

2011

International Antitrust Cooperation and the Preference for Nonbinding Regimes

Anu Bradford
Columbia Law School, abradf@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Antitrust and Trade Regulation Commons](#), [International Law Commons](#), and the [International Trade Law Commons](#)

Recommended Citation

Anu Bradford, *International Antitrust Cooperation and the Preference for Nonbinding Regimes*, COOPERATION, COMITY, AND COMPETITION POLICY, ANDREW T. GUZMAN, ED., OXFORD UNIVERSITY PRESS (2011). Available at: https://scholarship.law.columbia.edu/faculty_scholarship/1965

This Book Chapter is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

16. INTERNATIONAL ANTITRUST COOPERATION AND THE PREFERENCE FOR NONBINDING REGIMES

ANU BRADFORD*

INTRODUCTION

Today, multinational corporations operate in increasingly international markets, yet antitrust laws regulating their competitive conduct remain national. Thus, corporations are subject to divergent antitrust regimes across the various jurisdictions in which they operate. This increases transaction costs, causes unnecessary delays, and raises the likelihood of conflicting decisions. The risks inherent in multi-jurisdictional regulatory review were prominently illustrated in the proposed *GE/Honeywell* acquisition, which failed following the European Union's ("EU") decision to prohibit the transaction despite its earlier approval in the United States.¹ Inconsistent remedies imposed on Microsoft following parallel investigations by both the U.S. and EU authorities serve as another example of the regulatory burdens companies face when dealing with multiple antitrust investigations.

Some commentators believe that inconsistent antitrust decisions reflect protectionism. The EU's negative *GE/Honeywell* decision, for instance, was alleged to be motivated by the EU's desire to protect GE/Honeywell's European rivals.² Others, including myself, have argued that protectionism motivates U.S. and EU antitrust enforcement only in the margins, and that the rare enforcement conflicts are better explained by the existing differences in the goals and analytical

* Assistant Professor, The University of Chicago Law School. I am grateful to Travis Bradford, Rachel Brewster, Rosalind Dixon, Einer Elhauge, Jack Goldsmith, Katerina Linos, Eric Posner, and Joel Trachtman for their helpful suggestions on the earlier drafts of this article.

1. See Press Release, U.S. Dep't of Justice, Justice Department Requires Divestitures in Merger Between General Electric and Honeywell (May 2, 2001), available at http://www.usdoj.gov/atr/public/press_releases/2001/8140.htm (last visited May 24, 2010); Commission Decision No. 2004/134/EEC, O.J. L 48/1 (2004).

2. William J. Kolasky, Deputy Assistant Attorney General, *Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels*, Address at the George Mason University Symposium (Nov. 9, 2001), available at <http://www.usdoj.gov/atr/public/speeches/9536.htm> (last visited May 24, 2010).

foundations of antitrust law in the United States and the EU.³ Thus, whether the EU's *GE/Honeywell* decision is a manifestation of the EU's protectionism or an indication of legitimate differences in the U.S. and EU's antitrust thinking is debatable.

When antitrust authorities in a given jurisdiction evaluate a merger, they analyze whether the merger increases or diminishes competition in their domestic market. Efficiency gains or competitive harm outside the home market are irrelevant. Domestic antitrust laws strive to advance domestic consumer welfare, not global welfare. When evaluating the proposed GE/Honeywell merger, for instance, the EU antitrust authorities did not consider whether the merger's possible efficiencies in the United States would offset its alleged competitive harm within the EU. Similarly, the U.S. antitrust authorities focused on the transaction's consumer welfare effects within the United States, ignoring the effects in the EU. By internalizing only the domestic costs and benefits of a merger and externalizing its foreign effects, national antitrust authorities act within the legitimate boundaries of their domestic antitrust laws. This, however, can lead to a situation whereby a merger that would enhance global welfare is prohibited because the consumer harm it creates in a particular jurisdiction is not offset by efficiencies in that same jurisdiction.

The end result of the multi-jurisdictional antitrust enforcement is that the most stringent antitrust jurisdiction always prevails. If the United States wants to adopt a permissive antitrust policy (e.g., approve the GE/Honeywell merger) and the EU an interventionist policy (e.g., prohibit the GE/Honeywell merger), the EU antitrust policy prevails: the GE/Honeywell transaction is banned. Had GE/Honeywell been able to withdraw from the EU market altogether, it could have avoided EU antitrust review and proceeded with the merger. This, naturally, was not an option, given the importance of the EU market for the merging parties. The *GE/Honeywell* case illustrates how the EU becomes the de facto global antitrust regulator by choosing stringent enforcement policies.

Purely domestic antitrust laws fail to efficiently control cross-border transactions and anticompetitive practices spanning across global markets. Consequently, demands for establishing a comprehensive international antitrust regime have increased.⁴ Those fearing antitrust protectionism argue that an international

3. See generally Anu Bradford, *International Antitrust Negotiations and the False Hope of the WTO*, 48 HARV. INT'L L.J. 383 (2007).

4. See, e.g., Andrew Guzman, *The Case for International Antitrust*, in COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY 99 (Richard A. Epstein R. & Michael S. Greve eds., 2004); Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781 (2000); PHILIP MARSDEN, COMPETITION POLICY FOR THE WTO (2003); Leon Brittan, *A Framework for International Competition*, Address at World Competition Forum (Feb. 3, 1992), reprinted in 3 INT'L ECON. INSIGHTS 21 (1992); WTO Competition Working Group, *Communication by the*

antitrust regime could restrain and punish such protectionist impulses. Others support international antitrust cooperation on the grounds that it could mitigate coordination problems, reduce transaction costs, and prevent enforcement conflicts by enhancing convergence across jurisdictions.

International antitrust regime, properly designed, can diminish the various problems associated with decentralized antitrust enforcement. However, while the need for enhanced international antitrust cooperation is generally recognized, there is little consensus on the precise content of such cooperation. A group of scholars and some states, including the EU, hold that a legally binding international antitrust agreement ought to be established, perhaps by extending the coverage of the World Trade Organization ("WTO") to antitrust law.⁵ Others find a binding international agreement politically infeasible or normatively undesirable.⁶ The United States, for instance, is skeptical of a WTO antitrust agreement and calls instead for enhanced voluntary cooperation.

This article focuses on the relative merits of binding and nonbinding international antitrust cooperation. It argues that the primary impediment to international antitrust cooperation is the disagreement over the substance and institutional form of such cooperation. This disagreement has led states to water down the proposed binding international antitrust agreement to the point of severely limiting, if not eliminating, any net benefits. In the end, states have chosen not to spend resources and political capital in negotiating a binding international agreement that fails to generate substantial benefits, preferring to resolve their differences informally on a case-by-case basis.

Irrespective of its normative merits, a binding international antitrust agreement is currently not feasible to negotiate. Yet states do not resort to nonbinding antitrust cooperation as a "second-best" solution to capture limited gains when their first-best regime choice is unavailable. Nonbinding international antitrust

European Community and its Member States, WT/WGTCP/W/62, at 12–13 (Mar. 5, 1998); Munich Working Group, Draft International Antitrust Code, 5 *WORLD TRADE MATERIALS* 126 (Sept. 1993), reprinted in 64 *ANTITRUST & TRADE REG. REP.* (BNA) Special Supp. (July 10, 1993); Ernst-Ulrich Petersmann, *Competition-Oriented Reforms of the WTO World Trade System-Proposals and Trade Options*, in *TOWARDS WTO COMPETITION RULES* 43, 48–49 (Roger Zäch ed., 1999); Robert D. Anderson & Peter Holmes, *Competition Policy and the Future of the Multilateral Trading System*, 5 *J. INT'L ECON. L.* 531 (2002).

5. See, e.g., Guzman, *supra* note 4. See also Julian L. Clarke & Simon J. Evenett, *A Multilateral Framework for Competition Policy?* in *THE SINGAPORE ISSUES AND THE WORLD TRADING SYSTEM* (Simon J. Evenett ed., 2003) (providing a good overview of the various proposals for including antitrust in the WTO); Marsden, *supra* note 4.

6. See, e.g., Paul B. Stephan, *Against International Cooperation*, in *COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY*, *supra* note 4, at 66; Diane P. Wood, *Cooperation and Convergence in International Antitrust: Why the Light Is Still Yellow?*, in *COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY*, *supra* note 4, at 177.

cooperation remains preferable even if a binding agreement later becomes feasible. Given the nature of the collective action problem in international antitrust cooperation, binding agreements and formal institutions remain largely unnecessary and undesirable. Thus, this article rebuts the presumed supremacy of a binding international antitrust regime and claims that nonbinding cooperation offers a better path for international antitrust convergence for now and in the foreseeable future.

Part I below briefly reviews the nonbinding international antitrust regime that has emerged in the absence of a binding international antitrust agreement. Part II explains why negotiating binding international antitrust cooperation has been difficult and why such negotiation would yield limited benefits for states. Part III discusses why nonbinding cooperation is more likely to foster international antitrust convergence. Part IV explains why nonbinding cooperation is likely to persist even if the negotiation of a binding international antitrust agreement were to become viable in the future.

I. THE EMERGENCE OF A NONBINDING INTERNATIONAL ANTITRUST REGIME

States have attempted to launch WTO antitrust negotiations on several occasions.⁷ However, all attempts to negotiate a binding international antitrust agreement have thus far failed,⁸ prompting states to engage in voluntary cooperation instead.⁹ Over the past decade, states have concluded a number of bilateral

7. See, e.g., MARSDEN, *supra* note 4, at ch. 1; see also Nataliya Yacheistova, *The International Competition Regulation—A Short Review of a Long Evolution*, 18 *WORLD COMPETITION, LAW AND ECON.* 99, 99–110 (1994).

8. Most recently, the WTO negotiations on antitrust were stalled in Cancun in 2003 due to the resistance of the developing countries. See, e.g., Day 5: **Conference ends without consensus**, available at http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm (last visited May 24, 2010). On August 1, 2004, the WTO General Council decided to officially drop antitrust policy from the Doha Round negotiation agenda (“July decision”). See WTO General Council, *Decision Adopted by the General Council*, WT/L/579 (Aug. 2, 2004).

9. See generally Oliver Budzinski, *The International Competition Network: Prospects and Limits on the Road towards International Competition Governance*, 8 *COMP. & CHANGE* 223–42 (2004); Frederic Jenny, *International Cooperation on Competition: Myth, Reality and Perspective*, 48 *ANTITRUST BULL.* 973–1003 (2003); Anu Piilola, *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 *STAN. J. INT’L L.* 207 (2003).

agreements and engaged in active nonbinding multilateral cooperation in order to promote convergence and reduce enforcement conflicts.¹⁰

Bilateral cooperation occurs on a case-by-case basis. Antitrust authorities exchange nonconfidential market information, assist each other in evidence gathering, coordinate investigations, and negotiate joint remedies.¹¹ The primary challenge for the case-by-case cooperation is the agencies' inability to exchange confidential business information absent a waiver from the relevant corporations. For this reason, enforcement cooperation tends to be more successful in merger control investigations than in cartel investigations. Corporations seeking to merge often have an incentive to grant a waiver in order to ensure a swift investigation and, consequently, timely consummation of their transaction. In contrast, corporations remain reluctant to facilitate agencies' joint cartel investigations, as consenting to the exchange of confidential information would expose them to additional sanctions in another jurisdiction.¹²

Bilateral cooperation has been particularly successful between the United States and the EU.¹³ Frequent interactions between the two antitrust regimes have resulted in significant convergence in their antitrust analysis and enforcement practices. And while intense cooperation does not guarantee identical decisions, as the controversial GE/Honeywell merger demonstrated,¹⁴ enforcement

10. These cooperation arrangements have been extensively described elsewhere in the literature, *See, e.g.*, Bruno Zanetti, COOPERATION BETWEEN ANTITRUST AGENCIES AT THE INTERNATIONAL LEVEL (2002); *see also* Jenny, *supra* note 9; Budzinski, *supra* note 9.

11. Even though states have concluded formal bilateral agreements, the decision on whether to cooperate remains entirely at the discretion of domestic antitrust authorities. Thus, this form of cooperation is more aptly characterized as nonbinding rather than binding.

12. *Id.* Jenny, *supra* note 9. at 995. *See also* International Chamber of Commerce & Business and Industry Advisory Committee to the OECD, *ICC/BIAAC Comments on Report of the U.S. International Competition Policy Advisory Committee (ICPAC)* 8 (June 5, 2000), available at http://www.biac.org/statements/comp/00-06-ICC-BIAC_comments_on_ICPAC_report.pdf [hereinafter *ICC/BIAAC Comments on Report of the U.S. International Competition Policy Advisory Committee*].

13. *See* Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of the Competition Law, U.S.–E.C., Sept. 23, 1991, U.S. State Dep't No. 91-216, 30 I.L.M. 1487, 1991 WL 495155; Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, art. III, U.S.–E.C., June 4, 1998, U.S. State Dep't No. 98-106, 1998 WL 428268. *See also* Press Release, US–EU Merger Working Group, Best Practices on Cooperation in Merger Investigations (Oct. 30, 2002), available at <http://www.usdoj.gov/atr/public/international/docs/200405.pdf> (last visited May 24, 2010).

14. *See supra* note 1.

conflicts between the two agencies are rare in practice.¹⁵ In contrast, cooperation is less frequent between developed countries and developing countries.¹⁶ This might be because developed countries have less to gain from such cooperation. Developed countries would likely be exposed to numerous requests of enforcement assistance from developing countries, as large developed country corporations often achieve a high market share in small developing country markets. In contrast, smaller developing-country corporations rarely trigger an antitrust investigation in large developed-country markets.¹⁷

Bilateral antitrust cooperation offers only a partial solution for achieving greater coherence across antitrust jurisdictions. Multilateral institutions have complemented the efforts to foster international antitrust cooperation. Since 2001, the most active forum for nonbinding multilateral antitrust cooperation has been the International Competition Network (“ICN”). The ICN is an informal network of antitrust agencies, which seeks to enhance cooperation among the world’s antitrust authorities and promote substantive and procedural convergence of antitrust policies on a voluntary basis.¹⁸ The ICN identifies, develops, and publishes policy recommendations and best practices.¹⁹ Such voluntary norms are aimed at enhancing policy convergence, reducing transaction costs, and catalyzing and guiding domestic reforms. The ICN, together with other international institutions, also offers technical assistance to developing countries with the view of strengthening antitrust advocacy, building institutional capacity, and supporting market reforms in those countries.²⁰ Following the collapse of the WTO antitrust negotiations in 2003, the ICN remains the most influential international regime facilitating multilateral antitrust cooperation today.

15. The *GE/Honeywell* decision remains the only merger case in which the U.S. and EU authorities have reached a conflicting decision. The EU also prohibited a proposed merger between DeHavilland and ATR, which was approved by the Canadian authorities. (See Commission Decision, Case No. IV/M.053 of October 2, 1991, *Aerospatiale-Alenia/de Havilland*). Legal uncertainty resulting from multi-jurisdictional merger review is thus unlikely to form as significant of a negative externality as one might imagine. It is, however, difficult to evaluate the costs of the prospect—no matter how unlikely in practice—that any given merger has a higher risk of being prohibited when it must survive multiple regulatory reviews.

16. See Jenny, *supra* note 9, at 993, 979.

17. Developed countries are also more often than developing countries able to extend their domestic antitrust laws to regulate the conduct of foreign corporations, further diminishing their need to rely on enforcement assistance. Besides, developed countries might assume that their requests for assistance would never be met in practice due to the limited resources of the developing country antitrust agencies.

18. For more information on the purpose and the functioning of the ICN, see www.internationalcompetitionnetwork.org (last visited May 24, 2010).

19. See Budzinski, *supra* note 9, at 228.

20. See, e.g., Jenny, *supra* note 9, at 976–77.

II. THE LIMITED GAINS OF A BINDING INTERNATIONAL ANTITRUST AGREEMENT

A. How States' Divergent Preferences and Capacities Obstruct Cooperation

States agree that competitive markets and antitrust laws are beneficial. However, they disagree on the particular goals and priorities of antitrust enforcement. States also acknowledge the necessity to coordinate antitrust enforcement across jurisdictions but fail to agree on the specifics. These conflicting views on a globally optimal antitrust regime amount to a distributional conflict. A distributional conflict arises when the costs and the benefits of an international antitrust agreement are unevenly distributed among states, and when states therefore cannot agree on the focal point of coordination.²¹

The long-standing distributional conflict between the United States and the EU is one of the principal impediments for a binding international antitrust agreement. Both the United States and the EU acknowledge the efficiencies that international antitrust cooperation could generate, but disagree as to the optimal content, the legal form, and the institutional framework of cooperation.²²

The U.S.-EU disagreement stems from some key differences that persist between the United States and the EU despite the increasing alignment of their antitrust laws over the last decade.²³ The United States and the EU agree that antitrust laws seek to maximize consumer welfare. However, social considerations, such as promotion of employment or protection of small enterprises, still play a role at the margins of the EU antitrust analysis. The EU also employs its antitrust laws to further European integration. Antitrust laws ensure that anti-competitive practices of private enterprise do not frustrate the efforts to remove trade barriers within the EU. This market integration goal has led to a more interventionist enforcement policy vis-à-vis vertical agreements, in particular territorial restraints that threaten to partition the common market. The EU is also more skeptical of market power and has a lower threshold in bringing cases against dominant companies (*see* decisions against Microsoft and Intel). Similarly, the EU has also historically taken a harsher view towards vertical and conglomerate mergers (*see* GE/Honeywell). While there is increasing convergence between the two key antitrust jurisdictions today, these remaining

21. Generally, conflicting state preferences regarding international cooperation on any given issue emanate from many different factors, such as economic disparities, diverse development priorities and market structures, dissimilar enforcement capacities, different legal traditions, and the distinct domestic political equilibrium within each state.

22. *See* Bradford, *supra* note 3, at 522–26 (exploring reasons for the divergence of views between the United States and the EU regarding international antitrust cooperation).

23. *See* EINER ELHAUGE & DAMIEN GERADIN, *GLOBAL ANTITRUST LAW AND ECONOMICS* 1100, 1100 (2007).

differences have led the United States and the EU to endorse international convergence each toward their respective antitrust laws.²⁴

The United States and the EU also disagree on the optimal institutional framework for antitrust cooperation. The EU supports a binding WTO antitrust agreement. This is consistent with the EU's view that antitrust and trade policies are intrinsically linked. The United States, on the other hand, fears that antitrust would lose its exclusive focus on consumer welfare when enmeshed with trade policy considerations in the WTO. Instead, the United States has promoted antitrust cooperation within the ICN, which allows antitrust enforcers to cooperate without interference from the trade community.

In addition to the U.S.-EU controversy, disagreement between developed countries and developing countries regarding the content and the costs of a prospective antitrust agreement has obstructed cooperation efforts.²⁵ Developed countries want to "level the playing field" by enhancing multinational corporations' ("MNCs") access to the developing-country markets. Developed countries also seek to reduce transaction costs involved in MNCs' cross-border business transactions.²⁶ In contrast, developing countries are concerned about their inability to control the anticompetitive conduct of MNCs in their markets.²⁷ Developing countries also resist the idea of a level playing field, maintaining that they need to be able to shield their small domestic corporations from larger MNCs. Developing countries struggling with capacity constraints have also opposed WTO antitrust agreement because of the regulatory burden that new international obligations would impose on them.²⁸

Consequently, a critical impediment to antitrust cooperation is the difficulty of overcoming the distributional conflict between the United States and the EU

24. See, e.g., Fox, *supra* note 4, at 1799 (explaining how the United States and the EU have actively been exporting their own antitrust laws to developing countries and transition economies in the recent decade in an attempt to expand their preferred regulatory regimes).

25. Bradford, *supra* note 3, at 526–28, 534–37.

26. Bernard M. Hoekman & Kamal Saggi, *International Cooperation on Domestic Policies: Lessons from the WTO Competition Policy Debate*, in ECONOMIC DEVELOPMENT AND MULTILATERAL TRADE COOPERATION 439, 446 (Simon J. Evenett & Bernard M. Hoekman eds., 2006).

27. Ajit Singh & Rahule Dhumale, *Competition Policy, Development, and Developing Countries*, in WHAT GLOBAL ECONOMIC CRISIS? 122, 127 (Philip Arestis, Michelle Baddeley, & John McCombie eds., 2001). Developing countries are particularly vulnerable to international cartel activity, because their nonexistent or weak antitrust enforcers are unable to prosecute the threat effectively. See Margaret Levenstein & Valerie Y. Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 ANTITRUST L.J. 801, 801–03 (2004).

28. See discussion *infra* Part II.C (explaining why an international antitrust agreement would impose high compliance costs).

on one hand, and the developed countries and the developing countries on the other. These distributional tensions have narrowed the scope for any feasible international agreement.

B. How the Distributional Conflicts Would Lead to a Shallow Agreement

Distributional conflicts force states to negotiate compromises that lead to shallow international obligations. A shallow international antitrust agreement would likely exclude all areas of disagreement. The disagreement between the United States and the EU would prevent the inclusion of rules on unilateral conduct by monopolies, vertical and conglomerate mergers, and on vertical territorial restraints. These are the key areas where the U.S. and the EU antitrust thinking differ.²⁹ The United States would also likely oppose rules banning export cartels, given that it remains the only country that continues to use such exemptions to its domestic antitrust laws widely.³⁰ Developing countries would also demand significant exceptions to any obligations subjecting their local firms to international competition.³¹ However, meaningful rules might be difficult to negotiate, even with respect to issues where broad consensus exists. For instance, all states agree that hard-core cartels are anticompetitive. Yet a commitment to prohibit such cartels would be difficult to agree on in the absence of a consensus regarding the definition of a hard-core cartel or appropriate sanctions that should apply.³²

The United States has objected to the WTO antitrust agreement precisely on these grounds. It has argued that a binding international agreement would weaken antitrust laws throughout the world. Given the conflicting regulatory priorities, states could only reach a watered-down compromise.³³ At worst, the prospective antitrust agreement would only codify the lowest common denominator among the broad WTO membership.³⁴

29. See ELHAUGE & GERADIN, *supra* note 23, at 1100 (2007).

30. For example, the United States has defended domestic rules that permit the exemption of export cartels before the WTO in 2003 by arguing that these exemptions “were conceived as mechanisms for domestic entities that lacked the resources to engage in effective export activity acting individually.” See WTO Working Group on the Interaction between Trade and Competition Policy, *Note by the Secretariat: Report on the Meeting of February 20–21, 2003*, 37, WT/WGTCP/M/21 (May 26, 2003).

31. Singh & Dhumale, *supra* note 27, at 127.

32. The United States, for instance, applies criminal sanctions and treble damages to antitrust violations, whereas the EC competition provisions limit remedies to administrative fines.

33. Wood, *supra* note 6, at 186.

34. See Roscoe B. Starek, III, Commissioner, Federal Trade Commission, International Aspects of Antitrust Enforcement, Address at the Antitrust 1996 Conference (Sept. 29, 1995), available at <http://www.ftc.gov/speeches/starek/starekda.htm> (“The sticking point is whether agreement can be reached on a sufficiently stringent set of antitrust policies.

As the United States predicted, the proposed antitrust agreement within the WTO grew weaker with every new attempt to agree on the negotiation mandate. In the end, states were forced to strip the agreement of any meaningful content in an effort to accommodate their divergent preferences. The most recent proposal for a WTO antitrust agreement forwent substantive antitrust rules altogether, proposing merely to extend the fundamental yet vague WTO principles of “transparency” or “national treatment” to antitrust matters. Such an agreement would accomplish little in terms of fostering international convergence and would leave states with limited benefits to offset the costs of negotiating the agreement.³⁵

Some might argue that even weak antitrust commitments could deepen with time due to the gradual alignment of states’ preferences and alleviation of uncertainties surrounding cooperation.³⁶ As states learn more about the effects of the agreement and gradually reach a consensus on a wider set of issues, they may incrementally adopt deeper obligations. However, even if states were willing to gradually expand their obligations, the WTO—the most likely venue for a binding international agreement—would not lend itself well to frequent revisions of obligations. New, deeper commitments would call for new negotiations, which are slow, cumbersome, and costly. Consequently, states are more likely to resort to the WTO when they are able to agree on meaningful substantive norms at the outset. When the necessary consensus is missing, however, non-binding agreements outside the WTO are more likely to accomplish effective cooperation.

It is the fear of a “lowest-common-denominator” antitrust code that has made many American policymakers skeptical about pursuing a world code”); *see also* A. Douglas Melamed, Principal Deputy Assistant Attorney General, U.S. Dep’t of Justice, Antitrust Enforcement in the Global Economy, Address at the Fordham Corporate Law Institute, 25th Annual Conference on International Antitrust Law and Policy (Oct. 22, 1998), *available at* <http://www.usdoj.gov/atr/public/speeches/2043.htm> (“[A]ny WTO rules would be lowest-common-denominator rules that would merely serve to justify weak national antitrust enforcement. Third, such lowest-common-denominator rules would serve little purpose”).

35. BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM* 133–34 (2d ed. 2001).

36. This argument is advanced in particular by the “transformational approach.” Transformationalists endorse shallow framework agreements with broadest possible participation and claim that commitments that are that initially shallow deepen with time. For a discussion and critique of transformationalism, *see* George W. Downs et al., *The Transformational Model of International Regime Design: Triumph of Hope or Experience?*, 38 *COLUM. J. TRANSNAT’L L.* 465 (2000) [hereinafter Downs et al., *Transformational Model*].

C. How a Shallow Agreement Would Offer Limited Net Gains

A shallow WTO antitrust agreement mitigates distributional tensions. However, diluting the substance of the agreement simultaneously lowers its expected benefits. Thus, if an agreement becomes too shallow, it is no longer worth negotiating, because states do not gain any net benefits to offset the costs of negotiating the agreement.

The expected benefits of the WTO antitrust agreement are further reduced by the low-opportunity costs of not cooperating within the WTO. States with existing, well-functioning antitrust regimes are often able to exercise jurisdiction vis-à-vis foreign corporations as long as the foreign anticompetitive conduct has an effect on their domestic market.³⁷ States' ability to resort to extraterritorial enforcement makes the case for an international agreement less compelling. States can also solve many of the collective action problems through informal cooperation mechanisms that are already in place. Numerous bilateral agreements and nonbinding plurilateral and multilateral antitrust regimes have enhanced convergence and reduced negative externalities caused by decentralized antitrust enforcement. This further diminishes the need for a binding international antitrust regime.³⁸

Finally, negotiating a WTO antitrust agreement would be costly, reducing the net benefits from its success. Contracting costs are particularly high when international negotiations involve numerous states, distributional tensions, and burdensome national ratification procedures.³⁹ The WTO antitrust negotiations would involve 153 governments with heterogeneous preferences, multiple negotiation rounds, and extensive multi-issue bargaining. In addition, domestic ratification would presumably be necessary in most member states. Legislative approval adds to the contracting costs due to the additional negotiations, delays, and risks involved. Contracting costs are further augmented by the WTO enforcement mechanism, which enables member states to enforce potential violations of WTO commitments with sanctions.⁴⁰ States are expected to research and

37. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993); *Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, A. Ahlstrom Osakeyhtiö v. Commission* ("Wood Pulp"), 1988 E.C.R. 5193 (1988).

38. See discussion *infra*, Part IV.B.3.

39. Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 434 (2000) [hereinafter Abbott & Snidal, *Hard and Soft Law*].

40. A violation of a binding international agreement can lead to sanctions (including, for instance, bilateral retaliation authorized by the WTO Dispute Settlement Mechanism) or a loss of reputation. While a state might also impose (unauthorized) unilateral trade sanctions, an established framework for retaliation within the WTO makes sanctioning easier, as a state can withdraw an existing concession and benefit from the backing of the international system that approves the retaliation. Sanctions are therefore more likely to be feasible in the case of a breach of a binding WTO commitment. However, loss of reputation can occur when a country breaches a nonbinding agreement just as easily as when

negotiate each provision more cautiously when they know that they will face sanctions if they breach the agreement. This, obviously, entails higher contracting costs than the less rigorous bargaining associated with nonbinding commitments that lack enforcement.

Developing countries' resistance to WTO antitrust negotiations is illustrative of the significance of contracting costs. Developing countries blocked the antitrust talks in the 2003 WTO ministerial meeting in Cancun, partially because of the high contracting costs involved in the negotiations. Already faced with a high burden of regional trade negotiations,⁴¹ developing countries were unwilling to pursue yet another binding agreement, particularly since the negotiations of a WTO antitrust agreement would have required significant resources and technical expertise.⁴²

In addition, compliance costs associated with implementing and enforcing international antitrust rules would be high, especially for developing countries that lack the institutional capacity, technical expertise, and financial resources to establish sophisticated antitrust institutions to enforce new laws. The developing countries, in particular, would also incur political costs because their import-competing industries and former state-owned enterprises would resist any reforms that would remove the government protection they enjoy.⁴³ Even if states already have antitrust agencies, implementation of international antitrust rules involves costs if those rules require states to depart from antitrust laws that would be domestically optimal. New laws might also require retraining of antitrust enforcers or other similar adjustment expenses. Similarly, corporations might incur further costs if they have to revise some of their business practices to comply with new antitrust rules.

it breaches a binding agreement. This might be the case with nonbinding international antitrust cooperation, where frequent contacts among antitrust authorities reinforce peer pressure for countries to comply with jointly negotiated norms.

41. While the WTO negotiations were underway, Caribbean and Latin American countries were finalizing their Free Trade Area of Americas (FTAA) Agreement; and African, Caribbean, and Pacific (ACP) countries were still burdened by the aftermath of the Cotonou Agreement negotiations with the EU.

42. Taimoon Stewart, *The Fate of Competition Policy in Cancun: Politics or Substance?*, 31 LEGAL ISSUES OF ECON. INTEGRATION 7, 7 (2004); see Editorial, *The Real Lesson of the Cancun Failure*, FIN. TIMES (London), Sept. 23, 2003, at 16 ("It is absurd to push, as the EU has done, to impose rules in complex areas such as competition and investment on countries so poor that some cannot even afford WTO diplomatic representation.").

43. William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 BROOK. J. INT'L L. 403, 404-05 (1997). In contrast, domestic interest groups are not a significant source of resistance to antitrust enforcement in developed countries. Instead, they have been inactive in conveying their support for, or resistance of, international antitrust rules. See discussion *infra*, Part IV.B.2.

Consequently, while a binding international antitrust agreement would clearly create some benefits in the form of transactional efficiencies, those benefits are trivial when the substantive provisions of the agreement are watered down to accommodate states' divergent preferences and regulatory capacities. The high costs of cooperation together with the availability of alternatives further reduce the attractiveness of a binding international antitrust agreement. These reasons, taken together, explain why states have abandoned the binding antitrust negotiations within the WTO and have turned to other ways to achieve international antitrust convergence.

III. WHY NONBINDING COOPERATION OFFERS A BETTER PATHWAY TOWARDS CONVERGENCE

Nonbinding cooperation offers a superior alternative for states seeking international antitrust convergence for two primary reasons. First, nonbinding international agreements reduce contracting costs and implementation costs that states incur while pursuing cooperation. Second, while nonbinding agreements do not solve distributional tensions, they permit states to capture some benefits from cooperation by allowing them to cooperate case-by-case in instances where a necessary consensus exists. States are also more willing to enter into nonbinding multilateral agreements, knowing that if they later decide to deviate from the agreement, they can avoid costly sanctions.

Nonbinding international agreements often provide cooperating parties with the benefits of binding agreements at a lower cost.⁴⁴ Cooperation within informal networks such as the ICN, or targeted case-specific enforcement cooperation among a small number of antitrust authorities, involves low contracting costs. Negotiations in these venues are more circumscribed and less contentious.⁴⁵ The ICN is a largely virtual network that is flexibly organized around working groups. The members of the working groups draft recommendations and guidelines, which are then approved by the Network. As the individual antitrust authorities remain free to decide whether and how to implement the recommendations domestically, the process of approving such recommendations is unlikely to involve rigorous bargaining. Nonbinding recommendations also allow antitrust agencies to seek international convergence without involving the legislators, which diminishes costs and delays embedded in the domestic ratification process.

44. Abbott & Snidal, *Hard and Soft Law*, *supra* note 39, at 434.

45. Anne-Marie Slaughter, *The Accountability of Government Networks*, 8 *IND. L. GLOBAL LEGAL STUD.* 347, 347 (2001). Even though the ICN involves multiple parties with divergent preferences, the promulgation of nonbinding norms within the Network can be described as being "fast, flexible, and effective."

However, critics may argue that nonbinding cooperation is more costly than negotiating an antitrust agreement through the WTO. Non-binding antitrust cooperation today consists of numerous bilateral, plurilateral, and multilateral governance instruments, all focusing only on some subset of substantive or procedural antitrust matters. These multiple non-binding instruments, taken together, could be costlier than a single binding international antitrust agreement, provided that such an agreement was feasible to reach.

However, there are a number of reasons a WTO antitrust agreement probably involves higher contracting costs, even when compared to the aggregate costs of negotiating a myriad of nonbinding agreements. For instance, the pursuit of multiple nonbinding agreements has an important advantage of allowing a “cherry-picked” solution, where parties can choose to cooperate only on those issues where the net benefits of cooperation are the greatest. While the absence of (aggregate) net gains can delay or prohibit an entire binding international agreement—including the contemplated WTO antitrust agreement—the multitude of nonbinding agreements renders cooperation possible in those matters and among those parties where the benefits exceed the costs of cooperation.⁴⁶ Also, risk-adjusted contracting costs are significantly higher when states pursue a binding, nearly universal agreement. The possibility that the parties will fail to reach an agreement on a specific issue within the ICN, for instance, is less costly than the possibility that the WTO negotiations will fail to successfully conclude after years of intense bargaining. Thus, while the *ex post* costs of a single, all-embracing and successfully concluded binding international antitrust agreement could be lower, states’ *ex ante* risk-adjusted perception of those costs is significantly higher.

Compliance costs for developing countries are likely to be significant regardless of whether they enact domestic antitrust laws and set up enforcement mechanisms under binding or nonbinding international agreements. However, nonbinding agreements are likely to be more attractive in that they allow developing countries to adopt only those international norms that involve relatively low compliance costs.⁴⁷ Nonbinding cooperation is also likely to reduce political

46. This particular advantage also explains why states have pursued extensive bilateral cooperation. See discussion *supra* the chapter, pp.322–324 (Section I).

47. However, developing countries might be able to negotiate flexible provisions even if states choose to pursue a binding agreement under the auspices of the WTO. While the WTO is built on the idea that all its agreements apply equally to all WTO members, the WTO principle of “common but differentiated responsibilities” occasionally permits developing countries to enjoy more limited obligations or more generous implementation timeframes. See, e.g., Christopher D. Stone, *Common but Differentiated Responsibilities in International Law*, 98 AM. J. INT’L L. 276 (2004).

costs stemming from the domestic resistance of international antitrust rules by decreasing the visibility and the prominence of the international commitments.

Nonbinding agreements do not remove distributional tensions among states. However, they often ease bargaining problems by granting more flexibility regarding the manner and the extent to which states implement international antitrust commitments domestically.⁴⁸ Pursuing a myriad of nonbinding cooperation agreements allows states to limit cooperation to parties that maintain similar preferences or to issues where consensus exists.

States are also likely to prefer nonbinding agreements because the consequences of a breach are less severe. States with capacity constraints or conflicting preferences have a marginal ability, or willingness, to comply with any negotiated commitments. They are therefore more likely to join a regime under which they can defect without facing sanctions. Thus, by keeping international commitments nonbinding, states are able to capture some gains from international cooperation without relinquishing control over their domestic antitrust laws, or assuming the risk of sanctions if they are ultimately unable or unwilling to comply with their obligations.⁴⁹

IV. DO NONBINDING AGREEMENTS PAVE THE WAY FOR A BINDING INTERNATIONAL ANTITRUST AGREEMENT?

The above discussion has argued that a meaningful binding international antitrust agreement would currently be infeasible to negotiate, and explained why nonbinding agreements can still be effective in fostering cooperation. This Part extends the claim by asserting that even if binding multilateral cooperation were to become more viable in the future (predominantly due to the gradual alignment of state preferences as a result of voluntary cooperation), states will continue to rely on nonbinding cooperation in the near future.

A. Conventional Wisdom: Nonbinding Agreements Form a Second-Best Solution

Among international law scholars, there is often a presumption that binding international agreements, if attainable, would be superior tools to generate regulatory convergence. States are assumed to resort to nonbinding agreements

48. See also Abbott & Snidal, *Hard and Soft Law*, *supra* note 39, at 445. Abbott and Snidal suggest that “soft law should be attractive in proportion to the degree of divergence among the preferences and capacities of states.”

49. In contrast, the WTO’s Dispute Settlement Mechanism would authorize trading partners to retaliate if one party failed to comply with a potential WTO Antitrust Agreement.

when normatively more desirable binding agreements are not available.⁵⁰ Many commentators also argue that the greatest virtue of nonbinding agreements is their potential to pave the way for binding cooperation.⁵¹ Under this view, nonbinding agreements are considered to form merely a stepping stone in a gradual process towards the ultimate goal: a binding international agreement.

International cooperation may evolve gradually from lower to higher levels of cooperation.⁵² States may initially enter into modest cooperative arrangements that are more viable to negotiate.⁵³ Those arrangements might then incrementally evolve into binding international agreements, as uncertainty progressively diminishes and consensus among states begins to emerge. Constructivist scholars in particular support this theory of incremental norm formation. They argue that social interaction, diffusion of information, and collective deliberation within nonbinding regimes trigger a “self-reinforcing dynamic,” which leads states to pursue deeper and more formal means of cooperation.⁵⁴

Historically, the proponents of a nonbinding international antitrust regime have endorsed such a regime primarily on the grounds that it is more *feasible* to attain than a binding international agreement. Nonbinding cooperation is frequently viewed as the “best available” regime, implying that a binding international agreement would represent the optimal solution, if it were attainable. Diane Wood, one of the leading proponents of nonbinding international antitrust cooperation, has aptly summarized this view by calling a binding international

50. Steven R. Ratner, *Does International Law Matter in Preventing Ethnic Conflict?*, 32 N.Y.U. J. INT'L L. & POL. 591, 653 (2000) (noting the implicit assumption that hard law affects state behavior more than soft law); see also Jack L. Goldsmith & Eric A. Posner, *International Agreements: A Rational Choice Approach*, 44 VA. J. INT'L L. 113, 114 (2003) (noting that among traditional, positivistic approaches to international law, “nonlegal” instruments are viewed as being of secondary importance).

51. See, e.g., Christine Chinkin, *Normative Development in the International Legal System*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BONDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 21, 32 (Dinah Shelton ed., 2000) (noting that soft law can act as a catalyst for the development of customary international law, which to many commentators is the “*raison d'être* of soft law”).

52. See Kenneth W. Abbott & Duncan Snidal, *Pathways to International Cooperation*, in THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION 50, 50 (Eyal Benvenisti & Moshe Hirsch eds., 2004).

53. See Kenneth W. Abbott & Duncan Snidal, *Filling in the Folk Theorem: The Role of Gradualism and Legalization in International Cooperation to Combat Corruption* 1–2 (Aug. 30, 2002) (working paper presented at the American Political Science Association annual meeting).

54. *Id.* at 12. See also Abbott & Snidal, *Pathways to International Cooperation*, *supra* note 56; Downs et al., *Transformational Model*, *supra* note 36, at 467 n.2 (referring to literature that represents the Transformationalist perspective).

antitrust agreement an “impossible dream.”⁵⁵ A binding agreement is regarded as the ultimate goal and nonbinding cooperation as a pathway towards that goal.⁵⁶ While some independent benefits of nonbinding cooperation have been acknowledged in the debate, most advocates of nonbinding international antitrust law see it only as a second-best, partial, or interim solution.⁵⁷

It is possible that nonbinding antitrust cooperation will pave the way for binding international antitrust rules. Voluntary cooperation facilitates information exchange, learning, and trust-building among antitrust authorities. As a result, state preferences are expected to become more aligned, alleviating the distributional tensions that currently undermine cooperation. In addition, the costs of negotiating a legally binding agreement are prone to diminish, as states would no longer need to adjust their domestic laws significantly (as the domestic equilibrium would be closer to that sought by an international agreement). Such developments would likely remove, or at least mitigate, obstacles to the binding international antitrust agreement.

This view suggests that as binding cooperation becomes more feasible, states may attempt to revive negotiations toward a binding international antitrust agreement, within or outside the WTO framework. This raises the question whether negotiating a binding agreement is indeed the optimal path or whether a nonbinding international antitrust regime is preferable even when the alternative of binding cooperation becomes more viable.

B. Disputing the Presumed Supremacy of Binding Agreements

This article argues that a pathway from nonbinding to binding rules in antitrust cooperation is not inevitable, nor is it even likely. “Nations cooperate without law all the time,”⁵⁸ and they do so for a reason. Nonbinding agreements have their own, independent advantages and are sometimes more optimal governance

55. Diane P. Wood, *The Impossible Dream: Real International Antitrust*, 1992 U. CHI. LEGAL F. 277, 300–01 (1992).

56. See Wood, *supra* note 6, at 179, 185–185 (“[W]e need to exercise caution before we take a leap into a formal antitrust regime”; “A slower approach . . . was the better way toward our ultimate goal”; and “I believe that harmonization is, at this time, premature”).

57. *Id.* See also, e.g., Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. Rev. 343, 402 (1997) (“Cooperation is a valuable addition to the antitrust landscape, but not as an alternative to harmonization or a particularly valuable end unto itself.”); Wolfgang Kerber & Oliver Budzinski, *Competition of Competition Laws: Mission Impossible?*, in COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY, *supra* note 4, at 31 (supporting nonbinding cooperation on the grounds of retaining flexibility and allowing for parallel experimentation and mutual learning). However, Kerber and Budzinski also endorse supplementing nonbinding cooperation in cross-border antitrust matters with binding international jurisdictional rules.

58. See Goldsmith & Posner, *supra* note 54, at 116.

instruments than binding agreements.⁵⁹ States choose between binding and nonbinding agreements in accordance with their interest in any given issue, taking into account the constraints imposed by other states and the external environment in which they operate. Nonbinding agreements do not merely “come to the rescue” when legally binding regimes are not attainable.⁶⁰ Rather, binding and nonbinding agreements offer distinct benefits, the relative importance of which depends on the strategic situation of the states pursuing cooperation.

Nonbinding international antitrust cooperation avoids the problem of watering down the rules to accommodate divergent preferences. Nonbinding cooperation also offers more flexibility and reduces contracting and implementation costs associated with cooperation. A shift to binding cooperation would cause states to lose those important benefits. In addition, the specific advantages of binding agreements are of no real value to the negotiating parties for three primary reasons. First, assuming that antitrust laws are rarely used opportunistically for protectionist purposes, there is no need to pursue a binding agreement with enforcement provisions. Second, in the absence of coherent interests group support for far-reaching international antitrust cooperation, a binding agreement does not offer political economy gains. Finally, evolving nonbinding regimes are pre-capturing the highest gains of cooperation and thereby gradually decreasing the net benefits from the pursuit of a binding agreement.

1. The Self-Enforcing Nature of Antitrust Cooperation Renders a Binding Agreement Unnecessary The risk of opportunism is one of the key variables that states consider when choosing between binding and nonbinding agreements.⁶¹ Binding international agreements with cautiously negotiated commitments are less susceptible to states’ self-serving interpretation.⁶² Binding agreements raise the costs of noncompliance; cheating is easier and possibly more prevalent with nonbinding agreements.⁶³ Thus, binding agreements seem advantageous as “assurance devices” in situations where the potential for costly opportunism is high and cheating is difficult to detect.⁶⁴

59. Abbott & Snidal, *Hard and Soft Law*, *supra* note 39, at 423 (“[S]oft law offers many advantages of hard law, avoids some costs of hard law, and has certain advantages of its own”); *id.* at 456 (arguing that soft law is valuable on its own, and not just as a stepping stone to hard law).

60. Jan Klabbers, *The Undesirability of Soft Law*, 67 NORDIC J. INT’L LAW 381, 384 (1998).

61. Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT’L L. 581, 593–94 (2005).

62. Abbott & Snidal, *Hard and Soft Law*, *supra* note 39, at 426–27.

63. The costs of renegeing can manifest themselves both in the form of reputational costs or actual enforcement costs, for instance, in case of WTO dispute settlement. *See id.* at 427.

64. *Id.* at 429.

Binding agreements make sense in some contexts. For example, binding agreements are required as assurance devices most prominently in the national security domain, where any defection from cooperation would be particularly dangerous. Also, international trade matters are susceptible to opportunism. States seek enhanced market access for their exports but are at the same time tempted to renege on their own commitments to reciprocally open their domestic markets to foreign imports. These types of cooperation problems are characterized as Prisoner's Dilemmas where the central problem is the states' pervasive incentive to defect from any agreement they negotiate. In contrast, when the incentives to defect from the agreed commitments are low, a binding agreement with enforceable commitments is less valuable. This is the case in coordination games where the parties lack the incentives to deviate from the agreement once the focal point of coordination has been established.⁶⁵

I have elsewhere argued that the strategic situation underlying international antitrust cooperation resembles predominantly a coordination game with distributional consequences.⁶⁶ States would like to coordinate their antitrust policies but cannot agree on the optimal rules around which to converge.⁶⁷ For instance, while the United States would prefer all countries to enforce U.S.-style antitrust laws, the EU would rather see all countries enforce EU-style antitrust laws. This distributional conflict makes international antitrust cooperation difficult. However, if states were to agree on the optimal point of antitrust convergence, the agreement would be self-enforcing, as none of the states would have the incentive to deviate from the agreed rules.⁶⁸ This would render the enforcement

65. Raustiala, *Form and Substance*, *supra* note 66, at 592–94. See also Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 *YALE J. INT'L L.* 335, 358–62, 371–74 (1989). While the possibility of defection is not entirely absent in coordination situations, any surreptitious cheating at least is unlikely. See Lisa L. Martin, *The Rational State Choice of Multilateralism*, in *MULTILATERALISM MATTERS: THE THEORY AND PRACTICE OF AN INSTITUTIONAL FORM* 91, 102 (John Gerard Ruggie ed., 1993).

66. See generally Bradford, *supra* note 3.

67. The efforts to coordinate merger policies or cartel investigations among antitrust agencies, for instance, are unlikely to involve incentives to engage in noncooperative strategies and cheating. States can generally be expected to benefit from a more effective control of international cartels that adversely affect several markets. Similarly, harmonized merger control procedures enhancing legal certainty and reducing transaction costs and delays should generate aggregate and individual benefits that would only be undermined by choosing noncooperative strategies. For instance, neither the United States nor the EU would benefit from an inconsistent merger review decision between the two agencies, even though both states can be expected to want the other state to reach the same decision that they have reached. *Id.*, pp. 514–16.

68. However, China's first enforcement decisions under its newly adopted antimonopoly law offer some indication that antitrust review could be used as a vehicle for protectionism, possibly calling into question the characterization of international antitrust cooperation as a coordination game (as opposed to a Prisoner's Dilemma). China's

mechanism of any legally binding antitrust agreement less attractive, if not altogether unnecessary.⁶⁹

While deliberate cheating is likely to be rare in the antitrust domain, developing countries' capacity constraints, including a lack of enforcement institutions and antitrust expertise, might lead to occasional defections from international commitments. However, to the extent that states' defections can be traced to capacity constraints rather than to an intentional violation of the agreement, a binding agreement with enforcement provisions would be unlikely to bring about greater compliance. Capacity building in the form of technical assistance is likely to yield better results vis-à-vis developing countries whose inadequate regulatory capacities renders compliance with the contemplated agreement difficult. The "managerial model of compliance," which rests on transparency, capacity building, and persuasion, rather than on enforcement and sanctions,⁷⁰ seems therefore particularly suitable for ratcheting up antitrust standards in the developing countries.

Consequently, if the major obstacle to an international antitrust agreement is not the difficulty of ensuring compliance, but the difficulty of reaching an agreement in the first place due to the distributional problem, the enforcement benefits of binding agreements are limited. This is likely to cause states to prefer

decision to prohibit Coca Cola's proposed acquisition of the Chinese juice company Huyian, for instance, raised suspicions on the motivations behind China's antitrust policy. The possibility of China becoming a major antitrust force that repeatedly applies its antitrust laws strategically to block the market entry of foreign companies might underline the limits of voluntary cooperation. However, it is uncertain whether China's antitrust practices can revive the WTO antitrust negotiations. It is too soon to argue that China's early antitrust enforcement practices have fundamentally amended the strategic situation underlying international antitrust cooperation. It is also unclear whether China's enforcement patterns will prompt the United States and other states currently opposing WTO antitrust rules to change their minds on the benefits of such rules. Second, any WTO antitrust agreement aimed to constrain China's antitrust policies would require China's acquiescence on those new rules, complicating the negotiations.

69. Charles Lipson has argued that the distinction between enforceable and nonenforceable commitments is largely moot in international law, which lacks the enforcement mechanisms comparable to those embedded in domestic legal systems. Contrasting international and domestic enforcement structures does indeed highlight the weaknesses of the international legal system. However, this distinction is somewhat less pronounced with respect to areas of international trade law that are supported by the WTO dispute settlement mechanism. The dispute settlement mechanism provides for multilaterally authorized (yet bilaterally executed) retaliatory measures. Thus, the question of enforcement remains a relevant consideration when states choose between a binding WTO agreement on antitrust and, for instance, nonbinding ICN guidelines and recommendations. See discussion in Lipson, *Why Are Some International Agreements Informal?* 45 INT'L ORG. 495, 502-08, 513 (1991).

70. Abraham Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175, 197-204 (1993).

nonbinding agreements even in a situation where a binding agreement is assumed to be more feasible to attain.

2. A Binding Agreement Does Not Offer Political Economy Gains The choice between a binding and nonbinding international agreement is also informed by domestic political economy considerations.⁷¹ Binding agreements emerge in areas where domestic interest groups are active. Interest groups that favor international cooperation in a given issue area generally support binding agreements because of their perceived effectiveness.⁷² Binding agreements also offer the domestic constituency more opportunities to influence the content of the agreement, as their conclusion generally requires more domestic legislative involvement. In contrast, nonbinding cooperation mechanisms are common in the complex areas of “technocratic cooperation,” including antitrust, where domestic interest groups are less active.⁷³

There is no evidence that domestic interest groups, including consumers, corporations, or industry organizations, would deem an international antitrust agreement a priority.⁷⁴ Consumers, who would be expected to benefit from enhanced international antitrust enforcement, form a fragmented interest group with little agenda-setting capacity.⁷⁵ Corporations, on the other hand, have interests that are largely case- and issue-specific, rendering *ex ante* support for any comprehensive international antitrust agreement difficult. For example, a corporation will probably support international cooperation to ensure a smooth clearance of a merger in which it is participating, but may have contrary interests when its competitors are seeking to merge. Similarly, the corporation’s support for international cooperation in cartel matters is likely to hinge on whether agencies are seeking to prosecute a cartel in which the corporation itself, or its competitors, are participating.⁷⁶ Thus, corporations prefer to choose case-by-case the

71. Raustiala, *Form and Substance*, *supra* note 65, at 582.

72. *Id.* at 600.

73. *Id.*

74. See, e.g., ICC/BIAC *Comments on Report of the U.S. International Competition Policy Advisory Committee*, *supra* note 12, at 2, 6, 10. While the ICC and the BIAC support some degree of substantive and some procedural harmonization and convergence of domestic merger regimes, “ICC and BIAC agree that the WTO is not an appropriate forum for review of private restraints and that the WTO should not develop new competition laws under its framework at this time.”

75. International antitrust cooperation has not been a priority for consumer organizations either, which might be explained by the “technocratic” nature of antitrust law. See Raustiala, *Form and Substance*, *supra* note 65, at 600.

76. In general, while corporations tend to define their interests case-by-case, they are expected to support cooperation in the case of merger reviews, as this would reduce transaction costs and uncertainty. In contrast, corporations often resist rules that facilitate cooperation in cartel cases, out of fear of one day being the target of a cartel investigation. See ABA & INT’L BAR ASSOC., *A TAX ON MERGERS?: SURVEYING THE TIME AND COSTS TO*

issues and instances in which they want antitrust agencies to cooperate among themselves.

In the absence of coherent domestic interest group support, states are able to reap few political gains by pursuing a binding international antitrust agreement.⁷⁷ As a result, states prefer to focus on other regulatory priorities, leaving international antitrust cooperation to the domain of antitrust agencies.⁷⁸ This has caused international antitrust cooperation to be primarily an agency-driven regulatory process. Most antitrust agencies operate relatively independently from the executive and the legislature. Nonbinding international cooperation further strengthens their independence and expands their regulatory powers.⁷⁹ It is therefore not surprising that antitrust agencies have been the principal *norm entrepreneurs* behind the pursuit of international antitrust cooperation.⁸⁰ And as long as the demand for international antitrust cooperation continues to stem from the agencies rather than from domestic interests groups or the legislature, nonbinding cooperation is likely to persist.

3. Nonbinding Agreements Reduce the Gains Available from a Binding Agreement Today, a growing number of jurisdictions enforce increasingly

BUSINESS OF MULTI-JURISDICTIONAL MERGER REVIEWS 5 (June 2003) (noting that 56 percent of the businesses see scope for improving and harmonizing merger notification processes); see also ICC/BIAC *Comments on Report of the U.S. International Competition Policy Advisory Committee*, *supra* note 12, at 8.

77. The absence of interest group support is one reason countries have had difficulty negotiating a binding international antitrust agreement. By contrast, countries successfully concluded the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs”) largely as a result of intense lobbying by domestic corporations in the United States, the EU, and Japan. See Sylvia Ostry, *Convergence and Sovereignty: Policy Scope for Compromise?*, in *COPING WITH GLOBALIZATION* 52, 55–57 (Aseem Prakash & Jeffrey A. Hart eds., 2000); see also Bradford, *supra* note 3, at 547–48. (discussing why the prospects for formal cooperation in the case of the TRIPs and antitrust have been different).

78. “States” are in this connection understood as elected officials, including the legislature and the executive.

79. Antitrust enforcers rarely need to consult other government agencies or the legislature when pursuing nonbinding cooperation directly with their counterparts abroad. A nonbinding international regime that exclusively focuses on antitrust matters also empowers antitrust agencies vis-à-vis other government agencies. For example, a binding WTO antitrust agreement would shift powers from the Antitrust Division of the U.S. Department of Justice (DOJ) and the U.S. Federal Trade Commission (FTC) to the U.S. Trade Representative (USTR), whereas cooperation under the auspices of the ICN would allow antitrust agencies to retain all decision-making powers. This is probably one reason the USTR has endorsed incorporating antitrust in the WTO while the DOJ and FTC have opposed it. See Spencer Weber Waller, *National Laws and International Markets: Strategies of Cooperation and Harmonization in the Enforcement of Competition Law*, 18 *CARDOZO L. REV.* 1111, 1122–24 (1996).

80. The attempts to generate cooperation in any international forum—whether in the WTO, ICN, or OECD—have been predominantly driven by antitrust agencies.

consistent antitrust laws. Approximately one hundred states have domestic antitrust laws, all of which were enacted without any binding international obligation to do so.⁸¹ In addition to the rapid proliferation of new antitrust regimes, the existing antitrust laws are moving closer to one another.⁸² Antitrust norms and economic theories behind them have diffused rapidly across jurisdictions as countries have emulated more established antitrust regimes.⁸³

A large part of this predominantly voluntary adoption of antitrust rules and their increasing alignment may be attributed to the market-based diffusion of neo-liberal economic ideology and increasing domestic support for privatization and liberalization of trade and investment, even in developing countries and transition economies.⁸⁴ In addition, existing bilateral cooperation and nonbinding multilateral antitrust norms have accelerated this diffusion of antitrust norms across the globe, further contributing to international antitrust convergence.

While it is difficult to determine the extent to which existing convergence reflects nonbinding international rules on the one hand, and other motivations on the other, the very fact that convergence is taking place has two implications. First, increasing voluntary alignment of domestic antitrust laws ought to alleviate the distributional problem that has thus far undermined any efforts to negotiate a binding international antitrust agreement. Voluntary convergence is also likely to decrease the adjustment cost of cooperation. When domestic antitrust laws increasingly begin to resemble one another, commitments sought by a binding international agreement would not require states to undertake

81. See <http://www.globalcompetitionforum.org> (last visited May 24, 2010) (maintaining a list of existing antitrust laws across the world).

82. See, e.g., Fox, *supra* note 4, at 1787 (discussing cross-fertilization of antitrust laws, which has produced “increasingly high levels of common understanding”).

83. The existing international convergence has taken place largely around the U.S. or the EU antitrust regimes, resulting in two “clusters” of antitrust systems instead of a single *de facto* harmonized global antitrust regime. While the bipolar antitrust convergence is to some extent the result of a voluntary decision on the part of new antitrust regimes to emulate the two more developed regimes, the existing convergence also reflects a conscious effort by the United States and the EU to actively export their respective antitrust regimes abroad. On market-based harmonization that occurs when countries have an incentive to emulate more established regulatory regimes, see Beth A. Simmons, *The International Politics of Harmonization: The Case of Capital Market Regulation*, 55 INT’L ORG. 589 (2001).

84. For the most part, the creation of antitrust laws in developing countries does not appear to reflect an externally induced policy change. However, it is difficult to estimate the extent to which developing countries adopt antitrust laws out of self-interest and the extent to which they are pressured to conform to the preferences of the powerful antitrust regimes. See, e.g., SUSAN K. SELL, *POWER AND IDEAS: NORTH-SOUTH POLITICS OF INTELLECTUAL PROPERTY AND ANTITRUST* (1998) (characterizing developing countries’ decisions to implement antitrust laws as a “choice within constraints rather than coercion”).

substantial new commitments. This would decrease contracting costs and compliance costs alike, and increase the likelihood that even formal cooperation would gradually become net beneficial. The second implication is that the ongoing voluntary convergence is gradually eroding the benefits of binding cooperation. The voluntary alignment of domestic antitrust laws reduces negative externalities embedded in the current system, which decreases the need for binding international rules. In such circumstances, the added value from seeking to codify the status quo becomes questionable.

While it is difficult to predict whether the benefits or the costs of cooperation are likely to fall at a faster rate following voluntary convergence, it is likely that net benefits from cooperation are gradually shrinking. Existing voluntary cooperation focuses on issues where net benefits are the greatest and distributional tensions most manageable; any remaining binding agreement would be left to address a range of issues with lower prospective benefits. As the pursuit of a binding agreement must entail some level of fixed costs (in particular, contracting costs), a dwindling pool of available net benefits will likely reduce the incentive to pursue a binding agreement.

Accordingly, as long as (1) international antitrust cooperation continues to be largely self-enforcing and opportunistic behavior an exception, (2) domestic interest group support for international antitrust cooperation continues to be weak, and (3) nonbinding antitrust convergence continues to expand and show progress in mitigating negative externalities, states are likely to continue to rely on nonbinding agreements when pursuing antitrust cooperation. Nonbinding instruments may gradually develop toward binding antitrust commitments, but that is not inevitable. Nor is the move toward a binding international antitrust agreement necessarily a desirable one as long as the fundamental assumptions described above continue to hold.

CONCLUSION

This article has argued that the pursuit of nonbinding international antitrust cooperation represents an optimal choice for states. It is not merely an opportunity to capture limited gains from cooperation while proceeding towards a binding international agreement, as is commonly perceived.

States' conflicting preferences over the optimal content of international antitrust cooperation is the primary impediment for negotiating binding antitrust rules in the WTO. States have sought to accommodate their divergent preferences by removing controversial issues from the negotiation agenda. However, this has led to proposals for watered-down rules that would confer trivial benefits to WTO member states. Because states expect low net benefits from a prospective WTO antitrust agreement, states have abandoned the negotiations to seek case-by-case cooperation and voluntary international guidelines instead.

Nonbinding cooperation has successfully fostered international antitrust convergence. A growing number of states enforce increasingly consistent antitrust rules today without any binding international agreement requiring them to do so. Eventually, successful voluntary convergence could pave the way for binding cooperation. However, this article has argued that nonbinding agreements are likely to persist for three primary reasons. First, as cooperation under nonbinding agreements is largely self-enforcing, the added value of a binding agreement with provisions for monitoring, enforcement, and sanctions is trivial. Second, in the absence of coordinated domestic interest group support for international antitrust cooperation, a binding agreement would not provide states with any domestic political economy rents and therefore will remain a low national priority. Finally, the emerging voluntary convergence will slowly eradicate negative externalities stemming from decentralized antitrust regimes, making the case for a binding international agreement less compelling.

By arguing that nonbinding agreements are preferable to binding agreements, even in situations where binding agreements are feasible, this article disputes the view that nonbinding agreements are second-best instruments for fostering international antitrust convergence. States have not chosen nonbinding agreements because their first-best regime choice has been unavailable. Instead, states have viewed binding agreements as unnecessary and undesirable.

An optimal institutional design must be consistent with state interests to be effective. By acknowledging both the difficulties involved in the pursuit of binding international antitrust cooperation and the ability of nonbinding agreements to mitigate those difficulties, this article raises two critical questions. First, given the obstacles to international antitrust cooperation, how could a binding agreement emerge? And second, assuming that a binding agreement could emerge, what would it add to the existing nonbinding international antitrust regime? Until the proponents of a binding international antitrust agreement can answer those questions, nonbinding cooperation is, and will likely remain, the preferred solution.

