2012

Antitrust Law in Global Markets

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INTRODUCTION

Multilateral corporations' activities span across global markets. Yet antitrust laws regulating those activities remain national. Europeans can ban American companies from merging,[1] tell American companies how to design their products,[2] or determine what kind of discounts American companies are permitted to offer to their customers.[3] Chinese can impose conditions on off-shore mergers.[4] And Brazilians can insist on reviewing a transaction with minimal connections to the Brazilian market.[5]

As the global web of antitrust laws thickens, companies are forced to navigate an increasingly complex regulatory environment. The need to comply with multiple different domestic antitrust regimes exposes multinational corporations to additional transaction costs, delays, and uncertainty. Simultaneous application of many antitrust laws carries the risk of enforcement conflicts and is likely to lead to global overenforcement of antitrust laws. A lack of international antitrust regulation may also lead to antitrust protectionism if states underenforce their antitrust laws towards domestic corporations, while overenforcing those same laws towards foreign corporations.[6]

These concerns have sparked demands to move away from decentralized antitrust

* Thanks to Hanna Chung for outstanding research assistance.

1 See, e.g., Commission Decision 2004/134 of 3 July 2001, Case No. COMP/M.2220 – General Electric/Honeywell, [2004] O.J. L48/1 (hereinafter '*GE/Honeywell* Commission Decision').

2 See, e.g., Case T-204/04, Microsoft Corp. v. Comm'n, [2007] E.C.R. II-03601, paras 231–3 (requiring Microsoft to design their products to have greater interoperability with competitors); Press Release, *Antitrust: Commission Confirms Sending a Statement of Objections to Microsoft on the Tying of Internet Explorer to Windows*, 17 January 2009, available at http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/15.

3 See, e.g., Case T-457/08 R, Intel Corp. v. Comm'n, Order of the President of the Court of First Instance; Press Release, *Antitrust: Commission Imposes Fine of €1.06 Billion on Intel for Abuse of Dominant Position; Orders Intel to Cease Illegal Practices*, 13 May 2009, available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/745&format=HTML&aged=0&language=EN&guiLanguage=en (finding that Intel offered rebates to computer manufacturers in return for purchasing Intel CPUs exclusively).

4 *Coca-Cola Purchase of Huiyuan Fails to Pass Antimonopoly Review*, Xinhua News, 13 March 2009, available at http://news.xinhuanet.com/english/2009-03/19/content_11036911.htm.

5 See International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust, *Final Report* 103 (2000), available at www.usdoj.gov/atr/icpac/finalreport.htm (hereinafter 'ICPAC Report').

6 Frederic M. Scherer, Competition Policies for an Integrated World Economy 15–16 (Brookings, 1994); Henrik Horn and James Levinsohn, *Merger Policies and Trade Liberalization*, 111 Econ. J. Royal Econ. Soc. 244 (2001).

enforcement in favor of an international antitrust regime.[7] However, no overarching international antitrust regime has been established. Instead, states seek to mitigate the negative externalities embedded in decentralized antitrust enforcement largely through bilateral cooperation and voluntary multilateral norms.

This chapter describes the key issues underlying international antitrust law.[8] Section I reviews the recent proliferation of antitrust laws around the world, explaining why states adopt antitrust laws and why such laws may differ across jurisdictions. Section II discusses the most important problems embedded in the current system of multijurisdictional antitrust enforcement, focusing on increased transaction costs and uncertainties, enforcement conflicts, antitrust protectionism, and global overenforcement of antitrust laws. Section III discusses efforts to mitigate these problems through international cooperation. After reviewing the current state of antitrust cooperation, it examines why, despite the well-accepted inefficiencies embedded in the current system, no global antitrust regime exists. The final section offers suggestions for the direction of future scholarship in the field.

I PROLIFERATION OF ANTITRUST LAWS

Over the last two decades, the number of antitrust jurisdictions has increased dramatically. Today, over 100 countries have adopted domestic antitrust laws.[9] In 1989, 100 years after the first antitrust law was enacted in Canada, followed by the adoption of the Sherman Act in the United States one year later,[10] only 39 countries had antitrust laws.[11]

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7 See, e.g., Andrew Guzman, *The Case for International Antitrust*, in Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy 99, 108–10, 117–20 (Richard A. Epstein and Michael S. Greve eds., AEI, 2004); Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. Rev. 1781, 1805–6 (2000); Philip Marsden, Competition Policy for the WTO chs. 4–5 (Cameron May, 2003) (describing proposals made by the EU and others for greater international cooperation and harmonization, but generally taking a critical stance toward them); WTO Competition Working Group, *Communication by the European Community and its Member States*, WT/WGTCP/W/62, 12–13 (5 March 1998), available at http://docsonline.wto.org/gen_search.asp?language=1; International Antitrust Working Group, Draft International Antitrust Code, 5 World Trade Materials 126, 129–31 (September 1993); Ernst-Ulrich Petersmann, *Competition-Oriented Reforms of the WTO World Trade System: Proposals and Trade Options*, in Towards WTO Competition Rules 43, 48–9 (Roger Zäch and Carlos M. Correa eds, 1999); Robert D. Anderson and Peter Holmes, *Competition Policy and the Future of the Multilateral Trading System*, 5 J. Int'l Econ. L. 531, § IV (2002).

8 The concept of 'international antitrust law' can be misleading in the sense that there are no supranational antitrust rules or international enforcement mechanism; instead, international antitrust law refers to ways states seek to regulate cross-border business activity through their domestic antitrust laws.

9 See Keith Hylton and Fei Deng, *Antitrust Around the World: An Empirical Analysis of the Scope of Competition Laws and their Effects*, 74 Antitrust L.J. 271, 272 (2007); David S. Evans, *Trustbusting Goes Global*, in Trustbusters: Competition Policy Authorities Speak Out 7 (David S. Evans and Frédéric Jenny eds, Competition Policy International, 2009).

10 Michael Bliss, *Another Anti-Trust Tradition: Canadian Anti-Combines Policy, 1889–1910*, 47 Bus. Hist. Rev. 177 (1973).

11 Evans, *supra* note 9, at 9, 11.

The 1991 collapse of the Soviet Union became a watershed moment for the adoption of antitrust laws. After the fall of the Berlin Wall, former communist countries began to embrace free markets, adopting domestic antitrust laws in the process.[12] The implementation of antitrust laws by Eastern European countries coincided with the awakening of the 'Asian tigers' to the ability of free markets and competition to stimulate economic growth. Following these developments, almost all developed countries (94%) and almost half of all emerging and developing countries in the world (47%) have now enacted domestic antitrust laws.[13]

A Why States Adopt Antitrust Laws

Motivations for adopting domestic antitrust rules vary. Some countries adopt antitrust laws because they believe that such laws increase their domestic welfare. Antitrust laws foster strong domestic competition, which also tends to increase the competitiveness of these same domestic firms in global markets.[14] Domestic antitrust regimes can also instill a sense of confidence in a country's regulatory environment, which helps the country attract more international investment.[15]

At times, countries adopt antitrust statutes in response to a change in the country's economic philosophy. Many developing countries in Latin America and Asia, for instance, discovered first-hand the harmfulness of import substitution, negative effects of price controls, and inefficiencies of state-owned enterprises. These experiences led them to pursue market-oriented policies, including enacting antitrust regimes to foster efficiency and stimulate competition.[16] Similarly, several former Soviet satellites wanted to distance themselves from the state-driven economic policies by voluntarily embracing laws that dismantled state monopolies and established economies with competitive pressures.[17] International institutions, including the World Bank, the IMF, and the OECD, have enthusiastically supported these endeavors. They have endorsed antitrust policies as drivers of economic development and offered technical assistance to support emerging economies' efforts to establish antitrust regimes.[18]

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[12] *Id.* at 9–10.

[13] *Id.* at 11.

[14] Fox, *supra* note 7, at 1784; MICHAEL E. PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS 636 (Simon & Schuster, 2d ed. 1998) (arguing that domestic competition improves corporations' ability to compete in the global market, rather than encumbering it).

[15] Fox, *supra* note 7, at 1784.

[16] See Clive S. Gray and Anthony A. Davis, *Competition Policy in Developing Countries Pursuing Structural Adjustment*, 38 ANTITRUST BULL. 425, 430–31 (1993); Evans, *supra* note 9, at 11–12.

[17] Fox, *supra* note 7, at 1784–5. See Evans, *supra* note 9, at 9, 12.

[18] Evans, *supra* note 9, at 11; Jean-François Pons, Deputy Director General of Competition for the European Commission, *Is it Time for an International Agreement on Antitrust?* 12, available at http://ec.europa.eu/competition/speeches/text/sp2002_027_en.pdf (envisioning that the International Competition Network (ICN) will cooperate with the WTO, UNCTAD, and the OECD who are already established in the field); Merit E. Janow, *Developing a Competition Policy: A Role for WTO*, 13 CONSUMER POL'Y REV. 17, 21 (2003) (noting that the OECD has supported technical assistance and capacity building in the past); William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 BROOK. J. INT'L L. 403,

Other countries adopt antitrust laws more reluctantly, in response to international pressure or inducement to secure other benefits, including trade deals. International institutions' approach to lending support, for instance, has ranged from persuasion and assistance to imposing the requirement to adopt antitrust laws as a condition for loans and other funding. Indonesia and Zambia, for instance, adopted antitrust laws as part of structural adjustment programs that were financed by the IMF and the World Bank.[19] Several countries have adopted antitrust laws in response to their trading partners' demands to do so. For instance, Guatemala, Singapore, and Jordan enacted antitrust laws as a condition for securing a free trade agreement with the United States.[20] The EU employs the strategy of trade conditionality even more frequently and effectively. Aspiring Member States or states seeking trade agreements with the EU have to adopt antitrust laws as a condition for the trade agreement or in preparation for their membership.[21]

Some countries choose not to adopt antitrust laws. The reasons vary, but given that countries without antitrust laws are predominantly the least developed economies, an obvious reason is that antitrust enforcement is costly.[22] Adopting and enforcing antitrust laws requires institutional capacity, technical expertise, and economic resources that these countries lack. Even if an economic argument can be made that competitive markets support developing countries' quest for economic growth and higher levels of development,[23] antitrust laws may not be a regulatory priority given the limited

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407 (1997–1998) (observing that the support of advisory bodies and multinational donors such as the World Bank, the OECD, and UNCTAD have played an active role in shaping developing countries' newly adopted laws).

[19] Janow, *supra* note 18, at 18 and n.15 (reporting that the World Bank/IMF conditioned Indonesia's aid to the establishment of a domestic competition law); UNCTAD, *Report of the Third United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices* para. 63, U.N. Doc. TD/RBP/CONF.4/15 (1996), available at http://daccessdds.un.org/doc/UNDOC/GEN/G96/511/11/PDF/G9651111.pdf (reporting that Zambia had enacted a statute establishing a Competition Commission as a part of its World Bank-financed 'structural adjustment programme'); Eleanor M. Fox, *Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia*, 41 Harv. Int'l L.J. 579, 589 (2000).

[20] Evans, *supra* note 9, at 5.

[21] Evans, *supra* note 9, at 10, 12 (noting that countries such as Finland and Sweden enacted competition laws in order to join the European Union); see Mark R.A. Palim, *The Worldwide Growth of Competition Law: An Empirical Analysis*, 43 Antitrust Bull. 105, 120, 121 n.51 (1998) (noting that many current members of the European Community, such as the Czech Republic, Hungary, Slovak Republic, and Poland, adopted competition policies as a part of trade agreements before they were members).

[22] See Fox, *supra* note 7, at 1794.

[23] Porter, *supra* note 14, at 636; Eleanor M. Fox, *Economic Development, Poverty and Antitrust: The Other Path*, 13 Sw. J.L. and Trade Am. 211, 212–13 (2006–2007) (suggesting that, although developing nations stand to gain economic benefits from adopting antitrust laws, one should not expect the antitrust law of those nations to be identical to the law of developed nations, since developing nations have other pressing priorities, such as poverty); Peter A.G. van Bergeijk, *What Could Anti-Trust in the OECD Do for Development?*, para. 3 (Institute of Social Studies Working Paper No. 473, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1331830 (summarizing empirical studies documenting the costs that anticompetitive behavior imposes on developing nations).

government resources and the number of challenges these countries face.[24] Also, developed countries with small, open markets may conclude that antitrust laws would only yield marginal gains for them. Exposure to foreign competition may be sufficient to make domestic markets competitive.[25] This is a reason why Singapore and Hong Kong have taken such a long time to consider antitrust laws in earnest.[26]

B The Global Reach of Local Antitrust Laws

Given that over 100 countries have antitrust laws, a critical question is to determine which laws apply to which international business activity. The jurisdictional reach of domestic antitrust laws is often determined according to an 'effects doctrine'. This doctrine entails that a state can apply its antitrust laws to any anticompetitive conduct that has an effect on its domestic market.[27] No state can exercise exclusive jurisdiction in antitrust matters.[28] Thus, if a multinational corporation operates in several markets, it is likely to be subject to multiple antitrust laws simultaneously.

The United States and the EU have frequently resorted to extra-territorial enforcement of their antitrust laws.[29] The early antitrust jurisprudence in the United States denied the principle of extra-territoriality. In the *American Banana* case, the US Supreme Court held that US antitrust laws only extend to acts that take place within the United States' borders.[30] Gradually, however, the Supreme Court moved away from the territoriality

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[24] Editorial, *The Real Lesson of the Cancun Failure*, FINANCIAL TIMES (London), 23 September 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').

[25] Fox, *supra* note 7, at 1794.

[26] As of date, Hong Kong has yet to enact an antitrust law. See Grace Li and Angus Young, *Competition Laws and Policies in China and Hong Kong: A Tale of Two Regulatory Journeys*, 7 J. INT'L TRADE L. AND POL'Y 186 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1421792 (manuscript at 15). Singapore did not enact its Competition Act until 2004. Thomas K. Cheng, *A Tale of Two Competition Law Regimes*: *The Telecom-Sector Competition Regulation in Hong Kong and Singapore*, 30 WORLD COMPET. 501, 502 (2007).

[27] See Wolfgang Kerber, *The Theory of Regulatory Competition and Competition Law*, in ECONOMIC LAW AS AN ECONOMIC GOOD: ITS RULE FUNCTION IN THE COMPETITION OF SYSTEMS 38 (Karl Meessen ed., 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1392163; Wolfgang Kerber and Oliver Budzinski, *Competition of Competition Laws: Mission Impossible?*, in COMPETITION LAWS IN CONFLICT, *supra* note 7, at 45; Fox, *supra* note 7, at 1789.

[28] In this respect, antitrust differs from areas such as corporate law, where the internal affairs of the corporation are regulated exclusively by the laws of the state where the corporation was established. This creates a very different dynamic and incentives for regulatory competition.

[29] The United States and the European Union apply their antitrust laws to the conduct of foreign corporations as long the conduct has had an 'effect' on their domestic market. See, e.g., United States v. Alcoa, 148 F.2d 416, 444 (2d Cir. 1945); Case T-102/96, Gencor Ltd v. Comm'n, [1999] E.C.R. II-00753, paras. 92, 96 (CFI); Federal Trade Antitrust Improvements Act of 1982 (FTAIA), 96 Stat. 1246, 15 U.S.C. § 6a (1982). See, e.g., Damien Geradin, Marc Reysen, and David Henry, *Extraterritoriality, Comity and Cooperation in EC Competition Law* 4–7 (July 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1175003; Eleanor M. Fox, *National Law, Global Markets, and Hartford: Eyes Wide Shut*, 68 ANTITRUST L.J. 73, §§ IV–V (2000).

[30] Am. Banana Co. v. United Fruit Co., 213 US 347, 356, 359 (1909); Andrew T. Guzman, *International Competition Law*, in RESEARCH HANDBOOK IN INTERNATIONAL ECONOMIC LAW 419 (Andrew T. Guzman and Alan O. Sykes eds., Edward Elgar, 2007).

principle and focused on the effects of foreign conduct on the domestic market.[31] The landmark case of extra-territoriality in the United States was the *Hartford Fire* case, where the Supreme Court affirmed that 'the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States'. The Court held that considerations of international comity do not prevent US courts from attaching jurisdiction in cases where there is no true conflict between US and foreign law.[32] Most recently, the Supreme Court revisited the question of extra-territorial application of antitrust laws in the *Empagran* case. Invoking the principle of international comity, it limited the extra-territorial reach of the Sherman Act by holding that the Act did not extend to cases where a foreign plaintiff suffers an injury that is independent of any domestic harm.[33]

Notwithstanding its historically more cautious stand towards antitrust extra-territoriality, the EU today is prepared to extend its antitrust jurisdiction to foreign conduct.[34] The European Court of Justice re-affirmed the extra-territorial application of European antitrust laws in the *Wood Pulp* case.[35] The Commission has also exercised jurisdiction over mergers involving foreign companies whenever merging parties have exceeded the EU's revenue-based thresholds for notification.[36] However, many other

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[31] See United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945) ('it is settled law – as "Limited" itself agrees – that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize'). Although this is a Second Circuit case, it has the binding effect of a Supreme Court case because the Court lacked quorum and had to refer the case. See *id.* at 416. The *Alcoa* case held that the Sherman Act extends to foreign conduct if such conduct 'were intended to affect imports and did affect them'. *Id.* at 444. But see Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n, 549 F.2d 597, 611–12 (9th Cir. 1976) (softening the *Alcoa* effects test with a requirement that courts must weigh the interests of foreign states); Hartford Fire Ins. Co. v. California, 509 U.S. 764, 797 (1993) (acknowledging that comity considerations may apply, but only where there is a 'true conflict').

[32] Implicitly, the Court also re-affirmed the simultaneous applicability of multiple antitrust laws, and the requirement that an individual must comply with all those laws absent true conflict. True conflict exists only when one jurisdiction requires (as opposed to permits) a conduct that is prohibited by another jurisdiction. In most cases, a company can therefore ensure its compliance with multiple antitrust laws by simply conforming to the strictest jurisdiction. This phenomenon of 'strictest regime wins' is discussed *infra*.

[33] F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004); see also Ronald W. Davis, *Empagran and International Cartels: A Comity of Errors*, 19 Antitrust 58, 61 (2004); Victor P. Goldberg, *The Empagran Exception: Between Illinois Brick and a Hard Place* 11 (Center for Law and Economic Studies at the Columbia University School of Law Working Paper No. 345, 2009); Alvin K. Klevorick and Alan O. Sykes, *United States Courts and the Optimal Deterrence of International Cartels: A Welfarist Perspective on Empagran*, 3 J. Competit. L. and Econ. 309 (2007).

[34] Geradin *et al.*, *supra* note 29, at 4.

[35] Cases 89/85, 114/85, 116–117/85, 125–129/85, A. Ahlström Osakeyhtiö v. Comm'n (Wood Pulp), [1993] E.C.R. I-1307, para. 62; Case 48/69, Imperial Chem. Ind. v. Comm'n (Dyestuffs), [1972] E.C.R. 619, paras 125–42.

[36] Guzman, *supra* note 30, at 423. See, e.g., Commission Decision 97/26/EC, Case IV/M.619 (Gencor/Lonrho), [1997] O.J. L 11/30 para. 219; Commission Decision of 30 July 1997, Case IV/M.877 (Boeing/McDonnell Douglas), [1997] O.J. L 336/16 paras 8, 124; *GE/Honeywell*

jurisdictions beyond the United States and the EU have recognized the legitimacy of applying antitrust laws to the conduct of foreign firms as long as some anticompetitive effect is felt on the domestic market of that country.[37] China's recent decision to exert jurisdiction over Coca-Cola during its attempted acquisition of Chinese juice company Huiyuan offers an example of this.[38] India, departing from its previous practice of denying extra-territorial application of its antitrust laws, has also revised its antitrust laws to embrace the effects doctrine.[39]

C Why Antitrust Laws Differ Across Jurisdictions

In principle, all states could enforce the same antitrust laws. The basic economic theory informing antitrust enforcement applies regardless of the particular market or the specific situation.[40] Most states' antitrust laws also purport to promote the same goal: consumer welfare. Yet, a closer look at the laws and their enforcement reveals remarkable differences across the jurisdictions.

Substantive laws may often appear similar, given that most antitrust jurisdictions have chosen to adopt either US- or EU-style antitrust laws.[41] However, many states, while sharing the fundamental policy goal of consumer welfare, seek to pursue a wider set of objectives through their antitrust laws. These may include the advancement of public interest or 'fair' competition, the protection of small- and medium-sized enterprises, employment, or more equitable distribution of ownership.[42] Even where the substantive

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Commission Decision, para. 567. For all of these decisions, the legal basis of the decision came from EC Merger Regulation. Council Regulation 139/2004 of 20 January 2004, [2004] O.J. L24, art. 8(3).

37 See Restatement (Third) of Foreign Relations Law of the United States § 415 reporters' note 9 (1987).

38 See Sundeep Tucker and Jamil Anderlini, *China's Block on Coke Bid Raises Alarm Over M&A*, Financial Times, 19 March, 2009, at 16; Zhou Xin and Michael Wei, *China's Statement on Rejecting Coke's Huiyuan Bid*, Reuters, 18 March 2009 (quoting a translation of the Chinese Ministry of Commerce's decision to reject Coca-Cola's bid for Huiyuan).

39 See Aditya Bhattacharjea, *India's New Competition Law: A Comparative Assessment*, 4 J. Compet. L. and Econ. 609, 624, 627 (2008) (noting that the 1969 Monopolies and Restrictive Trade Practices Act was interpreted not to have extra-territorial application, but that the new Competition Act of 2002 will apply to any practices that have 'an anticompetitive *effect* in India'); Rahul Singh, *Shifting Paradigms, Changing Contexts: Need for a New Competition Law in India*, 8 J. Corp. L. Stud. 143, 153 (2008); S. Chakravarthy, *Competition Act, 2002: The Approach*, in A Functional Competition Policy for India para. 3.10 (Pradeep S. Mehta ed., 2006).

40 Evans, *supra* note 9, at 8.

41 See Fox, *supra* note 7, at 1799 (suggesting that the EU and the United States are locked in a competition to export their competition laws and become the dominant antitrust model for the world).

42 See Dina I. Waked, *Competition Law in the Developing World: The Why and How of Adoption and Its Implications for International Competition Law*, 1 Global Antitrust Rev. 69, 82 (2008) (noting that South Africa, for example, has a broader range of competition law objectives, including 'the promotion of a more equitable spread of ownership' and 'the interests of workers'); Michael J. Trebilcock and Edward M. Iacobucci, *National Treatment and Extraterritoriality: Defining the Domains of Trade and Antitrust Policy*, in Competition Laws in Conflict, *supra* note 7, at 167 (explaining that Canada may consider producer welfare in addition to consumer welfare); Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 Am. J. Int'l L. 1, 4–5 (1997) (suggesting

rules are similar, the actual enforcement (or, at times, nonenforcement) of those laws can lead to different outcomes in practice. Also, remedial options differ from one country to another: some countries choose to criminalize anticompetitive conduct; others prefer resorting to administrative fines and injunctive relief.[43]

Scholars have examined sources for divergence in states' antitrust laws. Some suggest that the size and openness of the economy determine the type of antitrust law that is optimal for a country.[44] Also, market structures and prevailing conditions for cooperation differ, at times calling for dissimilar antitrust laws. This may be a result of the country's history of state-owned businesses, or a reflection of the government's adherence to a different economic ideology.[45] Antitrust laws are also likely to reflect the level of economic development in the country.[46] Countries with abundant resources, well-established institutions, and technical expertise are more likely to be able to afford sophisticated antitrust regimes. Finally, the domestic political economy is dissimilar across the countries. The prospect of political rents leads the government to pursue different antitrust policies, depending on the relative influence of various interest groups in any given country.[47]

The need to explain the differences among countries' antitrust laws has give rise to a 'comparative antitrust law' scholarship. Comparative analysis of antitrust laws has thus far focused on US and EU antitrust enforcement.[48] Einer Elhauge and Damien Geradin's textbook, *Global Antitrust Law and Economics*, provides the most comprehensive comparative discussion of these two jurisdictions.[49] After discussing the similarities and the differences across the entire field of antitrust and merger control, they confirm that

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that the EU has a 'fuller [antitrust] agenda' that involves social policies); Nathan Bush, *The PRC Antimonopoly Law: Unanswered Questions and Challenges Ahead*, 7 Antitrust Source 1, 2 (2007), available at www.abanet.org/antitrust/at-source/07/10/Oct07-Bush10-18f.pdf (noting that the priorities of Chinese Anti-Monopoly Law are ambiguous because art. 1 lists so many: efficiency, consumer interests, fair market competition, the public interest, and the healthy development of the socialist market economy); Bhattacharjea, *supra* note 39, at 624, 627 (observing that public interest has been a consideration in past Indian competition cases, and noting that the clause in the new Competition Act 'keeping in view the economic development of the country' provides a potentially dangerous loophole).

43 Diane P. Wood, *Cooperation and Convergence in International Antitrust*, in Competition Laws in Conflict, *supra* note 7, at 183. *Cf. infra* notes 56–62 and accompanying text.

44 Wood, *supra* note 43, at 181–2; Michal S. Gal, *Size Does Matter: The Effects of Market Size on Optimal Competition Policy*, 74 S. Cal. L. Rev. 1437, 1441, 1450–67 (2001); see Fox, *supra* note 7, at 1794.

45 See Evans, *supra* note 9, at 8 (surmising that it is not unreasonable to treat firms with different historical and economic circumstances differently).

46 See discussion *infra*.

47 Anu Bradford, *International Antitrust Negotiations and the False Hope of the WTO*, 48 Harv. Int'l L.J. 383, 392 (2007).

48 See generally Handbook of Research in Trans-Atlantic Antitrust (Philip Marsden ed., Edward Elgar, 2006); Alberto Pera, *Changing Views of Competition, Economic Analysis and EC Antitrust Law*, 4 Eur. Competit. J. 127, 150–59 (2008); Eleanor M. Fox, The Competition Law of the European Union in Comparative Perspective: Cases and Materials (West, 2009); Alan J. Devlin, *Exploring the Source of Transatlantic Antitrust Divergence* 25 (bepress Legal Series Working Paper No. 1108, 2006), available at http://law.bepress.com/expresso/eps/1108/.

49 Einer R. Elhauge and Damien Geradin, Global Antitrust Law and Economics (Thomson West, 2007).

increasing convergence is taking place between the two key antitrust jurisdictions.[50] Both the United States and the EU seek to maximize consumer welfare as the primary goal of antitrust enforcement.[51] The EU is also increasingly embracing the economic analysis of antitrust law, adopting analytical tools closer to those employed by the US courts and antitrust agencies.[52] The antitrust doctrine is also similar, in particular with respect to collusive behavior or horizontal mergers.[53]

Still, some important differences remain. The EU employs its antitrust laws to further the creation of a common European market. This way, it ensures that the anticompetitive practices of private enterprise do not re-erect trade barriers within the common market.[54] The EU also intervenes more frequently, believing less in the ability of the markets to

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50 *Id.* at 1100.

51 Neelie Kroes, European Commissioner for Competition, Review of Insurance Block Exemption Regulation, Keynote Speech at the Insurance Block Exemption Regulation Conference, 2 June 2009, available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/278&format=HTML&aged=0&language=EN&guiLanguage=en (declaring that improving consumer welfare is the most important goal of the Commission); Mario Monti, European Commissioner for Competition, A Reformed Competition Policy: Achievements and Challenges for the Future, Speech before the Center for European Reform, 28 October 2004, available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/04/477&format=HTML&aged=1&language=EN&guiLanguage=en (declaring that 'consumer interest' has been confirmed as the main goal of competition policy). See Pera, *supra* note 48, at 127, 140–41 (observing that the more 'objective' economics-based analytical approach looking at consumer welfare has increasingly gained support, both in the United States and the EU); Devlin, *supra* note 48, at 11. However, the EU has goals other than maximizing consumer welfare; it also seeks to develop and maintain a single, integrated market. See Devlin, *supra* note 48, at 25.

52 See, e.g., Monti, *supra* note 51 (acknowledging that the trend in competition policy is to ground decisions in sound microeconomic reasoning, and making commitments toward that end); Makan Delrahim, Deputy Assistant Attorney General, Antitrust Division of the US Department of Justice, The Long and Winding Road: Convergence in the Application of Antitrust to Intellectual Property, Remarks at the George Mason Law Review Symposium, 6 October 2004, available at www.usdoj.gov/atr/public/speeches/205712.htm (speaking on 'reaching consensus on antitrust enforcement strategies that are grounded in sound economic theory' as a central goal of convergence and noting the progress that has been made between the United States and the EU); William J. Kolasky, Deputy Assistant Attorney General, Antitrust Division of the US Department of Justice, Global Competition: Prospects for Convergence and Cooperation, Remarks before the American Bar Association Fall Forum, 7 November 2002, available at www.usdoj.gov/atr/public/speeches/200446.htm (claiming that the EU and the United States have made 'substantial progress' toward convergence and noting favorably Commissioner Mario Monti's plan to hire a new chief economist as a step which will bring 'more rigorous economic analysis' to EU decision-making). See also Roger Van den Bergh, *The Difficult Reception of Economic Analysis in European Competition Law*, in POST-CHICAGO DEVELOPMENTS IN ANTITRUST LAW 34 (Antonio Cucinotta, Roberto Pardolesi, and Roger Van den Bergh eds, Edward Elgar, 2002); Pera, *supra* note 48, at 140–41; Devlin, *supra* note 48, at 38, 40.

53 For a standard book on European antitrust doctrine, see generally BELLAMY AND CHILD: EUROPEAN COMMUNITY LAW OF COMPETITION (Peter Roth and Vivien Rose eds, Oxford, 6th ed. 2007); RICHARD WHISH, COMPETITION LAW (Oxford, 6th ed. 2008).

54 See European Commission, *XXIXth Report on Competition Policy 1999*, 19 (2000) (explaining that the two principal objectives of EU competition law are the maintenance of competitive markets and the development of a single market). Also, social considerations such as promotion of employment or protection of small enterprises still play a role at the margins of the EU antitrust analysis. See Fox, *supra* note 42, at 4 n.17, 12.

self-correct.[55] As such, the EU is likely to err on the side of making 'false positive' decisions, whereas the United States is likely to err on the side of 'false negatives', fearing incorrect intervention. These transatlantic divergences are most notable in the regulation of unilateral conduct by dominant companies.[56] The EU is more likely to bring cases against dominant companies than to rely on the market.[57] Another key area of divergence is in the treatment of vertical restraints. Because the EU uses antitrust laws as a tool to facilitate a common market in Europe,[58] the EU is particularly hostile towards territorial restraints that threaten to partition the common market.[59] Finally, the *GE/Honeywell* case exposed critical transatlantic differences towards vertical and conglomerate mergers.[60]

While the substantive scope of antitrust in the EU appears to be wider than in the United States, it is not clear that corporations incur higher financial costs for complying with the EU's antitrust laws.[61] Assume that the narrower scope of US antitrust laws, together with the fear of 'false positive' decisions, causes the US antitrust agencies to underenforce their antitrust laws. Assume also that the more extensive scope of antitrust laws, together with the fear of 'false negative' decisions, causes the EU antitrust authori-

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55 Gunnar Niels and Adriaan ten Kate, *Introduction: Antitrust in the U.S. and the EU – Converging or Diverging Paths?*, 49 Antitrust Bull. 1, 15 (2004). See Nuno Garoupa and Thomas S. Ulen, *The Market for Legal Innovation: Law and Economics in Europe and the United States*, 59 Ala. L. Rev. 1555, 1579 (2008) (noting that those in the antitrust field in the United States have been far more receptive to free-market classical liberalism than those in the EU); Andreas Kirsch and William Weesner, *Can Antitrust Law Control E-Commerce? A Comparative Analysis in Light of U.S. and E.U. Antitrust Law*, 12 U.C. Davis J. Int'l L. and Poly. 297, 308 (2006).

56 See Elhauge and Geradin, *supra* note 49, at 255; see also *id.* at 1100 (listing the main differences between the United States and the EU). The United States and the EU differ on whether excessive pricing by dominant companies should be considered anticompetitive; whether above-cost predatory pricing should be banned; whether a below-cost predatory pricing claim requires the showing of recoupment of predatory losses; when a dominant company has a duty to deal; and, finally, under which circumstances loyalty- and volume-based discounts should be allowed.

57 The European Commission's recent decisions against Microsoft and Intel are illustrative of this. See generally Commission Decision 2004/900 of 24 March 2004, Case No. COMP/C-3/37.792 – Microsoft, [2003] O.J. L1; Commission Decision of 13 May 2009, Case No. COMP/37.990 – Intel (not yet published).

58 *XXIXth Report on Competition Policy 1999*, *supra* note 54, at 19.

59 *Id.*

60 Eleanor M. Fox, *GE/Honeywell: The U.S. Merger that Europe Stopped – A Story of the Politics of Convergence*, in Antitrust Stories 343–7 (Eleanor M. Fox and Daniel A. Crane eds., Foundation, 2007) (describing the fallout between the US Department of Justice and the EU Commission shortly after the GE/Honeywell merger had been shot down). However, developments since the *GE/Honeywell* case suggest that the differences raised in *GE/Honeywell* may not be as extreme as originally supposed. See *id.* at 353–5, 358–60 (arguing that EU rhetoric has largely converged to be compatible with the US school of thought, and suggesting that the *GE/Honeywell* decision might be an outlier in the long run); Case C-12/03 P, Comm'n v. Tetra Laval, [2005] E.C.R. I-1113 (involving another conglomerate merger, but resulting in annulment). For a recent attempt to clarify the European Union's stance on conglomerate mergers, see Commission Guidelines 2008/C 265/07, Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings, [2008] O.J. C265 6 (EC).

61 David S. Evans, *Why Different Jurisdictions Do Not (and Should Not) Adopt the Same Antitrust Rules* 8–9 (16 February 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1342797.

ties to overenforce their antitrust laws. Despite these differences, critical procedural differences in the two antitrust jurisdictions may offset any assumed underenforcement in the United States and overenforcement in the EU. European antitrust law is enforced by the European Commission and national competition authorities of the EU Member States. Private plaintiffs have thus far had a limited, almost nonexistent,[62] right to sue corporations for their antitrust violations in European courts.[63] In contrast, private plaintiffs bring 95% of the federal antitrust cases in the United States.[64] The volume of antitrust litigation is therefore much higher in the United States.[65] Antitrust remedies differ as well: US agencies and courts employ more aggressive remedies, including imprisonment and treble damages, for antitrust violations.[66] These tools are not available for the European Commission and European courts.[67] Consequently, despite the differences in substantive antitrust laws, the US and the EU antitrust laws may deter anticompetitive behavior at similar levels, given the offsetting effects of the procedural and remedial choices made.

Another focus of comparative antitrust law scholarship has been developing countries. A debate has emerged as to assess whether developing countries should adopt different types of antitrust laws because of their developmental needs. Some argue that antitrust laws that are optimal for developing countries are different from those that are optimal for developed countries.[68] Because of their less efficient production, developing countries

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62 *Id.* at 8 n.23 (reporting that there have been 12 successful actions and 12 unsuccessful actions in the European Union).

63 See Commission *White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2008)165 final*, 2–3 (2 April 2008), available at http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf (explaining that the 'right of victims to compensation' is guaranteed under Community law, but that in practice private victims rarely obtain reparation). However, the EU plans to expand the role of private litigation in enforcing its competition rules. See *id.* See also Mario Monti, European Commissioner for Competition Matters, Private Litigation as a Key Complement to Public Enforcement of Competition Rules and the First Conclusions on the Implementation of the New Merger Regulation, Speech before the International Bar Association 8th Annual Competition Conference, 17 September 2004, available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/04/403&format=PDF&aged=1&language=EN&guiLanguage=en. A few scholars have weighed in on the role of private litigation in EU antitrust enforcement. See, e.g., Wouter P.J. Wils, *The Relationship Between Public Antitrust Enforcement and Private Actions for Damages*, 32 World Compet. (2009); Christopher Cook, *Private Enforcement of EU Competition Law in Member State Courts: Experience to Date and the Path Ahead*, 4 Compet. Pol'y Int'l 3 (2008); Vincent Smith, *Will Europe Provide Effective Redress for Cartel Victims?*, 4 Compet. Pol'y Int'l 65 (2008); Assimakis P. Komninos, *The Road to the Commission's White Paper for Damages Actions: Where We Came From*, 4 Compet. Pol'y Int'l 81 (2008); Renato Nazzini and Ali Nikpay, *Private Actions in EC Competition Law*, 4 Compet. Pol'y Int'l 107 (2008).

64 Evans, *supra* note 61, at 8.

65 *Id.*

66 Evans, *supra* note 9, at 8.

67 Most countries do not impose criminal penalties for antitrust violations. Notable exceptions include the United States and the United Kingdom. See *id.*

68 See Waked, *supra* note 42, at 82; Paul E. Godek, *One U.S. Export Eastern Europe Does Not Need*, 15 Regulation 20, 21 (1992); Paul E. Godek, *A Chicago-School Approach to Antitrust for Developing Economies*, 43 Antitrust Bull. 274, 262 (1998); Bernard Hoekman and Petros C. Mavroidis, *Economic Development: Competition Policy and the World Trade Organization* 8

may need to focus on productive efficiency rather than allocative efficiency in assessing competitive effects on their markets.[69] Also, economies of scale may also be more important for developing countries.[70] This, some would argue, justifies higher levels of concentration in their markets. Developing country markets may support only few firms, which need to be allowed to acquire market power in order to innovate and compete against large developed country firms.[71] Critics doubt the categorical presumption that economies of scale require more concentrated markets.[72] They also question whether lax antitrust rules and the protection of monopolists lead to enhanced competitiveness and innovations in these countries.[73] Higher levels of concentration increase the risk of collusion or abuse of market power, suggesting that developing countries need more, not less, antitrust enforcement.[74] Empirical studies have also shown a positive correlation between antitrust enforcement and high GDP, further indicating that antitrust enforcement helps rather than impedes the goals of development.[75]

Most recently, the antitrust community has turned its attention to developments in China. After 13 years of drafting, China adopted an Antimonopoly Law in August 2008. The new law entered into force a year later. The law states consumer welfare and efficiency as its goal. However, the new law also purports to advance 'fair market competition', 'public interest' and 'the healthy development of socialist market economy'.[76] It is unclear which priorities will come to dominate the enforcement. The legislative history revealed mixed motivations: some domestic groups favored the law as a tool to control the conduct of state-owned enterprises and to abolish trade barriers among different regions within China; others saw the new law as an opportunity to challenge foreign multinationals that are increasingly controlling the Chinese economy. China's first year of enforcement has reinforced concerns that the law will be used as a tool for protectionism. Most prominently, China prohibited Coca-Cola's proposed

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(World Bank Policy Research Paper No. 2917, 2002), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=636279; A.E. Rodriguez and Malcolm B. Coate, *Limits to Antitrust Policy for Reforming Economies*, 18 Hous. J. Int'l L. 311, 320–22 (1996) (noting that several scholars have argued against applying the antitrust law of developed countries to developing countries, but also concluding that antitrust law has become an accepted part of developing countries' policies); Richard A. Posner, *100 Years of Antitrust*, Wall St. J., 29 June 1990, at A12; Elhauge, *supra* note 49, at 1206–8; Gal, *supra* note 44, at 1441–2.

[69] Ajit Singh and Rahule Dhumale, *Competition Policy, Development, and Developing Countries*, in What Global Economic Crisis? 133–4 (Philip Arestis, Michelle Baddeley, and John McCombie eds, Palgrave, 2001); Elhauge and Geradin, *supra* note 49, at 1207.

[70] Elhauge and Geradin, *supra* note 49, at 1206 (discussing this yet questioning the basis of the argument).

[71] Waked, *supra* note 42, at 86, 89. See Elhauge and Geradin, *supra* note 49, at 1206.

[72] Elhauge and Geradin, *supra* note 49, at 1207.

[73] *Id.*

[74] *Id.* at 1206.

[75] See World Bank, World Development Report: Building Institutions for Markets 141 (2002). See generally Michael W. Nicholson, *An Antitrust Law Index for Empirical Analysis of International Competition Policy*, 4 J. Compet. L. and Econ. 1009 (2008).

[76] See Anti-Monopoly Law of the People's Republic of China, Presidential Order No. 68 (National People's Congress, 2007, 2008), www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471587.htm (PRC), art. 1; Bush, *supra* note 42, at 2.

acquisition of a Chinese juice maker, Huiyuan, in March 2009.[77] A few months earlier, China imposed extensive conditions before approving the merger between two foreign brewers, American Anheuser-Busch and Belgian InBev.[78] These decisions, together with a similarly interventionist decision in the deal between Mitsubishi Rayon and Lucite International,[79] indicate that China's new law may indeed depart from antitrust laws of more established jurisdictions.

Assuming that all states have adopted antitrust laws that are optimal for their country (in maximizing either their domestic consumer welfare or their domestic total welfare), the differences across antitrust jurisdictions reflect legitimate policy choices. Those differences would therefore be difficult or costly to reverse without reducing the welfare of individual countries. Indeed, it is possible that no one-size-fits-all antitrust law exists.[80] Yet, the current system consisting of multiple, overlapping, and often inconsistent antitrust laws creates several externalities that fail to advance global welfare. These problems are discussed next.

II PROBLEM OF DECENTRALIZED ANTITRUST REGIMES

A Increase in Transaction Costs and Conflicts

1 Costs of compliance with multiple antitrust laws

Decentralized antitrust enforcement increases transaction costs, causes delays, and raises the likelihood of conflicting decisions.[81] Multijurisdictional merger review offers a pertinent example of this. Over 70 countries today have domestic merger control regimes, imposing overlapping notification obligations on merging parties. The sheer number of jurisdictions reviewing the transaction increases the costs of compliance. Further costs stem from inconsistent procedural requirements and conflicting substantive standards which different antitrust agencies use when assessing the competitive effects of transactions.

The costs associated with multijurisdictional merger review can be divided into three major categories. First, parties must expend management time and legal fees to ascertain whether a notification in a particular jurisdiction is required.[82] Opaque or

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77 *China Rejects Coke Bid for Juice Maker*, New York Times, 18 March 2009, available at www.nytimes.com/aponline/2009/03/18/business/AP-AS-China-Coca-Cola-Huiyuan.html?dbk.

78 Li Jing, *MOFCOM Approves InBev, AB Merger*, China Daily, 19 November 2008, www.chinadaily.com.cn/bizchina/2008-11/19/content_7219360.htm.

79 See *Mitsubishi/Lucite Deal Approved with 'Conditions'*, China Law and Practice, May 2009, www.chinalawandpractice.com/Article/2194925/MitsubishiLucite-deal-approved-with-conditions.html.

80 See Wood, *supra* note 43, at 179–82. *Cf.* Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 Am. J. Int'l L. 478, 504 (2000).

81 Tarullo, *supra* note 80, at 482; Guzman, *supra* note 7, at 100–101; Guzman, *supra* note 30, at 428–9.

82 International Competition Network, *Report on the Costs and Burdens of Multijurisdictional Merger Review* 10–12 (November 2004), available at www.internationalcompetitionnetwork.org/media/library/conference_1st_naples_2002/costburd.pdf (hereinafter 'ICN Report').

difficult-to-interpret filing requirements in a given jurisdiction may magnify these costs.[83] Second, the process of notifying an upcoming merger to multiple authorities entails filing fees, legal fees, document production fees, and possible translation fees.[84] These fees are particularly high in jurisdictions that require parties to submit extensive information even for mergers that have a trivial effect on the market.[85] Finally, multiple notification requirements may lead to costly delays in implementing the merger.[86] These delays lead to a loss of efficiencies that motivated the transaction. At worst, they can be fatal to a particularly time-sensitive transaction.[87]

Many commentators have asserted that the proliferation of merger control regimes imposes significant costs on merging parties.[88] Antitrust agencies across jurisdictions have conceded that multiple filing requirements function as a 'tax' on international mergers, perhaps discouraging or delaying efficient transactions.[89] Until recently, however, there was little empirical evidence on the actual magnitude of the costs associated with multijurisdictional merger review. Diane Wood and Richard Whish, in their study entitled *Merger Cases in the Real World*, made an important early attempt to account for the costs of multijurisdictional merger filing.[90] Another noteworthy study examining the associated costs is the 2000 ICPAC report to the Attorney General and Assistant Attorney General for Antitrust, which examined the effects of globalization on US antitrust policy, including the costs of multijurisdictional merger review.[91]

In 2002, the International Bar Association and the American Bar Association commissioned a study from PricewaterhouseCoopers LLP to quantify the costs of multijurisdictional merger review ('Multijurisdictional Merger Survey' or 'Survey').[92] As the first serious attempt to measure the costs of multijurisdictional review, the Survey drew from a sample of 62 international M&A deals from 2000 to mid-2002, involving 382 notifications

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83 *Id.* at 10–11; ICPAC REPORT, *supra* note 5, at 91.

84 ICN Report*, supra* note 82, at 7.

85 *Id.* at 14.

86 Guzman, *supra* note 30, at 429.

87 ICN Report*, supra* note 82, at 16.

88 See generally ICPAC Report, *supra* note 5; ICN Report*, supra* note 82.

89 See Konrad von Finckenstein, Commissioner of Competition, Canadian Competition Bureau, International Antitrust Cooperation: Bilateralism or Multilateralism?, Address to joint meeting of the American Bar Association Section of Antitrust Law and Canadian Bar Association National Competition Law Section, 31 May 2001, available at www.apeccp.org.tw/doc/Canada/Policy/1a.htm; Charles A. James, *Perspectives on the International Competition Network*, 16 ANTITRUST 36 (2001); Mario Monti, Competition Commissioner, European Commission, The EU Views on Global Competition Forum, Address before the American Bar Association, 29 March 2001, available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/01/147&format=PDF&aged=1&language=EN&guiLanguage=en.

90 RICHARD WHISH AND DIANE WOOD, MERGER CASES IN THE REAL WORLD: A STUDY OF MERGER CONTROL PROCEDURES (OECD, 1994). The study reports several merger investigations and their outcomes in detail, describing the nature of the transaction, the steps taken during the proceeding, and the parties' reactions; it then proceeds to analyse the factors that affect cooperation and propose suggestions for strengthening cooperation across jurisdictions.

91 ICPAC Report, *supra* note 5.

92 PricewaterhouseCoopers LLC, *A Tax On Mergers? Surveying the Costs to Business of Multi-Jurisdictional Merger Review* (June 2003), available at www.pwc.co.uk/pdf/pwc_mergers.pdf (hereinafter 'PWC Report').

in 49 jurisdictions. [93] Though the Survey's small sample size and overrepresentation of European deals limits its applicability, the Survey provides an important empirical foundation for the discussion on the costs of decentralized antitrust enforcement.[94]

The Survey confirmed that the current system of multijurisdictional review imposes additional costs on firms in terms of time and money. It found that a typical international merger requires parties to file with six different antitrust agencies. On average, a multijurisdictional merger review took seven months to complete. A regression analysis showed that the duration of the review process for any given merger is a function of the number of jurisdictions reviewing the transaction.[95] As for monetary costs, the Survey found that an average merger generated €3.3 million (US $4.7 million) in *external* merger review costs.[96] If an antitrust authority issued a 'second request', these costs increased to €5.4 million (US $7.8 million). The results indicated that the number of required filings was the most important determinant of the total external costs in the absence of economies of scale. By contrast, the primary determinant of the extent of the total *internal* costs was the transaction's value,[97] since economies of scale do lower the internal costs associated with the review process.

The Survey also compared the costs associated with multijurisdictional merger review to the value of an average merger, finding that the average external transaction costs of reviewing a merger constitute 0.11% of the total costs of the average deal. Transaction costs of this magnitude are unlikely to deter transnational mergers. Still, these costs impose a 'relatively small, but regressive tax' on international mergers.[98] As long as the states maintain a decentralized merger review process, this regressive tax cannot be entirely eliminated. Thus, international efforts to foster cooperation among antitrust agencies have primarily focused on identifying[99] and eradicating[100] the 'unnecessary'

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[93] See *id.* at 10–11, 44.

[94] ICN Report*, supra* note 82, at 5.

[95] PWC Report*, supra* note 92, at 34.

[96] *Id.* at 42. These represented approximately 85% of the overall costs of the merger review for the merging parties, comprising legal fees (65%), filing fees (19%), and other advisory fees (14%). *Id*. at 4.

[97] To measure the internal costs of the merger, the Survey looked at the time the management dedicated to the review process, measured in person-weeks. For Phase I reviews, average internal costs amounted to 28 person-weeks, whereas the costs increased to 120 person-weeks for Phase II reviews.

[98] See PWC Report*, supra* note 92, at 4. The 'regressive tax' is likely to have a disproportionately adverse impact on relatively small-value transactions.

[99] For instance, the ICN Mergers Working Group has identified four categories of unnecessary costs that it urges countries to reduce. These include costs associated with (1) imprecise or subjective notification thresholds; (2) notifications without an appreciable nexus with the reviewing jurisdiction; (3) unduly onerous filing requirements; and (4) unreasonable delays in the review process. ICN Report*, supra* note 82, at 9–18. See also OECD Business and Industry Advisory Committee and International Chamber of Commerce, Recommended Framework for Best Practices in International Merger Control Procedures §§ 2.1.2.2–2.1.2.5 (4 October 2001), available at www.biac.org/statements/comp/BIAC-ICCMergerPaper.pdf; Merger Streamlining Group, *Best Practices for the Review of International Mergers* 27 (November 2002), available at www.mcmillanbinch.com/mergerstreamlininggroup.html (hereinafter 'MSG Report'); ICPAC Report, *supra* note 5, at 91–92; American Bar Ass'n Section of Antitrust Law, *Report on Multijurisdictional Merger Review Issues* 8–11 (17 May 1999), available at www.abanet.org/ftp/pub/antitrust/icpac-mr.doc.

[100] The ICN Working Group proposes a set of Recommended Practices to reduce unnecessary

costs – costs that can be avoided while retaining the current system of multijurisdictional merger review.

2 Possibility of conflicting decisions

As discussed above, antitrust laws and enforcement practices differ across the jurisdictions. At worst, this can lead to inconsistent decisions among antitrust authorities. The most prominent enforcement conflict erupted when the European Commission enjoined the proposed merger between two American companies, General Electric and Honeywell, in June 2001,[101] despite the transaction's earlier approval in the United States.[102] Had it not failed, the transaction would have been the largest industrial merger in history.[103]

The reasons for the transatlantic divergence in the *GE/Honeywell* case have been extensively debated in the literature.[104] Most notably, the US and the EU authorities differed on two issues: the competitive effects of 'mixed bundling' and the existence of vertical foreclosure. 'Mixed bundling' refers to a practice of offering goods both separately and in a bundle. The European Commission was concerned about the merged entity's ability

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costs. The ICN urges antitrust agencies to adopt clear notification thresholds and to offer prenotification guidance to parties. These measures would mitigate uncertainties involved in ascertaining if a notification is required in a given jurisdiction. The ICN further suggests that states should only assert jurisdiction over mergers that have 'appreciable competitive effects within their territory' based on sales the merging parties generate or assets they possess within that jurisdiction. This would eliminate unnecessary filings to jurisdictions where the effects of a transaction are trivial. To alleviate the burden of notifications, the ICN proposes methods to limit the amount of information agencies require, at least at the initial stage. Finally, the Group proposes allowing for early notification of mergers and imposing strict time limits within which agencies must complete their reviews. ICN Report, *supra* note 82, at 18–22; ICPAC Report, *supra* note 5, ch. III; see generally MSG Report, *supra* note 99. See generally International Competition Network, Recommended Practices for Merger Notification Procedures (2002), available at www.internationalcompetitionnetwork.org/media/archive0611/mnprecpractices.pdf.

101 *GE/Honeywell* Commission Decision, *supra* note 1.

102 See Press Release, US Dep't of Justice, *Justice Department Requires Divestitures in Merger Between General Electric and Honeywell*, 2 May 2001, available at www.usdoj.gov/atr/public/press_releases/2001/8140.htm. For the cases that followed in the European Union, see *GE/Honeywell* Commission Decision, *supra* note 1; Case T-209/01, Honeywell Int'l Inc. v. Comm'n, Case T-210/01, Gen. Elec. v. Comm'n, [2006] O.J. C48/26.

103 Fox, *supra* note 60, at 331, 332, 337 (reporting that the merger deal involved exchange of GE stock worth just under US$45 billion, which would have made the merger the largest ever).

104 See *id.* at 352, 355 (suggesting that the EU had not been accustomed to employing economic analysis of consumer welfare benefits in their relatively new merger law); Bradford, *supra* note 47, at 397, 406–7 (arguing against the theory that the EU was simply being protectionist); William J. Kolasky, Deputy Assistant Attorney General, Antitrust Division, US Department of Justice, Address before the George Mason University Symposium, 9 November 2001, available at www.usdoj.gov/atr/public/speeches/9536.htm (suggesting that the reasons for the divergence in the *GE/Honeywell* case might come from the number of economists on staff at the US Department of Justice as opposed to the Commission staff, the greater availability of judicial review in the United States, and the possibility that the EU has a fundamentally different stance toward the reliability of government intervention); Donna Patterson and Carl Shapiro, *Transatlantic Divergence in GE/Honeywell: Causes and Lessons,* ANTITRUST 18, 25 (Fall 2001) (concluding that the *GE/Honeywell* disagreement occurred because there are fundamental differences between the United States and the EU on whether mergers that lead to lower prices are procompetitive or anticompetitive).

to offer complementary products (GE engines and Honeywell avionics) as a bundle. According to the Commission, the merged entity's extensive product range and unparalleled access to capital would enable it to lower the price of the bundle until all the competitors were forced to exit the market.[105] The US antitrust authorities criticized the mixed bundling theory, suggesting that it may penalize firms for efficient conduct that will result in lower prices. The other analytical difference – the EU's concern for vertical foreclosure – stemmed from the fact that Honeywell, as a leading supplier of engine starters, could disrupt the supply of these essential inputs to GE's rivals, reinforcing GE's dominance in the engine market.[106] Again, the US authorities disagreed, asserting that the EU had underestimated the adaptive responses of other market participants.[107]

The *GE/Honeywell* transaction was not the first conflict between antitrust enforcers. In 1991, the European Commission prohibited the European-owned ATR from acquiring the Canadian-based de Havilland, even though the Canadian antitrust authorities had already approved the same transaction.[108] The Commission held that the merger would have given the new entity excessive market power in Europe.[109] Canadian antitrust authorities, on the other hand, supported the transaction, arguing that de Havilland was a 'failing firm' that would have gone out of business unless saved by an acquisition.[110] An enforcement conflict nearly occurred in another aircraft-industry merger involving Boeing and McDonnell Douglas, which the Commission threatened to enjoin despite the clearance decision in the United States.[111] The two jurisdictions were able to avoid conflict eventually, but only after extensive political pressure from the United States; the Commission ultimately backed down and agreed to clear a merger, subject to significant commitments.

The conflicts associated with decentralized antitrust regimes are not limited to mergers. Inconsistent remedies may result each time that corporations are targets of antitrust investigation in several jurisdictions simultaneously. For example, American, European, and Korean authorities imposed different remedies in their investigation of Microsoft's alleged abusive practices. The European Commission, for instance, concluded that

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105 The Commission relied on the theory of 'portfolio effects', referring to the advantage the merged entity would have had because of its broad product portfolio and superior access to capital through GE's subsidiary GE capital.

106 Fox, *supra* note 60, at 339–40.

107 Timothy Muris, Chairman of Fed. Trade Comm'n, Merger Enforcement in a World of Multiple Arbiters, Remarks before the Brookings Institution Roundtable on Trade and Investment Policy, 21 December 2001, available at www.ftc.gov/speeches/muris/brookings.pdf.

108 Commission Decision of 2 October 1991, Aerospatiale-Alenia/de Havilland, Case No. IV/M.053, [1991] O.J. L334/42 (12 May 1991).

109 See *id.* paras 32–3, 36–42; Robert Howse and M.J. Trebilcock, The Regulation of International Trade 604 (3d ed. 2005).

110 Ioannis Kokkoris, *Failing Firm Defence in the European Union: A Panacea for Mergers?*, 2006 Eur. Compet. L. Rev. 494, 497–8 (2006).

111 See Commission Decision of 30 July 1997, *Boeing/McDonnell-Douglas,* Case No. IV/M.877, [1997] O.J. L336/16 (8 December, 1997); see generally Thomas L. Boeder, *The Boeing-McDonnell Douglas Merger*, in Antitrust Goes Global: What Future for Transatlantic Cooperation? 139 (Simon J. Evenett, Alexander Lehmann, and Benn Steil eds., 2000); William E. Kovacic, *Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy*, 68 Antitrust L.J. 805, 817–63 (2000–2001).

Microsoft had anticompetitively tied its Windows operating system to the Windows Media Player, and required Microsoft to offer an unbundled version of its products for European customers.[112] The Korean authorities' approach was similar to the Europeans': they also required Microsoft to unbundle its products.[113] In contrast, the US authorities did not require a comparable remedy in their settlement decree.[114]

Conflicting enforcement decisions have several economic and political consequences. William Kolasky, the former Deputy Assistant Attorney General for Antitrust, identified three key implications from the enforcement conflict in the *GE/Honeywell* case. First, when one jurisdiction blocks a merger that other jurisdictions find procompetitive, the former jurisdiction denies consumers around the world the benefits the merger might have delivered. Second, inconsistent substantive standards applied by the United States and the EU increase transaction costs associated with the multijurisdictional merger review process, possibly deterring efficiency-enhancing mergers. Third, the divergence akin to the one witnessed in the *GE/Honeywell* case undermines the political consensus supporting strong antitrust enforcement.[115]

Enforcement conflicts also increase tensions among antitrust regulators. The McDonnell Douglas controversy escalated into a political battle where the US administration considered a range of actions against the Europeans in response to the European Commission's threat to enjoin the merger, including the possibility of limiting transatlantic flights, imposing retaliatory tariffs on European aircrafts, and challenging the Commission's decision before the WTO.[116] The criticism was no less muted after the negative *GE/Honeywell* decision. The US Secretary of the Treasury, Paul O'Neil, described the decision as being 'off the wall', adding that the Commission was 'the closest thing you can find to an autocratic organization that can successfully impose their will on things that one would think are outside their scope of attention'.[117] Similarly, when the European

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112 See Christian Ahlborn and David Evans, *The Microsoft Judgment and its Implications Towards Dominant Firms in Europe*, 75 Antitrust L.J. 887, § II.A (2009); Harry First, *Strong Spine, Weak Underbelly: The CFI Microsoft Decision* (NYU Law and Economics Research Paper No. 08-17, 2008), available at http://ssrn.com/abstract=1020850.

113 Korea Fair Trade Commission, *The Findings of the Microsoft Case* (7 December 2005), at 1, available at http://ftc.go.kr/data/hwp/micorsoft_case.pdf [*sic*]; Youngjin Jung, *Abuse of Market Dominance in Korea: Some Reflections on the KFTC's Microsoft Decision*, 36 Legal Issues of Econ. Integration 57, 59 (2009).

114 Damien Geradin, *The Perils of Antitrust Proliferation: The Globalization of Antitrust and the Risks of Overregulation of Competitive Behavior*, 10 Chi. J. Int'l L. 189, 190 n.8 (2009); Harry First, *Netscape is Dead: Remedy Lessons from the Microsoft Litigation*, at 9–12 (New York University Law and Economics Working Paper No. 166, 2008), available at http://lsr.nellco.org/nyu_lewp/166/. A similar conflict between regimes occurred when the the European Union and the United States reviewed British Airways' and Virgin Airlines' loyalty discounts. The United States concluded that the conduct was permissible under its law, but the EU condemned the conduct as contrary to its law. See Virgin Atl. Airways Ltd. v. British Airways PLC, 257 F.3d 256 (2d Cir. 2001); Case T-219/99, British Airways PLC v. Comm'n, [2003] E.C.R. II-5917.

115 Kolasky, *supra* note 104.

116 Steven Pearlstein and Anne Swardson, *U.S. Gets Tough to Ensure Boeing, McDonnell Douglas Merger; Retaliation Plan in Works as Europe Threatens*, Washington Post, 17 July 1997, at C01.

117 Tom Brown, *Update 2: U.S. Treasury Chief Slaps at Europe Over GE Deal*, Reuters, 27 June 2001.

Court of First Instance handed down its judgment in the *Microsoft* case, Tom Barnett, the Assistant Attorney General for Antitrust at the time, criticized the judgment vocally, accusing the Europeans of 'chilling innovation and discouraging competition'.[118]

The furor surrounding these high-profile merger controversies shadows the fact that the instances of actual conflict are extremely rare. Despite the common fear of inconsistent merger decisions, the *GE/Honeywell* and the *De Havilland/ATR* cases remain rare examples of mergers which resulted in different antitrust jurisdictions adopting contradictory decisions. This is remarkable given how frequently mergers are reviewed by multiple antitrust agencies applying different substantive standards and relying on dissimilar analytical processes.[119] One might also argue that corporations can avoid jurisdictional conflicts by conforming their conduct to the most stringent jurisdiction.[120] This, however, leads to another problem, where the most stringent antitrust jurisdiction has the ability to set the standards of competitive conduct in global markets, as will be discussed in section IIC.[121]

B Emergence of Antitrust Protectionism

Some commentators believe that states employ antitrust laws to further protectionist goals.[122] As traditional trade barriers have fallen following multiple rounds of trade

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[118] See Thomas O. Bartnett, Assistant Attorney General, Antitrust Division, US Dep't of Justice, Statement on European Microsoft Decision (17 September 2007), available at www.usdoj.gov/atr/public/press_releases/2007/226070.htm..

[119] However, it is conceivable that the mere *possibility* of a negative decision by a certain authority leads to costs in terms of inefficiencies embedded in structuring the merger. The merging parties might, for instance, carve out certain assets of a transaction in order to avoid filing in a certain jurisdiction. Similarly, they may do this to pre-empt an in-depth investigation (a 'second request' equivalent in another jurisdiction) or to avoid having to agree to extensive commitments as a condition for clearance. It is difficult, if at all possible, to evaluate the costs of inefficiencies embedded in this type of precautionary action. Also, the issue is not limited to mergers. See Dave Heiner, *Working to Fulfill Our Legal Obligations in Europe for Windows 7* (11 June 2009), available at http://microsofttonthe-issues.com/cs/blogs/mscorp/archive/2009/06/11/working-to-fulfill-our-legal-obligations-in-europe-for-windows-7.aspx (discussing Microsoft's proposal to offer Windows 7 without Internet Explorer in the European Union); Brad Smith, *Microsoft Proposal to European Commission* (24 July 2009), available at www.microsoft.com/presspass/press/2009/jul09/07-24statement.mspx (proposing that Microsoft could release a version of Windows 7 with full browser capability, but giving the user the option of selecting which browser to install). Microsoft had proposed this design for Windows 7 to preempt a regulatory setback, not to provide consumers the features they demand. Similarly, companies may refrain from offering their products at the lowest competitive price, fearing investigations by jurisdictions with low evidentiary standards for predation.

[120] Elhauge and Geradin, *supra* note 49, at 1100.

[121] *Id.* See discussion *infra*.

[122] See, e.g., Nuno Garoupa and Thomas S. Ulen, *The Market for Legal Innovation: Law and Economics in Europe and in the United States*, 59 Ala. L. Rev. 1555, 1632 (2008) (surmising that protectionism is a problem both in the United States and in the European Union, but that the size of the market may exacerbate the problem in the European context); Fox, *supra* note 60, at 336 (raising the more moderate hypothesis that agencies do not follow an explicitly acknowledged policy of protectionism, but may still have professional inclinations to cooperate with politicians' nationalistic agendas); Guzman, *supra* note 7, at 100–101; Kerber, *supra* note 27, at 44; Paul B. Stephan, *Against International Cooperation*, in Competition Laws in Conflict, *supra* note 7, at 75.

negotiations, states are expected to look for alternative ways to protect their domestic markets.[123] Domestic firms seeking protection may increasingly turn to antitrust authorities, urging them to block the entry of foreign rivals on antitrust grounds, or to tolerate domestic firms' monopolistic practices in an effort to bolster their international competitiveness.[124] If successful, these protectionist pressures can convert antitrust laws into instruments of industrial policy, severely undermining the gains of trade liberalization.

Antitrust protectionism can take several forms: states may engage in systematic under- or overenforcement of antitrust laws depending on their terms of trade ('trade-flow bias'). States may also exempt domestic firms from antitrust scrutiny altogether ('statutory bias'). Similarly, antitrust agencies may engage in selective enforcement practices, disproportionately targeting foreign firms at the expense of domestic firms in their investigations ('enforcement bias'). Yet the key assumption behind all forms of alleged antitrust protectionism is the same: each antitrust jurisdiction internalizes the costs and the benefits incurred by its domestic producers and consumers, while externalizing the costs and the benefits sustained by producers and consumers in another jurisdiction.

1 Trade-flow bias in antitrust laws

Andrew Guzman has developed a theory on how trade flows across countries can impact the type of antitrust laws a country adopts ('trade-flow bias').[125] Consistent with rational choice theory, Guzman assumes that states 'externalize the costs and internalize the benefits of the exercise of market power across borders' to maximize their national welfare.[126] This behavior, according to Guzman, leads states to choose the appropriate level of antitrust regulation based on their trading status as a net-importer or a net-exporter. A net-importer country employs stricter-than-optimal antitrust standards (overregulation), since it does not internalize costs of overenforcement, which are primarily borne by foreign producers.[127] Conversely, a net-exporter country enacts laxer-than-optimal antitrust laws (underregulation), since the costs of the lax enforcement fall on foreign consumers. Both over- and underregulation are instances of suboptimal antitrust enforcement that reduces welfare globally.

Guzman does not draw on game theoretic insights when developing his theory. Implicitly, however, he seems to assume that the strategic setting underlying international antitrust cooperation resembles a prisoner's dilemma (PD). Guzman argues that

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[123] See Edward D. Mansfield and Marc L. Busch, *The Political Economy of Nontariff Barriers: A Cross-National Analysis*, in International Political Economy: Perspectives on Global Power and Wealth 353 (Jeffrey A. Frieden and David A. Lake eds, Routledge, 4th ed. 2000); Henrik Horn and James Levinsohn, *Merger Policies and Trade Liberalization* 1 (Nat'l Bureau of Econ. Research Working Paper No. 6077, 1997), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=226484.

[124] See Kerber, *supra* note 27, at 45–6.

[125] Guzman, *supra* note 7, at 101; Andrew T. Guzman, *Antitrust and International Regulatory Federalism*, 76 N.Y.U. L. Rev. 1142, 1154–5 (2001).

[126] *Id.*

[127] 'Optimal' antitrust laws would be globally efficient, as no state would engage in over- or underenforcement, but would choose the same antitrust laws as they would have absent trade flows. *Id.* at 108–9.

individual antitrust enforcers' uncoordinated action leads to a Pareto-suboptimal solution as each state seeks to increase its national welfare at the expense of other states. Individual states always maximize their own welfare by choosing a noncooperative strategy (over- or underregulation), even though choosing to enforce optimal antitrust laws (i.e., refraining from over- or underregulation) would maximize states' collective welfare.[128] Guzman also assumes that any agreement to overcome these suboptimal incentives would be difficult to sustain as the states would have the incentive to defect from their commitments.[129] These assumptions are consistent with a PD-type game.[130] In a PD situation, each state has the incentive to defect from the agreement, as it can increase its payoff by taking advantage of the other party's cooperation while refusing to cooperate itself. Thus, the primary impediment for cooperation is the constant fear of the other player's defection from the agreement.[131]

In a PD situation, a net-exporter can maximize its welfare by underregulating whereas a net-importer can maximize its welfare by overregulating.[132] State A, for instance, could obtain the highest individual payoff by choosing to overregulate (if a net-importer) or underregulate (if a net-exporter), if state B chose optimal antitrust laws. State B, however, will not choose optimal antitrust laws. It knows that if it chooses optimal antitrust laws and state A fails to reciprocate with the same strategy, it receives the lowest possible payoff.[133] Seeking to maximize their individual payoffs and fearing each other's defection,

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128 *Id.* at 101 ('each state pursues its own interests without regard for the interests of other states'); *id.* at 108–9 ('The resulting policies are domestically optimal but are suboptimal from a global perspective'); *id.* at 110 ('Because cooperative policy is globally optimal, it must be the case that there are sufficient gains for a Pareto improving agreement to be reached').

129 Guzman, *supra* note 125, at 1158 ('The WTO has additional advantages that make it a desirable forum for the negotiation of a competition policy agreement. Most obvious among these advantages is the presence of a dispute settlement system. Dispute resolution is of great importance because if a deal is reached, some of the parties to the agreement will have consented to the system of international antitrust only because they were offered other benefits. In the absence of procedures to compel such compliance, these countries have little incentive to honor their commitments').

130 Similar claims are made by Wolfgang Kerber and Oliver Budzinski, who have explicitly likened countries' processes for choosing discriminatory competition policy to a prisoner's dilemma situation. See Kerber and Budzinski, *supra* note 27, at 44–5. Unlike Guzman, who finds that 'optimal *strategic* antitrust policy' can be rigid or lenient depending on a country's terms-of-trade, Kerber and Budzinski only describe lenient forms of strategic behavior (i.e., the lax antitrust enforcement that comes from a 'deliberate toleration of market power'). Such a characterization of country strategy ignores the possibility that strategic antitrust policy can also lead to excessive antitrust enforcement vis-à-vis foreign competitors. See also Oliver Budzinski, *Toward an International Governance of Transborder Mergers? Competing Networks and Institutions Between Centralism and Decentralism*, 36 N.Y.U. J. Int'l L. and Pol. 1, 6–8 (2004) (explaining ways in which a noncoordinated merger control regime presents a prisoner's dilemma situation).

131 Many international trade issues, for instance, can best be modeled as a PD. See James D. Morrow, Game Theory for Political Scientists 262–3 (Princeton, 1994) (applying the prisoner's dilemma analysis to explain why enforcement of long-term relations, generally, is difficult because of incentives to defect from the cooperative enterprise, then suggesting that '[t]he regulation of international trade is one such problem').

132 In comparison, according to Kerber and Budzinski, the dominant strategy for each state would be to lower their antitrust standards. See Kerber and Budzinsk; *supra* note 27, at 41–3.

133 See *id.* at 44–5.

both states adopt suboptimal antitrust laws.[134] Consequently, both states are worse off than they would have been if they both adopted optimal antitrust laws.

Other authors have questioned that trade flows could lead to biased antitrust enforcement. Einer Elhauge and Damien Gerardin note that the effects doctrine compromises states' ability to engage in systematic underenforcement or overenforcement.[135] If a net-exporting country were to enact overly lax antitrust laws, its producers would still be subject to the antitrust laws of the importing jurisdiction, assuming their activities have an effect on that market.[136] The prospect of a concurrent jurisdiction by importing jurisdictions renders net-exporting countries' underenforcement irrelevant, steering them towards optimal regulation.[137] Elhauge and Geradin point out that the importing jurisdiction also has optimal incentives to regulate as long as it embraces the consumer welfare standard.[138]

Michael Trebilcock and Edward Iacobucci question whether trade deficits or surpluses would ever determine countries' preferred level of antitrust regulation, given that trade imbalances usually constitute only a small percentage of any nation's GDP.[139] John McGinnis notes that trade flows have a tendency to fluctuate, and doubts that countries amend their antitrust laws in response to their changing trade balances.[140] McGinnis further argues that trade-flow bias would be infeasible to apply in practice, considering that it is often difficult to categorize a multinational corporation as 'domestic' or 'foreign'. Hence, exercising bias against a 'foreign' corporation may have the unintended effect of harming the corporation's many domestic shareholders and employees.[141] Anu Bradford points out that biased policies may have similar unintended consequences on domestic industries that rely on intermediate goods, since such goods comprise approximately 50% of the total imports in developed countries.[142] Thus, if a country is a net-importer, predisposed to adopt overly strict antitrust laws, those strict antitrust laws would not only target the foreign producers attempting to penetrate the market but also domestic firms that depend on imported goods as inputs or raw materials.[143] This

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134 Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335, 358–9 (1989).

135 See ELHAUGE AND GERADIN, *supra* note 49, at 1012–14.

136 This assumes that the foreign antitrust agencies have adequate enforcement capacity, including access to evidence, which is not always the case.

137 See ELHAUGE AND GERADIN, *supra* note 49, at 1012–14.

138 Elhauge and Geradin assume that consumer welfare is the optimal standard for antitrust enforcement rather than total welfare. The US and EU antitrust laws both embrace a consumer welfare standard. According to Elhauge and Geradin, the case for a consumer welfare standard is even stronger internationally than domestically, because in the international situation it is less likely that increases in producer welfare will benefit consumers as employees, shareholders, or taxpayers. ELHAUGE AND GERADIN, *supra* note 49, at 1103.

139 Trebilcock and Iacobucci, *supra* note 42, at 168–9.

140 John O. McGinnis, *The Political Economy of International Antitrust Harmonization*, in COMPETITION LAWS IN CONFLICT, *supra* note 7, at 136.

141 *Id.* at 134.

142 Bradford, *supra* note 47, at 390–91. On trade in intermediate goods, see Jörn Kleinert, *Growing Trade in Intermediate Goods: Outsourcing, Global Sourcing, or Increasing Importance of MNE Networks?*, 11 REV. INT'L ECON. 464 (2003).

143 See *id*. at 464–5.

criticism, if accepted, suggests that trade flows have, at best, only a marginal effect on countries' level of antitrust regulation.

2 Export cartels as examples of antitrust protectionism

Antitrust protectionism can also manifest itself in the types of exemptions given to domestic companies. For example, scholars have frequently cited exemptions for export cartels in domestic antitrust laws as an example of biased antitrust enforcement that favors domestic firms.[144] An export cartel refers to an agreement between two or more firms to charge a specified export price or to divide export markets among them.[145] The difference between an export cartel and a normal cartel is that an export cartel restricts its collusive behavior to goods or services that are exported to foreign markets. Export cartels enhance the welfare of domestic firms, which can extract supracompetitive profits at the expense of foreign consumers. The export cartel's home state does not have the incentive to pursue the cartel's anticompetitive activity given that the entire anticompetitive harm falls outside of its jurisdiction.[146]

To illustrate how export cartels can serve states' protectionist interests, assume that state A is the exporting jurisdiction, and state B is the importing jurisdiction. Critics of export cartel exemptions fear that state A exempts export cartels because it fails to consider the cartels' anticompetitive effects on state B's consumers. Knowing this, state B likewise chooses to exempt export cartels from its antitrust laws, given that the anti-competitive harm falls on state A's consumers. As a result, both state A and state B fail to pursue export cartels, causing harm to both state A and state B consumers. This yields a suboptimal payoff for both states.

It is, however, unclear that the above description of the strategic situation is accurate.

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144 See Trebilcock and Iacobucci, *supra* note 42, at 152. See also Guzman, *supra* note 7, at 100 (referring to export cartels as the 'most obvious example' of states' biased application of their antitrust laws); Florian Becker, *The Case of Export Cartel Exemptions: Between Competition and Protectionism*, 3 J. Compet. L. and Econ. 97, 101–8 (2007).

145 See discussion on the prevalence of export cartels in Margaret C. Levenstein and Valerie Y. Suslow, *The Changing International Status of Export Cartel Exemptions*, 20 Am. U. Int'l L. Rev. 785, 793, 796 (2005).

146 In contrast, some have defended the practice of exempting export cartels. The proponents of export cartel exemptions argue that they are predominantly formed to create export opportunities for small- and medium-sized companies who would not have the resources to engage in export activity alone. Export cartels are hence argued to generate new trading opportunities and enhance (instead of diminish) competition on markets where exporters would otherwise not compete at all. The United States, for example, defended the WPA and ETCA in 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 Fed. Rep., WT/WGTCP/M/21, at 15 (26 May 2003). See also Spencer Weber Waller, *The Failure of the Export Trading Company Program*, 17 N.C. J. Int'l L. and Com. Reg. 239, 250 (1992) ('[today] the ETC program has been used almost exclusively by small export intermediaries and by trade associations focusing on a small group of products, industries and markets'); *id.* at 251 ('the history of Webb-Pomerene Act suggests that few export associations will have sufficient global market power to exploit foreign markets'). See also Aditya Bhattacharjea, *Export Cartels: A Developing Country Perspective* 32 (Centre for Dev. Econ. Working Paper No. 120, 2004) (arguing that neither a per se prohibition nor a presumption of efficiencies constitutes an optimal policy response to export cartels exporting to developing countries).

One may argue that export cartel exemptions do not pose a serious international enforcement problem. Even when state A exempts the export cartel from its antitrust laws, state B can pursue the export cartel under its domestic antitrust laws as long as the cartel adversely affects competition in state B's domestic market.[147] One can even argue that the decision by state A not to prosecute the cartel represents optimal allocation of jurisdiction: state B is in a better position to evaluate the effects of the cartel on its own market. Of course, this argument assumes that state B has the resources to impose effective remedies on the cartel. Effective prosecution by state B may therefore require assistance from state A, in particular if the evidence is located in the jurisdiction of the latter.[148]

3 Antitrust protectionism embedded in biased enforcement

Antitrust laws rarely plainly favor local firms at the expense of their foreign counterparts. But even facially neutral antitrust laws can lead to discrimination if those unbiased laws are enforced selectively. Antitrust agencies are often vested with substantial discretion. Organized domestic interest groups could exploit that discretion by seeking protection from antitrust enforcement or by urging the domestic authorities to take on cases against their foreign competitors. This could lead to deliberate underenforcement of the anticompetitive conduct of domestic corporations, or to deliberate overenforcement of the anticompetitive conduct of foreign corporations.[149]

Biased enforcement differs from the trade-flow bias discussed above in that state A and state B would not generally underenforce or overenforce based on their status as a net-exporter or net-importer. Instead, both states would have optimal antitrust laws but would engage in selective enforcement of those laws case-by-case, depending on the nationality of the corporation that they are investigating. For instance, state A might approve an anticompetitive merger between two state A firms to build a national champion that can better compete internationally, while prohibiting a merger between two state B companies in order to protect their rival in state A who opposes the merger.

It seems plausible that antitrust enforcers deliberately overlook the anticompetitive conduct of domestic corporations in individual instances while disproportionately

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[147] This argument, however, assumes that the importing country is vested with adequate enforcement capacity and can hence be problematic if the prosecution of the export cartel requires evidence that is located in the exporting jurisdiction or if the importing jurisdiction cannot impose effective remedies.

[148] Cf. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 256–7, 266 (2004) (noting that US law will permit agencies to lend discovery assistance to 'any interested person', even if that person is involved in a foreign proceeding).

[149] Guzman, *supra* note 7, at 100. Guzman expects this type of 'favoritism toward locals' to take place at the administrative level, 'either because the regulators themselves view local firms more favorably or because political leaders bring pressure to bear on regulators and encourage them to pursue foreign firms rather than national champions'. See also McGinnis, *supra* note 140, at 128–9, 134 (explaining that regulators have an interest in maintaining an interventionist policy because it enables them to extract greater rents and acknowledging that regulators could discriminate between local and foreign firms); Kerber, *supra* note 27, at 41–4. See also an analysis of how domestic antitrust enforcement can become susceptible to bias in Fred S. McChesney, *Debate: Public Choice: Do Politics Corrupt Antitrust Enforcement? Economics versus Politics in Antitrust,* 23 Harv. J.L. and Pub. Pol'y 133 (1999).

targeting foreign corporations.[150] Suspicions were reinforced when the EC Commission threatened to block the merger between the two US-based companies, Boeing and McDonnell Douglas, after the merger had been cleared in the United States.[151] Both the United States and the EU accused one another of engaging in industrial policy: the Europeans perceived the US clearance of the merger as an effort to create a US-based global monopolist in the large civil jet aircraft market, whereas the Americans accused the EU of opposing the merger to protect Boeing's main European rival, Airbus, from competition.[152] Distrust over antitrust protectionism escalated further in 2001, when the EU moved on to prohibit the *GE/Honeywell* merger.[153]

Despite the perception of protectionism, a deeper inquiry into the EU antitrust authorities' merger decisions does not reveal any systematic bias against US corporations. In fact, while 25% of the merger notifications the EU Commission received in 1995–2005 involved at least one US-based company, only 12% of the prohibited mergers involved a US corporation.[154] Similarly, only 17% of the mergers withdrawn after the notification involved a US corporation, 26% of the Commission's initiated phase II investigations ('second request') involved a US corporation, and 27% of the conditional clearances were granted in cases that involved a US company. These numbers suggest that any enforcement bias would be limited to a small number of individual cases, or that enforcement bias may not even exist. There are several reasons for this. For instance, the threat of judicial review may sufficiently deter antitrust agencies from engaging in blatant

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[150] The claim that antitrust agencies engage in selective enforcement is consistent with well-developed public choice theories of agency capture. These theories explain how government agencies respond to the demands of organized interest groups. Tanya Heikkila, *The Contribution of Public Choice Analysis to Decision Making Theories*, in HANDBOOK OF DECISION MAKING 23–4 (Göktuğ Morçöl ed., CRC 2007) (discussing 'bureaucratic pathologies' where interest groups spend resources on lobbying rather than productive activity and bureaucrats allocate resources to strengthen their political base rather than to best fulfill their mission); JAMES M. BUCHANAN AND GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 287 (Michigan, 1962) (using economic analysis to explain that interest groups become entrenched because the political process can give unequal advantages, and these unequal advantages then further strengthen interest groups and incentivize them to pursue further preferential treatment).

[151] See Commission Decision of 30 July 1997, Boeing/McDonnell-Douglas, Case No. IV/M.877, [1997] O.J. L336/16 (8 December 1997); Boeing Co., et al., Joint Statement Closing Investigation of the Proposed Merger, FTC File No. 971-0051 (1 July 1997), reported in 5 Trade Reg. Rep. (CCH) para. 24, 295.

[152] Kerber, *supra* note 27, at 42.

[153] See Fox, *supra* note 60, at 332 (citing Matt Murray, Phillip Shishkin, Bob Davis, and Anita Raghavan, *Oceans Apart: As Honeywell Deal Goes Awry for GE, Fallout May be Global – The U.S. Giant's Troubles in Europe Could Chill Mergers of Multinationals – Raining on Welch's Parade*, WALL ST. J., 15 June 2001, at A1 (quoting Sen. Ernest Hollings of the Senate Commerce Committee) ('EU disapproval gives credence to those who suspect that the EU is using its merger review process as a tool to protect and promote European industry at the expense of its US competitors'). Senator Hollings further accused the EU of 'an apparent double standard by swiftly approving mergers involving European companies and holding up those of US groups'.

[154] Commission Decision of 28 June 2000, MCIWorldCom/Sprint, Case No. COMP/M.1741, [2000] O.J. L300/1; *GE/Honeywell* Commission Decision, *supra* note 1. Note that the *MCIWorldCom/Sprint* merger was also challenged in the United States. In contrast, the *General Electric/Honeywell* merger was approved subject to limited undertakings in the United States.

parochialism. Agencies must also give reasons for their decisions, and will therefore find it difficult to depart manifestly from an established legal framework.[155]

Another question is whether some less established antitrust regimes with fewer institutional safeguards are more susceptible to antitrust protectionism. China's first enforcement decisions under its newly adopted Antimonopoly Law[156] offer some indication that antitrust review could be used as a vehicle for protectionism.[157] China's decision to prohibit Coca-Cola's proposed acquisition of the Chinese juice company Huiyuan,[158] for instance, raised suspicions on the motivations behind China's antitrust policy. While it is too soon to draw drastic conclusions based on China's limited enforcement record, the possibility of China becoming a major antitrust force that repeatedly applies its antitrust laws strategically to block the market entry of foreign companies has reinforced concerns of antitrust protectionism.

C Global Overregulation

The final problem relating to decentralized antitrust enforcement is that the strictest antitrust jurisdiction always prevails when a real jurisdictional conflict arises. This leads to global overregulation. To illustrate this, assume that both state A and state B choose suboptimal antitrust laws: state A underregulates and state B overregulates. State A

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155 McGinnis, *supra* note 140, at 134–5 (noting that institutional checks and craft interests help deter overly discriminatory policies).

156 See Sundeep Tucker, *InBev Ruling Sparks Fears for M&A in China*, Financial Times, 30 November 2008 (noting that the *InBev/Anheuser-Busch* deal was approved, but with a number of unanticipated restrictions that will prevent InBev from acquiring further interests in certain companies in the Chinese beer market); Gordon Fairclough and Carlos Tejada, *China's Coke Decision Threatens to Chill Investment*, Wall St. J. (Eastern), 19 March 2009, at B9 (describing China's decision to block of the proposed Coca-Cola/Huiyuan merger after widespread nationalistic resentment of foreign ownership); Aaron Back and J.R. Wu, *China Flexes Global Merger Clout, Imposes Conditions on Lucite Deal*, Wall St. J., 28 April 2009, at B6 (conditioning approval of the *Mitsubishi Rayon/Lucite* merger on a five-year ban that prevents it from acquiring any Chinese producer of methylmethacrylate or building factories in China making such products). *Cf.* Anti-Monopoly Law of the People's Republic of China, Presidential Order No. 68 (National People's Congress, 2007, 2008), www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471587.htm (PRC).

157 See Bruce M. Owen, Su Sun, and Wentong Zheng, *China's Competition Policy Reforms: The Antimonopoly Law and Beyond* 28 (Stanford John M. Olin Program in Law and Economics Working Paper No. 339, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=978810 (explaining that administrative monopolies could create regional blockage leading to protectionism); Salil K. Mehra and Meng Yanbei, *Against Antitrust Functionalism: Reconsidering China's Antimonopoly Law*, 49 Va. J. Int'l L. 380, 421–3 (2009) (noting that China still needs to clarify how the Antimonopoly Law will balance social welfare concerns while avoiding improper protectionism). *Cf.* Adrian Emch, *Abuse of Dominance in China: A Paradigmatic Shift?*, 29 Eur. Compet. L. Rev. 615, 622 (2008) (explaining that the current scope of the Antimonopoly Law is unclear and that art. 7 may exempt 'industries vital to the national economy and national security').

158 Andrew Batson, *China's Statement Blocking Coca-Cola Huiyuan Deal*, Wall St. J. (China Journal Blog), 18 March 2009, http://blogs.wsj.com/chinajournal/2009/03/18/china%E2%80%99s-statement-blocking-coca-cola-huiyuan-deal/. For the original Chinese statement, see Ministry of Commerce of the People's Republic of China, 商务部就可口可乐公司收购中国汇源公司案反垄断审查做出裁决 (18 March 2009), available at www.mofcom.gov.cn/aarticle/ae/ai/200903/20090306108388.html.

may choose to underregulate for protectionist or nonprotectionist reasons. It may be a net-exporter wishing to extract welfare gains at the expense of the importing jurisdiction or it may simply not believe in the benefits of strong antitrust intervention. In contrast, state B may choose to overregulate, similarly for a variety of protectionist and legitimate reasons. Assuming that state A (underregulator) and state B (overregulator) investigate the same transaction, state B prevails. This example exposes the key international antitrust paradox: the strictest regime wins.

Imagine that state A is the United States examining the *GE/Honeywell* transaction and state B is the EU examining the same transaction. Suppose first that the transaction would have an identical effect in both markets but that the antitrust authorities in the United States and in the EU differ in their assessments on whether the merger should proceed. The United States favors a permissive antitrust policy and chooses to approve the transaction. The EU favors an interventionist policy and chooses to prohibit the transaction. The inevitable outcome is that the EU antitrust policy prevails: the *GE/Honeywell* transaction is banned, not just in the EU, but around the world.

Now suppose that the *GE/Honeywell* transaction would have different effects in the US and the EU markets: the merger would increase consumer welfare in the United States and reduce consumer welfare in the EU. Assume further that the expected efficiencies of the merger in the United States would offset its alleged competitive harm within the EU. When evaluating the merger, the EU antitrust authorities would ignore the merger's possible efficiencies in the United States, in the same way the US authorities would disregard any alleged anticompetitive harm in the EU. Advancing domestic consumer welfare rather than global welfare is consistent with both US and EU antitrust laws. However, assuming that the merger's expected aggregate global efficiencies outweighed its expected aggregate global anticompetitive harm, the EU's decision to ban the merger would be globally suboptimal.

The *GE/Honeywell* case illustrates the more general phenomenon that the decentralized antitrust enforcement consisting of both under- and overenforcement is likely to lead to overregulation globally. It is debatable whether the United States or the EU was pursuing optimal antitrust policy in the *GE/Honeywell* controversy. But assuming that both the United States and the EU are equally likely to err toward under- and overregulation across the range of antitrust cases, the net effect is global overregulation.[159] If the EU antitrust decisions overall are more stringent than those of the United States, the United States effectively relinquishes the antitrust regulation of international business activity to the EU. This way, the EU becomes the de facto global antitrust regulator, simply by choosing more stringent enforcement policies.[160]

Damien Geradin illustrates the same problem by offering a hypothetical example of a firm A's decision to integrate a piece of software into its hardware. Firm B, which offers only the software in question, launches a complaint before antitrust authorities in jurisdictions X, Y, and Z, after having lost sales to firm A. Assume that antitrust authorities of jurisdictions X and Y note that there is consumer demand for the integrated product, and reach a decision that firm A's conduct is procompetitive. Assume further that this

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159 Elhauge and Geradin, *supra* note 49, at 1100–1101.
160 See *id.* at 1101.

decision follows a sound economic analysis. The jurisdiction Z, however, decides to forgo any effects-based analysis and declares that firm A's conduct constitutes anticompetitive tying. It orders firm A to disintegrate the product and imposes a substantial fine. In the worst-case scenario, firm A would be forced to abandon the sale of its integrated product altogether. This might be the case if it is too expensive to design different products for different markets (for instance, integrated products for markets X and Y and separate products for the market Z).[161]

The problem of global overregulation could be mitigated if corporations could easily escape from the antitrust review of an overly zealous antitrust jurisdiction. This could be done, for instance, by carving out assets located in a particular jurisdiction when structuring a merger to avoid notification in that particular jurisdiction. Similarly, a corporation might cease to supply customers in a particular jurisdiction or it may change its product design or distribution practices in a particular market. For instance, the easiest way out for firm A in the previous example would have been to abandon business in jurisdiction Z. But this is generally an option only when the jurisdiction Z is insignificant enough to make abandonment commercially viable.[162] The merging parties in the *GE/Honeywell* transaction, for instance, could have evaded EU antitrust review only by withdrawing from the EU market altogether. But abandoning the world's largest market was never, obviously, a realistic option. As the most aggressive antitrust enforcers are generally the jurisdictions with the largest consumer markets (including the EU, Brazil, Korea, and maybe increasingly China),[163] escaping their jurisdiction is rarely feasible. Accordingly, global overregulation remains a significant problem.[164]

Antitrust differs from many other areas of law subject to jurisdictional competition in that the strictest regime governs firms' conduct in global markets. This defies the prevailing theories of regulatory competition. Regulatory competition is often believed to lead to either welfare-increasing legal rules and regulations ('race to the top') or welfare-reducing legal rules and regulations ('race to the bottom'). The jurisdictional competition of corporate charters in the United States is an example of the latter: corporations have the choice of law to incorporate in any state. This gives all states an incentive to adopt

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161 Geradin, *supra* note 114, at 203–4.

162 *Id*. at 204.

163 *Id.* at 206.

164 Corporations may exacerbate this problem by forum shopping. Though they cannot engage in forum shopping for their own merger approvals (since a lone jurisdiction that blocks the merger can block the merger from happening anywhere), they can still shop for forums that will be most receptive to their complaints against *competitors'* mergers. For example, the European Commission has garnered enough of a reputation for aggressive investigation of anticompetitive practices that US companies will lodge complaints before the Commission rather than before a domestic agency. See, e.g., Bobbie Johnson, *Google Pledges to Support EU's Microsoft Case*, GUARDIAN, 25 February 2009, www.guardian.co.uk/technology/2009/feb/25/microsoft-internet; Miguel Helft, *Google Joins Europe Case Against Microsoft*, N.Y. TIMES, 24 February 2009 (noting that Google had attempted to lodge a complaint with the US Department of Justice in the past, and finding it unsurprising that Google would join Opera's complaint against Microsoft in the EU). *Cf.* European Commission, *Antitrust: Commission Confirms Sending a Statement of Objections to Microsoft on the Tying of Internet Explorer to Windows* (17 January 2009), available at http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/15&format=HTML&aged=0&language=EN&guiLanguage=en.

business-friendly corporate laws in order to attract corporations and thereby increase their tax base. At best, this incentive leads to more efficient and innovative rules. At worst, however, regulatory competition leads to a detrimental race to the bottom whereby jurisdictions compete to lower their regulatory standards, including environmental or labor standards, in order to attract businesses that are seeking to reduce their production costs.[165]

For regulatory competition to occur, firms must either be able to choose the laws that apply to them or be able to relocate to their chosen jurisdictions. Neither of these preconditions are present in antitrust law. The effects doctrine prevents corporations from choosing an applicable antitrust law through choice of law or relocation. The only possible race in antitrust enforcement is therefore the race to be the strictest jurisdiction among the states seeking to assert their norms globally, given that all other jurisdictions yield to the most aggressive regulator in case of a conflict.

The 'strictest regime wins' phenomenon could have some positive effects, however. For example, it could correct distortions stemming from suboptimally lenient antitrust enforcement. Some jurisdictions do not have the capacity to prosecute multinational companies who extract supracompetitive profits within their borders. Such countries rely on other aggressive jurisdictions with the resources to pursue anticompetitive cross-border conduct of multinational enterprises, hoping to free-ride on their investigations. For instance, suppose that an international cartel has anticompetitive effects in the United States, the EU, and several developing countries. The developing countries will look to the United States and the EU to prosecute and sanction the cartel. But if none of the anticompetitive effects are felt in jurisdictions that have enforcement capacity, a serious risk of underenforcement remains. The United States and the EU will not expend resources in pursuing a cartel that has trivial or no effects in their domestic jurisdictions. Some may therefore argue that global overregulation is desirable in that it compensates for the underenforcement of antitrust laws by weaker antitrust jurisdictions. However, many others advocate for more direct ways to mitigate the problem of underenforcement, such as offering technical assistance to help weak antitrust jurisdictions pursue their investigations.

III TOWARDS AN INTERNATIONAL ANTITRUST REGIME?

The above problems of decentralized antitrust enforcement have led many states and numerous scholars to advance proposals to enhance international antitrust convergence. These proposals range from complete substantive harmonization of antitrust laws to various decentralized forms of cooperation. Some envision the establishment of a stand-alone international antitrust organization[166] that will enforce the harmonized

[165] See Fox, *supra* note 7, at 1790–91; OLIVER BUDZINSKI, THE GOVERNANCE OF GLOBAL COMPETITION: COMPETENCE ALLOCATION IN INTERNATIONAL COMPETITION POLICY 80 (Edward Elgar, 2008) (explaining how countries can attract foreign business by either improving domestic competition conditions or offering lax standards).

[166] See, e.g., Eleanor M. Fox, *Competition Law and the Millennium Round*, 2 J. INT'L ECON. L. 665, 675 (1999) (arguing for the creation of a 'World Competition Forum' for competition-specific

antitrust law.[167] Others propose incorporating substantive antitrust norms within the existing institutional framework, via organizations such as the WTO,[168] the Organisation for Economic Co-operation and Development (OECD)[169] and the United Nations Conference on Trade and Development (UNCTAD).[170] Some scholars remain skeptical of substantive harmonization but advocate limited WTO negotiations to prevent anticompetitive private practices from becoming trade barriers,[171] or propose rules allocating jurisdictional competence among states.[172] Still others remain skeptical of any

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issues). But *cf.* Eleanor M. Fox, *Antitrust and Intellectual Property in a Global Context*, 13 Sw. J.L. and Trade Am. 211, 233 (2007) (suggesting, more flexibly, that the European Union's proposal for a worldwide competition policy could be implemented in the WTO *or* as a stand-alone project); Eleanor M. Fox, *International Antitrust, A Multi-Tiered Challenge: The Doha Dome*, 43 Va. J. Int'l L. 911, 925–6 (2003) (hereinafter '*Doha Dome*') (arguing that a stand-alone world antitrust institution would be theoretically preferable, but conceding that it would be very difficult to establish).

[167] See Trebilcock and Iacobucci, *supra* note 42, at 169 (describing the International Antitrust Working Group's Draft International Antitrust Code and proposal for a mandatory World Antitrust Authority, but dismissing it as largely irrelevant to modern preoccupations regarding antitrust); Fox, *Doha Dome*, *supra* note 166, at n.36 (explaining that neither the EU nor the United States has the legitimate authority to enforce competition law on behalf of the world).

[168] Fox, *Doha Dome*, *supra* note 166, at 929–30; Guzman, *supra* note 125, at 1158; Robert D. Anderson and Peter Holmes, *Competition Policy and the Future of the Multilateral Trading System*, 5 J. Int'l Econ. L. 531, 557–60 (2002) (explaining various proposals regarding implementing competition law under the WTO); Frédéric Jenny, *Globalization, Competition and Trade Policy: Convergence, Divergence and Cooperation*, in Competition Policy in the Global Trading System: Perspectives from the EU, Japan and the USA 295 (Clifford A. Jones and Mitsuo Matsushita eds., Kluwer, 2002). See generally Martyn Taylor, International Competition Law: A New Dimension for the WTO? (Cambridge, 2006); Marsden, *supra* note 7.

[169] See Tarullo, *supra* note 80, at 501 (proposing that the OECD be given substantial autonomy to evolve antitrust arrangements into more ambitious agreements).

[170] Ioannis Lianos, *The Contribution of the United Nations to the Emergence of Global Antitrust Law*, 15 Tul. J. Int'l and Comp. L. 415, 455–61 (2006–2007) (explaining that UNCTAD may play a role in garnering international support by facilitating antitrust negotiations with developing countries).

[171] See, e.g., Marsden, *supra* note 7, at 284 (proposing the development of a 'trade and competition "guideline" by which WTO Members would undertake to prohibit those arrangements that substantially impede access to their market and which are thereby likely to lessen competition substantially in the relevant market for the products at issue'); Trebilcock and Iacoburri, *supra* note 42, at 154–7 (proposing a 'national treatment principle' which would prohibit countries from enforcing domestic competition laws in a way that favors domestic producers over foreign producers); Fox, *supra* note 7, at 1806 (proposing a modest extension of WTO obligations for member states to prevent market closure, but not demanding a comprehensive antitrust agreement); Fox, *Doha Dome*, *supra* note 166, at 928–31 (suggesting two possible models for global antitrust governance, one based on agreeing on certain basic principles and establishing a protocol for dealing with clashes, and another that focuses more on technical assistance); Fox, *Competition Law and the Millennium Round*, *supra* note 166, at 670–72 (proposing that countries could begin by negotiating an agreement ensuring market access with any noncompetition considerations transparently disclosed). McGinnis is skeptical of negotiating substantive rules in the WTO but proposes including an 'antidiscrimination antitrust code' within its institutional framework. Such a code would ensure that the WTO's Dispute Settlement Mechanism has jurisdiction to condemn discriminatory antitrust laws that impede trading partners' market access. McGinnis, *supra* note 140, at 126–7, 136–7.

[172] See Budzinski, *supra* note 165, at 203–6 (describing a system of 'mandatory lead jurisdiction' where a supranational authority decides which market has suffered the most anticompetitive

binding international antitrust rules, preferring bilateral cooperation between antitrust agencies and endorsing voluntary multilateral convergence through the International Competition Network (ICN).[173]

The history of international antitrust cooperation reveals that none of the more ambitious proposals for an international antitrust regime have been realized in practice; despite the well-known inefficiencies of decentralized antitrust enforcement, no overarching international antitrust regime has been established. Instead, international cooperation today consists of bilateral cooperation agreements among key jurisdictions and pursuits of voluntary multilateral convergence. This section reviews the current stage of antitrust cooperation and discusses why efforts to write binding international antitrust rules have failed.

A Current Status of International Antitrust Cooperation

States have attempted to launch international antitrust negotiations on several occasions.[174] In 1948, states negotiated international rules against anticompetitive business practices. These rules were incorporated into the Havana Charter, which contemplated establishment of an International Trade Organization (ITO).[175] The Charter failed to gain Congress' approval, and the world abandoned the ITO.[176] However, the need for multilateral coordination still remained, and the international community has periodically tried to revive antitrust negotiations in some other form.

In more recent history, the EU in particular has advocated including antitrust in

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impact in order to assign which country gets exclusive jurisdiction over the case); Wood, *supra* note 43, at 186–7 (advocating an international clearinghouse for mergers, where companies could submit the filing form of their home jurisdiction to the international clearinghouse, which would then submit it forward to other jurisdictions for review and optional follow-up).

173 The United States, for example, has continued to stress that any antitrust cooperation should be voluntary, through mechanisms such as the ICN. See Antitrust Division, US Dep't of Justice, *Final Report of the Int'l Competition Advisory Comm. to the Att'y Gen. and Assistant Att'y Gen. for Antitrust* ch. 4 (2000), available at www.usdoj.gov/atr/icpac/finalreport.htm; Kolasky, *supra* note 52. See also Wood, *supra* note 43, at 185 (taking the stance that any attempt at harmonization would be premature); Anu Bradford, *International Antitrust Cooperation and the Preference for Non-Binding Regimes*, in Cooperation, Comity and Competition Policy (Andrew Guzman ed., Oxford University Press, 2011) at 331, 333 (arguing that a binding agreement would only yield limited gains and that a nonbinding agreement would be able to capture much of the same gains with lower transaction cost); Paul B. Stephan, *Global Governance, Antitrust, and the Limits of International Cooperation*, 38 Cornell Int'l L.J. 173, 215–17 (2005) (endorsing a system of regulatory competition for innovation and investment, suggesting that countries will have an incentive to adopt the best laws once they feel the pressure of a neighbor's technological progress).

174 See, e.g., Marsden, *supra* note 7, ch. 1; see also Nataliya Yacheistova, *The International Competition Regulation A Short Review of a Long Evolution*, 18 World Compet. Law and Econ. 99, 99–110 (1994).

175 See Susan A. Aaronson, Trade and the American Dream: A Social History of Postwar Trade Policy 43 (Kentucky, 1996); Final Act and Related Documents of the United Nations Conference on Trade and Employment ('Havana Charter'), April 1948, U.N. Doc. E/807, available at www.wto.org/english/docs_e/legal_e/havana_e.pdf.

176 See Aaronson, *supra* note 175, at 127–31. See also *id.* at 4–5, 50–8, 61 (discussing the various factors and competing priorities that led to the waning of support for the ITO in the United States).

the WTO's negotiation agenda. Following the EU's request, the WTO established a Working Group on the Interaction of Trade and Competition in 1996 to study the interface between trade and antitrust policy.[177] In the 2001 Doha Ministerial meeting, the WTO Member States agreed to launch WTO antitrust negotiations in the near future.[178] However, prospective antitrust negotiations came to halt in the 2003 Cancun Ministerial meeting, largely as a result of opposition from developing countries.[179] The efforts to revive antitrust negotiations by the WTO General Council in 2004 also failed, and antitrust was officially removed from the Doha agenda at that time.[180] With that decision, any further efforts to adopt antitrust rules within the WTO were abandoned, at least for the time being.

The failure to negotiate a binding international antitrust agreement has prompted states to pursue voluntary cooperation, both bilaterally and multilaterally.[181] Several states have negotiated bilateral agreements, which allow their antitrust authorities to cooperate, for instance, by exchanging market information, assisting each other in evidence gathering, coordinating investigations, and negotiating joint remedies.[182] The primary challenge for the case-by-case cooperation, however, 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 (where agencies can incentivize corporations to cooperate with the prospect of accelerated merger approval) than in cartel investigations (where cooperation could expose corporations to additional sanctions in another jurisdiction).[183]

Bilateral cooperation has been particularly successful between the United States and

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[177] Budzinski, *supra* note 165, at 137. See World Trade Organization, Ministerial Declaration of 18 December 1996 ('Singapore Ministerial Declaration'), WT/MIN(96)/DEC.

[178] See World Trade Organization, Ministerial Declaration of 20 November 2001 ('Doha Ministerial Declaration'), WT/MIN(01)/DEC/1.

[179] See, e.g., *Day 5: Conference Ends Without Consensus*, available at www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm. On 1 August 2004, the WTO General Council decided to officially drop antitrust policy from the Doha Round agenda of negotiations. See World Trade Organization, Decision Adopted by the General Council on 1 August 2004, WT/L/579, para. 1(g).

[180] See *id.*

[181] See generally Oliver Budzinski, *The International Competition Network: Prospects and Limits on the Road Towards International Competition Governance,* 8 Comp. and Change 223 (2004); Frederic Jenny, *International Cooperation on Competition: Myth, Reality and Perspective,* 48 Antitrust Bull. 973 (2003); Anu Piilola, *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 Stan. J. Int'l L. 207 (2003). These cooperation arrangements have been extensively described elsewhere in the literature. See generally Bruno Zanetti, Cooperation Between Antitrust Agencies at the International Level (2002); Budzinski, *supra* note 165.

[182] Some states have concluded formal bilateral agreements, but these are more nonbinding than binding in character, since the decision to cooperate remains entirely at the discretion of domestic antitrust authorities.

[183] Jenny, *supra* note 181, at 995. See also International Chamber of Commerce and Business and Industry Advisory Committee to the OECD, ICC/BIAC Comments on Report of the US International Competition Policy Advisory Committee (ICPAC) 8 (5 June 2000), available at www.biac.org/statements/comp/00-06-ICC-BIAC_comments_on_ICPAC_report.pdf.

the EU,[184] leading to significant convergence of their enforcement practices.[185] And while frequent cooperation does not eliminate the risk of conflicting decisions, as the controversial GE/Honeywell merger demonstrated,[186] enforcement conflicts between the United States and the EU are rare in practice.[187] Indeed, the *GE/Honeywell* decision remains the only merger case in which the US and EU authorities have reached a conflicting decision. In contrast, developed countries have rarely sought cooperation agreements with developing countries.[188] This might be because developed countries do not expect to gain much from such cooperation. Corporations based in developing countries are predominantly small and thus rarely able to acquire significant market power in developed country markets. Developed countries' domestic laws and superior enforcement resources also give them adequate power to regulate extra-territorially the conduct of developing country corporations, if necessary. Developed countries may also fear that they would be subject to frequent requests for enforcement assistance from developing countries, which do not have the resources to prosecute large corporations from developed countries.

Multilateral institutions have complemented bilateral efforts to foster nonbinding international antitrust cooperation. Both UNCTAD and the OECD have included antitrust matters on their agendas. UNCTAD has not played a major role in enhancing international antitrust convergence beyond its educational and capacity-building efforts, and its role in international antitrust governance today is marginal.[189] The OECD has

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[184] See Agreement between the Government of the United States and the Commission of the European Communities regarding the Application of the Competition Law, US–EC, 23 September 1991, US State Dep't No. 91-216, 30 I.L.M. 1487, 1991 WL 495155; Agreement between the Government of the United States and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, art. III, US–EC, 4 June 1998, US State Dept. No. 98-106, 1998 WL 428268. See also Press Release, US–EU Merger Working Group, *Best Practices on Cooperation in Merger Investigations*, 30 October 2002, available at www.usdoj.gov/atr/public/international/docs/200405.pdf.

[185] The effectiveness of transatlantic antitrust cooperation was also recognized by Robert Pitofsky, the former Chairman of the Federal Trade Commission, who noted in 2000 that '[t]here has been a remarkable convergence in substance between the EC and the U.S. in merger review in the last ten years . . . In my view, it is hard to imagine how day-to-day cooperation and coordination between enforcement officials in Europe and the United States could be much improved'. See Robert Pitofsky, Chairman, Federal Trade Commission, EU and US Approaches to International Mergers: Views from the US Federal Trade Commission, Address at the EC Merger Control 10th Anniversary Conference, 14–15 September 2000, available at www.ftc.gov/speeches/pitofsky/pitintermergers.shtm.

[186] See *supra* note 60.

[187] For example, the EU prohibited a proposed merger between de Havilland and ATR, which was approved by the Canadian authorities. See Commission Decision of 2 October 1991, Aerospatiale-Alenia/de Havilland, Case No. Case No IV/M.053, [1991] O.J. L334/42 (12 May 1991).

[188] See Jenny, *supra* note 181, at 979, 993.

[189] See A. Douglas Melamed, Promoting Sound Antitrust Enforcement in the Global Economy, Address before the Fordham Corporate Law Institute, 19 October 2000, at § II–III, available at www.usdoj.gov/atr/public/speeches/6785.htm (noting that UNCTAD has given technical assistance, but noting that its mandate is not conducive to negotiating international convergence). In 1980, the United Nation's General Assembly adopted a nonbinding set of rules for the control of restrictive business practices ('RBP Code'). See UNCTAD, A Set of Mutually Agreed Equitable

been more influential. Its Governing Council and the Competition Committee have issued a series of nonbinding recommendations and best practice guidelines to facilitate cooperation and convergence among national antitrust regulators and their respective antitrust policies.[190] The OECD has not sought to harmonize national antitrust laws or create uniform enforcement institutions. Instead, it has emphasized the need to enhance voluntary convergence in principles underlying antitrust policy, domestic policy objectives, and enforcement practices.[191] The most active forum for nonbinding multilateral antitrust cooperation since 2001 has been the International Competition Network (ICN). As an informal network of antitrust agencies, the ICN seeks to enhance policy convergence, reduce transaction costs, and catalyse domestic reforms on a voluntary basis.[192]

Principles and Rules for the Control of Restrictive Business Practices, TD/RBP/CONF/10/REV.1 (1980). The RBP Code recommends member states to eliminate restrictive business practices by encouraging them to establish domestic antitrust regimes. In addition, the RBP Code urges businesses to refrain from engaging in anticompetitive practices. The RBP Code also established an Intergovernmental Group of Experts. The Group of Experts and the UNCTAD Secretariat have provided education and technical assistance to facilitate the adoption of antitrust laws in developing countries. See Lianos, *supra* note 170, at 427.

[190] While the OECD also has the capacity to issue binding international norms, see, e.g., 1997 International Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ('Anti-Bribery Convention'), 8 April 1998, OECD Doc. Daffe/IME/BR (97)20, 37 I.L.M. 1, cooperation within the antitrust domain has thus far been voluntary. Earlier OECD recommendations on antitrust cooperation focused on international consultation, notification, investigative assistance, and information exchange among agencies. The Recommendation Concerning Cooperation Between Member Countries on Anti-Competitive Practices Affecting International Trade was adopted in 1967 and amended in 1973, 1979, 1986, and 1995 ('OECD Recommendation'). See Revised Recommendation of the Council concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade, 28 July 1995, OECD Doc. C(95)130/Final; OECD Revised Recommendation of the Council concerning Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade, 21 May 1986, OECD Doc. C(86)44/Final; Recommendations of the Council of the Organisation for Economic Co-operation and Development concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade, 25 September 1979, OECD Doc. C(79)154/Final; Recommendation concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade, OECD Doc. C(73)99/Final (3 July 1973); Recommendation of the Council concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade, OECD Doc. C(67)54/Final (5 October 1967). More recent recommendations have dealt with, for instance, merger review and action against hard-core cartels. See 2005 Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations, available at www.oecd.org/dataoecd/1/33/35590548.pdf; 1998 Recommendation of the Council concerning Effective Action Against Hard Core Cartels, 25 March 1998, OECD Doc. C(98) 35/Final, available at www.oecd.org/dataoecd/39/4/2350130.pdf.

[191] Jenny, *supra* note 181, at 987; Tarullo, *supra* note 80, at 494–6.

[192] For example, the ICN identifies, develops, and publishes policy recommendations and best practices. ICN Report*, supra* note 82, at 18–23. See Budzinski, *supra* note 165, at 228 (describing the ICN's functions and proposing to develop the ICN further to create an International Competition Panel that can exercise lead jurisdiction). 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. For more information on the purpose and the functioning of the ICN, see www.internationalcompetitionnetwork.org. See also Jenny, *supra* note 181, at 976–7 (discussing in more

Following the collapse of the WTO antitrust negotiations in 2003, the ICN has become the most influential international regime facilitating multilateral antitrust cooperation today.

B Why Attempts to Negotiate International Antitrust Rules Have Failed

1 Disagreement on optimal rules

Section IIB explored the possibility that the risk of defection inherent in the prisoner's dilemma would impede states from pursuing international antitrust cooperation. However, some scholars have questioned this premise. They argue that the greatest impediment for international cooperation does not stem from the possibility of defection but from the difficulty of reaching the right set of rules in the first place. States prefer convergence to nonconvergence; they just cannot agree on optimal rules to converge on. Bradford, for instance, has argued against the widespread existence of PD-incentives,[193] asserting instead that the collective action problem underlying international antitrust cooperation resembles a 'coordination game' where the distributional consequences of various forms of coordination impede states' ability to settle on any given set of international rules.[194] This theory assumes that different antitrust rules are optimal for different states. The costs and the benefits of a harmonized antitrust regime would therefore be unevenly distributed among states, creating a distributional conflict. This distributional conflict impedes states' ability to agree on the focal point of coordination.[195]

The most prominent distributional conflict exists between the United States and the EU. Despite the increasing alignment of the US and EU antitrust laws over the last decade, some key differences persist, as discussed above in section IC.[196] These enduring differences explain why the United States and the EU have competed against each other to direct international convergence towards their respective antitrust laws.[197] Even if both entities recognize that increased international coordination would lead to greater

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general terms the efforts between national competition authorities to enhance cooperation and advocate policy).

193 Bradford, *supra* note 47, at 389–97.

194 *Id.* at 397–400.

195 See *id.* at 413–15; Wood, *supra* note 43, at 184 (concluding based on her government service that the differences between governments are too great at present to form a meaningful agreement); Guzman, *supra* note 125, at 1155 (noting that the interests of exporters in supporting weak antitrust laws would conflict directly with the interests of net-importers who would want strict antitrust laws); Stephan, *supra* note 122, at 74; Trebilcock and Iacobucci, *supra* note 42, at 169 (suggesting that, although countries may occasionally act opportunistically, most conflicts probably arise from good-faith differences of opinion). See also World Trade Organization, *Report of the Working Group on the Interaction Between Trade and Competition Policy to the General Council*, WT/WGTCP/6 (9 December 2002) (revealing a great diversity of viewpoints, even for smaller agenda items).

196 See Elhauge and Geradin, *supra* note 49.

197 See, e.g., Fox, *supra* note 7, at 1799 (explaining how the United States and the EU have actively exported their own antitrust laws to other countries in the recent decade in order to expand their regimes' influence).

efficiency, each would prefer to internationalize their respective domestic antitrust regimes.[198]

This type of strategic situation is known as a coordination game with distributional consequences (CGDC) or a 'battle of the sexes'.[199] In a CGDC, both states prefer a coordinated outcome to a noncoordinated outcome, even though both also favor coordinating at their respective preferred equilibrium. For instance, the United States and the EU might both prefer coordination to noncoordination given that their antitrust laws today are increasingly similar; neither the United States nor the EU would incur significant adjustment costs if they were to coordinate to each other's preferred equilibrium. Still, it is reasonable to assume that, given the choice, both players would favor their own respective regimes as the focal point of convergence. The challenge is to choose between the focal point the United States prefers (US antitrust law) and the focal point the EU prefers (EU antitrust law).

Similar distributional conflict exists between developed countries and developing countries.[200] Developed countries want any international antitrust regime to reduce multinational corporations' (MNCs') transaction costs of operating on global markets. They also seek to 'level the playing field' by enhancing MNCs' access to the developing-country markets.[201] In contrast, developing countries resist the idea of a level playing field, asserting that their small domestic corporations require protection to be able to compete against MNCs.[202] Developing countries struggling with capacity constraints also fear that an international antitrust agreement would impose unduly burdensome obligations on them. Both developed countries and developing countries would benefit from coordination, but they disagree on whether to coordinate around the focal point preferred by the former or the latter.

Even the proponents of an international antitrust agreement concede that the

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198 This assumption rests on the presumption that the status quo of the domestic antitrust regime represents the domestic political equilibrium on this particular issue.

199 Simple coordination games that present no distributional consequences are relatively easy to solve as long as the parties can communicate. Neither player has a dominant strategy: there exist two Pareto-efficient outcomes that both players value equally and two Pareto-deficient outcomes that both players want to avoid. Since both parties are indifferent as to the choice between the two possible equilibria, the coordination is expected to be relatively smooth. In CGDC games, on the other hand, players hold different preferences as to the actual point of coordination. Players agree on mutually undesirable outcomes (noncoordination) but disagree as to which of the two Pareto-efficient equilibria to coordinate on (focal point of coordination). This makes coordination in a CGDC situation difficult.

200 Bradford, *supra* note 47, at 418–22.

201 *Cf.* Bernard M. Hoekman and 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 and Bernard M. Hoekman eds., World Bank, 2006) (reporting that the European Union, the United States, and other OECD members wanted the WTO to address antitrust because they did not want national idiosyncrasies to impede market access).

202 Singh and Dhumale, *supra* note 69, at 127. Developing countries are also concerned with their inability to prosecute international cartels. See Margaret Levenstein and Valerie Y. Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 ANTITRUST L.J. 801, 801–3 (2004).

unequal distributional consequences of any international agreement would present a challenge for cooperation.[203] This has led them to propose ways to overcome the distributional conflict. Eleanor Fox, for instance, invokes the spirit of cosmopolitanism as a solution to the existing disagreements among antitrust jurisdictions on optimal law and policy.[204] Fox calls on countries to bar government actions 'where the harm [the action] causes to world welfare perceptibly outweighs the benefit to the nation's citizens'.[205] However, critics have pointed out that this approach raises practical and moral concerns. On the practical level, data measuring 'world' and 'domestic' welfare would be hard to obtain and, once obtained, would remain controversial; it would also be difficult for countries in the WTO to agree when 'perceptible' net losses to world welfare have occurred. On an even more fundamental level, Fox's approach raises concern on whether 'world welfare' is the appropriate standard to use in the first place. As Marsden argues, the national government's obligations should lie with its national constituency.[206]

Andrew Guzman similarly recognizes that net-exporters and net-importers disagree on the optimal content of an international antitrust regime, the former seeking lax rules and the latter strict rules.[207] To overcome the distributional conflict between net-importers and net-exporters, Guzman proposes that states resort to transfer payments via the WTO.[208] This way, winners can compensate losers and thereby overcome their resistance to the agreement. Others have questioned the feasibility of transfer payments in the case of WTO antitrust negotiations. Bradford, for instance, argues that the costs and the benefits arising from an international antitrust agreement are likely to be diffuse, case-specific, and difficult to forecast. As long as states remain unable ex ante to identify the winners and losers under an agreement, they do not know who should compensate whom and by how much. As a result, transfer payments would be difficult to negotiate.[209] Moreover, Trebilcock and Iacobucci have noted that, even if such transfer payments were feasible, they might be normatively objectionable because some countries would have to adopt antitrust laws that would decrease their domestic welfare.[210]

Absent linkages, states are likely to be forced to negotiate compromises that lead to

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203 See Guzman, *supra* note 125, at 1155–6 (noting that net-exporters and net-importers will have different objectives); Fox, *supra* note 42, at 12 (observing that many countries with more statist traditions may be concerned about different goals than the United States or the EU such as the distribution of wealth or tight control over the potential abuses of multinational corporations).

204 The cosmopolitan view, as Fox characterizes it, means taking 'concern for the interests of the entire community without regard to nationality, while recognizing the legitimate role for national and provincial governments to act in the interest of their citizens'. Fox, *supra* note 42, at 3 n.4.

205 *Id.* The WTO Secretariat has expressed similar sentiments, suggesting that 'the negative consequences for foreign interests must exceed the benefits to domestic agents' in order for the national competition policy to be deemed an inefficient allocation of resources from a global point of view. Marsden, *supra* note 7, at 197.

206 *Id.* at 251.

207 Guzman, *Antitrust and International Regulatory Federalism*, *supra* note 125, at 1155.

208 *Id.* at 1155–8.

209 Bradford, *supra* note 47, at 422–32.

210 Trebilcock and Iacobucci, *supra* note 42, at 171.

shallow international obligations.[211] The United States has resisted the WTO antitrust agreement precisely because of the fear that a binding international agreement would weaken antitrust laws throughout the world. Conflicting regulatory priorities would inevitably lead to a watered-down compromise, weakening antitrust laws worldwide.[212] At worst, the WTO antitrust agreement would merely codify the lowest common denominator among its broad and diverse membership.[213] Diane Wood similarly predicts that efforts to reach a compromise in the midst of vast disagreement would merely lead to international rules riddled with exceptions.[214] Proponents of the WTO antitrust agreement may respond that initially weak antitrust commitments could deepen with time as a result of voluntary convergence and gradual alignment of states' preferences.[215] However, the WTO does not generally lend itself well to the idea of 'gradualism'. Frequent revision of WTO obligations would call for new negotiations among over 150 states. These negotiations would inevitably be slow and costly, producing, at best, an uncertain outcome.[216]

2 Costs of international convergence

Limited net benefits stemming from the agreement Another impediment for an international antitrust agreement is the perception that the net benefits of such an agreement would be limited. Several scholars have argued that the costs of a binding international

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211 See, e.g., Bradford, *supra* note 173, at 7–9; Wood, *supra* note 43, at 186 (arguing that any consensus could only be achieved after diluting the law to the point that it lacks any real guiding content).

212 See Wood, *supra* note 43, at 186; Roscoe B. Starek, III, Commissioner, Federal Trade Commission, International Aspects of Antitrust Enforcement, Address at the Antitrust 1996 Conference, 29 September 1995, available at www.ftc.gov/speeches/starek/starekda.htm ('The sticking point is whether agreement can be reached on a sufficiently stringent set of antitrust policies. 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 Att'y Gen., US 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, 22 October 1998, available at www.usdoj.gov/atr/public/speeches/2043.htm ('any 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'). Every new attempt to accommodate divergent preferences stripped the antitrust agreement of more meaningful content. The most recent proposal for a WTO antitrust agreement is the most unambitious yet: rather than proposing any substantive rules, it merely extends the fundamental yet vague WTO principles of 'transparency' or 'national treatment' to antitrust matters. See Bradford, *supra* note 173, at 8.

213 See Starek, *supra* note 212; Melamed, *supra* note 212.

214 Wood, *supra* note 43, at 185–6.

215 See, e.g., Fox, *Doha Dome*, *supra* note 166, at 926–32 (explaining that the world is not yet ready for a global consensus on principles and suggesting horizontal cooperation in the meantime); Guzman, *supra* note 30, at 437–40 (proposing several possibilities for small-scale cooperation). In general, this approach is advanced by the 'transformational approach'. Transformationalists endorse shallow framework agreements with broadest possible participation and claim that commitments that are 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).

216 See Bradford, *supra* note 173, at 9; Stephan, *supra* note 122, at 80.

antitrust agreement may exceed its benefits.[217] There are three principal reasons for this. First, the benefits from such an agreement are hard to predict and possibly not as great as generally presumed. Second, the opportunity costs of forgoing the agreement are relatively low. Third, negotiating a binding international agreement would be costly, particularly when compared to the uncertain benefits stemming from coordination and the lack of high opportunity costs under the status quo.[218] These reasons are discussed below.

An international antitrust agreement may yield disappointing returns for several reasons. If the parties to the agreement dilute its substance to accommodate distributional tensions, the agreement will no longer generate any net benefits to offset the costs of negotiating the agreement.[219] Also, the externalities from multijurisdictional antitrust enforcement may not be as great as commonly presumed, making reform unnecessary. Scholars often point to multijurisdictional merger review as an example of an antitrust action that involves high transaction costs. However, as discussed above, these 'high' transaction costs seem relatively small when compared to the total costs of the deal.[220] Another example comes from a recent US International Trade Commission survey, which challenges the presumption that anticompetitive practices would constitute significant nontariff barriers that compromise the gains of trade liberalization.[221] Third, unlike in other areas involving regulatory competition, antitrust law does not carry the risk of a detrimental race to the bottom, as discussed above; this reduces the need to pursue international rules.[222]

Also the opportunity costs of forgoing global antitrust rules are relatively low.[223] Most states – the strong antitrust jurisdictions in particular – can apply their domestic antitrust laws extra-territorially as long as their respective domestic markets are affected by the alleged anticompetitive conduct. Extra-territorial enforcement by the importing jurisdiction limits externalities stemming from any underenforcement of antitrust laws by the exporting jurisdiction.[224] Further, the existing bilateral agreements and voluntary

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217 Bradford, *supra* note 47, at 410–13.

218 McGinnis, *supra* note 140, at 126. McGinnis maintains that harmonization would be costly and likely to retard rather than advance the goals of antitrust enforcement. *Id.* at 129.

219 Bradford, *supra* note 173, at 9–11.

220 See discussion *supra*.

221 The USITC statistics analyse data collected by the USTR, the EU, and the WTO to evaluate the relative harmfulness of various nontariff barriers (NTBs) that may impede the free flow of goods and services. The study compiles data from 53 economies, dividing the information into 15 categories of NTBs, 'anticompetitive practices/competition policy' being one of them. As a category, 'anticompetitive practices/competition policy' was second to last in frequency among the NTBs. 'Anticompetitive practices/competition policy' was also second to last in terms of the number of economies in which the measure was reported. See Diane Manifold and William Donnelly, *A Compilation from Multiple Sources of Reported Measures which May Affect Trade*, in QUANTITATIVE METHODS FOR ASSESSING THE EFFECTS OF NON-TARIFF MEASURES AND TRADE FACILITATION 41–50 (Philippa Dee and Michael Ferrantino eds, World Scientific, 2005).

222 See discussion *supra* (discussing the 'strictest regime wins' problem, in which the law of the strictest jurisdiction has the power to set the de facto world standard).

223 Bradford, *supra* note 47, at 433–5 (comparing the relatively low opportunity costs to forgoing antitrust agreements to the relatively high opportunity costs of forgoing intellectual property agreements).

224 However, extra-territoriality does not solve the overenforcement problem raised by the 'strictest regime wins' phenomenon.

multilateral cooperation within the OECD and the ICN have enhanced convergence and reduced the frictions arising from decentralized enforcement. While voluntary guidelines and case-by-case cooperation may have their limits, they may lower the opportunity cost enough to make the expected benefits of a global antitrust regime no longer worthwhile.[225] Paul Stephan also argues that international rules are unnecessary because there are sufficient market incentives for states to refrain from over- and underenforcement of their antitrust rules. For instance, a state that chooses to protect domestic producers against welfare-enhancing competition does so at the expense of future investment and innovation, the welfare of its consumers, and the competitiveness of its industries. [226]

Finally, negotiating and implementing an international agreement would be costly. Contracting costs are particularly high in an institution like the WTO where numerous states with divergent preferences are seeking to agree on binding norms.[227] The need to secure domestic ratification of the agreement in (presumably) most WTO member states would add to the contracting costs. The negotiations would also be slow and cumbersome: the Uruguay Round of WTO negotiations required eight years to complete. The current Doha Round, launched in 2001, is still ongoing. Pursuing a WTO antitrust agreement would hence almost inevitably be a slow and costly process. Implementing and enforcing international rules would also be costly, in particular for developing countries with limited institutional capacity, technical expertise, and financial resources. The costs associated with international rules were a major reason why developing countries blocked the antitrust talks in the 2003 WTO ministerial meeting in Cancun.[228] Consequently, the prospect of international antitrust laws, while yielding certain undeniable efficiencies, may simply not have been a priority for states due to high costs, limited gains, and the absence of significant opportunity costs.

Agency costs and institutional limitations The international antitrust regime could also entail higher agency costs, reducing the welfare effects of antitrust laws. Stephan has opposed delegating antitrust decision-making powers to the WTO precisely because of the prospect of higher agency costs.[229] All agencies vested with discretion have the capacity to act arbitrarily. Often, states can mitigate these agency problems by curtailing agencies' discretion ('bonding') ex ante and supervising their behavior ('monitoring') ex

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[225] Bradford, *supra* note 47, *Id.* at 439; Fox, *Doha Dome*, *supra* note 166, at 929–30.

[226] Stephan, *supra* note 122, at 67.

[227] States would negotiate each provision more cautiously when they know that they will be legally bound by the agreement.

[228] See Editorial, *The Real Lesson of the Cancun Failure*, Financial Times (London), 23 September 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'). See also Taimoon Stewart, *The Fate of Competition Policy in Cancun: Politics or Substance?*, 31 Legal Issues of Econ. Integration 7 (2004). The developing countries would also have to sustain higher political costs because their import-competing industries and former state-owned enterprises would resist any reforms that would remove the government protection they enjoy. See William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 Brook. J. Int'l L. 403, 404–5 (1997).

[229] Stephan, *supra* note 173, at 198–201; Stephan, *supra* note 122, at 77–9.

post.[230] Bonding and monitoring an international agent that administers and enforces an agreement of substantive antitrust policy would, however, be particularly challenging, for two reasons. First, the principals (the WTO member states) do not share an understanding on optimal antitrust rules, making bonding difficult. This would leave an international agent with wide discretion. Second, monitoring the agent would be ineffective because of the difficulty of reforming international regimes even if states were dissatisfied with the agent.[231] Thus, according to Stephan, international antitrust agreement would entail a risk of replicating, if not magnifying, the government failures experienced at the domestic level.[232]

John McGinnis opposes international antitrust agreement on similar grounds. He argues that such an agreement would create higher agency costs, while depriving states of the distinct benefits that the decentralized enforcement regime provides.[233] For example, there are fewer ways of holding an international antitrust regime democratically accountable than there are for domestic agencies.[234] Being more opaque than domestic administrative processes, the monitoring costs of an international agent would be higher.[235] The dangers of agency capture would also be more severe: political rents available on a global scale are expected to be higher, inducing interest groups to expend more resources on costly lobbying.[236] Whereas interest groups have to capture numerous agencies under the decentralized antitrust regime, interest groups under the unified regime would only need to capture one agency to influence an outcome.[237]

Stephan also emphasizes the difficulties associated with creating institutions and reforming them. International institutions are inflexible in their decision-making and therefore often incapable of responding to changing circumstances. McGinnis agrees, emphasizing the high lock-in costs of international institutions in a rapidly changing world. These costs can deter beneficial change.[238] In contrast, decentralized antitrust enforcement creates opportunities for legal innovation, experiment, and mutual learning.[239] Wolfgang Kerber and Oliver Budzinski take this view. They argue that states can use each other's experiences to re-assess their own antitrust regimes, imitating successful regimes and correcting their own errors as necessary.[240] They maintain that no one country knows which rules are best ex ante, and see the freedom to experiment in multiple

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230 See generally Michael C. Jensen and William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. Fin. Econ. 305 (1976) (proposing bonding and monitoring as an appropriate solution for agency problems).

231 See Stephan, *supra* note 122, at 66, 77–9.

232 See *id*.

233 McGinnis, *supra* note 140, at 129.

234 See *id.* at 126; Wood, *supra* note 43, at 185.

235 McGinnis, *supra* note 140, at 129.

236 *Id.*

237 But see Josef Drexl, *Comments on Harry First: Decentralized Antitrust Enforcement and the Evolution of an International Common Law of Antitrust*, in The Future of Transnational Antitrust: From Comparative to Common Competition Law 60 (Josef Drexl ed., Kluwer, 2003) (arguing that, in practice, the European Commission has been less subject to the political influence of private businesses than national governments).

238 McGinnis, *supra* note 140, at 126.

239 *Id.*

240 See Kerber and Budzinski, *supra* note 27, at 36–9 (describing the concept they call 'yardstick

jurisdictions as an opportunity to test competing theories. Indeed, several commentators have argued that the criticism directed at the EU in the aftermath of the *GE/Honeywell* decision prompted several changes in the European antitrust regime, shifting the EU's enforcement closer to that of the United States.[241]

The WTO also has serious institutional limitations that impede its ability to effectively embrace new areas of regulation, including antitrust.[242] Diane Wood, for instance, fears that incorporating antitrust within the WTO would lead to institutional and political overload of the organization.[243] At worst, this could weaken the WTO's ability to carry out its key mission: to liberalize world trade. Several commentators note that the WTO is predominantly a trade organization with limited expertise in antitrust.[244] They fear that the WTO could conflate antitrust issues with trade policy considerations in its decision-making.[245] The United States in particular has opposed a WTO antitrust agreement on these grounds.[246] It has repeatedly emphasized the need to avoid enmeshing antitrust with trade policy.[247] This stands in stark contrast to the EU, which is comfortable in entangling trade and antitrust policies. After all, the EU's antitrust laws were enacted predominantly to complement the goal of establishing a Common Market and ensuring that the efforts to remove trade barriers would not be frustrated by private barriers to trade.[248]

Consequently, opposition to a global antitrust regime revolves around several related

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competition', in which countries mutually learn from one another by observing one another's successes and failures).

241 See, e.g., Mario Monti, Commissioner for Competition Policy, Feedback to the Green Paper: An Overview, Remarks Before the Conference on Reform of European Merger Control (4 June 2002), available at europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/02/252&format=PDF&aged=1&language=EN&guiLanguage=en; McGinnis, *supra* note 140, at 131; Fox, *supra* note 60, at 353–4, 358–9.

242 See Stephan, *supra* note 122, at 80–81.

243 Wood, *supra* note 43, at 185. Stephan agrees, asserting that extending the scope of the WTO to new areas, including antitrust, would be precarious. At worst, it would reduce the WTO's capacity for effective intervention in traditional areas of trade liberalization. See Stephan, *supra* note 122, at 81.

244 See, e.g., D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 Berkeley Bus. L.J. 37, 91–2 (2007). In response to the criticism that the WTO does not have sufficient expertise in antitrust, Guzman proposes changes in the organizational structure of the institution: the WTO could be divided into specialized departments, each vested with the responsibility and corresponding expertise in a particular substantive area. See Andrew T. Guzman, *Global Governance and the WTO*, 45 Harv. Int'l L.J. 303, 306, 310 (2004). Under this proposal, a WTO department could develop specialized knowledge particular to the WTO, much as antitrust divisions in national jurisdictions do now.

245 See Tarullo, *supra* note 80, at 493–4 (predicting that broadening the WTO's agenda to include antitrust will strain its ability to address other trade-related parts of its mission). In contrast, scholars such as Fox are not worried about this potential conflation, and even welcome existing trade concepts as a potential platform on which to build basic consensus and protocol rules. See Fox, *Doha Dome*, *supra* note 166, at 926, 929–30.

246 See Melamed, *supra* note 189, at § II.

247 See, e.g., Melamed, *supra* note 212, at § III. See also Spencer Weber Waller, *The Decline of the Nation State and its Effect on Constitutional and International Economic Law:* Contribution: *National Laws and International Markets: Strategies of Cooperation and Enforcement of Competition Law,* 18 Cardozo L. Rev. 1111, 1123 (1996).

248 See Bradford, *supra* note 47, at 406–9; Bradford, *supra* note 173, at 6.

perceptions: that divergences across states loom too great, that such a regime would represent the lowest common denominator, that the global regime would not entail sufficient net benefits to make it a priority, or that it would magnify agency problems or even subject antitrust rules to trade policy. These reasons, taken together, help us understand why efforts to negotiate an international antitrust agreement have failed. Still, the idea of international antitrust governance continues to invite vibrant scholarly discussion. The last section of this chapter will sketch possible directions for that discussion going forward.

IV CONCLUSION

The above discussion has exposed the dual problem underlying international antitrust law. Section II discussed how decentralized antitrust enforcement can produce externalities and reduce global welfare. Section III discussed how seeking increased convergence across jurisdictions may not be optimal either. This has led international antitrust scholars to search for ways to reduce negative externalities embedded in the decentralized antitrust regime, while respecting each antitrust jurisdiction's freedom to design its own laws.

Debate on the optimal balance between convergence and divergence continues. Two trends have emerged to shape the direction of this debate. First, those engaged in the discussion are beginning to appreciate that the world of antitrust extends beyond the United States and the European Union. Second, scholars are beginning to realize the paucity of empirical scholarship on international antitrust law.

The United States and the European Union remain the two most significant antitrust jurisdictions in the world. Comparative inquiries into their antitrust laws and enforcement practices continue to be fruitful. However, the center of gravity for international business activity is increasingly shifting to emerging markets. Goldman Sachs has predicted that by 2035, the GDP of the 'BRIC' countries (referring to Brazil, Russia, India, and China) will exceed the GDP of the current G-7 countries.[249] The scholarship on international antitrust law should seek to anticipate the implications this development has for antitrust law. This also requires revisiting the distinction between developed countries and developing countries. Today, developing countries comprise a diverse group of states, with vastly different domestic markets, levels of openness, political economies, and institutional capacities. China and Kenya cannot be expected to balance similar concerns when designing their domestic antitrust regimes. The increasing heterogeneity among developing countries has given new impetus for the debate on how different market conditions and political economies shape antitrust laws, how universal the economic theories underlying antitrust enforcement are, and how adaptable these theories are for guiding countries that do not share the same economic or political history and that face different opportunities and challenges.

On the methodological side, while domestic antitrust law has for a long time benefited from sophisticated analytical tools, scholarship on international antitrust law has not

[249] Goldman Sachs, *BRICs and Beyond* 5 (November 2007), available at www2.goldmansachs.com/ideas/brics/BRICs-and-Beyond.html. The G-7 countries are Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States.

taken full advantage of insights from economics or other disciplines. More recently, scholars have employed new tools, including game theory and empirical methods, to bring more analytical coherence into the field.[250] The ICN study measuring the costs of multijurisdictional merger enforcement was a welcome early step in the right direction.[251] Some areas of international antitrust law have already received more attention by empiricists. Margaret Levenstein and Valerie Suslow have studied the effect of international cartels on developing countries.[252] They have also made a significant contribution to our understanding of the prevalence and harmfulness of export cartels.[253] Building on work done by Nicholson,[254] Keith Hylton and Fei Deng have undertaken an ambitious project seeking to quantify antitrust laws around the world. Studying variations across antitrust jurisdictions, they developed a 'scope index' to measure the extent to which antitrust laws of a given country are likely to catch anticompetitive conduct.[255] Their findings are less credible because of their exclusive focus on antitrust laws in books – they do not incorporate actual enforcement realities when constructing the scope index. Still, they have contributed a founding work to empirical international antitrust law scholarship on which other scholars in the future are likely to build. Such future work will help us verify the importance of the problems underlying international antitrust law that are often assumed rather than empirically validated.

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250 For a game theory-based analysis of antitrust cooperation strategies, see generally Bradford, *supra* note 47. In addition to empirical work mentioned in this section, see generally Daniel Sokol and Kyle Steigert, *An Empirical Evaluation of Long Term Advisors and Short Term Interventions in Technical Assistance and Capacity Building* (University of Missouri School of Law Legal Studies Research Paper No. 2008-03, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1095884; Çaglar Özden, *International Dimensions of Competition Policies: European Responses to American Mergers*, 56 Revenue Economique 1413 (2005); Simon Evenett and Alexander Hijzen, *Conformity with International Recommendations on Merger Reviews: An Economic Perspective on 'Soft Law'* (University of Nottingham Research Paper No. 2006/04, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=893034.

251 ICN Report, *supra* note 82.

252 Levenstein and Suslow, *supra* note 202, at 800–806.

253 Levenstein and Suslow, *supra* note 145, at 792–3.

254 See generally Michael W. Nicholson, *Quantifying Antitrust Regimes*, 3 Erasmus L. and Econ. Rev. 41 (2007). For a more recent follow-up to the original study, see generally Nicholson, *supra* note 75.

255 See generally Hylton and Deng, *supra* note 9.