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Striking a Balance: Competition Law, Investment Agreements, and Fair Application

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ABSTRACT

International investment law plays a critical role in attracting foreign capital, which is vital for global economic growth. However, investment agreements can conflict with competition laws, potentially creating an imbalance that may stifle market competition. There presents a significant challenge of maintaining an equitable application of international investment agreements while ensuring robust market competition. Specifically, it examines how investment protections may inadvertently lead to anti-competitive behaviors, which undermine fair market conditions within the host country. This article aims to investigate and propose mechanisms that can harmonize the need for foreign investment protection with the imperatives of competition law. The research draws on existing literature on International Investment law, competition law, and case studies of investment disputes. It also reviews various investment agreements, regulatory frameworks, and the role of oversight bodies in different jurisdictions. The transparency in investment agreements allows authorities to assess the impact of competition-related restrictions. Proportionality, through justifiable and temporary limitations, ensures that the invested company has a limited period to establish itself without undermining competition. Mechanisms such as sunset clauses and market share criteria further support the balance between investment protection and fair competition. Achieving a balance between foreign investor protection and competition law is crucial for promoting economic growth, safeguarding consumer interests, and attracting international investment. While differences in competition laws across countries pose challenges, sector-specific considerations and strong regulatory agencies are essential for effective oversight and enforcement. Ongoing dialogue and negotiations are necessary to develop a framework that supports both investment and competitive fairness in this evolving field. This balanced approach promises significant benefits, including enhanced market dynamics and a conducive environment for sustainable economic development.

***Keywords**: Antitrust law, International Investment law, Investor protection, Fair market condition, foreign investment.*

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I. INTRODUCTION

The connection between investment law and competition law has been a subject of contemporary concern. The primary objective of the former is to provide conditions in the market suitable for fair competition. The latter refers to a measure adopted to protect the financial investments made by foreign companies in the state. The conflict between the two laws becomes more apparent as the regulation of International Investment agreements (IIAs) expands. An example of a barrier to entry for overseas investors in a market is when local enterprises in the host state have a monopoly on an area of business. Nationality-based discrimination arises when a host country applies and construes its domestic laws in a way that benefits its own local businesses. Consequently, international investors find themselves in a position of disadvantage. Based on the stipulations of the International Investment Agreements (IIAs), this should be considered a breach of the principle of national treatment. If a host country applies and interprets its own legislation that benefit the country's own businesses, thereby harming foreign investors, there is discrimination due to nationality. One could argue that this is a violation of the IIAs' national treatment clause. In spite of the rare instances involving investments arbitration that address how the two laws interact, this subject merits more analysis at a later time.

(A) How can competition help investments? Competition as a catalyst for investment

Empirical research has demonstrated that competition can have a good or negative effect on investment despite the ambiguous theoretical link between the two. Conversely, investments possess the capacity to affect the circumstances that govern competitiveness. The impact of competition on investment is depending upon the particular circumstances and is influenced by the nature of the investment and the precise measures implemented to promote competition.

According to economic theory, competition influences important variables that impact investment decisions. This class of issues encompasses regulatory factors, as well as structural or behavioural challenges.

Structural barriers to entry refer to the sunk costs that enterprises must incur when they enter an industry. These are irrecoverable expenditures incurred when a company chooses to exit the market. When the project's overall cost surpasses the estimated net present value of the investment, sunk costs become an obstacle to entrance[3].

Behavioural barriers to entry refer to the tactics employed by established local, multinational,

[3] A Review of IIL Awards of 2016 Through the Lens of Proportionality, https://www.duo.uio.no/bitstream/handle/10852/58244/5/A-review-of-IIL-awards-of-2016-through-the-lens-of-proportionality.pdf.

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or state-owned companies to hinder market entry by exploiting their dominant position in the market. These firms might be either domestic or international companies. Establishing exclusive agreements with market outlets or input suppliers allows incumbent firms to effectively keep competitors out of the market. Examples of actions that are widely recognised as customary business practice include the execution of contractual agreements with wholesalers, the ban on retailers selling goods made by competitors, and the inclusion of contractual clauses in lease agreements that limit property owners from leasing to rivals. Generally, market participants are typically eager to comply with these rules, but they often challenge them when competition legislation and enforcement measures are put into effect.

Given the inherent connection between competition and investment, it is crucial that competition policies align with investment-promoting policies. Upholding liberal trade and Uniform investment policies is a highly successful approach to addressing barriers that hinder the entry of new companies into a market. This theory's justification is that companies aiming to dominate a market will encounter rivalry from possible foreign investors or imported goods, which will act as a kind of discipline. The market has transcended the confines of the traditional national market since open trade and investment systems continue to exist.

The implementation of open market regimes is not enough to maintain competition in national markets. Even in the context of open trade and investment policies, the inherent features of an economy can act as a barrier between existing businesses and their rivals. These characteristics may encompass elements specific to local markets and regulations that do not impede investment, such as standards and licensing requirements. Moreover, investment may be impeded by companies that partake in restrictive business activities, such as collusion.

When designing competition policy, it is essential to understand the four distinct ways in which investment policies and competition policies may mutually influence each other.

Investors may be incentivised to participate in actions or circumstances that would otherwise be considered a breach of competition regulations, and investment policy may even require such actions or circumstances. An investment policy might, for instance, mandate the segmentation of markets according to areas or allow pricing coordination, both of which could be deemed anti-competitive under competition law.

Investment regulation objectives can be met by including opportunities to utilise market incentives and competitive dynamics in the design of investment instruments. To guarantee that these tools function as planned within the constraints of competition law duties, coordination could be required.

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Investment policy can actively regulate market power by implementing pricing regulations and controlling entrance and access. This approach is particularly relevant in cases where a monopoly seems inevitable from the outset. There is a possibility that the underlying assumption supporting regulation, which argues that competition policy and institutions alone are not enough to avoid monopoly and the abuse of market power, may be reconsidered due to technological advancements and changes in other institutions. Investment rules and regulations, akin to competition policy, serve as a deterrent against coordination or exploitation within an industry. Regulations can provide requirements for fair competition.

II. THE RULE OF THE NATIONAL TREATMENT

International investment law is a body of international law that guards foreign investors' money against the host state—the nation in which the investment is made—using its public authority improperly. An international investment agreement between governments provides protection to the foreign investor as a third party[4]. The national treatment rule is a well-known and firmly established standard in international investment agreements (IIAs). These agreements might be free trade agreements like NAFTA3 and CAFTADR, or they can be bilateral investment treaties (BITs) or other international treaties containing investment provisions (TIPs) like the Energy Charter Treaty (ECT). There have been several attempts, but none of them have been successful, to establish an international framework agreement for foreign investments. However, because some components are regarded as part of international custom and can be invoked through diplomatic protection, foreign investment protection has worldwide consequences.

This customary protection's contents have been designated as the minimal requirement. It guarantees that the foreign investor receives fundamental justice; in criminal and civil processes, the foreign investor shall be treated fairly, not be subjected to discrimination.

There are multiple fundamental features. The national treatment clause is primarily intended to provide foreign investors equal opportunities, particularly in the period after the establishment of their business. Simultaneously, the national treatment provision guarantees that foreign investors receive "equal and fair market access" as domestic investors. However, it can also function as a mechanism that limits the rights of foreign investors in cases when nationals have only limited rights. Furthermore, concerns arise regarding antitrust matters that arise in connection with prominent operators who own a dominant market position. The second claim

[4] A Review of IIL Awards of 2016 Through the Lens of Proportionality, https://www.duo.uio.no/bitstream/handle/10852/58244/5/A-review-of-IIL-awards-of-2016-through-the-lens-of-proportionality.pdf.

pertains to the national treatment clause, which imposes an obligation on host governments. This clause prohibits them from favouring foreign investors over domestic or local businesses by engaging in discriminatory practices. All of these elements are within the purview of this stipulation. Furthermore, the national treatment clause employs terms that exhibit considerable similarity. However, due to the wide range of exceptions that different economic sectors are given, the actual outcomes may differ from industry to industry.

The evaluation of national treatment follows a three-step process, as outlined in the jurisprudence of the investment arbitration. At first, the tribunals are tasked with analysing whether the foreign investors and local investors are located in a similar setting, often referred to as "in like circumstances" or "in like situations." The tribunals investigate whether the treatment given to foreign investors is superior to or on par with that given to domestic investors in the second phase of the process. The tribunals also consider whether the host state's distinction can be supported by any additional grounds that are not covered by the norm, such as a valid regulation.

(A) Using a three-step process:

The main component of applying national treatment law is that discrimination between international and domestic investors is forbidden. Hence, to carry out a comprehensive assessment of national treatment, it is normally necessary to establish a "suitable comparability" for evaluating the treatment that is widely seen as less favourable. The national treatment provision is commonly included in most international investment agreements, typically expressed as "in like circumstances". One of the concerns that emerges from this term is whether or not this language is separate from the words "like product", as stated in Article III of the World Trade Organisation and the General Agreement on Tariffs and Trade. Most laws controlling national treatment under bilateral investment agreements have selected a very basic standard to compare the most similar local investors in the same industry. In the Grand River case[5], the tribunal examined the interpretation of the term "like circumstances" in relation to whether the entities being compared were subjected to similar legal constraints in their regulatory treatment. Case law indicates that there is no universally applicable standard for determining what qualifies as "in like circumstances." Consequently, this condition has been assessed on an individual basis. The phrase "in like circumstances" in Feldman[6] was understood

[5] Grand River Enterprises Six Nations, Ltd. v. United States, UNCITRAL Arbitration Rules, Award, ¶ 166 (Jan. 12, 2011).
[6] Fieldman v. Mexico, ¶ 177.

to refer to the same industry, in this example, the export of cigarettes. Occidental[7], on the other hand, made reference to local producers generally, saying that "this cannot be done by addressing just the sector in which that specific activity is carried out. In Grand River, the tribunal looked at the meaning of "like circumstances" in relation to the inquiry into whether the comparable entities' regulatory treatment was subject to "like legal requirements."The case law states that since there isn't a standard method for determining what constitutes "in like circumstances," this condition has to be evaluated case-by-case, as it should be. Differentiation based on nationality and a breach of the national treatment provision would be established if a measure of the host state specifically targeted foreign individuals. This scenario would occur if the measure were specifically focused on individuals who are not citizens of the country. The need to provide national treatment is based on objective facts and does not require the host state to exercise subjective judgment. Arbitral tribunals have made it evident that proving the host state's discriminatory intent is not necessary to prove a breach of the national treatment requirement. For instance, the arbitral panel that presided over the S.D. Myers case[8] determined that while intent can be important, "protectionist intent alone does not always determine the outcome." However, in specific situations, it may be essential for the host state to possess the desire or motive to discriminate or distinguish amongst persons. According to the tribunal's decision in Genin, discriminatory intent must exist before discrimination can be shown.

Differentiations are generally accepted to be justified when they are supported by rational considerations. The S.D. Myers[9] tribunal ruled that when assessing 'similar circumstances', it is necessary to consider factors that would provide a valid reason for government regulations to treat them differently, with the aim of safeguarding the public interest. "This is essential to safeguard the welfare of the general public."

III. CONCLUSION

Typically, International Investment Agreements (IIAs) contain a provision that mandates investors and investments to comply with the laws and regulations of the country where they are operating. In short, this article states that investments must be established in compliance with the Uniform law of the host State. The goal of this clause is to guarantee the preservation of the host state's uniform regulatory control authority over foreign investors and investments to preserve fair competition in the market under fair conditions of the market. How would

[7] Occidental Expl. & Prod. Co. v. Republic of Ecuador, UNCITRAL Arbitration, LCIA Case No. UN 3467, Final Award, ¶ 173 (July 1, 2004).
[8] S.D. Myers, Partial Award, ¶ 250 (Nov. 13, 2000).
[9] S.D. Myers, Partial Award, ¶ 254 (Nov. 13, 2000).

international investors foresee the outcome of an investment arbitration tribunal hearing on a matter involving the enforcement of anti-monopoly regulations? Given the lack of uniformity in the case law on National Treatment and the presence of conflicting awards, it is difficult to accurately predict the outcome. However, it is possible to identify four factors that either provide advantageous or disadvantageous conditions for international investors. Firstly, there is a requirement for additional competitors. Furthermore, if the first condition is satisfied, it is possible to establish and verify the presence of an alternative or unfavourable approach. This relates to the differentiation between companies that have been officially approved and those that have not received official approval. Thirdly, there will be no need to present evidence of the government's intention to discriminate against foreign investment. The presence of harmful treatment, as evaluated in the second criterion, is enough to establish a breach of the National Treatment. Regarding the potential for justification, it is crucial to discuss regulations that allow for an exemption based on the national economy. Arbitrators possess the capacity to employ the notion of "public interest" in relation to this specific facet of competition regulation inside the state.

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