these opportunities, FDI contains some serious threats that can be articulated as “private exclusionary risks” and “excessive government concessions”. Exclusion of the local competitors by the foreign investor may occur where the latter use its non-proportional financial power or brand reputation in an exclusionary conduct.

The most-debated Competition Policy-oriented international trade dispute is “Japan-Photographic Films” case brought before the World Trade Organization by the United States of America. In accordance with the Dispute Settlement Understanding rules of the WTO, a panel has been established and issued a report. Panels are quasi-judicial bodies in charge of adjudicating disputes between Members in the first instance composed of three experts selected on *ad hoc* basis. Panel reports are subject to Appellate Body review. In this particular case the USA did not bring the case before the Appellate Body hence the Panel Report has been the final document of the dispute settlement process. Testimonies supplemented by the parties to the trade dispute on photographic film between the United States of America and Japan[11] provide us with crucial empirical impression on private exclusionary risks. According to the USA, Kodak achieved a high market share in all countries, except Japan. In this particular business, the distribution channel plays a key role, because the film and paper are supplied to the final consumer through thousands of resellers, and the distribution business is relatively costly and hard to perform. Fuji Film has allegedly deterred the wholesalers from selling Kodak products and forced them to keep Kodak products prices artificially high; Japanese authorities have allegedly tolerated this conduct by not implementing sufficient competition rules.

Even though the Panel rejected all the American claims, the title of the litigation has been sufficient to describe a potential threat: ‘Privatizing Protectionism.’ Theoretically, this abuse of market dominance concern arises when the incumbent firms operating in the host country are financially and structurally as strong or stronger than the newcomer foreign direct investor or stronger. From a developing country's perspective, on the other hand, the vital question is opposite to the facts in this specific case: "What would happen if the multinational enterprise (in this case, Kodak) had convinced or forced the wholesalers to exclude the local products in a developing country?" Establishment of a sound competition policy is, therefore, necessary before the arrival of FDI for all parties: foreign investor, local enterprises and consumers.

International organizations compile data acquired from recent cases where FDI inflow brings about a risk of elimination of competition in the host economy.

As mentioned in an UNCTAD report:

[11] Panel Report, Japan – Measures Affecting Consumer Photographic Film and Paper, WT/ DS44/R and DS /45.

> "Market-oriented reforms, including deregulation, privatization, trade and foreign direct investment liberalization, have continued to prevail, bringing to the fore the need to adopt competition policies and laws. Without competition policy, privatization may result in the creation of private monopolies; trade liberalization might be used by enterprises using anti-competitive practices to maintain their vested interests; and FDI liberalization risks crowding out the domestic private sector if there is no competition authority capable of controlling abuses of dominance or other anti-competitive practices that might occur."[12]

The anti-competition threats are not necessarily the outcome of inadequate competition legislation enabling the powerful actors to eliminate small sized local competitors. In certain extreme cases, the governments may have used immunities from competition rules or monopoly rights as a tool to attract a foreign investor. UNCTAD, in another report (1997), cites to a Sri Lankan case, privatization of the Colombo Gas Company (1995), where exclusivity had been employed as an incentive to attract FDI. In this particular case, the foreign investor acquiring the majority shares of the Company had been granted a five-year monopoly, and protected from both import and foreign direct investment competition along with immunity from national competition law until the end of the contract.[13] The Investment Division of the OECD, as well, recognizes a potential tendency to grant market exclusivity to foreign investors acquiring a state-owned monopoly. The draft text of the Policy

[12] UNCTAD TD/B/COM.2/CLP/45: Preliminary Assessment of the Set:, p. 5.

[13] UNCTAD: World Investment Report 1997, "Transnational Corporations, Market Structure and Competition Policy", Geneva and New York, 1997.

Framework for Investment involves a question (Chapter 4, Question 6[14] and the annotation thereto) to identify the peril.

Cernat and Holmes[15] argue that "In order to ensure that a developing country gains the full benefit of foreign direct investment, government policy in that area must be consistent with the objectives of competition law. Sometimes, in order to attract a large-scale foreign direct investment by MNC, a national or local government may offer that corporation exclusive rights to supply its goods and services to the public authorities. It may even agree that no other firm will be given approval to enter the market in question. Such inducements are evidently anti-competitive, …"

2. MOTIVATION TO INVEST ABROAD

2.1. Cost-saving and Risk-Hedging Competition among Multinational Enterprises

Investments in developing and least developed economies usually bring about cost savings to multinational enterprises due to lower labor cost and, in most cases, abundant raw materials. Following their transition to free market economies, Central and Eastern European Countries have become attractive host countries for Western multinationals. The fact that a significant part of the production has been subject to exportation indicates that a noteworthy proportion of those MNEs have invested due to lower costs of production, as empirical evidence – such as the automotive industry in the Slovak Republic – proves. The production of Western car manufacturers exceeds the aggregate local market demand in the aforesaid country by more than a factor of 5 – both in units and in value. Investing in several foreign countries has also become a way of hedging financial, political and macroeconomic risks for

[14] Which reads as follows: "What is the role of the competition authorities during privatizations? Have competition considerations having a bearing on investment opportunities, such as not permitting market exclusivity clauses, been adequately addressed?"
[15] UNCTAD, 2004, p: 7,8.

multinational enterprises. Since multinational enterprises, especially those which operate in the "new economy," mostly compete with small profit margins, exchange rate fluctuations may become fairly important in this competitive environment. Therefore, investing exclusively in the home country or in only one foreign country may be risky.

2.2 Market Penetration-Oriented FDI

Definitely, cost savings is not the sole goal of FDI; penetration into markets where purchasing power is relatively higher has been a major motivation for MNEs to launch production facilities in these countries and the history of the latter dates back beyond that of the former. Assembling units of Japanese car manufacturers operating in the USA refer to an efficient alternative to conventional international trade. Besides the developed markets, emerging economies, too, are eligible targets for those multinational enterprises focusing on host markets. Clearly, the selection criteria employed by local market-oriented MNEs are quite different than those employed by cost-savings-oriented ones. Opportunities to access the final consumer via or without resellers become vital for local market-oriented investors. In this regard, competition policy applicable to retailing services is crucial for Multinational Enterprises.

China, serving as an appropriate manufacturing location thanks to its abundant and cheap labor force on one hand, and its huge domestic demand on the other, constitutes a mixed-type instance. Empirical evidence shows that MNEs invested in China, both for cost-savings and penetration into the local market. Anti-Monopoly Law in the People’s Republic of China has been enacted on 1 August 2008. However, numerous provisions concerning monopolistic conduct and restraints of competition used to exist before this law was enacted.[16]

---

[16] Ming, p:4.

2.3. The concerns of FDI

Although certain enterprises have invested in foreign countries as long as centuries ago, the nature of foreign investment has evolved in the course of time and the evolution process is still going on. The outstanding change marking the evolution is the changing concerns of foreign investors. The very primitive concern of FDI is understandably the risk of expropriation. The first known bilateral investment treaty[17] between France and the United States of America involved this concern. Over the course of time, the number of foreign investments increased dramatically and investors began searching for ways to remedy more sophisticated worries. These are basically threefold: political, commercial and legal concerns.

Measurement of political and economic risks is quite subjective; however, measurement of legal uncertainty may depend on more concrete data, such as bilateral or multilateral treaties, to which the specific country is a party. Due to remarkable improvements regarding the satisfaction of legal or political concerns, which can be classified under the generic title of "public concerns," the focus is shifting towards "private protectionism" concerns that effect trade. Cernat and Holmes[18] mention that "It is also argued that an economy that has implemented an effective competition law is in a better position to attract foreign direct investment than one that has not. This is because most multinational corporations are accustomed to the operation of such a law in their home countries and know how to deal with any concerns that the competition authority may raise. Moreover, multinational corporations expect competition authorities to ensure a level playing field between domestic and foreign firms, including MNCs."

---

[17] Treaty of Amity and Commerce, February 6, 1778.
[18] UNCTAD, 2004. P: 7.

2.4 Nature and composition of FDI

Traditionally a typical foreign direct investor is supposed to operate in the manufacture of goods; however, the recent trend is towards a significant increase in FDI operating in the services markets. The General Agreement on Trade in Services (GATS) and some other conventions identify four modes of trade in services, the third and the fourth of which require physical existence of a service provider (natural or legal person) in the host country. Evidently, the evolving migration policies of states, having facilitated the physical existence of service providers originating from foreign countries, contribute to this new trend. To Ferrarini, citing to the UNCTAD databases,[19] stated "During the last decade the sectoral distribution of cross-border M&As [Mergers and Acquisitions] has changed. Whereas in 1990, at the global level, 50 percent of M&A took place in the manufacturing sector and 46 percent in services, in 2001 the percentage shares were 33 and 62 respectively." A service provider FDI may also be export-oriented. Foreign-owned language schools in Australia and Malta probably serve as the foremost examples. The language may become a significant advantage in nations' competition for attracting FDI as proven by the rapidly increasing number of call centers in India and the Philippines.

To Ferrarini, three other recent developments accompany the above-mentioned trend. Firstly, "rather than representing the creation of new enterprises, FDI flows to industrialized economies tends to take the form of mergers and acquisitions." Secondly, "FDI originates in and flows to industrialized economies. However, the importance of FDI flows to developing countries is increasing both as a share of GDP and fixed capital formation." Thirdly, "FDI flows to developing countries are concentrated in certain countries."

[19] Ferrarini, 2003, p. 4.

Another category of FDI has also become more significant in value and importance within last one decade – infrastructure investment. A typical example of infrastructure investment is telecommunications. Sacerdoti[20] identified the risks for private foreign investment in infrastructure in developing countries, in particular. The origin of these specific risks, in the view of the author, is the fact that "the projects involved tend to be large and their costs can be recouped only over long period of times. Moreover infrastructure projects often provide for services that are considered essential by consumers, but are provided by monopolists," which stands for a high risk of political pressure over the company's pricing policy.

To address possible violations of certain competition rules in the specific business of telecommunications, the Negotiating Group on Basic Telecommunications finalized the WTO Reference Paper on Basic Telecommunications on 24 April 1996, according to which the parties have committed to making their large incumbent telecommunications companies provide sufficient entry points on satisfactory terms to enable their competitors (mostly foreign direct investors) to access their networks. The main criteria of "satisfactory terms" are articulated as access to network on non-discriminatory conditions, in a timely manner and upon request. Examples given for the anti-competitive practices include, *inter alia,* "anti-competitive cross-subsidization, use of information obtained from competitors with anti-competitive results." Each signatory Member undertakes to have its regulator – which can be a competition authority – adhere to these commitments according to Article 2.5 thereof and any failure to adhere to it can be the subject of a WTO Dispute Settlement.[21] This above-mentioned legal text -currently

[20] Sacerdati, Giorgio: "International Legal Protection for Foreign Direct Investment", submitted at World Bank Conference on Political and Regulatory Risks in Private Infrastructure Investment, Rome September 1999.
[21] Marsden, 2003, p:55.

the most specific competition-related multilateral one– covers the trade in services in the telecommunications business between Members.

Consequently, the Annex on Telecommunications to the General Agreement on Trade in Services is currently the most detailed multilateral commitment incorporating Competition Law rules into a Foreign Direct Investment-related legal text. Trade negotiators are seeking to test the applicability of its principles to other formerly "public" sectors with monopolies or oligopolistic characteristics, including postal and courier, air transport and energy, as well as non-public sectors, such as "distribution" services.[22]

2.5. Regional Trade Agreements:

Regional trade agreements appear to be more likely to bring about relatively comprehensive and efficient remedies to parties' concerns thanks to the limited number of signatories, providing for enhanced elasticity and facilitating negotiations. The European Communities (in the era of the EU-15) brought together a set of developed economies, while the North American Free Trade Area gathered developed and developing economies together within a free trade zone. Multinational agreements creating both free trade areas, namely the European Communities and the North American Free Trade Area (NAFTA), have their own chapters on investment. Both organizations also contain provisions on intellectual property rights, competition policies, and environment, as well as other relevant policies. NAFTA covers a comprehensive set of disciplines.[23] Thanks to these distinguishing features,[24] regional

[22] UNCTAD, 2005, p: 83.

[23] "The agreement includes a comprehensive set of measures on goods, trade and tariffs; market access; a system of rules of origin and technical standards; health and phytosanitary standards, and common safeguards, among others. Further, services, investment, telecommunication, public procurement, competition rules, intellectual property rights and a dispute settlement mechanism, are also part of NAFTA", Paez, 2003.

[24] To repeat, elasticity due to limited number of signatories, comprehensive scopes involving *inter alia* intellectual property rights, competition policy, environment, dispute settlement, etc.

trade agreements are accepted to have contributed to the amelioration of the investment climate.

2.6. The role of competition policy

Certainly, several competition-linked concerns force the FDI decision-makers to review the competition policy of the host country where they consider making an investment. These concerns may be assessed under the three titles listed below.

2.6.1. Competitive situation in the raw materials' markets

Transnational corporations, which invest abroad, mostly value predictability more than smaller-sized enterprises do. This is especially true regarding the actual prices of the basic inputs of production and their possible course in visible future are decisive factors. In economies where a sound competition policy does not exist or is not enforced, the suppliers of these inputs may likely cease the competition among them and augment the prices when a newcomer buyer generates a demand. Where an input supplier holds a dominant position, the situation may become more dramatic. A car manufacturer would not easily decide to settle on a country for FDI where the steel industry is under monopoly, especially if its transportation or importation is subject to high costs, high custom rates, or physical barriers. There would be no substantial difference if the steel suppliers had been operating in an oligopolistic market in the absence of competition law enforcement, since they can easily form a cartel.

2.6.2 General level of prices in essential services

Financial service, insurance services, transportation and ports can be mentioned as being among the major "key services" that an investor considers before concluding a decision on where to invest. Definitely, the quality and the prices of these services depend highly upon the actual level of competition in these businesses. The lack of competition in these services markets may not be that much important for local market-oriented MNEs because their rivals, too, will face a similar difficulty. Export-oriented potential investors, however, are likely to suffer further from a lack of competition in one or more of these markets. This fact requires a careful evaluation of surveys. When explaining their motivation to invest or not to invest in a particular country, representatives of MNEs usually refer to high or low costs of the above-mentioned services in that given country; the enforcement of competition law does not normally appear among the answers, though. However, in most cases, the high prices in one or a few of these businesses stand for a lack of competition in that sector.

2.6.3 Restrictive Business Arrangements

Restrictive business arrangements and the competition policy thereto adopted by the host country are among the leading factors determining a firm's access to final consumers. Single-brand dealership agreements require resellers to market the products of the contractor exclusively, hence rendering access to the final consumer by competitors more difficult. The benchmark case in this field is the "Impulse ice cream products" case.[25] Discrimination in favor of those resellers who focus on marketing their products is another tool that dominant enterprises often employ to drive competitors out of the market. The Michelin Case[26] can be mentioned as an example case in this regard. Even though the independent tire resellers are not exclusively Michelin dealers, Michelin fixes an exclusionary schedule in order to deter the independent resellers to concentrate their marketing efforts on Michelin tires.

Finally, tie-in agreement – forcing the reseller to purchase a (set of) product(s) in order to be provided with a more appreciated product can serve the same end. Brand

[25] Decision by the Court of First Instance, 8 June 1995 t-7/93 Langnese-Iglo GmbH v Commission [1995] ECR II-1611.
[26] Michelin *Versus* Commission [1983] ECR 3461, [1985] 1 CMLR 282.

reputations and spectrum of products are the outstanding instruments that MNEs can employ in order to convince the retailers to conclude single-brand dealership or tie-in agreements, or to discriminate in favor of their products. Indeed, The Coca-Cola Company has been accused several times in Turkey with allegation that its marketing conducts employed a forbidden tie-in measure.

Theoretically, either an incumbent or a newcomer firm may have a stronger brand reputation, large spectrum of products and financial power to be able to convince or force the resellers to conclude exclusive business arrangements. However, a multinational enterprise is definitely more likely to possess these powers.

Consequently, the competition policy adopted by the host country becomes vital when access to final consumer by a newcomer enterprise – either local or foreign – is concerned, especially in businesses where an incumbent firm (either local or foreign) holds a dominant position in the relevant market. Indeed, the OECD recognizes the vital importance of a sound competition policy. "The Stability Pact for South Eastern Europe," adopted upon the European Union's initiative, aims at supporting the covered countries "in their efforts to foster peace, democracy, respect for human rights and economic prosperity in order to achieve stability in the whole region." Competition Law and Policy in South Eastern Europe (SEE) is identified as a "Regional Flagship Initiative."

3. MULTILATERAL FRAMEWORKS

3.1. Bilateral Investment Treaties

The most frequently used method of regulating FDI matters is Bilateral Investment Treaties (BITs) between trade partners, the number of which is currently over than 2,000. BITs are more or less comprehensive, depending upon the contracting parties. Leading economic powers, like USA, Germany and others have developed their standard types of model BITs over the course of time.

3.2. WTO Initiatives

3.2.1. The TRIMS

The Agreement on Trade Related Investment Measures (TRIMS) basically prohibits four kinds of "host country operational measures," which infringe the relevant GATT provisions, namely: (a) local content requirements; (b) trade-balancing requirements; (c) foreign exchange restrictions related to foreign exchange inflows attributable to an enterprise; and, (d) export controls. The General Agreement on Trade in Services (GATS) also regulates some investment-related topics imposing on the parties' transparency and Most Favored Nation (MFN) treatment. In order to create a development-friendly (respecting national priorities) framework, the GATS adopts a so-called 'positive-list approach.'

3.2.2 Trade on Competition as a Trade Topic:

The Working Group on the Relationship between Trade and Investment is founded under the auspices of the World Trade Organization (WTO), following its Ministerial Meeting in Singapore in 1996. The next significant step, representing a bulk of nations, namely the Doha Declaration, decided in favor of the positive list approach. The Doha mandate also identified the work that the Working Group was expected to perform (Paragraph 22) as:

- Scope and definition,
- Transparency,
- Non-discrimination,
- Modalities for pre-establishment commitments based on a positive list approach,
- Development provisions,

- Exceptions and balance-of-payments safeguards, and
- Settlement of disputes.

The first item, namely Scope and Definition, has significant importance because the American definition of Foreign Direct Investment is broader than the mainstream concept and includes portfolio investments. Some of the leading economies, e.g. European Communities, are searching for ways to create a new multilateral framework on investment. India represents the opposite view to a potential multilateral framework – the primary reason for the Indian objection is the concern that a multinational framework might not respect developing countries' individual national development objectives and schedules. Despite the strong opposition, parties are submitting their contributions to the working group. These contributions mostly bring about views and suggestions on dispute settlement mechanisms for a potential framework, and on some key issues, like the scope of balance of payment exceptions. The European Community claims that the potential multilateral treaty must involve a dispute settlement mechanism within that of the WTO:

> "28. The question of investors' behaviour and their responsibility vis-à-vis host countries could also be addressed. As mentioned in our submission WT/WGTI/W/81, there is a concern of developing countries that MNEs apply high standards of behaviour, so that host countries can be in a position to reap most benefits from FDI. In our view the OECD Guidelines for multinational enterprises provide a useful example of how to ensure that MNEs conduct their activities in a responsible manner and in harmony with the policies of the countries in which they operate."

3.2.3 The GATS

The General Agreement on Trade in Services (GATS) has been concluded by the signatories as a result of the Uruguay Round, 1995. Among others, two significant distinguishing features of the GATS are the "Positive List" approach and flexibility to deviate from two basic principles of the multilateral trade, namely Most Favored Nation (MFN) and National Treatment, which have been explicitly expressed within the legal text. The GATS anatomically contains two types of obligations for the parties, namely unconditional obligations and specific (sectoral) commitments.

Over the course of time, the implementation of the GATS has acquired, *inter alia*, two *de facto* features. The founding Members have submitted their specific commitments during the Uruguay Negotiations however liberalized their services businesses well beyond their specific commitments in following years. New-acceding Members, however, submitted their commitments following tough negotiation procedures and their commitments are by far more comprehensive than those of their trade partners. Another consequence of the implementation has been the questionable fact that the deviations from Specific Commitments have rarely been a topic of trade dispute between Members.

"Double Standardization" over the course of time:

According to Adlung[27]:

> Recently acceding Members have undertaken more comprehensive commitments than founding Members even though the latter is mostly composed of relatively more developed economies. While most participants elected not to undertake bindings on healthcare services at the end of the Uruguay Round, nor to make offers in the ongoing negotiations, insurance services have been among the most frequently committed sectors. If there is a common denominator, regardless of the Members concerned (except for recently acceded countries), it is the existence of a lot of 'water' between existing commitments and more open conditions of actual access in many sectors. This may also explain, in part, why there have been very few trade disputes under the GATS to date - far fewer than under the GATT in merchandise trade. Also, governments appear to be generally hesitant in politically and socially sensitive areas to take action in the WTO.

"Boomerang" Concern:

The fact that GATS provisions have rarely been subject to trade disputes can be explained with the Boomerang concern approach. Indeed the parties to a trade in

[27] Trade in Health Care and Health Insurance Services; the GATS as a Supporting Actor (?).

services may have worry that their similar trade policies may also constitute a target in case they initiate a dispute settlement process against a trade partner's policy.

Within the text of the GATS, Article XVII is crucial as it integrates two major disciplines, i.e. Multilateral Trade in Services and Competition. Unlike the provisions of Article XVI regulating the Specific Commitments under Market Access title and containing concrete definitions, Article XVII includes only a relatively abstract definition, i.e. "Conditions of Competition". Not all domestic measures modifying the conditions of competition are articulated below. Nationality requirements and language requirement are also measures typically modifying the conditions of competition however do not have any intersection with competition law or policy.

- Use of Intellectual Property Rights

Multinational enterprises most of the time possess a relatively stronger brand reputation compared to local ones. Trademark rights are among the most significant instruments that multinational enterprises use at competition. Typically, requirement to carry a local brand name for all enterprises in a given relevant market is accepted to be a measure modifying the conditions of competition.

- Pricing Policy
- Marketing and Access to Customer
- Universal Service Obligations

The WTO Case "Mexico-Measures Affecting Telecommunications Services" (WT/DS204/R) is a remarkable one as the Panel Report thereof contains significant findings highlighting the interrelation between competition and trade in services. According to the Panel report "The Annex applied to a WTO Member measures that affect the access to and use of public telecommunication transport networks and services by basic telecommunications suppliers of any other Member

3.3. The OECD Initiatives

Attempts to create the Multilateral Agreement on Investment (MAI) proposed by the OECD ended up in failure. As shown in the two tables by Ferrarini, the essential features of MAI were basically similar to -- or sometimes, identical with -- Chapter 11 of the North American Free Trade Agreement (NAFTA).[28] According to Ferrarini, the reason why the negotiations broke down is fierce opposition by a coordinated group of NGOs concerned about the impact of the proposals for a MAI on labor and environmental standards and on the potentially negative effects of globalization, besides disagreement on the scope of the agreement.

The OECD launched the "Initiative on Investment for Development" in 2003. According to the OECD resources, "the initiative is inspired by values that underpin the Monterrey Consensus."[29] Accordingly, the Task Force, which was charged to develop a "Framework" through a partnership process involving OECD Member and non-Member governments, in co-operation with civil society and other international organizations, identified the components of the preliminary list of policy-building blocks as:

- Investment Policy,
- Investment Promotion and Facilitation,
- Trade Policy,
- Competition Policy,
- Tax Policy,
- Corporate Governance and Responsibility and Market Integration,
- Human Resource Development,
- Infrastructure Development, and
- Public Governance.

[28] Ferrarini concludes the similarity comparing the provisions of two Agreements under five disciplines, namely "Scope of Application", "Investment Liberalisation", "Investment Protection", "Dispute Settlement", and "Investment Incentives".
[29] DAF/COMP(2004)38: "OECD Initiative on Investment for Development: Towards a Policy Framework for Investment", Annex.

3.4. The World Bank Initiatives

Two Conventions have been concluded by the members to World Bank. The Multilateral Investment Guaranteeing Agreement (MIGA) Convention of 1985 brings about a scheme of multilateral insurance of foreign investment against non-commercial risks. The International Centre for Settlement of Investment Disputes (ICSID Convention) concluded in 1965 is currently the most competent international body to settle investment-related conflicts. In Sacerdoti's words, "The ICSID Convention establishes an optional procedural mechanism that is applicable, if the parties or at least the host States agree to make it applicable to a specific investment or to certain classes of foreign investments, for the settlement of investment disputes through direct arbitration in an international framework." The settlement of investment-related disputes is another complicated part of the topic, because the disputes arise between a private party (the investor) and a state or state entities (of the host country).

ICSID, moreover, identifies a comprehensive list of elements in order to assess to what extent a convention or an agreement protects FDI. The list contains:

- The scope of application,
- Admission,
- Treatment,
- Transfers,
- Expropriation, and
- Dispute settlement.

Along with the bilateral treaties and multilateral agreements bringing about binding rules and soft-law mechanism of the OECD and similar organizations, there is also another international body where the members share their experiences, namely the World Association of Investment Promotion Agencies (WAIPA). WAIPA issues certain non-binding recommendations and serves as a forum where the members discuss best practices. Members of the WAIPA are the respective national investment promotion agencies of a vast majority of countries of the world.

3.5. Monterrey Consensus of the International Conference on Financing for Development (The Monterrey Consensus)

The Monterrey Consensus has been concluded by heads of States or Governments of the signatories and by the International Monetary Fund, the World Trade Organization, the World Bank and business and civil society leaders on 22 March 2002 at Monterrey, Mexico. The Monterrey Consensus recognizes that "Foreign Direct Investment contributes toward financing sustained economic growth over the long term. It is especially important for its potential to transfer technology, create jobs, boost overall productivity, and enhance competition and entrepreneurship."

3.6. Code of Conduct for MNEs

Not only the host country governments, but also transnational enterprises are expected to obey certain rules. Protection of the environment, protection of labor rights, and respect for the local culture and universal virtues can be mentioned among these expectations. However, scientific research and studies in this field have so far not caught up with those conducted in formulation of ideal treatment by host governments. Not surprisingly, the governments of host economies press for imposition of a standard or a framework of behavior for multinational enterprises operating in their territories.

The efforts towards satisfaction of this concern of host countries date back to very recent times. The "world's foremost comprehensive, voluntary corporate responsibility initiatives" are the UN Global Compact and the OECD Guidelines for Multinational Enterprises. The UN Global Compact articulates 10 principles that have been granted universal recognition through the Universal Declaration of Human Rights, the International Labor Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and the United Nations Convention against Corruption. The objectives pursued by the UN Global Compact are described as "making the Global Compact and its principles an integral part of business strategy and operations everywhere" and "facilitating cooperation among key stakeholders promoting partnerships in support of UN goals". The OECD Guidelines for Multinational Enterprises are recommendations by governments to multinational enterprises operating in 30 OECD and 9 non-OECD Countries[30]. OECD Guidelines include chapters on human rights, labor, environment, and anti-corruption, like the Global Compact does. The scope of the OECD Guidelines is relatively broader since it covers disclosure, consumer interests, science and technology, competition, and taxation.

4. CONCLUSION

Foreign Direct Investment, or "mobilizing international resources for development" – as named within the Monterrey Consensus, Part II. B – is an important component of multilateral trade. The essence of FDI is in its nature as a "win-win" game. The host economies benefit from capital inflow to correct their current account balances, from the technology and know-how transfers and FDI contributions to competition as far as a sound competition law and policy are implemented, while the multilateral corporations benefit from lower costs and penetration into developed or emerging markets (where relevant).

[30] 9 non-OECD Countries at that time were Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania, Romania, and Slovenia.

Basically, foreign investors' common selection criteria contain the legal certainty, economic and political stability of the host country, internationalization of the host economy, effective implementation of a competition law and recognition of intellectual property rights. All measures and policies involved within this study are supposed to serve the amelioration of the investment climate and not to provide for more favorable standards for foreign investors in an arbitrary way. However, local enterprises mostly have to ignore whether those measures are taken or policies are implemented because they are relatively small-sized ones and they can only decide whether to invest or not. Multinational enterprises are endowed with more adequate financial power, know how and brand reputation, so that they can invest wherever they think that above-mentioned policies are more seriously implemented. The most significant outcome of these host country efforts will probably be the fact that the potential local enterprises will benefit from the ameliorated investment climate more than foreign investors (MNEs) would.

International organizations, OECD, the World Bank, WTO and UNCTAD, *inter alia,* have launched several initiatives to regulate various aspects (commercial, legal and political) of the issue, some of them failed and some of them succeeded. In essence, these initiatives mainly aimed at rendering FDI as an impetus to sustainable development.

Promotion of the efforts towards identifying a code of conduct for Multinational Enterprises will render the discussions between the pros and cons more constructive and contribute to host countries' development processes. Indeed the latest publication of the OECD “Investment Policy Review China 2008” concentrates the attention on the Anti-trust Law of China that has recently been enacted. The Global Compact of the UN and the OECD Guidelines for Multinational Enterprises already formulate certain rules based on basic universal virtues. Relatively comprehensive regional and bilateral trade agreements also contain certain provisions on host countries' legislation on environment, competition, intellectual property and their relevant policies, thus address the "public" party of the transaction.

International organizations have been searching for ways to establish a multilateral framework through which the foreign direct investment would contribute further to the development processes of the host countries and would be employed as a tool to fight against global poverty. The World Bank has been successful in its initiatives towards a more transparent legal infrastructure.

Regarding the global welfare aspect of "mobilizing international resources for development," OECD and WAIPA grant a favorable and special treatment within their assistance programs to those countries which are less attractive for FDI. UNCTAD runs a "peer review" mechanism, namely the Investment Policy Review process, through which it assesses the investment climate in developing and least developed countries and publishes country reports. The goal is to acquaint potential investors with the investment climate in each country.

BIBLIOGRAPHY:

FERRARINI, Berno and Simon J. EVENETT (2003), "The Singapore Issues and the World Trading System" and in *The Road to Cancun and Beyond*, State Secretariat of Economic Affairs, Bern, Switzerland.

LI, Wei and Lixin Colin XU (2002): "The Impact of Privatization and Competition in the Telecommunications Sector around the World", October 2002.

MANEA, Julia and Robert PEARCE (2004): "Industrial Restructuring in Economies in Transition and TNCS' Investment Motivations" in *Transnational Corporations*, Vol 13, No: 2 (August 2004).

MARSDEN, Philip: A Competition Policy for the WTO, Cameron May, Great Britain, 2003.

MING, Shang: "Antitrust in China – a constantly evolving subject- Competition Law International February 2009.

MORSE H. M.: "Anti-Trust Issues in High-Tech Industries" *The Ant-Trust Review of the Americas 2000,* Global Competition Review Special Report.

OECD: Directorate for Financial and Enterprise Affairs; Trends and Recent Developments in Foreign Direct Investment (June 2004).

OECD: Directorate for Financial and Enterprise Affairs; Working Papers on International Investment, 2004/2: Most-Favored-Nation Treatment in International Investment Law (September 2004).

OECD: Directorate for Financial and Enterprise Affairs; Working Papers on International Investment, 2004/3: Fair and Equitable Treatment Standard in International Investment Law (September 2004).

OECD and the South East Europe Regional Roundtable on Investment Promotion: Strategic Investment Promotion, June 2002.

OECD: Directorate for Financial, Fiscal and Enterprise Affairs; Competition Law and Policy in South East Europe (April 2003).

OECD: Directorate for Financial and Enterprise Affairs; Trends and Recent Developments in Foreign Direct Investment (June 2004).

PAEZ, LAURA: "Investment Protection in the Americas: The Legal, Economic and Policy Implications of the Investment Chapter in the NAFTA" unpublished dissertation, p. 5; Bern 2003. Accessible at: www.wti.org /mile/mile-theses.html.

PARKER, David & KIRKPATRICK, Colin: "Privatisation in Developing Countries: A Review of the Evidence and the Policy Lessons" (Working Paper Series, Centre on Regulation and Competition), July 2003, Manchester.

POURNARAKIS, Mike & VARSAKELIS, Nikos C.: "Institutions, Internationalisation and FDI: The Case of Economies in Transition" *Transnational Corporations*, Vol. 13 No.2 (August 2004).

SACERDATI, Giorgio: "International Legal Protection for Foreign Direct Investment", submitted at: World Bank Conference on Political and Regulatory Risks in Private Infrastructure Investment, Rome September 1999.

UNCTAD: TD/B/COM.2/CLP/45: Preliminary Assessment of the Set.

UNCTAD: Competition, Competitiveness and Development: Lessons from Developing Countries (Edited by: Bruisck, Philippe; Alvarez, Ana Maria; Cernat, Lucian; Holmes, Peter), Geneva 2004.

UNCTAD: International Centre for Settlement of Investment Disputes: Dispute Settlement, New York and Geneva 2003.

ABBREVIATIONS:

BITs	Bilateral Investment Treaties
FDI:	Foreign Direct Investment
GATS	General Agreement on Trade in Services
GATT	General Agreement on Trade and Tariffs
GNDP	Gross National Domestic Production
ICSID	International Centre for Settlement of Investment Disputes
i.e.	in exact words
IT	Information Technology
MAI	Multilateral Agreement on Investment
MFN	Most Favored Nation
MIGA	Multilateral Investment Guaranteeing Agreement
MNE(s)	Multinational Enterprise(s)
M&A	Mergers and Acquisitions
NAFTA	North American Free Trade Area
OECD	Organization for Economic Cooperation and Development
SEE	South Eastern Europe
TNC(s)	Transnational Corporation(s)
TRIMs	Trade-Related Investment Measures
UNCTAD:	United Nations Conference on Trade and Development
USA	United States of America
V	Versus
WTO	World Trade Organization
WAIPA	World Association of Investment Promotion Agencies