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International Antitrust Negotiations and the False Hope of the WTO

Anu Bradford*

INTRODUCTION

Multinational corporations (“MNCs”) operate today in an increasingly open global trade environment. While tariff barriers have collapsed dramatically, several states and numerous scholars have raised concerns that the benefits of trade liberalization are undermined by various non-tariff barriers (“NTBs”) to trade, including the anticompetitive business practices of private enterprise. As a result, demands to link trade and antitrust policies more closely by extending the coverage of the World Trade Organization (“WTO”) to incorporate antitrust law have gathered momentum over the last decade.¹

Most advocates of a WTO antitrust agreement base their normative claims on largely intuitive assumptions about the necessity or desirability of international rules.² The existing literature contains few examinations of the strategic situation that characterizes international antitrust cooperation and, as a result, has either completely ignored or largely mischaracterized the collective action problem that has impeded the efforts to negotiate any multinational antitrust rules. With the help of insights developed in game theory, this Article seeks to fill the gap in the current debate by analyzing the strategic interactions underlying states’ attempts to seek convergence of their antitrust laws. Understanding why attempts to generate formal international antitrust cooperation have thus far been unsuccessful is a critical

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1. For a good overview of the various proposals for including antitrust in the WTO, see, for example, PHILIP MARSDEN, *A COMPETITION POLICY FOR THE WTO* (2003); Julian L. Clarke & Simon J. Evenett, *A Multilateral Framework for Competition Policy?*, in *THE SINGAPORE ISSUES AND THE WORLD TRADING SYSTEM: THE ROAD TO CANCUN AND BEYOND* (State Secretariat of Econ. Affairs, Switz. & Simon J. Evenett eds., 2003), available at <http://www.evenett.com/chapters/wtoguiocompetition.pdf>; Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT’L L. 1 (1997).

2. See discussion *infra* p. 384, 388 (noting that there have been few examinations of the strategic situation characterizing international antitrust regulation in the existing literature).

prerequisite for designing a normatively desirable international antitrust regime. By offering a more accurate descriptive account for the failure to reach a binding international antitrust agreement, the Article can also be expected to inform the normative debate on optimal international antitrust governance.

The prevailing perception is that recent trade liberalization and the reduction of tariff barriers, which governments have historically employed to protect or promote their national interest, will induce states to make use of antitrust laws to pursue the same objectives.³ Thus, states are expected to apply domestic antitrust laws strategically to advance their national interest at the expense of global welfare. Andrew Guzman, for instance, has claimed that states attempt to “externalize the costs and internalize the benefits of the exercise of market power across borders” in an effort to maximize their national interest.⁴ According to this theory, states have the incentive to either under-enforce or over-enforce their antitrust laws depending on trade flows. Specifically, if a state is a net importer, it has an incentive to employ stricter antitrust standards than what would be globally optimal as it fails to internalize costs born by foreign producers.⁵ If a state is a net exporter, it has an incentive to enact laxer antitrust laws than it would in a closed economy, externalizing costs to foreign consumers.⁶ Guzman concludes that an international antitrust agreement is needed to overcome these sub-optimal domestic antitrust laws.⁷ Recognizing that such an agreement would be difficult to reach as net exporters and net importers disagree on the optimal content of an international antitrust regime, he argues that the negotiations ought to take place under the auspices of the WTO, which allows for the formation of strategic linkages across issue areas and hence the compensation of losing states by prospective winners.⁸

While there have been no systematic efforts to formalize the strategic situation characterizing international antitrust regulation in the existing literature,⁹ Guzman, among other commentators, seems to imply that the

3. See Henrik Horn & James Levinsohn, *Merger Policies and Trade Liberalization 1* (Nat'l Bureau of Econ. Research, Working Paper No. 6077, 1997).

4. Andrew T. Guzman, *The Case for International Antitrust*, in *COMPETITION LAWS IN CONFLICT, ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY* 99, 101 (Richard A. Epstein & Michael S. Greve eds., 2004).

5. *Id.* at 108–09. “Optimal” antitrust laws would be globally efficient as no state would engage in over- or under-enforcement but would choose the same antitrust laws as they would absent trade flows.

6. *Id.*

7. *Id.* at 109–10.

8. Andrew T. Guzman, *Antitrust and International Regulatory Federalism*, 76 N.Y.U. L. REV. 1142, 1156–58 (2001). Negotiating parties may seek “strategic linkages” to broaden the scope for an acceptable compromise in situations where gains within a given issue area are asymmetrically distributed and, consequently, where no agreement can be reached on a single issue alone. See Steve Charnovitz, *Triangulating the World Trade Organization*, 96 AM. J. INT'L L. 28 (2002); David W. Leebron, *Linkages*, 96 AM. J. INT'L L. 5 (2002); Joel P. Trachtman, *Institutional Linkage: Transcending “Trade and . . .”*, 96 AM. J. INT'L L. 77 (2002).

9. *But see* Wolfgang Kerber & Oliver Budzinski, *Competition of Competition Laws: Mission Impossible?* in *COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY*, *supra* note 4, at

collective action problem underlying international antitrust resembles a Prisoner's Dilemma ("PD"), where the dominant strategy for each player is to behave opportunistically and deviate from the mutually optimal policy. While sharing Guzman's assumptions about states as rational actors who seek to maximize their national interest, this Article contests the extent to which domestic antitrust laws and enforcement are characterized by national bias. Instead of deliberately deviating from the mutually optimal antitrust policy, states appear to engage in under- and over-enforcement of domestic antitrust laws largely for less opportunistic reasons and would be willing to align their antitrust policies but either have found it too costly or have not yet managed to agree on the precise content of cooperation.¹⁰

This Article argues that a binding international agreement on antitrust has been difficult to reach as states find themselves facing one of two distinct game theoretic situations that inhibit effective cooperation. First, cooperation has at times failed because states have perceived the political and economic costs to exceed the expected benefits of cooperation. In these "Deadlock" situations, pursuing the convergence of domestic antitrust regimes has not represented a Pareto-superior alternative and has thus failed on the merits. Retaining the status quo has therefore been the single rational and optimal equilibrium of the game.

Second, in situations where states have perceived cooperation to Pareto-dominate non-cooperation, the pursuit of binding cooperation has been obstructed by the simultaneous existence of a distributional problem and an informational problem. The *distributional problem* arises as states assume that the costs and the benefits of an international antitrust agreement would be unevenly distributed among them. The *informational problem* arises as states are unable to predict the value of various solutions and have difficulties ex ante identifying which country would fare better under an international agreement and, therefore, who should compensate whom and by how much. This type of uncertainty regarding the magnitude and the division of payoffs among states is further complicated by uncertainty at the domestic level. Costs and benefits arising for domestic actors from an international antitrust agreement are likely to be diffuse, case-specific, and exceedingly difficult to

31, 44 (suggesting by way of a brief reference that the current decentralized antitrust regime resembles a Prisoner's Dilemma ("PD")); 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. & POL. 1, 6-8 (2004) (arguing that a non-coordinated merger control regime can be characterized as a PD).

10. It is outside the scope of this Article to discuss the type of international cooperation that could take place in the antitrust realm. Cooperation could entail, for instance, some degree of harmonization of substantive antitrust laws, agreement on minimum standards, allocation of jurisdiction, or centralized enforcement. In general, the word "cooperation" is used here to imply the achievement of greater coherence and policy convergence and thus the reduction of negative externalities that arise when domestic antitrust laws govern global markets. This Article also uses the term "coordination" to refer to situations where states pursue cooperation in a strategic setting that can be modeled as a "coordination game." See discussion *infra* at the beginning of Part III.A (on coordination games and how they differ from collaboration games).

forecast. When the distributional consequences of the agreement are uncertain, the status quo is likely to persist.¹¹ These latter interactions are modeled as a Coordination Game with Distributional Consequences ("CGDC"), where the game is modified to include the informational problem.

While the WTO could conceivably solve either the distributional or the informational problem in isolation, the *coexistence* of the two problems exacerbates the cooperation dilemma and increases the likelihood that cooperation will fail. The distributional problem creates an incentive for states to dissemble or misrepresent information in the hope of obtaining a more favorable solution. The distributional conflict thus thwarts the honest sharing of information, which again would be necessary to mitigate the informational problem.¹² With the persisting uncertainty regarding the distribution of gains and losses under the agreement, it has been difficult to devise reciprocal commitments and rely on cross-issue bargaining in the WTO, removing the essential foundation on which the argument for linking trade and antitrust rests.

Conceptualizing the strategic structure of state interaction predominantly as a Deadlock or a CGDC has important policy implications. First, the Deadlock situations call into question the rationale for any binding international antitrust agreement, challenging the prevailing presumption that the pursuit of international convergence of domestic antitrust laws would at all times be desirable. Second, the CGDC situations suggest that international coordination of antitrust policies, when desirable, is unlikely to necessitate extensive enforcement provisions in the majority of antitrust issues. Once the agreement has been reached in a CGDC setting, it is largely self-enforcing as neither party has an incentive to deviate from it. Accordingly, the case for incorporating antitrust into the WTO seems less compelling as the organization's ability to facilitate linkages is contested and its capacity to enforce compliance is not called for by the underlying strategic structure of the game. With uncertain benefits to any binding multilateral antitrust regime and little advantage in using the WTO to reach or enforce an agreement, this framework explains why such negotiations have thus far failed to show any meaningful progress and why states have resorted, and will likely continue to resort, to informal cooperation instead.¹³

This Article proceeds as follows. Part I explains why the majority of the cooperation problems in the antitrust domain may more fruitfully be characterized as a Deadlock or a CGDC than as a PD. Part II discusses the difficul-

11. Raquel Fernandez & Dani Rodrik, *Resistance to Reform: Status Quo Bias in the Presence of Individual-Specific Uncertainty*, 81 AM. ECON. REV. 1146, 1146 (1991).

12. James D. Morrow, *Modeling the Forms of International Cooperation: Distribution Versus Information*, 48 INT'L ORG. 387 (1994).

13. See *infra* text accompanying note 94 (discussion on informal international cooperation in the antitrust domain).

ties in reaching an international agreement in a Deadlock situation. It disputes the assumption that cooperation always Pareto-dominates non-cooperation and describes how cooperation has at times failed as states have perceived the political and economic costs to exceed the expected benefits of cooperation. Part III examines the CGDC situation, showing that even when cooperation is perceived Pareto-optimal, it has at times been unsuccessful due to the simultaneous existence of the distributional problem and the informational problem relating to the consequences of the prospective agreement. Part IV discusses why the WTO has been unable to mitigate the cooperation problem even in situations where the benefits have been perceived to exceed the costs of cooperation. The conclusion summarizes the argument and outlines some possible normative implications that follow from the discussion.

I. ANALYZING THE STRATEGIC SITUATION UNDERLYING INTERNATIONAL ANTITRUST COOPERATION: DISPUTING THE EXTENT OF STRATEGIC ANTITRUST POLICY

A. *Modeling the Conventional Wisdom: The Strategic Pursuit of Antitrust Policies in the Prisoner's Dilemma*

The argument for extending the coverage of the WTO to antitrust law is based on the perception that governments' diminished abilities to employ protectionist trade instruments following extensive trade liberalization drive them to resort to antitrust laws to pursue the same objectives. Thus, policymakers in several states fear that governments apply antitrust laws strategically to advance their domestic interests at the expense of global welfare, compromising simultaneously the gains achieved within the trade regime.¹⁴

Some of the most persuasive and frequently quoted arguments in support of negotiating antitrust commitments in the WTO have been developed by Andrew Guzman. As explained above, Guzman claims that each country adjusts its antitrust laws strategically to take trade flows into account (*trade flow bias*).¹⁵ In addition, Guzman argues that domestic antitrust regimes are characterized by a parochial bias that manifests itself in the form of export cartels and industry exemptions (*statutory bias*)¹⁶ and favoritism toward domestic corporations through selective enforcement (*enforcement bias*).¹⁷

Guzman does not refer to game-theoretic models when developing his claim. Implicitly, however, he appears to suggest that the strategic setting

14. See Guzman, *supra* note 4; see also Horn & Levinsohn, *supra* note 3, at 1–2; John O. McGinnis, *The Political Economy of International Antitrust Harmonization*, in *COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY*, *supra* note 4, at 126–27. Neither Horn and Levinsohn nor McGinnis advocate the WTO as a solution, but each acknowledges the premises of the debate on the interface between trade liberalization and antitrust laws.

15. Guzman, *supra* note 4, at 101–04.

16. *Id.* at 100.

17. *Id.*

underlying international antitrust cooperation resembles a PD. Guzman argues that individual behavior by rational states in the absence of an international agreement leads to a Pareto-suboptimal solution as all states attempt to increase their national welfare at the expense of other states.¹⁸ He assumes that states always choose a non-cooperative strategy (over- or under-regulation) even though it would be in their joint interest to choose globally optimal antitrust laws.¹⁹ Guzman also believes that states have an incentive to defect from their commitments, requiring enforcement of those commitments once they have been established.²⁰ These assumptions essentially characterize a PD-type game. Similar claims are made by Wolfgang Kerber and Oliver Budzinski, with a brief but explicit reference to a PD.²¹

To formalize Guzman's argument, a simplified, two-player PD matrix is shown below in *Figure 1*.²² States are assumed to be aware of the information

FIGURE 1

		STATE 2	
		<i>Sub-optimal antitrust laws</i>	<i>Optimal antitrust laws</i>
STATE 1	<i>Sub-optimal antitrust laws</i>	2,2	4,1
	<i>Optimal antitrust laws</i>	1,4	3,3

18. *Id.* at 101–04, 108–09.

19. *Id.* at 101.

20. Guzman, *supra* note 8, at 1158.

21. See Kerber & Budzinski, *supra* note 9, at 44–45. 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 refer only to “deliberate toleration of market power” and hence lax antitrust enforcement as a country’s dominant strategy in a PD, ignoring the possibility that strategic antitrust policy can also comprise excessive antitrust enforcement vis-à-vis foreign competitors. *Id.* at 41–42. See also Budzinski, *supra* note 9, at 6–8.

22. States are assumed to face a choice between enacting globally optimal and globally sub-optimal (yet domestically advantageous) antitrust laws. The numbers in the four cells of the payoff matrix represent four different possible outcomes in the game. The payoff available for State 1 is given first, followed by the payoff available for State 2. The 2×2 payoff matrix naturally simplifies the strategic situation involving numerous interacting states. For the purpose of illustrating the basic argument, an n -player game would be more accurate but significantly more complex.

regarding the payoff matrix and the options available for both parties, but are unable to communicate or see each other's moves.²³

In a PD, every state has an incentive to maximize its own economic welfare.²⁴ According to Guzman, a strategy that maximizes a state's national welfare is determined by its terms-of-trade and can consist of under- or over-regulation.²⁵ While both states would be better off if they abstained from adopting overly strict or lenient antitrust laws (yielding a payoff of three for both parties), the PD incentives and the fear of the other state's defection pull states toward non-cooperative strategies.²⁶ State 1, for instance, could individually obtain the highest payoff (a payoff of four) by over-regulating (if a net importer) or under-regulating (if a net exporter), either one being an instance of sub-optimal antitrust laws, if State 2 chose to pursue optimal antitrust policies. State 2, however, knows that choosing optimal antitrust laws in the event that State 1 continued to under- or over-regulate would lead to a "sucker's payoff" (a payoff of one).²⁷ Both parties hence have an offensive as well as a defensive incentive to resort to sub-optimal antitrust laws (yielding a payoff of two for both parties).²⁸ Thus, if international antitrust cooperation were best characterized as a PD, the case for binding international antitrust rules and the employment of the WTO's dispute settlement mechanism to enforce such rules would seem compelling. Further examination, however, reveals that states face a different and more complex set of conditions and choices in practice.

B. *Why National Bias in Domestic Antitrust Laws is Likely to be Limited*

This Article questions the extent to which antitrust laws are in practice applied strategically to advance national interests at the expense of global welfare. Instead, the Article claims that the majority of the cooperation problems within the antitrust realm are manifestations of more inadvertent, system-based market failures and hence are better captured by an analytical framework other than a PD. While some degree of parochial bias may in fact characterize antitrust laws and enforcement at the margins, the discussion below demonstrates that *trade flow bias*, *statutory bias*, and *enforcement bias* are likely to be considerably more limited than Guzman assumes.

23. Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335, 356, 359 (1989).

24. This first assumption is not unique for a PD and generally holds for any type of game between rational actors.

25. In comparison, according to Kerber and Budzinski, the dominant strategy for each state would be to lower its antitrust standards. See *supra* text accompanying note 21.

26. Abbott, *supra* note 23, at 362.

27. Kerber & Budzinski, *supra* note 9, at 44–45.

28. Abbott, *supra* note 23, at 358–59.

1. *Questioning the Theoretical and Empirical Foundation of the Alleged Trade Flow Bias*

While Guzman's argument that trade flows influence states' general level of antitrust regulation may sound intuitively appealing, a closer examination of his claim challenges the theoretical and empirical bases of the argument. For instance, trade flows have a tendency to fluctuate. It is unlikely that any given country would constantly amend its antitrust laws in accordance with its fluctuating trade balance.²⁹ In addition, trade deficits or surpluses often constitute only a small percentage of any nation's gross domestic product ("GDP"), rendering it unlikely that such a small deficit or surplus would be decisive when states determine their level of antitrust regulation.³⁰

Guzman offers little, if any, empirical evidence to support his theory of the relationship between a country's trade status and its antitrust laws. Guzman's claims would be significantly more persuasive if he were able to show an existing correlation between countries' trading status and the relative rigidity of their antitrust laws. Similarly, Guzman could refute the criticism about changing trade flows if he were able to demonstrate that the changes in domestic antitrust laws do in fact correlate with the changes in foreign trade flows or, better still, that there is indeed a causal relationship between the change in countries' trading status and the rewriting of their antitrust laws.³¹

Trade flow bias is also questionable considering that it is often difficult to classify the nationality of a MNC. A bias against a "foreign" corporation may unintentionally result in a bias against many of the company's domestic shareholders and employees.³² Similar consequences could result from the

29. McGinnis, *supra* note 14, at 136.

30. Michael J. Trebilcock & Edward M. Iacobucci, *National Treatment and Extraterritoriality: Defining the Domains of Trade and Antitrust Policy*, in COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY, *supra* note 4, at 168–69. Guzman might argue that he does not refer to overall trade flows but trade flows in "imperfectly competitive markets" when developing his theory. The criticism levied against his theory seems valid nonetheless. Trade balances regarding the "relevant goods" (i.e., goods sold in imperfectly competitive markets) can similarly fluctuate. In addition, their portion of the country's GDP is inevitably even smaller than that of the overall trade deficit or trade surplus of the country.

31. Furthermore, some examples Guzman cites in support of his theory are difficult to justify empirically. For example, Guzman asserts that "developed countries tend to export goods in imperfectly competitive markets, while developing countries tend to import those goods," which leads him to argue that "[d]eveloped countries would be opposed to an international agreement because they prefer a relatively weak set of international antitrust rules. Developing countries, on the other hand, prefer the adoption of international antitrust policies that are relatively strict." Andrew Guzman, *International Antitrust and the WTO: The Lesson from Intellectual Property*, 43 VA. J. INT'L L. 933, 946 (2003). First, generally categorizing developed countries as net exporters and developing countries as net importers is unlikely to be accurate. Second, if developed countries were indeed predominantly net exporters, why do they generally have stricter antitrust rules in place (or at least enforce their laws more strictly) than developing countries? Finally, developed countries have been most vocal in expressing fears about "watered down" international antitrust rules while it is difficult to find examples of developing countries that have rallied for strict WTO rules on antitrust. See discussion *infra* p. 412.

32. McGinnis, *supra* note 14, at 134–35.

magnitude of trade in intermediate goods, which comprise approximately half of the total imports in developed countries.³³ Even if a country is a net importer, a large portion of imports may comprise intermediate goods. Overly strict antitrust laws would hence not only harm the foreign producers attempting to penetrate the market but also domestic firms that rely heavily on imported intermediate goods as inputs or raw materials.

In addition, it is questionable whether a government prone to protectionism would find that adjusting the general level of antitrust laws to take trade flows into account is an effective instrument to advance that goal. Any given country is necessarily a net importer of some goods and a net exporter of other goods.³⁴ Accordingly, net importers' alleged incentive to adopt sub-optimally strict antitrust laws would not only hurt foreign firms; overly rigid antitrust laws would at the same time impede the interests of domestic firms subject to the same sub-optimal laws and adversely affect domestic consumers who would be deprived of the benefits that increased competition by foreign firms would produce.³⁵ Similarly, the assumed tendency of net exporters to condone anticompetitive practices would often yield significant negative effects in domestic markets as domestic and importing firms' anticompetitive conduct would similarly go unpunished. It is doubtful that such adverse effects would be outweighed by gains that result from advancing domestic exporters' interests.³⁶

Finally, the "effects doctrine" significantly limits the successful use of antitrust policy for strategic purposes.³⁷ The effects doctrine holds that no

33. Joern Kleinert, *Growing Trade in Intermediate Goods: Outsourcing, Global Sourcing, or Increasing Importance of MNE Networks?*, 11 REV. INT'L ECON. 464, 464 (2003).

34. With the exception of some industry exemptions or the exemption of export cartels from antitrust scrutiny, antitrust laws apply equally to all industries and cannot be industry-specifically tailored to be strict with respect to the goods that the country predominantly imports and lenient with respect to goods that the country primarily exports. While Guzman's theory focuses on the overall effect of trade flows (e.g., whether a country's imports generally exceed its exports when the net effect of all sectors are taken into account), it seems that a country could more effectively maximize its overall gains by adjusting its antitrust enforcement to take into account its sector-specific and often contradictory incentives. This type of "tailored" bias would more successfully advance the interests of both net exporter and net importer industries. An industry-specific bias of this kind could at least in theory be assumed to be feasible thorough selective, case-by-case enforcement bias. A country could hence be arguably better off having generally "optimal" antitrust laws, combined with both selective over-enforcement (e.g., more enforcement activity vis-à-vis industries in which the country is a net importer) and selective under-enforcement (e.g., less enforcement activity vis-à-vis industries in which the country is a net exporter).

35. This would suggest that antitrust authorities, who are specifically entrusted with the task of protecting consumers, would strike the balance between maximizing consumer and producer surplus in favor of the latter. This seems unlikely unless antitrust agencies can be assumed to be captured by trade interests.

36. Among the tools available within the antitrust domain, only the exemption of export cartels would seem to have the effect of advancing domestic producers' interests without simultaneously impeding the interests of domestic consumers, as discussed below.

37. See EINER ELHAUGE & DAMIEN GERADIN, *GLOBAL ANTITRUST LAW AND ECONOMICS* 1101 (2007).

state can exercise exclusive jurisdiction in antitrust matters.³⁸ Irrespective of the location of a corporation, every country is, in principle, able to establish jurisdiction over any given corporation as long as the corporation's activities have an "effect" on the domestic market of that country.³⁹ Thus, even if a net-exporting country enacted overly lax antitrust laws, its producers could face antitrust scrutiny in another jurisdiction to which they export, assuming their activities had an effect on that foreign market.⁴⁰ Any possible bias or sub-optimal enforcement level is hence diluted by the prospect of concurrent jurisdiction exercised by other impacted states.

Indeed, Einer Elhauge and Damien Geradin have argued that, under a consumer welfare standard, importing nations have optimal incentives to regulate.⁴¹ This renders alleged under-enforcement by exporting nations irrelevant.⁴² More aggressive regulation by exporting nations would not even be desirable, considering that the current regime optimally allocates enforcement authority to the importing nations that have the best incentives to enforce competition laws that advance a consumer welfare standard. Leaving the regulation to the importing nations, however, requires that states cooperate on evidence collection and judgment enforcement, which occurs in practice.⁴³

Consequently, "systematic and predictable deviations" from optimal antitrust policy due to alleged trade flow bias, as Guzman has suggested,⁴⁴ seem unlikely. Instead, the content of domestic antitrust laws is likely to be determined by existing market conditions as well as domestic political economy considerations. Antitrust laws are enacted to take into account the country's economic development, its particular domestic market structures and prevailing conditions for competition, its degree of trade liberalization, and its institutional structures and regulatory capacity. Antitrust laws in any given country also tend to be heavily influenced by prevailing economic theories

38. Antitrust can in this respect be contrasted with 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 very different dynamics and incentives for regulatory competition.

39. The United States and the EU in particular have applied their antitrust laws to the conduct of foreign corporations as long as the conduct has had an "effect" on their domestic market. *See, e.g.*, *U.S. v. Alcoa*, 148 F.2d 416, 443–44 (2d Cir. 1945); *Case T-102/96, Gencor Ltd v. Comm'n*, 1999 E.C.R. II-0753, ¶¶ 89–92; *infra* text accompanying note 92. Many other nations also recognize the legitimacy of applying their antitrust laws to the conduct of foreign firms as long as some anticompetitive effect is felt on the market of the country exercising jurisdiction. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 415 reporters' note 9 (1987).

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

41. *See* ELHAUGE & GERADIN, *supra* note 37, at 1101–02. U.S. and EU antitrust laws both embrace a consumer welfare standard rather than a total 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. *See id.* at 1103.

42. *See id.* at 1101–02.

43. *See id.* at 1102, 1188–1202.

44. Guzman, *supra* note 4, at 101.

and the extent to which policymakers have internalized them. In addition, domestic interest groups that have a stake in the political process are likely to determine the content of any given country's antitrust laws more than that particular country's trade flows.⁴⁵ If the country, for instance, has powerful exporters who lobby for generally lax antitrust laws, the domestic antitrust regime is likely to be overly lenient based on their interests rather than overly stringent based on the trade deficit the country may be running. Trade flows thus seem marginally, if at all, relevant in the process of states determining their desirable level of antitrust regulation.⁴⁶

2. *The Insignificance of Export Cartels as Indicators of Statutory Bias*

In looking at the options available to states, it is difficult to find antitrust laws that would be discriminatory on their face. Antitrust statutes are not commonly drafted to explicitly favor local firms at the expense of their foreign counterparts. However, the exemption of export cartels⁴⁷ by several jurisdictions from their antitrust laws constitutes a notable exception to otherwise neutral antitrust statutes.⁴⁸ Export cartels, whose sole purpose is often the enhancement of the welfare of domestic firms at the expense of foreign consumers, are therefore argued to form the core of what is called "strategic antitrust policy."⁴⁹

45. It is outside the scope of this Article to provide a detailed discussion of state preferences in antitrust matters and how they are formed. See brief discussion *infra* Parts III.B.2 (discussing uncertainty relating to the formation of preferences at the domestic level) and IV.A (contrasting the domestic political economy considerations underlying the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs Agreement") with those characterizing international antitrust negotiations).

46. Governments devising antitrust laws are assumed to be motivated by both *public welfare* and *public choice* considerations. While policymakers are expected to care about how any given regulatory measure affects the economic welfare of the country, they are not likely to disregard pressures or constraints arising from the domestic political economy. Guzman recognizes this by noting that a government that is sensitive to public choice considerations can adjust the general level of antitrust enforcement to take trade flows and *public choice bias* into account. See Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501, 1529–31 (1998). However, it seems that a government that is responsive to domestic interest groups could more successfully respond to their demands through biased case-by-case enforcement. Modifying the general level of antitrust regulation cannot effectively incorporate the demands of various organized interest groups, some of which might be exporters, while others might be import-competing industries. Nevertheless, it may be more feasible to favor domestic corporations by adopting generally strict antitrust laws that favor consumers but resorting to selective non-enforcement when "would-be defendants" are domestic corporations.

47. "Export cartel" refers to an agreement or other arrangement between two or more firms to charge a specified export price or to divide export markets among themselves. Unlike a normal cartel, an export cartel's collusive behavior is restricted to goods or services that are exported to foreign markets.

48. See Margaret C. Levenstein & Valerie Y. Suslow, *The Changing International Status of Export Cartel Exemptions*, 20 AM. U. INT'L L. REV. 785, 800–06 (2005). Levenstein and Suslow examine exemptions of export cartels in fifty-five countries, including all OECD countries, EU countries, and selected developing countries. Of the fifty-five countries surveyed, seventeen were found to have explicit exemptions (including the United States, Canada and Australia), thirty-four had implicit exemptions (including the EU and almost all EU Member States), and four (including Russia) had no statutory exemptions.

49. Trebilcock & Iacobucci, *supra* note 30, at 152. See also Guzman, *supra* note 4, at 100 (referring to export cartels as the "most obvious example" of states' biased application of their antitrust laws). In addition to a small number of domestic antitrust statutes that contain an explicit exemption for export cartels, we might find some evidence of statutory bias in the form of exemptions of certain economic

Considering that export cartel exemptions are generally regarded as inherently discriminatory, assumptions about states' PD incentives in connection with export cartels initially appear valid. It might however be argued that the decision to exempt export cartels from the scope of the domestic antitrust laws does not reflect a national bias but merely an attempt to allocate jurisdiction by granting enforcement authority to the country whose markets are affected by the cartel. While export cartels are not pursued by the exporting country, the importing country can always target them under its domestic laws if competition in its domestic market is adversely affected.⁵⁰ Leaving the prosecution of export cartels to importing countries might still result in non-enforcement if the importing country lacks the resources to take legal action against them. Even then, however, it is questionable whether any prospective international rules ought to be tailored to abolish exemptions or whether they should instead be aimed at strengthening the capacity of each jurisdiction to regulate the competitive conduct that affects its domestic market.

In addition, characterizing international antitrust cooperation as a PD game would seem more appropriate if export cartels were indeed generally representative of cross-border externalities caused by domestic antitrust laws. Export cartels, however, constitute merely a fraction of the antitrust issues in which states pursue international cooperation.⁵¹ The strategic situation that underlies export cartel exemptions should therefore not be generalized to explain other areas of international antitrust cooperation.

Finally, a closer look at the prevalence of export cartels suggests that they are increasingly uncommon today and hence unlikely to significantly impede competition and international trade.⁵² Despite the difficulties in ob-

sectors from antitrust scrutiny altogether. However, these industry-wide exemptions also apply to foreign producers should they compete in the same market. Thus, such exemptions can only be seen to reflect national bias to the extent that the exempted sectors consist of industries in which the host country is a significant producer and where there is little inbound trade.

50. ELHAUGE & GERADIN, *supra* note 37, at 1101. 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.

51. In addition to export cartels, international antitrust cooperation is pursued with respect to, *inter alia*, prosecution of international cartels (not limited to exports), control of anticompetitive conduct by global monopolies, regulation of exclusive arrangements that deter entry to foreign markets, and regulation of cross-border mergers and acquisitions.

52. In addition, some have questioned the anticompetitive propensities of export cartels. While the *per se* anticompetitive nature of export cartels is often assumed, 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. Hence they argue that export cartels generate new trading opportunities and enhance (instead of diminish) competition in markets where exporters would otherwise not compete at all. The United States, for example, defended the Webb-Pomerene Act and the Export Trading Company Act 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 Working Group on the Interaction between Trade and Competition Policy, *Note by the Secretariat: Report on the Meeting of 20-21 February 2003*, ¶ 37, WT/WGTCP/M/21 (May 26, 2003). See also Spencer Weber Waller, *The Failure of the Export Trading*

taining reliable data on the pervasiveness of export cartels, recent research indicates that at least the number of granted exemptions has considerably declined in the last few decades.⁵³ In Japan, for instance, there were 180 export cartel exemptions in force in 1973, three in 1998, and none in 1999.⁵⁴ In Australia, the number of authorized export cartels declined from sixty-nine in 1975 to four in 2002.⁵⁵ In Germany, the trend has been similar: 227 exemptions were in effect in 1972, thirty-six in 1999, and none in 2003.⁵⁶ In contrast, the United States has been one of the leading proponents of export cartel exemptions. In 2003, 162 export cartel exemptions remained in effect under the Export Trading Company Act (“ETCA”) and twelve more under the Webb-Pomerene Act (“WPA”).⁵⁷ The number of exemptions under the WPA has declined since the 1970s, and exemptions under the ETCA leveled out in the mid-1990s.⁵⁸ Consequently, the extent to which export cartels and the PD incentives associated with them undermine international antitrust cooperation appears marginal at best.

3. Limited Evidence of Biased Antitrust Enforcement

The institutional and procedural underpinnings of antitrust enforcement are arguably susceptible to some degree of national bias. Agencies are often vested with wide discretion. In addition, budgetary constraints necessarily make enforcement somewhat selective. In these circumstances, antitrust enforcers might become captured by powerful interest groups and consequently engage in deliberate non-enforcement of the anticompetitive conduct of domestic corporations in individual instances. Conversely, biased

Company Program, 17 N.C. J. INT'L L. & 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”) and 251 (“[T]he history of Webb-Pomerene Act suggests that few export associations will have sufficient global market power to exploit foreign markets”).

53. As most countries do not require registration or notification of export cartels, it is difficult to draw any wide-reaching conclusions from the available data. There are few public records indicating how widespread export cartels are. In addition, export cartels can also operate based on an implicit exemption in national law. See Levenstein & Suslow, *supra* note 48, at 794, 796; see also F.M. SCHERER, COMPETITION POLICIES FOR AN INTEGRATED WORLD ECONOMY 46 (1994). Research by Scherer supports findings that the amount of trade covered by export cartels has dropped dramatically. His information is already somewhat dated but shows a downward trend even two decades ago when export cartel exemptions were more prevalent. At their peak in the 1930s, about 19 percent of U.S. exports were originated by export cartels compared to less than 2 percent in 1981. *Id.* Similarly, export cartels accounted for approximately 2 percent of German exports in the 1980s. *Id.*

54. Levenstein & Suslow, *supra* note 48, at 793.

55. *Id.*

56. *Id.* at 793, 806, 816–18 (Table 1).

57. See Levenstein & Suslow, *supra* note 48, at 792, 816–18 (Table 1); Export Trading Company Act of 1982, 15 U.S.C. §§ 4001–21 (2000); Webb-Pomerene (Export Trade) Act of 1918, 15 U.S.C. §§ 61–66 (1994). Even in the United States, however, the export cartels currently in effect are unlikely to cover more than a trivial part of the total export activity.

58. Levenstein & Suslow, *supra* note 48, at 792, 816–18 (Table 1).

enforcers may also resort to excessively rigid enforcement vis-à-vis foreign corporations.⁵⁹

Today, organized domestic interest groups may increasingly seek to influence antitrust authorities' decisions, as trade liberalization efforts have reduced the scope of protection that trade instruments can afford.⁶⁰ As consumers constitute a diffuse interest group, it is difficult for them to counter the efforts of a more organized lobby. It also seems reasonable to expect that antitrust agencies are not entirely immune to domestic political economy considerations when setting enforcement priorities. At the same time, however, the institutional safeguards that are in place in all well established antitrust jurisdictions can be expected to militate against any blatant parochial bias. As administrative law and established legal culture oblige courts and government agencies to give reasons for their decisions, deviating manifestly from the established legal framework is unlikely.⁶¹

The highly contested 1997 merger between Boeing and McDonnell Douglas illustrates how antitrust enforcement is at times perceived to serve strategic purposes.⁶² While U.S. antitrust authorities cleared the merger as "pro-competitive," European Union ("EU") authorities threatened to block the transaction. The conflict escalated as both sides blamed the other for using antitrust laws to advance their respective industrial policy goals at the expense of consumer welfare. The Europeans saw the U.S. clearance decision as an attempt to create a U.S.-based global monopoly for large civil jet aircraft whereas the Americans perceived the opposition of the EU to the merger as an attempt to protect the (European-owned) Airbus against its more efficient foreign competitor.⁶³ The European Commission's decision in 2001 to prohibit a proposed acquisition involving two U.S.-based companies, Honeywell and General Electric, after the acquisition was approved by U.S. antitrust authorities caused an even greater uproar, leading to unprecedented accusations that EU antitrust enforcement was being manifestly protectionist of European interests and discriminatory against U.S. corporations.⁶⁴

59. Guzman, *supra* note 4, at 100; see also Kerber & Budzinski, *supra* note 9, at 41–44; Fred S. McChesney, *Debate: Public Choice: Do Politics Corrupt Antitrust Enforcement? Economics versus Politics in Antitrust*, 23 HARV. J.L. & PUB. POL'Y 133 (1999) (analyzing how domestic antitrust enforcement can become susceptible to bias); McGinnis, *supra* note 14, at 128–29, 134.

60. Kerber & Budzinski, *supra* note 9, at 45–46. This kind of case-by-case pressure by powerful interest groups leading to enforcement bias seems in theory more feasible than any overarching ex ante pressure resulting in statutory bias. See *infra* p. 429.

61. McGinnis, *supra* note 14, at 134–35.

62. See Commission Decision 97/816 of 30 July 1997, Case No. IV/M.877—Boeing/McDonnell-Douglas, 1997 O.J. (L 336) 16; Boeing Co., et al., Joint Statement Closing Investigation of the Proposed Merger, 5 Trade Reg. Rep. (CCH) ¶ 24,295 (July 9, 1997).

63. Kerber & Budzinski, *supra* note 9, at 42.

64. See Press Release, U.S. Dep't. of Justice, Justice Department Requires Divestitures in Merger Between General Electric and Honeywell (May 2, 2001), available at http://www.usdoj.gov/atr/public/press_releases/2001/8140.htm; Commission Decision 2004/134 of 3 July 2001, Case No COMP/M.2220—General Electric/Honeywell, 2004 O.J. (L048) 1 [hereinafter General Electric/Honeywell].

While allegations of a protectionist bias in EU antitrust enforcement gathered momentum particularly in the wake of the GE/Honeywell decision,⁶⁵ a broader inquiry into the EU Commission's merger control practices does not support this perception.⁶⁶ Between 1995 and 2005, the EU Commission received 2622 merger notifications.⁶⁷ Out of these notifications, 651 (25 percent) involved at least one U.S.-based company.⁶⁸ During the same time period, the Commission prohibited seventeen mergers of which only two (12 percent) involved a U.S. corporation.⁶⁹ Also, other statistics from 1995 to 2005 indicate that the Commission does not favor local corporations at the expense of the U.S. firms: fourteen (17 percent) out of eighty-three mergers that were withdrawn after the notification involved a U.S. corporation; thirty-three (26 percent) out of 128 cases in which a phase II investigation ("second request") was initiated involved a U.S. corporation; and, finally, forty-nine (27 percent) out of 181 conditional clearances were granted in a case in which at least one U.S. company was a party to the merger. These numbers suggest that parochial enforcement bias, to the extent it exists, underlies the enforcement of antitrust laws only in some limited set of individual cases.⁷⁰

C. *Re-Conceptualizing the Debate: From Prisoner's Dilemma to a Deadlock or a Coordination Game*

As the above argument shows, a tendency among net importers to strategically use overly rigid antitrust policies and among net exporters to use overly lenient policies seems unlikely. While a statutory bias may exist in the use of export cartels and some marginal bias could occur in antitrust

65. See, e.g., John R. Wilke, *U.S. Antitrust Chief Criticizes EU Decision to Reject Merger of GE and Honeywell*, WALL ST. J., July 5, 2001, at A3 (quoting Assistant Attorney General Charles James: "Clear and longstanding U.S. antitrust policy holds that the antitrust laws protect competition, not competitors . . . [The EU decision] reflects a significant point of divergence.").

66. The extent to which antitrust enforcement is actually characterized by parochial bias is highly debatable and always difficult to substantiate. Antitrust agencies and courts' published decisions can be reviewed, but we often have no information on cases that have *not* been published nor even pursued. The decision not to investigate a case involving domestic corporations can reflect national bias as much as a decision to prosecute anticompetitive practices by foreign corporations. Any conclusions about the extent to which enforcement is in fact characterized by national bias must hence be approached with caution.

67. See European Comm'n, *European Merger Control—Council Regulation 139/2004—Statistics*, <http://ec.europa.eu/comm/competition/mergers/statistics.pdf> (last visited Apr. 4, 2007).

68. For a comprehensive list of Commission merger control decisions since 1990, see European Comm'n, *Merger Cases*, <http://ec.europa.eu/comm/competition/mergers/cases/> (last visited Apr. 4, 2007) (the identification of the parties to the transaction allows for the determination of the nationality of the corporations in each case, which enables the compilation of the statistics regarding the existence of possible parochial enforcement bias).

69. See *General Electric/Honeywell*, *supra* note 64; Commission Decision 2003/790 of 28 June 2000, Case COMP/M.1741—MCI WorldCom/Sprint, 2003 O.J. (L 300) 1 [hereinafter *MCI WorldCom/Sprint*]. Note that the *MCI WorldCom/Sprint* merger was also challenged in the United States. The *General Electric/Honeywell* merger was approved subject to limited undertakings in the United States.

70. More elaborate analysis would require the breakdown of the data based on whether the U.S. company in any given transaction was the target or the acquirer. However, this information was not possible to extract from the available data.

enforcement, strategic use of antitrust laws is unlikely to be as prevalent as some commentators have feared. Accordingly, the PD game does not seem to offer an appropriate framework to analyze the broader set of collective action problems relating to international antitrust cooperation.

Negative externalities do arise, however, from systematic over- and under-enforcement of antitrust laws for many other reasons.⁷¹ Antitrust laws are under-enforced in particular by developing countries that do not have any antitrust regimes in place or that lack the adequate resources to effectively enforce their laws vis-à-vis foreign corporations.⁷² Also, developed economies are at times unable to apply their antitrust laws extraterritorially. Their enforcement problems often occur with respect to international cartels because of the difficulty of obtaining evidence that is located outside of their jurisdiction.⁷³ Under-enforcement can also result from governments' alleged tolerance of restrictive business practices that impair market access.⁷⁴

Decentralized antitrust regimes also suffer from over-enforcement, particularly in multinational merger control where transactions are frequently subject to multiple overlapping notification requirements. Numerous simultaneous reviews increase transaction costs, cause unnecessary delays, and undermine legal certainty due to the prospect of conflicting assessments or incompatible remedies imposed by different antitrust enforcers.⁷⁵ As the strictest rule always applies in antitrust matters, any jurisdiction entitled to review the merger can prohibit its implementation regardless of where the effects of the merger are principally felt.⁷⁶ Indeed, if each antitrust jurisdiction chooses an antitrust law that optimally trades off domestic over- and under-enforcement, the net international effect will generally be over-en-

71. As the market failures stemming from decentralized antitrust enforcement have been a subject of extensive discussion elsewhere, they are only briefly touched on below.

72. *But see infra* note 120 (noting the developing countries' limited ability to free ride on, and hence benefit from, the over-enforcement by developed countries).

73. *See, e.g.*, *United States v. General Electric Co.*, 869 F. Supp. 1285, 1300-01 (S.D. Ohio 1994). The court entered a judgment of acquittal in the GE/De Beers cartel case. The court cited the inability of the government to obtain more complete evidence from abroad as an important reason for the acquittal. *See also* Joel I. Klein, Acting Assistant Att'y Gen., U.S. Dep't of Justice, A Note of Caution with Respect to a WTO Agenda on Competition Policy, Address at the Royal Institute of International Affairs (Nov. 18, 1996), available at <http://www.usdoj.gov/atr/public/speeches/0998.htm>.

74. In particular, the government's toleration of vertical distribution systems in Japan has often been alleged to restrict trade. *See, e.g.*, WTO Dispute Panel Report on Japan-Measures Affecting Consumer Photographic Film and Paper, WTO Doc. WT/DS44/R (Mar. 31, 1998).

75. *See, e.g.*, cases cited *supra* notes 62 and 64. *See also* ABA & INT'L BAR ASSOC., A TAX ON MERGERS?: SURVEYING THE TIME AND COSTS TO BUSINESS OF MULTI-JURISDICTIONAL MERGER REVIEWS (June 2003) [hereinafter MULTI-JURISDICTIONAL MERGER SURVEY]; discussion *infra* p. 404.

76. Over-enforcement which increases transaction costs and legal uncertainty is also possible in case of multiple simultaneous investigations on the alleged abuse of dominance. *See, e.g.*, Commission Decision of 24 Mar. 2004, Case COMP/C-3/37.792—Microsoft, available at <http://ec.europa.eu/comm/competition/antitrust/cases/decisions/37792/en.pdf> (imposing a fine after concluding that Microsoft had abused its dominant position in violation of Art. 82 EC); *New York v. Microsoft Corp.*, No. 98-1233 (D. D.C. Nov. 1, 2002) (memorandum order endorsing the settlement between plaintiff states and Microsoft.); *United States v. Microsoft Corp.*, No. 98-1233 (D. D.C. Nov. 1, 2002) (memorandum order endorsing the settlement between the United States and Microsoft).

forcement for all antitrust law issues because each nation's over-enforcement will govern given concurrent international jurisdiction.⁷⁷

Strengthening antitrust enforcement by eliminating enforcement gaps and diminishing transaction costs by reducing over-enforcement should be in the mutual interest of the states. By enhanced cooperation and convergence of their antitrust laws, states ought to be able to capture efficiency gains through more effective enforcement, reduced transaction costs, and increased competition that can be expected to emerge as a result. The discussion below, however, shows that notwithstanding some undeniable benefits of increased cooperation and convergence, high costs and questionable benefits of international antitrust cooperation as well as the distributional conflict and uncertainty underlying the collective action problem have thus far frustrated the efforts to generate formal international cooperation.

With the view of these particular impediments to cooperation, it seems more compelling to cast the question of international antitrust cooperation predominantly as a Deadlock or a CGDC than a collaboration game such as a PD.⁷⁸ In a Deadlock, at least one state prefers non-coordination to coordination, rendering progress in negotiations unattainable.⁷⁹ The Deadlock captures situations where states perceive that the costs would exceed the benefits available from coordination. In such cases, states prefer to resist coordination and preserve the status quo. Conversely, the CGDC describes situations when coordination is in the interest of the states. States, however, disagree on the distributionally distinct focal points of coordination, which makes the agreement difficult to attain. The CGDC framework describes the various rounds of antitrust negotiations where international coordination of antitrust laws is assumed to Pareto-dominate non-coordination, but where the coordination has been obstructed by the simultaneous existence of a distributional problem and an informational problem.⁸⁰

These two types of games—Deadlock and CGDC—are employed primarily to explain why the international antitrust negotiations have failed in the WTO setting.⁸¹ Any given WTO negotiation (thought of in this framework

77. ELHAUGE & GERADIN, *supra* note 37, at 1100–01.

78. This Article uses the term “coordination” when it discusses states pursuit of cooperation in the Deadlock. While the CGDC is a more traditional representation of a coordination game, “the model [describing the Deadlock] is consistent with, but not identical to, other international relations models of coordination.” See DANIEL DREZNER, *ALL POLITICS IS GLOBAL* 53 (2007).

79. Abbott, *supra* note 23, at 357.

80. While game theoretic models can be helpful in clarifying complex interactions by focusing on the very essence of a social situation, the analytical rigor they offer comes at a cost. Any given model inevitably represents a highly simplified account of the reality and can never be complete in the sense that it would successfully capture every relevant social setting. Any specified “game” always assumes away factors that arguably would be necessary to include in the analysis to provide a more complete description of a situation. The narrative of this Article therefore has its limitations, some of which will hopefully be mitigated by other scholars who will challenge and further develop the claims outlined in this Article.

81. There have been several attempts to create an international regulatory framework for antitrust laws since the adoption of the Havana Charter in 1948. See, e.g., MARSDEN, *supra* note 1, at 45–66; Nataliya Yacheistova, *The International Competition Regulation—A Short Review of a Long Evolution*, 18

as a “game”) can be assumed to consist of multiple rounds of negotiations where payoffs may differ between those various negotiation rounds. In a particular round of the game, coordination might be perceived Pareto-optimal (for instance, CGDC). However, there are instances—individual rounds of the same game—where coordination is not regarded as worth pursuing, as states perceive the costs to exceed the expected benefits of coordination (Deadlock). The variation in the payoff structure, and the resulting difference in the characterization of the game, are explained by the extensive time span over which WTO talks on antitrust have taken place. Between the various rounds of negotiations, states have occasionally re-evaluated their interests and priorities, particularly in response to changes in the envisioned content of the prospective agreement.

The circumstances under which the attempts to launch WTO negotiations on antitrust have taken place have been characterized primarily by a distributional conflict between the two major antitrust powers, the United States and the EU, in addition to another conflict between developed countries and developing countries. Consequently, this Article presents the WTO negotiations as a two-stage game that comprises two sets of major players. The first stage of the game takes place between the great powers. The game is characterized either as a Deadlock or a CGDC between the United States and the EU. In the Deadlock between the United States and the EU, the principal question is whether the players perceive the benefits to exceed the costs of coordination. In the CGDC between the United States and the EU, the players acknowledge the efficiencies that a more harmonized global antitrust regime would generate but disagree on the regime’s optimal content. The second stage of the game focuses on the disagreement between developed countries and developing countries. The Deadlock between developed countries and developing countries shows how the question of costs has impeded the pursuit of coordination, while the CGDC between developed countries and developing countries illustrates the different preferences the two groups of states have regarding the focus of the prospective agreement.

The failure to coordinate antitrust laws due to the Deadlock is discussed in Part II, whereas the failure to coordinate antitrust laws due to the CGDC’s simultaneous distributional and informational problems is discussed in Part III below.

WORLD COMPETITION L. AND ECON. REV. 99, 99 (1994). Most recently, the WTO negotiations on antitrust were stalled in Cancun in 2003 due to the resistance of the developing countries. On August 1, 2004 the WTO General Council decided to officially drop antitrust policy from the Doha Round negotiation agenda (“July Decision”). See General Council Decision, *Doha Work Programme* WT/L/579 (Aug. 2, 2004) and *infra* discussion accompanying note 121.

II. THE POSSIBILITY OF A DEADLOCK: A FAILURE TO COORDINATE DUE TO HIGH COSTS AND QUESTIONABLE BENEFITS OF COORDINATION

The existing scholarly debate on international antitrust regulation often rests on a presumption that an international agreement, if only achievable, would always be Pareto-superior to non-cooperation and hence normatively desirable.⁸² The discussion below challenges this presumption, suggesting that at times negotiations have failed as international coordination of antitrust laws has been thought of as too costly and therefore not in the interest of the states.

The superiority of a coordinated outcome is the function of both 1) the efficiency gains achieved through coordination and 2) the adjustment costs resulting from the adoption of new, coordinated laws domestically. *Efficiency gains* would stem from the reduction of transaction costs, delays, uncertainties, and conflicts associated with multiple, overlapping, and at times inconsistent regulatory reviews. In contrast, *adjustment costs* would arise from the international negotiation of new laws, the process of seeking their domestic ratification, and the need to retrain antitrust agencies to enforce them. Governments could also experience sovereignty costs if they were required to give up some degree of their independence in decision making (or amend their domestic laws to correspond to the preferences of other states) and additional political costs if new laws did not receive the support of domestic interest groups and voters. Further costs would be incurred by corporations that would need to revise some of their existing business practices to comply with new antitrust rules. If the adjustment costs exceeded the expected benefits of policy coordination, the state would be better off when retaining its domestic regime. Consequently, the equilibrium in this type of strategic setting would be “no coordination.”⁸³ In game theory, this type of situation, where both parties’ dominant strategies consist of non-coordination, is described as a Deadlock.

A. *Deadlock Between the United States and the EU: The Questionable Benefits of Coordination and the High Tolerance for the Status Quo*

A game between the United States and the EU, where the status quo represents a strategic choice rather than a coordination failure, is presented

82. See, e.g., WTO Working Group on the Interaction Between Trade and Competition Policy, *Communication by the European Community and its Member States*, WT/WGTCP/W/62, at 12–13 (Mar. 5, 1998); International Antitrust Working Group, *Draft International Antitrust Code*, 5 WORLD TRADE MATERIALS 126, Sept. 1993; MARDEN, *supra* note 1; Robert D. Anderson & Peter Holmes, *Competition Policy and the Future of the Multilateral Trading System*, 5 J. INT’L ECON. L. 531 (2002); Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781 (2000); Guzman, *supra* note 4; Ernst-Ulrich Petersmann, *Competition-Oriented Reforms of the WTO World Trade System—Proposals and Trade Options*, in TOWARDS WTO COMPETITION RULES 43, 48–49 (Roger Zäch ed., 1999); Leon Brittan, *A Framework for International Competition*, Address at World Competition Forum (Feb. 3, 1992), reviewed by J. David Richardson, *The Way to Compete*, 3 INT’L ECON. INSIGHTS 21 (1992).

83. DREZNER, *supra* note 78, at 53.

below in *Figure 2*. Applying (and slightly modifying) a game-theoretic model on regulatory coordination developed by Daniel Drezner,⁸⁴ the United States and the EU are assumed to face a decision between a coordinated and non-coordinated outcome when adjustment costs are compared to the efficiency benefits of coordination.

FIGURE 2

		THE EU	
		<i>Coordinate to the U.S. Model</i>	<i>Retain the EU Model</i>
THE U.S.	<i>Retain the U.S. Model</i>	$\pi_{us}, \pi_{eu} - d_{eu}$	0, 0
	<i>Coordinate to the EU Model</i>	$-d_{us}, -d_{eu}$	$\pi_{us} - d_{us}, \pi_{eu}$

π_{us} = the benefits of coordination to the United States

π_{eu} = the benefits of coordination to the EU

d_{us} = the costs of coordination to the United States

d_{eu} = the costs of coordination to the EU

For simplicity, the United States and the EU are assumed to have two options: they can either hold on to their domestic antitrust laws (with the possibility of the other party converging to their regime) or switch to the other state's existing antitrust laws. The United States prefers that the EU adopts the antitrust laws of the United States and the EU prefers that the United States coordinates to the EU's domestic regime. Both the EU and the United States receive the lowest payoff if they agree to adopt each other's domestic antitrust laws but fail to coordinate (the United States adopts EU antitrust laws and the EU adopts the U.S. antitrust laws).

The payoffs from retaining the status quo are normalized to zero. The efficiency benefits from coordinated antitrust laws are assumed to be π and the adjustment costs d . The adjustment costs (d) are presumed to depend largely on the degree of divergence between the U.S. laws and the EU laws and the magnitude of political and economic friction that the adjustment

84. *Id.*

creates.⁸⁵ As already indicated, it is also assumed that π and d can take different values in different rounds of games (antitrust negotiations).

For now, the model continues to assume symmetrical payoffs. In other words, $\pi_{us} = \pi_{eu}$ and $d_{us} = d_{eu}$. In the event that $\pi > d$, coordination is possible as the benefits from coordination outweigh the adjustments costs for both parties, providing that the distributional conflict can be solved. If adjustment costs, however, exceed the efficiency benefits that the coordination of antitrust regimes would generate ($d > \pi$), both states' dominant strategy is to retain their domestic antitrust laws and, consequently, not to coordinate. In other words, if the United States believes that the economic and political adjustment costs it would incur by adopting the EU's antitrust laws would exceed the benefits from a harmonized antitrust regime ($d_{us} > \pi_{us}$), it would always fail to adopt those laws. Irrespective of what the EU would do, it would always play "retain domestic antitrust laws" (as $\pi_{us} > 0 > \pi_{us} - d_{us}$). If the United States retains its domestic laws, the EU would also always be better off in not coordinating (as $0 > \pi_{eu} - d_{eu}$). Consequently, under the assumption that $d > \pi$ for all parties, retaining the status quo is the only equilibrium of the game.⁸⁶

1. *The Low Opportunity Costs of Non-Coordination for Both the United States and the EU*

It seems plausible to argue that coordination has not taken place because the United States and the EU have concluded that coordination would not yield benefits that would make coordination worthwhile or, alternatively, that the benefits would be superseded by costs that international coordination would entail ($0 > \pi_{eu} - d_{eu}$ and $0 > \pi_{us} - d_{us}$). Retaining the status quo may in fact have been perceived to be desirable for three principal reasons. First, the extent of benefits that the United States and the EU could derive from coordination is uncertain and possibly not at great as generally presumed. Second, the opportunity costs of not coordinating antitrust laws are relatively low for both parties. Third, negotiating a binding international agreement is likely to be costly, especially when compared to the uncertain benefits stemming from coordination and the lack of high opportunity costs under the status quo.

Many commentators advocating international antitrust rules assume that such rules would lead to significant transaction cost savings. The clearance of international mergers, for instance, has generally been assumed to involve high transaction costs due to multiple reviewing authorities with inconsistent informational and procedural requirements as well as contradictory standards for assessment.⁸⁷ Some recent research, however, questions

85. *Id.* at 52–53.

86. *Id.*

87. See, e.g., Guzman, *supra* note 4, at 100; McGinnis, *supra* note 14, at 127.

whether the alleged inefficiencies attributed to decentralized enforcement are in fact as high as often presumed.⁸⁸ A survey of over sixty international mergers and acquisitions deals in 2003 found that a typical international merger requires filing with six different antitrust agencies, generating on average €3.3 (\$4.3) million in external merger review costs. These average (external) transaction costs attributable to the merger review were, however, found to constitute merely 0.11 percent of the total costs of the deal when compared to the overall value of the average merger.⁸⁹ Such minor transaction costs are unlikely to have a significant impact on the decision of whether to proceed with a transaction, diminishing the value of π for the negotiating parties.⁹⁰ Similarly, recent data collected by the U.S. International Trade Commission (“USITC”) cautiously suggest that anticompetitive practices may not constitute as significant NTBs as often perceived.⁹¹

Also, the opportunity costs of non-coordination are relatively low. Both the United States and the EU have strong domestic antitrust laws that can be applied extraterritorially as long as their respective domestic markets are affected by the alleged anticompetitive conduct. Both countries have also resorted to extraterritorial enforcement on several occasions.⁹² In addition, there are various informal cooperation mechanisms in place that have increased cooperation between different antitrust authorities. Numerous bilateral agreements have been concluded that facilitate the exchange of information and coordination of international antitrust investigations.⁹³ Non-binding multilateral guidelines and best practices have been developed, for instance, in the framework of the Organization for Economic Co-

88. See MULTI-JURISDICTIONAL MERGER SURVEY, *supra* note 75.

89. *Id.* at 4. If a second request is issued by an antitrust authority, the costs were found to increase dramatically, amounting to average external costs of €5.4 million, or, in case of major deals, to over €10 million.

90. It can, however, be assumed that relatively small-value transactions are disproportionately impacted by the prospect of a costly multi-jurisdictional review.

91. The USITC statistics evaluate the relative harmfulness of various NTBs that are expected to impede the free flow of goods and services, based on preliminary information reported by the U.S. Trade Representative (“USTR”), the EU, and the WTO. The study compiles data from fifty-three economies, dividing the information into fifteen categories of NTBs, “anticompetitive practices/competition policy” being one of them. “Anticompetitive practices/competition policy” as a category was reported second to last in terms of the relative frequency of the NTBs. Similarly, “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 & 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 & Michael Ferrantino eds., 2005).

92. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993); *Joined Cases 89, 104, 114, 116, 117 & 125–129/85, Ahlström v. Comm’n*, 1988 E.C.R. 5193 [hereinafter “Wood Pulp”]. Obviously, the status quo option entails some transaction costs (including the possibility of enforcement conflicts akin to the *GE/Honeywell* case).

93. See, e.g., Corrigendum to Decision 95/145, ECSC of the Council and the Commission of 10 April 1995, Concerning the Conclusion of the Agreement between the European Communities and the Government of the United States of America Regarding the Application of their Competition Laws, 1995 O.J. (L 131) 38. In addition, the United States has concluded bilateral antitrust cooperation agreements with Australia, Brazil, Canada, Germany, Israel, Japan, and Mexico. The EU has also concluded a bilateral agreement with Canada and Japan.

operation and Development (“OECD”) and the International Competition Network (“ICN”).⁹⁴ These “soft law” mechanisms for cooperation, while non-binding, have the effect of notably enhancing convergence and reducing friction caused by decentralized enforcement. While voluntary guidelines and case-by-case cooperation arguably have limits, they have diminished the potential benefits of formal cooperation.

Finally, negotiating an international agreement always entails costs. Contracting costs are particularly high when numerous states with divergent preferences are seeking to agree on binding norms.⁹⁵ An antitrust agreement within the WTO framework, for instance, would require reaching a consensus among 149 heterogeneous states, as well as seeking domestic ratification by their respective legislatures. The Uruguay Round of WTO negotiations required eight years to complete. The current Doha Round, launched in 2001, has already dragged on for over five years with no end in sight.⁹⁶ Pursuing a binding international antitrust agreement within the trade regime would thus inevitably be a slow and costly process.

Consequently, the prospect of coordinating international antitrust laws, while generating some benefits, may simply not have been a priority for the United States and the EU due to certain costs, limited gains, and lack of significant opportunity costs. Alternatively, it could be that either party might have wanted to launch the negotiations, but the other party, perceiving the costs exceeded the benefits of coordination, obstructed negotiations. The possibility of asymmetrical payoffs between the United States and the EU is examined below.

2. *Explaining the United States-EU Divergence and the Possibility of Asymmetrical Payoffs*

Thus far, the game-theoretic model has assumed the payoffs for the United States and the EU to be symmetrical. At first blush, this assumption appears valid. The interests of the two states regarding international antitrust governance should be closely aligned: if the EU was to gain by having

94. The ICN is a voluntary network among the worlds’ antitrust agencies with the objective of facilitating procedural and substantive convergence in antitrust enforcement and developing best practices. Together with the OECD, it has been the most prominent antitrust network among domestic regulators since its initiation in October 2001. See, e.g., Oliver Budzinski, *The International Competition Network: Prospects and Limits on the Road Towards International Competition Governance*, 8 COMPETITION & CHANGE 223 (2004); Anu Piilola, *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 STAN. J. INT’L L. 207, 235–36 (2003); Frederic Jenny, *International Cooperation on Competition: Myth, Reality and Perspective*, 48 ANTITRUST BULL. 973 (2003).

95. Because the costs of non-compliance are high, states negotiate each provision more cautiously when they know that they will be legally bound by the agreement. In addition, the approval of a binding international agreement often requires domestic ratification, further adding to the contracting costs.

96. Alan Beattie, *Doha Talks Bring Engagement but No Broad Accord*, FIN. TIMES (London), Feb. 27, 2007, at 8; Alan Beattie, *The Doha Round: The Rising Risk of a Backlash Against Free Trade*, FIN. TIMES (London), Sept. 12, 2006, at 5; *Free Trade’s Best Defence Is the Truth*, FIN. TIMES (London), July 25, 2006, at 16.

an international agreement on antitrust law, gains ought to be available to the United States as well. In other words, π_{eu} ought to be equal, or close to equal, with π_{us} .⁹⁷

In reality, however, the United States has repeatedly stated its objection to multinational antitrust rules while the EU has been their strongest advocate.⁹⁸ While the U.S. position softened in 2000 when it explicitly acknowledged the need for enhanced multilateral cooperation in antitrust matters,⁹⁹ the United States has continued to endorse voluntary antitrust cooperation within the ICN over any binding cooperation in the WTO framework.¹⁰⁰ It might therefore be that the parties calculate their respective benefits from formal cooperation differently. Thus, the assumption of symmetric payoffs should be relaxed, allowing for the examination of the possibility that there would be more benefits available for one party (the EU) than for the other (the United States) from the coordination ($\pi_{eu} > \pi_{us}$), or that the adjustment costs of switching to the other regime would be higher for the United States than for the EU ($d_{us} > d_{eu}$).

There are several explanations for the EU's endorsement of an international antitrust agreement and the United States's resistance of it. First, the two regimes' respective approaches to multilateral rulemaking are different. The United States has been considerably more selective in ceding its sovereignty to supranational institutions and in participating in multilateral agreements than the EU.¹⁰¹ The way the two view the sovereignty costs of

97. For instance, it is difficult to imagine that the EU corporations would face more significant market access problems than U.S. corporations when trying to enter foreign markets or that they would meet more burdensome merger notification requirements than the U.S. corporations. It is also doubtful that the EU Commission's capacity to apply EU competition law extraterritorially would in practice be significantly more limited than that of the United States. Accordingly, the payoffs for both states could be expected to be roughly symmetrical.

98. See, e.g., Douglas Melamed, Principal Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Antitrust Enforcement in a Global Economy, Address at the Fordham Corporate Law Institute 25th Annual Conference on International Antitrust Law and Policy (Oct. 22, 1998), available at <http://www.usdoj.gov/atr/public/speeches/2043.htm>; Mario Monti, European Commissioner for Competition Policy, Address at the European Competition Day Conference: A Global Competition Policy? (Sept. 17, 2002), available at http://ec.europa.eu/comm/competition/speeches/index_speeches_by_the_commissioner.html; Working Group on the Interaction between Trade and Competition Policy, *Communication from the European Community and Its Member States*, W/WGTCP/W/115 (May 25, 1999).

99. See Joel I. Klein, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Address at the EC Merger Control 10th Anniversary Conference: Time for a Global Competition Initiative?, (Sept. 14, 2000), available at <http://www.usdoj.gov/atr/public/speeches/6486.htm>.

100. See Antitrust Div., U.S. 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 (2000), available at <http://www.usdoj.gov/atr/icpac/finalreport.htm>; William J. Kolasky, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Address at the American Bar Association Fall Forum: Global Competition: Prospects for Convergence and Cooperation (Nov. 7, 2002), available at <http://www.usdoj.gov/atr/public/speeches/200446.htm>.

101. Examples include the United States's refusal to join the Kyoto Protocol on Climate Change, the Rome Statute of the International Criminal Court, and the Landmine Treaty, in addition to unilateral withdrawal from the Anti-Ballistic Missile Treaty. In the human rights area, the United States has been hesitant to ratify several international treaties, including the most widely accepted human rights treaty, the Convention on the Rights of the Child. See Andrew Moravcsik, *Why Is U.S. Human Rights Policy So*

international rulemaking may hence suggest that d would in this respect be higher for the United States than for the EU ($d(\text{loss of sovereignty})_{\text{us}} > d(\text{loss of sovereignty})_{\text{eu}}$).

In addition, the respective legal traditions in the EU and the United States strike a balance between ex ante codification of rules and ex post case-by-case cooperation differently. The EU, which is dominated by civil law tradition, is more used to clear, codified, ex ante rules which are believed to ensure legal certainty and predictability. Europeans are less comfortable with a regime characterized by a less predictable and more pragmatic, case-by-case approach to cooperation—a tradition that is deeply embedded in the legal culture in the United States.¹⁰² Thus, the EU may perceive codified, formal cooperation to yield higher benefits than informal cooperation mechanisms, increasing the value of π more for the EU than for the United States ($\pi(\text{formal cooperation})_{\text{eu}} > \pi(\text{formal cooperation})_{\text{us}}$).¹⁰³

The United States and the EU also hold different views on whether antitrust would lose its exclusive focus on consumer welfare when enmeshed with trade policy considerations and how detrimental such a development would be. The United States has repeatedly emphasized the importance of retaining the “purity” of the antitrust laws and hence the need to avoid enmeshing them with trade policy.¹⁰⁴ In contrast, the EU antitrust laws were enacted first and foremost to complement the goal of establishing a single market and to ensure that the efforts to remove trade barriers would not be frustrated by erecting private barriers to trade. The EU, therefore,

Unilateralist?, in MULTILATERALISM AND US FOREIGN POLICY: AMBIVALENT ENGAGEMENT 345, 361–69 (Shepard Forman & Patrick Stewart eds., 2002). See also the general discussion on U.S. unilateralism and its resistance to sign international treaties in, for example, John G. Ikenberry, *Is American Multilateralism in Decline?*, 1 PERSP. ON POL. 533 (2003). In contrast, the United States has been more willing to acknowledge the benefits of international rulemaking in trade areas, being the strongest advocate for creating the WTO and dispute settlement within the WTO. The United States also actively endorsed the signing of the North American Free Trade Agreement. The United States, however, has also pursued unilateralist courses in trade, monetary, and financial policies. In trade, for instance, the United States has frequently made use of Section 301 of the 1974 Trade Act, which allows it to impose unilateral trade sanctions against alleged unfair practices of its trading partners.

102. See, e.g., Roger Van den Bergh, *The Difficult Reception of Economic Analysis in European Competition Law*, in POST-CHICAGO DEVELOPMENTS IN ANTITRUST LAW 34, 46–50 (Antonio Cucinotta et al. eds., 2002) (attributing the EU-U.S. divergence in antitrust partly to EU's obsession with predictability). For an example of the EU's preference for clear ex ante rules and the United States's inclination to write more open-ended laws which leave case-by-case assessment to the courts see, for example, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (1995), available at <http://www.usdoj.gov/atr/public/guidelines/0558.pdf>; Commission Regulation 772/2004, 2004 O.J. (L 123) 11. These types of doctrinal differences, however, might be less significant when agencies' decisions are examined in practice. See, e.g., ELHAUGE & GERADIN, *supra* note 37, at 208–32.

103. In contrast, it can be argued that the EU was originally more opposed to the formal codification of the WTO than the United States and also initially resisted the enforcement mechanism that the Uruguay Round instituted.

104. See, e.g., Melamed, *supra* note 98. See also Spencer Weber Waller, *National Laws and International Markets: Strategies of Cooperation and Harmonization in the Enforcement of Competition Law*, 18 CARDOZO L. REV. 1111, 1123 (1996).

appears more receptive to entangling trade and antitrust policies.¹⁰⁵ Thus, the negotiations within a trade regime may increase π for the EU, while increase d and decrease π for the United States.

The most powerful explanation for the United States's hesitation (and the EU's converse enthusiasm) to international antitrust rules, however, appears to be the prospect that any international antitrust agreement negotiated today would be likely to resemble the EU-model of antitrust regulation (yielding the United States the payoff $\pi_{us} - d_{us}$). Both the United States and the EU have been actively exporting their antitrust regimes to developing countries and transition economies in an attempt to expand their respective "spheres of influence."¹⁰⁶ While several countries have adopted U.S.-style antitrust laws, the EU seems to be winning the race for the supremacy of antitrust laws.¹⁰⁷ Thus, an international antitrust agreement would be likely to shift several states away from the "U.S. model" and toward the "EU model," compromising U.S. influence in an important area of economic policy. For the same reason, it is not surprising that the EU is willing to seize the opportunity to "lock in" its preferred regulatory approach worldwide.

On the other hand, the divergence regarding international antitrust agreement may also just be a matter of timing. The EU is perceived to be gradually converging its antitrust laws toward the U.S. model. Consequently, the United States might anticipate being able to strike a more favorable bargain sometime in the near future when the EU's antitrust regime is expected to be more closely aligned with that of the United States. The United States may believe that its π is gradually increasing and it is therefore holding out to obtain a better outcome in some later rounds of negotiations.¹⁰⁸

105. This question relates to the "substantive linkage" between trade and antitrust policies, which can be distinguished from "strategic linkage," discussed *supra* note 8. Substantive linkage refers to connecting norms that are so closely related that they ought to be resolved together. Claims for linkage in such cases are based on the need to facilitate coherence between closely correlated norms or to ensure that the application of one set of rules does not interfere with the goals of another set of rules. See Leebron, *supra* note 8, at 11–12. Trade and antitrust norms are considered to enhance interconnected goals as both seek to facilitate economic transactions by ensuring that markets are open and free. Trade and antitrust policies, however, can also be mutually conflicting if applied inconsistently. The EU's endorsement of WTO rules on antitrust, for instance, largely hinges on the idea that an international antitrust agreement is necessary to complement the goals of trade liberalization and prevent inconsistencies.

106. The contest manifests itself in the form of antitrust advocacy as both the United States and the EU actively offer technical assistance and advice to developing countries and transition economies willing to adopt antitrust laws. See, e.g., Fox, *supra* note 82, at 1799 (2000).

107. *Id.* This is especially true with respect to countries which have close trading relationships with the EU and which aspire to eventually join the union. Adopting EU-style antitrust regimes has been made a precondition for membership in the EU. The EU model also often seems more appealing to developing countries and transitional economies as it embraces a broader set of goals and offers more flexibility in implementation than U.S. antitrust laws, which focus exclusively on enhancing efficiency.

108. See ELHAUGE & GERADIN, *supra* note 37, at 1209. However, this presumption is complicated by the fact that while the EU is moving toward the U.S. model, the rest of the world is moving toward the more "traditional EU model." Waiting may thus not guarantee an international antitrust agreement at the United States's preferred point of coordination as the majority of nations will, most likely, have EU-style antitrust laws in place at that point.

In addition to this external power struggle that manifests itself as the contest between the United States and the EU for the preeminence of their respective antitrust regimes, the U.S antitrust agencies might also oppose a WTO agreement on antitrust due to an internal power struggle. A WTO agreement on antitrust would inevitably shift powers from the Federal Trade Commission and the Department of Justice to the Office of the U.S. Trade Representative.¹⁰⁹ In contrast, the EU Commission's powers would increase vis-à-vis the EU member states if antitrust was brought within the WTO framework as the Commission would have exclusive competence in WTO negotiations on antitrust matters.¹¹⁰

The above discussion has shown that asymmetrical benefits as such do not make coordination impossible. If the costs are believed to exceed the benefits of coordination for both parties ($\pi_{eu} - d_{eu} < 0$ and $\pi_{us} - d_{us} < 0$ while $\pi_{eu} \neq \pi_{us}$ and/or $d_{eu} \neq d_{us}$), both players' respective dominant strategies would lead them to play "retain domestic antitrust laws." The failure to coordinate would in this situation be explained by the parties' unwillingness to change the status quo. However, if the EU is assumed to always prefer coordination to the status quo ($\pi_{eu} > \pi_{eu} - d_{eu} > 0$) even though the United States would prefer the status quo to coordinating at the EU model ($\pi_{us} > 0 > \pi_{us} - d_{us}$), the situation would resemble that of asymmetric interdependence where coordination could take place if the EU agreed to coordinate at the United States's preferred point of coordination. The EU is not able to impose its regime on the United States, nor can it supply the international regime on its own.¹¹¹ Should the EU wish to proceed with the international regime under these conditions of asymmetric interdependence, its only option would be to accept the U.S. model.

However, as the status quo continues to persist, it might be realistic to assume that instead of conceding to adopt the U.S. model, the EU would prefer trying to change the dynamics (payoff structure) of the game by offering concessions to the United States that would either increase π_{us} or decrease d_{us} . This type of strategic linkage could in theory broaden the scope for a compromise and persuade the United States to play a move that would not be its dominant strategy absent any linkage. In essence, a successful

109. Weber Waller, *supra* note 104, at 1122–24 (noting that while the DOJ opposes the WTO agreement on antitrust, the USTR supports it).

110. *Id.* at 1123–24. However, the argument about the internal power struggle in the EU can be questioned in light of the recent active efforts on behalf of the EU to decentralize its antitrust enforcement powers and expand the role of the individual member states in applying EU antitrust laws.

111. While there are areas of international cooperation where a hegemon alone is able to supply the regime, in the antitrust domain, the EU cannot, for example, declare itself to be an "international clearinghouse" for mergers or claim "international discovery rights" that would enable it to conduct dawnraids and seize documents in foreign jurisdictions when seeking to prosecute international cartels. The EU possesses no "go-it-alone" power as the United States can form a blocking coalition and thereby prevent the negotiations from taking place. See generally LLOYD GRUBER, *RULING THE WORLD: POWER POLITICS AND THE RISE OF SUPRANATIONAL INSTITUTIONS* (Princeton University Press 2000) (discussing the "go-it-alone power" and its limits).

strategic linkage must be able to offset the negative distributional consequences that would arise if the agreement were constrained to a single issue area. By broadening side-payments that are available, a distributive (“win-lose”) bargaining game can be converted into an integrative (“win-win”) bargaining game.¹¹² Even as coordination using strategic linkages might theoretically be possible in a world of certainty about expected payoffs, Part III below will show how uncertainty, together with the existing distributional tensions, continues to impede the effective use of transfer payments.

Before exploring the effects of the dual problem of distribution and information, however, this Article briefly examines how the coordination problems in the antitrust domain have been further exacerbated by a possible deadlock between developed countries and developing countries.

*B. The Deadlock Between Developed Countries and Developing Countries:
Why Developing Countries Have Opposed the WTO Negotiations
on Antitrust*

Over the last decade, we have witnessed a remarkable trend toward a proliferation of domestic antitrust regimes in developing and transition economies. Currently, over seventy developing countries have adopted domestic antitrust laws.¹¹³ Antitrust regimes have become increasingly essential following the extensive liberalization of economic activity that developing countries have undergone in the last few decades. If liberalized imports and exports become subject to private restrictions on trade, the gains from economic reforms are inevitably compromised.¹¹⁴ Antitrust laws are therefore seen to have an important complementary role in the privatization process.¹¹⁵

112. BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM* 115–16 (2d ed. 2001).

113. When the Global Competition Forum’s data on existing antitrust laws is cross-referenced with the World Bank’s classification of developing countries, it appears that seventy-three out of 152 developing countries have adopted domestic antitrust laws. See Global Competition Forum, Home Page, <http://www.globalcompetitionforum.org> (follow “Laws” hyperlink) (last visited Apr. 4, 2007); World Bank, Key Development Data & Statistics, <http://www.worldbank.org/data/countrydata/countrydata.html> (last visited Apr. 4, 2007). Furthermore, seven developing countries report that they are in the process of enacting laws protecting competition. The information listed in the Global Competition Forum database might not be completely accurate due to difficulties in obtaining data from all developing countries, but it is the most comprehensive data available. Regarding the World Bank’s country classification, countries are considered “developing” if they are classified by the World Bank as “low income,” “lower-middle income,” or “upper-middle income” countries. “Developed” countries are classified as “high income countries.” World Bank, Data—Frequently Asked Questions, <http://www.worldbank.org/data/countrydata/countrydata.html> (follow “FAQ” hyperlink) (last visited Apr. 4, 2007).

114. Ross C. Singleton, *Competition Policy for Developing Countries: A Long-Run, Entry-Based Approach*, 15 *CONTEMP. ECON. POL.* 1, 5 (1997). See also Ajit Singh & Rahule Dhumale, *Competition Policy, Development, and Developing Countries*, in *WHAT GLOBAL ECONOMIC CRISIS?* 122 (Philip Arestis, Michelle Baddeley & John McCombie eds., 2001).

115. Occasionally, developing countries have adopted antitrust laws voluntarily, believing that laws serve their interests and make their businesses and markets more robust. At times, however, the adoption of antitrust laws has taken place more coercively. Indonesia, for instance, adopted antitrust laws in 1999

However, significant flaws in enforcement often compromise the effectiveness of the promising antitrust laws in developing countries. The implementation of antitrust regimes has been obstructed by resource austerity, deficient institutional structures, inadequate legal and economic expertise, and political opposition from state-owned enterprises and import-competing industries lobbying for continued protection.¹¹⁶ Further, while strong antitrust regimes like those in the United States and the EU have repeatedly extended their jurisdiction to transactions involving foreign corporations, developing countries have very rarely been able to do so.¹¹⁷ Thus, developing countries cannot effectively defend themselves against MNCs that have subsidiaries in developing countries or foreign corporations that import cartel-affected goods and services to developing countries.¹¹⁸ Also, the voluntary enforcement cooperation that has lowered the costs of non-coordination in developed countries has been considerably more limited among developing countries themselves and between developed and developing country antitrust agencies.¹¹⁹

It therefore seems that developing countries would be the greatest beneficiaries of an international antitrust agreement ($\pi_{\text{Developing}} > \pi_{\text{Developed}}$).¹²⁰ However, it was the developing countries that blocked the negotiations on antitrust at the WTO ministerial meeting in 2003 in Cancun.¹²¹ While

as a condition to obtaining rescue funds from the International Monetary Fund. See Fox, *supra* note 82, at 1784.

116. William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 *BROOK. J. INT'L L.* 403, 404–05 (1997).

117. See *supra* p. 405 and note 92. See also Margaret Levenstein & Valerie Y. Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 *ANTI-TRUST L.J.* 801, 801–03 (2004).

118. Levenstein & Suslow, *supra* note 117. Levenstein and Suslow have examined the economic effects of international cartels in developing countries. Analyzing a sample of over forty successfully prosecuted international cartels in the 1990s (consisting of close to all price-fixing cartels prosecuted by the United States and the EU in that decade), they found that in the year 1997, developing countries imported \$51.1 billion worth of goods from industries that were affected by cartel activity during the 1990s, representing 3.7 percent of all imports to developing countries that year and 0.79 percent of their combined GDP. *Id.* at 805, 816. Though their data must be interpreted with considerable caution due to difficulties in compilation, the total figure of \$51.1 billion is staggering, especially considering that official foreign aid to all developing countries in 1997 amounted to \$39.4 billion.

119. Jenny, *supra* note 94, at 991–93.

120. Arguably, developing countries can at times “free ride” on developed countries’ enforcement efforts even in the absence of any international coordination. As long as an international merger, for instance, would have negative effects both on the U.S. market and on some developing country markets, the developing countries could benefit from the possible prohibition or concessions demanded by the U.S. antitrust authorities. However, when only developing country markets are affected, developing countries cannot expect the United States or the EU to pursue a transaction that does not impede competition on their respective home markets. It is in these latter types of situations where an international regime could be highly beneficial for the developing countries.

121. See, e.g., Taimoon Stewart, *The Fate of Competition Policy in Cancun: Politics or Substance?*, 31 *LEGAL ISSUES OF ECON. INTEGRATION* 7, 7 (2004); WTO, DAY 5: CONFERENCE ENDS WITHOUT CONSENSUS, http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm (last visited Mar. 19, 2007).

there are several reasons for the developing countries' resistance,¹²² the most important individual objection was probably a concern relating to the increased regulatory burden and resulting compliance costs. Compared to developed countries whose costs of compliance following an agreement would be nearly non-existent, developing countries would face significant financial hurdles in establishing effective antitrust laws and creating institutions for enforcement ($d_{\text{Developing}} > d_{\text{Developed}}$).¹²³ In addition, these countries would have to sustain political costs as import-competing industries or former state monopolies would be likely to resist any reforms that would further remove government protection. Without legal and economic expertise or adequate resources and experience in enforcing antitrust laws, the developing countries thus concluded that they were not ready for a WTO agreement.¹²⁴ In other words, their ultimate unwillingness to coordinate reveals their implicit perception that $\pi - d < 0$.

As mentioned in the U.S.-EU game, the dynamics of this conflict resulting in adherence to the status quo could hypothetically be changed by offering concessions to countries that would need to incur significant adjustment costs. "Balanced concessions" form a fundamental precondition for bargains in the WTO where states seek to exchange mutually beneficial and balanced concessions in the spirit of reciprocity.¹²⁵ Balanced concessions do not mean that countries would be required to have, for instance, equal tariff levels. Instead, reciprocity operates to level the *new* trading opportunities that countries offer and receive in return, taking the initial trading positions of countries as given.¹²⁶ In the context of negotiating new WTO commitments regarding antitrust enforcement, the reciprocity principle would operate from the premise that the status quo of the antitrust enforcement in the

122. Stewart, *supra* note 121, at 7–11. Linking antitrust negotiations to other "Singapore issues" (consisting of trade facilitation, investment protection, and transparency in government procurement in addition to antitrust policy) was arguably one reason for the failure to launch negotiations on antitrust.

123. Adjustment costs could be expected to be significant in the case of antitrust, especially considering that many developing countries do not have any pre-existing regulatory infrastructure in place. In addition, building the capacity to administer and enforce a highly complex regulatory area like antitrust, which assumes sophisticated economic expertise, would be costlier than establishing regulatory capability in a less technical area.

124. Developing countries also failed to see the agreement on antitrust as a development priority in light of more pressing socioeconomic problems that would need to be addressed. See Editorial, *The Real Lesson of the Cancun Failure*, FIN. TIMES (London), Sept. 23, 2003, at 16 ("It is absurd to push, as the EU has done, to impose rules in complex areas such as competition and investment on countries so poor that some cannot even afford WTO diplomatic representation.").

125. Reciprocity in the WTO framework can operate both intra-issue and inter-issue: *intra-issue reciprocity* entails the exchange of identical concessions (e.g., matching tariff concession regarding the same product) whereas *inter-issue reciprocity* refers to an exchange of dissimilar concessions (e.g., removal of agricultural subsidies against a commitment to ensure effective protection of intellectual property rights). When concessions are reciprocated, they result in equal trade flows, maintaining the terms-of-trade unchanged. In other words, when a country agrees to increase the flow of imports by lowering its trade barriers, it receives concessions in return that offset the increase of imports by an equal value of new export opportunities. ROBERT Z. LAWRENCE, CRIMES AND PUNISHMENTS? RETALIATION UNDER THE WTO 21, 23–24 (2003).

126. *Id.* at 22.

WTO countries would represent a “balance” and that any new concessions in this respect should be reciprocated by trading parties. Consequently, developed countries, with WTO-consistent antitrust laws in place, would be obliged to compensate developing countries that agreed to bring their laws into conformity with negotiated WTO antitrust rules.

Developing countries could, for example, be compensated for the increased costs they would need to incur when drafting laws and establishing institutions necessary to carry out effective enforcement by offering them technical assistance.¹²⁷ They could also be offered concessions in another area; for instance, by linking required antitrust reforms to developed countries’ commitment to reduce agricultural subsidies they currently give to their producers. These types of transfer payments might lead developing countries to re-evaluate the costs of coordination and agree to play a move that would not be their dominant strategy absent any linkage. However, as will be discussed below in Part III, there remain notable difficulties in establishing effective issue linkages in the WTO negotiations on antitrust.

III. A FAILURE TO COORDINATE DUE TO THE COEXISTENCE OF A DISTRIBUTIONAL PROBLEM AND AN INFORMATIONAL PROBLEM

As discussed above, if states believe that the costs of coordination were to exceed its benefits for all relevant negotiating parties (for instance, $\pi_{eu} - d_{eu} < 0$; $\pi_{us} - d_{us} < 0$), all players would, in that round, play the move “retain domestic antitrust laws.” The failure to coordinate under this assumption could be explained by the reluctance of any party to change the status quo. In contrast, the discussion below focuses on a situation where antitrust coordination is assumed to be beneficial but where an international agreement is difficult to reach due to disagreement on the specific content of the agreement (for instance, when $\pi_{eu} - d_{eu} > 0$ and $\pi_{us} - d_{us} > 0$ but $\pi_{eu} \neq \pi_{us}$ and/or $d_{eu} \neq d_{us}$). In such a strategic setting, international regimes can be helpful in facilitating coordination by helping the parties solve the distributional conflict that stands in the way of reaching an agreement. While acknowledging that regimes can at times assist states in generating cooperation, this Article argues that the potential benefits of international regimes are difficult to harness in the case of international antitrust negotiations characterized by the simultaneous existence of the *distributional problem* and the *informational problem*.

127. While the Doha Declaration of the WTO Ministerial Conference incorporated a commitment to offer technical assistance for developing countries to help them build antitrust enforcement capacity, (See Ministerial Conference, *Fourth Session*, Doha, Qatar, November 9–14, 2001, *Ministerial Declaration*, ¶ 24, WT/MIN(01)/DEC/1, (Nov. 14, 2001)) the developing countries’ disappointment with the 1980 U.N. Set of Mutually Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices may, however, have made them skeptical about the materialization of any promised technical assistance. See SUSAN K. SELL, *POWER AND IDEAS: NORTH-SOUTH POLITICS OF INTELLECTUAL PROPERTY AND ANTI-TRUST* 141, 158 (1998).

Section A and Section B below discuss how the distributional problem and the informational problem, respectively, aggravate the international coordination of antitrust laws. Section C explains how these two problems, when existing simultaneously, further exacerbate the collective action problem, increasing the likelihood that coordination fails.

A. *How the Distributional Conflict Aggravates Coordination*

Coordination games generally involve different types of collective action problems than do the collaboration games (including the PD) discussed in Part I and, consequently, often require a very different set of political, legal, and institutional solutions to solve them.¹²⁸ Resolving a collaboration game requires mutual policy adjustment as both players must abandon their dominant strategies and move away from a Pareto-inferior equilibrium by agreeing to cooperate. An incentive to behave opportunistically and defect from the agreed point of cooperation always remains, as any one party receives the highest individual payoff if it takes advantage of the other party's cooperation while refusing to cooperate itself.

In contrast, in a CGDC states generally prefer collective action but disagree on the exact point of coordination.¹²⁹ The existence of multiple, distributionally distinct, Pareto-improving equilibria makes an agreement difficult to attain. Once the agreement has been reached, however, it can often be considered self-enforcing, as neither party has an incentive to deviate from it.¹³⁰ The attempts to coordinate merger policies or cartel or mo-

128. See Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, in INTERNATIONAL REGIMES 115, 127–32 (Stephen D. Krasner ed., 1983) (discussing the difference between coordination and collaboration games). In a coordination game the parties have an incentive to avoid a particular outcome whereas in a collaboration game the parties have an incentive to ensure a particular outcome. *Id.* This has led Stein to characterize the two types of games as *dilemmas of common interests* (collaboration game) versus *dilemmas of common aversions* (coordination game). *Id.* at 120–32. Collective action problems are often erroneously characterized as a PD without carefully examining that their underlying strategic structure is actually captured by that particular formalization. Thus, research programs in international relations have been biased toward examining situations of market failure that focus on examining institutional solutions for curtailing cheating at the expense of coordination games. See Stephen D. Krasner, *Global Communications and National Power: Life on the Pareto Frontier*, 43 WORLD POL. 336, 361–64 (1991); Duncan Snidal, *Coordination Versus Prisoners' Dilemma: Implications for International Cooperation and Regimes*, 79 AM. POL. SCI. REV. 923, 924 (1985).

129. Simple or pure coordination games must be distinguished from a CGDC. Simple coordination games that present no distributional consequences are relatively easy to solve as long as parties can communicate. In such a setting neither player has a dominant strategy nor does either of them prefer a single outcome. There exist two Pareto-efficient outcomes that both players value equally and two Pareto-deficient outcomes that both players want to avoid. Coordination is required as the players' strategies are contingent on each other's moves. However, as both parties are indifferent as to the choice between the two possible equilibria, the coordination is expected to be relatively smooth. In contrast, in a CGDC players hold different preferences as to the actual point of coordination. Coordination is more complicated as players agree on mutually undesirable outcomes (non-coordination) but disagree as to which of the two Pareto-efficient equilibria to coordinate on (focal point of coordination).

130. It might, of course, be that one state attempts at some later point to deviate from the commonly agreed solution in an effort to shift the point of coordination to its preferred equilibrium. See discussion *infra* p. 436 and note 191.

nopoly investigations, for instance, can be assumed to involve a genuine willingness to coordinate regulatory policies across jurisdictions rather than an incentive to engage in non-cooperative strategies and cheating. Most, if not all, states can be expected to benefit from more effective control of international cartels (not limited to exports) or dominant companies that adversely affect several markets. Similarly, more harmonized merger control procedures that would bring about transaction cost savings, reduce delays, and lead to enhanced legal certainty can be assumed to generate aggregate and individual benefits that would be undermined by choosing non-cooperative strategies.

Thus, in a CGDC both parties have the incentive to play the same move (for instance, the United States and the EU would generally prefer reaching a similar assessment as to the legality of a merger that affects both markets). They do not typically have independent dominant strategies that would lead to a sub-optimal equilibrium. Instead, there are two Pareto-efficient equilibria and the central dilemma is how to choose between the two equilibria (for instance, whether the merger is assessed under the analytical framework endorsed by the United States or the EU and whether the procedural requirements of the United States or the EU are followed).¹³¹ The optimal move of a party is always contingent on the move of the other party (for instance, neither the United States nor the EU benefits from an inconsistent decision among their authorities even though they can be expected to want the other state to reach the same decision as they have reached).¹³²

1. *The Coordination Game Between the United States and the EU: "The Battle of the Antitrust Regimes"*

A game between two antitrust powers, where the distributional problem stands in the way of coordination, is presented below. In a two-player CGDC parties choose between strategy A and strategy B. There are two Pareto-optimal points of coordination, AA (where both parties choose strategy A) and BB (where both parties choose strategy B). Both players prefer playing the same move (AA or BB) to playing a different move (AB or BA). Distributional conflict arises as player 1 prefers that both players play move A (resulting in equilibrium AA), whereas player 2 prefers that both players move B (resulting in equilibrium BB). This disagreement over the exact point of coordination is referred to as a "distributional problem" and is often represented through a game known as "Battle of the Sexes."¹³³ Trans-

131. Krasner, *supra* note 128, at 340. Krasner has distinguished a CGDC from a collaboration game by noting that in a CGDC "[t]he problem is not how to get to the Pareto frontier but which point along the frontier will be chosen." *Id.*

132. Lisa L. Martin, *Interests, Power, and Multilateralism*, 46 INT'L ORG. 765, 775 (1992).

133. There are various examples of this game, including one where a husband (player 1) and wife (player 2) prefer spending their vacation together. They have two choices for the destination: they can go to the mountains ("strategy A") or to the ocean ("strategy B"). The husband would prefer vacationing in the mountains and the wife by the ocean, but it is more important to both of them to spend their

lated into the antitrust domain, the CGDC, or the “Battle of the Antitrust Regimes,” captures a strategic setting where states are expected to benefit from a coordinated global antitrust regime but disagree on the type of regime that ought to be adopted. This conflict over the exact point of coordination makes an agreement difficult to reach.

It is generally agreed that one of the main obstacles to reaching any agreement on international antitrust rules is the disagreement between the United States and the EU.¹³⁴ Thus, the two-by-two CGDC between the United States and the EU provides a useful analytical framework for demonstrating a key impediment to any international cooperation in the antitrust domain: the conflict between the two antitrust powers over the preeminence of their respective antitrust regimes. It seems reasonable to assume that any international agreement on antitrust would reflect either the U.S. model or the EU model as they represent the two most well-developed and widespread antitrust regimes in the world. Further, both the United States and the EU have actively been exporting their respective regimes to third countries, which is why the two-by-two game can also be considered to represent a game between two major “clusters” of antitrust regimes: one set of states following the U.S. model and another set of states that have replicated the EU model.¹³⁵

In the CGDC, both the United States and the EU are assumed to recognize that increased coordination and convergence would reduce transaction costs and increase economic efficiency and legal certainty. The United States and the EU, however, disagree whether the international regime should reflect the U.S. or the EU vision of the regime’s optimal content. Both players would prefer internationalizing their domestic antitrust regimes.¹³⁶ Thus, in this game, the United States prefers that both countries play move United States (US,US) (both parties converge to the “U.S. model”) whereas the EU prefers that they both play move EU (EU,EU) (both parties converge to the “EU model”). Converting *Figure 2* to a simplified payoff matrix showing only net benefit will help to explain this coordination problem. The simplified payoff matrix is represented below in *Figure 3*:

vacation together than to end up vacationing in the destination they individually would prefer. See, e.g., Krasner, *supra* note 128, at 339.

134. See discussion *supra* Part II.A.2.

135. See discussion *supra* p. 408 and notes 106–07.

136. This postulation rests on the presumption that the status quo of the domestic antitrust regime represents the domestic political equilibrium on this particular issue. While this model does not explicitly address the costs of coordination, the conjecture that the United States’s and the EU’s preferences for an international antitrust regime are the function of their current domestic antitrust laws is also supported by the fact that the adjustment costs of the state (and its corporations) are minimized when the domestic model of that particular country is internationalized. See DREZNER, *supra* note 78, at 46–47, 52–53.

FIGURE 3

		THE EU	
		<i>Coordinate to the U.S. Model (US)</i>	<i>Retain the EU Model (EU)</i>
THE U.S.	<i>Retain the U.S. Model (US)</i>	a_{us}, b_{eu}	0,0
	<i>Coordinate to the EU Model (EU)</i>	<0,<0	b_{us}, a_{eu}

a_{us} ($= \pi_{us}$) = The United States’s payoffs for coordinating to the U.S. model ($a_{us} > 0$)
 a_{eu} ($= \pi_{eu}$) = The EU’s payoffs for coordinating to the EU model ($a_{eu} > 0$)
 b_{us} ($= \pi_{us} - d_{us}$) = The United States’s payoffs for coordinating to the EU model ($\pi_{us} - d_{us} > 0$)
 b_{eu} ($= \pi_{eu} - d_{eu}$) = The EU’s payoffs for coordinating to the U.S. model ($\pi_{eu} - d_{eu} > 0$)

Unlike the Deadlock situation discussed above, in a CGDC, both states are assumed to believe that a coordinated outcome Pareto-dominates a non-coordinated outcome (irrespective of whether the coordination takes place at the U.S. model or the EU model) even though both states would prefer coordinating at their respective preferred equilibrium.¹³⁷ This assumption seems valid, especially considering that while each player is likely to favor its own respective regime, the U.S. and EU antitrust laws today are increasingly similar.¹³⁸ Neither player would need to incur significant adjustment costs if it were to coordinate at each other’s preferred equilibrium. In other words, it is assumed that $a_{us} > b_{us} > 0$ and that $a_{eu} > b_{eu} > 0$.¹³⁹

In the above payoff matrix, the difference between payoffs a and b represents the degree of the distributional conflict: the greater a is relative to b , the more strongly the United States and the EU favor coordination on their respective preferred models relative to agreeing on any joint solution. The

137. The game has three Nash equilibria, two in pure strategies (US,US and EU,EU) and one in mixed strategies [$a_{us}/(a_{us} + b_{us})$ US, $b_{us}/(a_{us} + b_{us})$ EU]; [$b_{eu}/(a_{eu} + b_{eu})$ US, $a_{eu}/(a_{eu} + b_{eu})$ EU].

138. See, e.g., Jenny, *supra* note 94, at 1000; Charles A. James, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Antitrust in the Early 21st Century: Core Values and Convergence, Address at the Program on Antitrust Policy in the 21st Century (May 15, 2002), available at <http://www.usdoj.gov/atr/public/speeches/11148.pdf>; Neelie Kroes, European Comm’r for Competition Policy, Developments in Anti-Trust Policy in the EU and the US, Speech at the C. Peter McColough Series on International Economics, The Council on Foreign Relations (Sept.15 2006), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/494&format=HTML&aged=0&language=EN&gui-Language=EN>.

139. Here the payoffs from a coordinated outcome are assumed to be symmetrical ($a_{us} = a_{eu}$ and $b_{us} = b_{eu}$). This assumption could, however, be relaxed (See discussion *supra* Part II.A.2 in connection with Deadlock). As long as $b_{us} > 0$ and $b_{eu} > 0$, parties would be playing a CGDC even if $b_{eu} \neq b_{us}$.

variables a and b are assumed to be the function of both the perceived relative efficiency of the parties' preferred point of coordination and the expected adjustment costs resulting from coordinating on the less preferred equilibrium.¹⁴⁰ In other words, the more the United States believes its model to enhance efficiency relative to the EU's model, the higher the payoff a (relative to b) for the United States is. Similarly, the greater a (relative to b) is, the costlier it is for the United States to coordinate on the EU's preferred point of coordination.

It is difficult to estimate the actual degree of the distributional conflict between the United States and the EU or approximate the relative value they place on coordination per se versus coordination on their preferred outcomes. Considering that the United States and the EU antitrust regimes increasingly resemble one another today as a result of recent voluntary alignment of their respective policies, they can be expected to be more willing to strike a bargain at either equilibrium now than a decade ago. On the other hand, it could be argued that if the two players strongly valued coordination and cared less about the point on which they would converge, we would already have a global antitrust regime in place. It also seems fair to assume that as both the United States and the EU are able to enforce their antitrust laws extraterritorially, they have a relatively higher tolerance for the status quo ante than less prominent antitrust regimes would have. Neither regime is dependent on reaching a coordinated outcome and can therefore afford to be more concerned with coordinating on their respective preferred outcomes than with successful coordination per se. Similarly, while transaction costs are higher due to decentralized global antitrust enforcement, cross-border transactions still take place and many international cartels are successfully prosecuted. The costs of non-coordination, while not irrelevant, do not seem insurmountable, allowing the United States and the EU to sustain remaining regulatory diversity and insist on coordinating on their respective preferred equilibrium.

The difficulty of predicting the value for a or b is particularly complicated as there is significant uncertainty as to exactly how much each state would benefit from any given coordinated antitrust regime. The extent to which this informational problem complicates the game is discussed in Section B below, after the examination of the distributional conflict between developed countries and developing countries.

2. *The Coordination Game Between Developed Countries and Developing Countries*

In addition to the U.S.-EU controversy, considerable discrepancy exists between the preferences of the developing countries and those of the wealthier WTO members. A state's level of economic development determines to a

140. See discussion *supra* p. 401.

significant extent the kind of antitrust regime that would present a “win-set” for that particular country.¹⁴¹ The optimal antitrust rules might differ between developed and developing nations, for instance, because developing nations have smaller economies of scale or because they are more concerned about productive efficiency than allocative efficiency.¹⁴² More generally, the differences in the composition of the domestic market, the degree of trade liberalization, the institutional ability to pursue antitrust violations as well as domestic interest group dynamics are likely to be decisive determinants of the type of international antitrust regime that a country prefers.

Developed countries and those developing countries that have supported a WTO agreement on antitrust have advanced their arguments on different grounds. Developed countries have endorsed an international agreement mainly based on two core arguments: they have called for the reduction of transaction costs as well as for enhanced market access. Their main concern is that the current decentralized regulatory framework increases the costs of doing business as international mergers need to be cleared with multiple antitrust agencies and agreements have to be drafted to withstand the strictest scrutiny.¹⁴³ The existence of divergent national antitrust laws hence results in economic inefficiency, legal uncertainty, and incoherence. In addition, developed economies often demand a “level playing field” and better access to developing country markets. They accuse developing countries of impeding the effective market entry of foreign suppliers by failing to exercise control over the anticompetitive practices of local corporations.¹⁴⁴

Developing countries, on the other hand, are less concerned about market access and transaction costs and worry more about their inability to control the anticompetitive practices of MNCs, which increasingly affect their markets as a result of the global merger wave and the growing presence of MNCs in developing countries.¹⁴⁵ Developing countries are also disproportionately affected by international cartel activity and would benefit from an international agreement that abolished exceptions for export cartels and allowed them to better prosecute international cartels that import goods and services into developing countries.¹⁴⁶ Developing countries would therefore expect any international agreement to remedy the inequitable regulatory ca-

141. While this argument would suggest that the United States and EU would agree on the need for an international regime and the form it ought to take, this Article has sought to show above that considerations other than the level of economic development of a country also influence its perception of its potential payoffs. Yet if the United States were to endorse an international agreement and it was not able to internationalize its own regime, it could be expected to prefer the kind of an agreement that resembles more closely the proposal of the EU than that of the developing countries.

142. See ELHAUGE & GERADIN, *supra* note 37, at 1206–07 (considering these possibilities, but concluding that theory and empirical evidence fail to support these claims).

143. See discussion *supra* pp. 398, 404.

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

145. Singh & Dhumale, *supra* note 114, at 124–28.

146. See Levenstein & Suslow, *supra* note 48, at 796.

capacities between the powerful and the weak economies and ensure extensive technical assistance to assist them in their enforcement efforts. At the same time, developing countries have opposed the developed countries' market access agenda, claiming that the level playing field would prevent them from pursuing measures to promote local firms, including shielding them from competition from MNCs and thereby helping them become viable competitors to foreign firms.¹⁴⁷ This has led to calls for a phased, flexible approach and the inclusion of special exemptions in the spirit of the WTO principle of "special and differential treatment."¹⁴⁸

Similar to the earlier discussion of the U.S.-EU conflict where states were assumed to play a CGDC, the discrepancy between the preferences of the developed countries and the developing countries could be formalized as a CGDC. In the CGDC framework, both developed countries and developing countries are assumed to benefit from an international agreement but have difficulties in reaching such an agreement due to the existence of a distributional conflict. Developed countries would gain most by having an international agreement that ensured transaction cost savings and focused primarily on facilitating market access in developed as well as the developing markets. Developing countries, on the other hand, would gain most by having a two-tier agreement that would require them to implement some degree of anti-trust enforcement but that would leave them with considerably less burdensome obligations than developed countries have.

The CGDC further assumes that even the developing countries' preferred equilibrium would be preferable to non-coordination for the developed countries. While developing countries' preferred focal point would cause developed countries to retain their own antitrust laws (in addition to extending technical assistance to developing countries), developing countries would be required to move somewhat closer to developed countries' antitrust rules, which would represent an improvement to the status quo. Similarly, while developing countries would prefer a two-tier system in which their markets would be governed by less stringent antitrust laws than those of the developed world, in a CGDC, they are assumed to be aware of the benefits of antitrust laws and to prefer more stringent antitrust laws (developed countries' preferred equilibrium) to having no antitrust laws (the status quo).

As discussed above, developing countries blocked the antitrust talks in the 2003 WTO ministerial meeting in Cancun.¹⁴⁹ This happened after developed countries became convinced that their preferred focal point was not likely to be realized and that the agreement was likely to force the develop-

147. See Singh & Dhumale, *supra* note 114, at 127.

148. See, e.g., OECD Joint Group on Trade and Competition, The Role of "Special and Differential Treatment" at the Trade, Competition and Development Interface, COM/TD/DAFFE/CLP(2001)21/FINAL (Dec. 4, 2001), available at <http://www.oecd.org/dataoecd/49/37/2072318.pdf>.

149. Stewart, *supra* note 121, at 7.

ing countries to incur significant adjustment costs. Developing countries feared that negotiations, if launched, would lead to an imposed regime, the content of which would reflect the interests of the powerful economies due to coercive bargaining, asymmetrical negotiation skills, and their economic dependence on the developed economies. Many developing countries therefore perceived an international agreement as a threat of regulatory imperialism and insisted on the need for the developing countries to retain control over their economies and development priorities.¹⁵⁰

Accordingly, while the WTO's antitrust agenda leading to the Cancun meeting envisioned CGDC-type negotiations regarding the particularities of the antitrust agreement (including the choice between different focal points), the developing countries' move to block the antitrust talks demonstrates that, in the end, they refused to play the CGDC. Thus, the second-stage game between developed countries and the developing countries in Cancun was essentially converted from a CGDC to a Deadlock, with the consequence that the status quo prevailed and antitrust was subsequently removed from the WTO's current trade agenda.

The strategic situation that led to a stalemate in the WTO negotiations might suggest that developing countries today exert increasing influence in international organizations. While great powers still often set the international policy agenda, developing countries have a growing ability to exercise veto power and thus prevent certain international outcomes from occurring. On the other hand, the impasse in Cancun can also be explained with the help of a theory developed by Daniel Drezner. When examining international regulatory convergence, Drezner treats the great power game as a first stage of the overall game that involves multiple actors. Depending on the outcome of the first-stage game (i.e., whether great powers agree or not), the second stage will consist of regulatory convergence or regulatory competition. According to Drezner,

{w}hen great powers act in concert, there will be effective policy harmonization When the great powers fail to agree, policy convergence *of a sort* will take place. The increasing returns to scale of regulatory harmonization will lead powerful actors to compete for as many allies as possible, leading to strong policy convergence, but at multiple nodes.¹⁵¹

While a single state vested with "go-it-alone" power might at times supply a global regime on its own without the support of another great

150. The developing country position was forcefully shaped by the views and advice of the NGO community. See *id.* at 9–11; see also Martin Khor, Third World Network, No Consensus on Competition in WTO, According to Many Developing Countries (Jun. 6, 2003), <http://www.twinside.org.sg/title/twninfo23.htm> (last visited Apr. 4, 2007).

151. Daniel Drezner, *Globalization, Harmonization, and Competition: The Different Pathways to Policy Convergence*, 12 J. EUR. PUBL. POL'Y. 841, 842 (2005) (footnote omitted).

power,¹⁵² and, while on occasion, regulatory convergence can take place even when great powers play merely a marginal role in facilitating it,¹⁵³ Drezner's theory on policy convergence seems compelling when tested in the international antitrust setting. It captures well the bi-polar antitrust convergence that we are currently observing as numerous new U.S.-modeled and EU-modeled antitrust regimes have emerged due to conscious efforts by the United States and the EU to actively export their respective antitrust regimes in the absence of an agreement on the optimal point of convergence between the powers themselves.

Thus, if the United States and the EU agreed on how to achieve greater international convergence in antitrust, it would be unlikely that other states in the second stage of the game would be able to prevent the global regulatory convergence from occurring at the set of standards jointly preferred by the United States and the EU.¹⁵⁴ Had the United States and the EU acted in concert, it would have been considerably harder for the developing countries to block the negotiations on antitrust in Cancun. The United States and the EU could possibly have resorted to various tactics (including, for instance, coercion, persuasion, and compensation through strategic linkages) to co-opt the developing countries into the agreement. However, because the consensus between the United States and the EU was lacking, it was easy for the developing countries to take advantage of the "division of powers" and effectively ensure that no progress toward a binding international antitrust agreement was made.

B. Bargaining in the "Shadow of Uncertainty": The Problem of ex ante Identifying Winners and Losers Among and Within States

In addition to the distributional problem, an informational problem has impeded the efforts to coordinate antitrust laws internationally.¹⁵⁵ The informational problem arises as states are uncertain about the consequences of the coordinated regime and have difficulties in ex ante identifying the winners and losers of a prospective international agreement, both internationally and domestically. When states are unable to predict the distributional consequences of a high-stakes agreement, they are significantly less eager to

152. See, e.g., ANDREAS HASENCLEVER ET. AL., THEORIES OF INTERNATIONAL REGIMES 86–104 (1997) (discussing hegemonic stability theory).

153. Sylvia Ostry, *Convergence and Sovereignty: Policy Scope for Compromise?*, in COPING WITH GLOBALIZATION 52, 58–59 (Aseem Prakash & Jeffrey A. Hart eds., 2000) (discussing business-driven convergence and self-regulation of international financial markets).

154. Drezner, *supra* note 151, at 849–50.

155. Naturally, some degree of uncertainty underlies many international negotiations. Uncertainty can, for instance, relate to scientific evidence or other contested facts relevant to the content of the agreement, the presence of asymmetrical information, the monitoring and enforcement of the agreement, or the magnitude or the distribution of gains available. However, this Article claims that uncertainty is particularly pronounced in the international antitrust context and hence prone to impede coordination.

sign on to it.¹⁵⁶ Even if the agreement would produce aggregate gains, the distributional uncertainty regarding the effects of a contemplated international antitrust agreement can be expected to cause the policies to remain at the status quo,¹⁵⁷ further aggravating efforts to reach an international antitrust agreement.¹⁵⁸

1. *Uncertainty Among States*

Whether concessions are exchanged in the WTO within or across issue areas, some metric has to be established to be able to assess whether the exchange of concessions is balanced. Measurement of the “size” of any given concession forms a key requirement for the operation of the principle of reciprocity. While a state can accurately calculate the distributional consequences of a tariff reduction (which is a quantifiable, sector-specific measure) or the removal of an export subsidy (which is similarly measurable and firm-specific), it is more complicated to try to forecast who would gain and who would lose under any prospective international antitrust agreement.

The assessment of the effects of tariff cuts is relatively straightforward due to the inherently quantifiable nature of the concessions.¹⁵⁹ The operation of

156. Barbara Koremenos has empirically shown that states respond to distributional uncertainty by making agreements more flexible, essentially by limiting their duration and including provisions allowing for renegotiation once the effects of the agreement have become clearer. However, states integrate renegotiation provisions into the agreement only when “the value to them of reducing ex ante variance of the outcome stemming from agreement uncertainty is large relative to the cost of renegotiating.” Barbara Koremenos, *Loosening the Ties That Bind: A Learning Model of Agreement Flexibility*, 55 INT’L ORG. 289, 290, 296 (2001). There are clear limitations to introducing flexibility and renegotiations provisions to WTO agreements. Considering the rapid changes in many markets and economic theories pertaining to antitrust laws, any agreement with meaningful provisions would most likely need to be renegotiated frequently. This would be particularly costly considering the WTO’s broad membership. Flexibility in the circumstances has therefore been sought through various soft law mechanisms that facilitate international cooperation.

157. Fernandez & Rodrik, *supra* note 11, at 1146–55. Status quo bias (“SQB”) in policy making is likely to emerge as long as winners and losers of a contemplated reform cannot be identified ex ante. In these situations, governments often fail to adopt efficiency-enhancing reforms, even when they are assumed to be rational, forward looking, and risk neutral. Fernandez and Rodrik further demonstrate that the SQB persists even assuming that the reform would have received adequate popular support ex post. *Id.* at 1152 – 55. The individual-specific uncertainty hence prevents the governments from pursuing policies that would be consistent with aggregate preferences.

158. *But see* GEOFFREY BRENNAN & JAMES M. BUCHANAN, THE REASON OF RULES: CONSTITUTIONAL POLITICAL ECONOMY 30 (1985). Geoffrey Brennan and James M. Buchanan claim that the “veil of uncertainty” makes a potential agreement more rather than less likely. *Id.* Brennan and Buchanan argue that “[t]o the extent that a person faced with constitutional choice remains uncertain as to what his position will be under separate choice options, he will tend to agree on arrangements that might be called ‘fair’ in the sense that patterns of outcomes generated under such arrangements will be broadly acceptable, regardless of where the participant might be located in such outcomes.” *Id.* In other words, in the presence of uncertainty, individuals (or states) forgo pressing for particularistic interests and distributive advantages and choose rules that enhance general welfare. *See also* Oran R. Young, *The Politics of International Regime Formation: Managing Natural Resources and the Environment*, 43 INT’L ORG. 349 (1989) (arriving at a similar conclusion).

159. HOEKMAN & KOSTECKI, *supra* note 112, at 122, 124. Even though it might be difficult to accurately predict how a certain tariff reduction will affect economic welfare in the future (including effects on future trade flows, domestic production, and prices), negotiators use various methods that

the reciprocity principle is considerably more complex in connection with NTBs due to difficulties associated with quantifying the effects of any given NTB and hence establishing a metric for exchanging “equivalent” concessions.¹⁶⁰ NTBs form a heterogeneous group of trade restrictions and take the form of, inter alia, quantitative restrictions, non-tariff charges, restrictive government and private practices, custom procedures, and technical barriers to trade.

Despite the often acknowledged difficulties associated with quantifying NTBs, countries have successfully exchanged concessions relating to the removal of various NTBs in a series of WTO negotiations. This type of uncertainty alone, therefore, should not form an irresolvable impediment to antitrust negotiations and prevent the formation of strategic linkages. The challenges relating to measuring anticompetitive business practices might, however, be even more pronounced than those present when negotiating the reduction of other types of NTBs. Antidumping duties, quotas, voluntary export restraints, and other NTBs are explicitly imposed, discrete measures that have the unambiguous object of restricting trade in a specifically identified economic sector. In contrast, with the possible exception of export cartels, the majority of anticompetitive practices are not industry-specific, “proclaimed measures” with an instantly recognizable effect of restricting trade.¹⁶¹ They take many forms, exist in most economic sectors, and often have ambivalent effects requiring a careful case-by-case assessment.¹⁶² Further, their alleged tolerance by governments is expected to be embedded in

allow them to quantify the effects of the proposed reduction. For instance, using the “trade coverage” method, if a tariff is reduced by 15 percent (e.g., from 50 percent to 35 percent) with respect to a product that is currently imported worth \$10 million, the trade coverage of the reduction is \$1.5 million ($0.15 \times \10 million). This figure is then used as a benchmark against which a country evaluates whether a concession that is offered in return is balanced.

160. *Id.* at 133–34.

161. Identifying the existence and quantifying the severity of trade-restricting anticompetitive behavior across markets is also challenging due to the lack of information about all the anticompetitive practices that exist. The information available is limited to anticompetitive practices only to the extent they are being investigated, prosecuted, and lead to a final decision. The extent of *established* antitrust violations, however, is unlikely to accurately estimate the actual number of antitrust violations that may restrict trade. The rigidity of antitrust enforcement is dependent on the resources available to the government as well as on their willingness to pursue anticompetitive behavior. If the government was to engage in lax, selective, or discriminatory enforcement, it would be unlikely that we would obtain information about the cases that “should have been pursued,” especially if no complaint has been filed or if records on complaints are not kept or made publicly available.

162. Sophisticated econometric models exist to measure the effects any particular restrictive agreement, unilateral conduct, or transaction has on the price or the quantity of the goods available on the market. However, the effects would most likely be completely different if a similar agreement was concluded in another market where the conditions for competition were different, or if the transaction were consummated in a year’s time when new entrants have changed the competitive dynamics on the market. The effects of restrictive business practices are hence intrinsically dependent on the specific market context in which they take place. Extending the analysis conducted in connection with an individual case to measure the aggregate effect that anticompetitive practices of all kinds have across various economic sectors in any given economy would therefore be a daunting task.

lenient, selective, discriminatory, or non-transparent administrative practices rather than in explicit legislation.¹⁶³

Furthermore, the attempt to quantify anticompetitive practices by focusing only on the conduct that the government tolerates simplifies the picture. Both overly lax and overly strict antitrust enforcement policies can potentially constitute a NTB. While this Article has questioned the extent of biased enforcement in practice, in principle, governments can raise trade barriers by condoning anticompetitive practices as well as by engaging in overly active enforcement to deter foreign entrants. For instance, when a foreign exporter attempts to enter the market by trying to acquire an existing distributor, banning the vertical merger may restrict trade and lead to a “market access barrier” that is a result of antitrust enforcement rather than the lack of it. It is difficult to infer any degree of trade restrictiveness merely based on the relative rigor of the country’s antitrust laws and enforcement practices.

Finally, it is difficult for states to measure the gains their corporations would accrue from the removal of antitrust-related market barriers and to weigh those gains against losses that the same corporations would incur by having to forgo benefits resulting from lax antitrust enforcement abroad. Assume, for instance, that all developing countries that currently do not have antitrust regimes in place were required to adopt U.S.-style antitrust laws. Under such reform, the U.S. corporations might benefit from an enhanced market access to new markets (as developing countries would be required to remove private barriers to trade and discontinue protecting their domestic firms), increasing the benefits from coordination. At the same time, however, the U.S. corporations would be forced to put an end to exploiting previously lax antitrust regimes (because the U.S. corporations would also face increased antitrust scrutiny abroad), increasing the costs of coordination.¹⁶⁴ It would be difficult to predict whether the benefits of an enhanced market access would, in fact, exceed the costs of stricter antitrust scrutiny vis-à-vis U.S. corporations.

163. Contrary to NTBs that in all cases restrict trade, few business practices that governments allegedly tolerate have this type of *inherently* trade-restrictive propensity. For instance, if a government employs a lax antitrust policy toward vertical restraints in general, there is a risk that some agreements that restrict trade and competition escape antitrust scrutiny. It cannot, however, be implied that all distribution agreements that are not prohibited by that government constitute an NTB. Some agreements might have restrictive propensities that also hinder market access, while others have neither the object nor the effect of restricting trade. Similarly, some practices may be considered to violate antitrust laws but at the same time have trade enhancing properties (e.g., a domestic cartel that maintains the price above a competitive level might encourage rather than deter entry as potential competitors can enter and win customers by offering a lower price. If the cartel, however, is supported by exclusive practices, it may constitute a market barrier).

164. Justice Stewart has suggested that companies may use cartel profits earned in the developing countries to subsidize fines imposed on them in developed countries. *See Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 315 (1978) (“[P]ersons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad could offset any liability to plaintiffs at home.”).

Consequently, the uncertainty surrounding the extent to which anticompetitive practices actually restrict trade impedes the dynamics of the negotiations. When governments are uncertain of the value and the distributional impact of commitments, their ability to exchange reciprocal concessions and form issue linkages is obstructed. In such circumstances, it is doubtful that an exchange of any meaningful, substantive “balanced concessions” in the spirit of reciprocity could take place. Thus, it is not surprising that many proposals for WTO negotiations on antitrust have had to turn to fundamental, yet vague, principles of “transparency” or “national treatment,” as nobody can ex ante predict the effects of more precise substantive rules.¹⁶⁵

2. *Uncertainty Within States*

The uncertainty surrounding the attempts to evaluate the magnitude and the distribution of the gains and the losses that any prospective international antitrust regime would produce appears even more pronounced at the domestic level.¹⁶⁶ The costs and benefits that domestic actors would derive from an international antitrust agreement are likely to be diffuse, case-specific, and difficult to forecast. Consequently, the decision makers are not receiving any strong or coherent domestic signals that could effectively be translated into state policy.¹⁶⁷ The absence of a clear domestic message as to whether a binding international antitrust regime would represent an improvement of the status quo and ambiguity regarding the distribution of the costs and benefits of the regime among the domestic constituency hence further aggravate the informational problem and complicate the formation of states’ preferences.

165. HOEKMAN & KOSTECKI, *supra* note 112, at 133–34. See also discussion *supra* note 158 regarding the possibility that uncertainty could actually facilitate rather than impede the conclusion of an international agreement. Should that be the case, the agreement would most likely reflect vague, “fair for all” provisions, thus codifying little more than the “lowest common denominator” among the WTO members.

166. In antitrust negotiations, the bargaining takes place not only among governments but also among different stakeholders within societies. While the actual WTO negotiations are carried out among the states (agents), the true forces driving or resisting outcomes are the domestic actors (principals) that stand to win or lose from a possible agreement. See the pioneering work on the concept of “two-level games” by Robert D. Putnam, who has argued that

The politics of many international negotiations can usefully be conceived as a two-level game. At the national level, domestic groups pursue their interests by pressuring the governments to adopt favorable policies, and the politicians seek power by constructing coalitions among those groups. At the international level, national governments seek to maximize their own ability to satisfy domestic pressures, while minimizing the adverse consequences of foreign developments.

Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427, 434 (1988). This Article does not carry out a formal agent-principal analysis but focuses on domestic interest group dynamics in shaping states’ preferences, thereby conceptualizing the negotiations as a “two-level game” only in a loose sense of the word.

167. Fernandez & Rodrik, *supra* note 11, at 1458–59.

Domestic interests groups are often considered to play a key role when analyzing the likelihood and the content of any given international trade agreement. In rudimentary terms, political economy considerations suggest that to predict any policy outcomes, we can at the first stage 1) sketch out the effects of different trade policies on the incomes of various sectoral groups and then 2) deduce the policy outcomes from the relative organizational strength of these groups, while also taking into account the characteristics of existing political institutions.¹⁶⁸ The deduction of policy outcomes from the relative organizational strength and political clout of various interests groups, however, appears exceedingly difficult in the antitrust context, as no powerful interest groups seem to be lobbying for an international antitrust agreement. Few corporations, industry organizations, or consumer groups have been actively endorsing the agreement. There is also no evidence that key export sectors deem substantial harmonization of antitrust laws a priority in trade negotiations.¹⁶⁹

In general, an international agreement is likely to receive strong domestic interest group support when its perceived benefits are concentrated and costs are diffuse.¹⁷⁰ In the case of antitrust, however, both the costs and benefits of international agreements appear diffuse and case-specific. Consumers, who should comprise the most unambiguous group of beneficiaries of any agreement, form a fragmented interest group. Also, consumer organizations representing the interests of individual consumers have been inactive in their attempts to push for increased international cooperation in this area, prioritizing less “technocratic” areas of regulatory cooperation in their lobbying activities.¹⁷¹

The domestic business interests favoring more extensive international cooperation on antitrust are also scattered and largely case- as well as issue-specific. In general, businesses tend to favor extensive cooperation and harmonization in merger enforcement, as this would enhance procedural coher-

168. James E. Alt et al., *The Political Economy of International Trade: Enduring Puzzles and an Agenda for Inquiry*, 29 *COMP. POL. STUD.* 689, 709 (1996).

169. See, e.g., International Chamber of Commerce & Business and Industry Advisory Committee to the OECD, *ICC/BIAAC Comments on Report of the US International Competition Policy Advisory Committee (ICPAC)* 2, 6, 10 (June 5, 2000), available at http://www.biac.org/statements/comp/00-06-ICC-BIAC_comments_on_ICPAC_report.pdf (while the International Chamber of Commerce (“ICC”) and Business & Industry Advisory Committee (“BIAAC”) support some degree of substantive and some procedural harmonization and convergence of domestic merger regimes, “ICC and BIAAC agree that the WTO is not an appropriate forum for review of private restraints and that the WTO should not develop new competition laws under its framework at this time.”).

170. Putnam, *supra* note 166, at 445.

171. It is considerably easier to engage in policy debates and form intuitive opinions on less “technocratic” matters, such as product safety (including, for example, genetically modified food), tobacco, privacy, and other consumer protection issues that do not require the same level of technical knowledge and analytical rigor as the debate on the welfare effects of various international regulatory models for antitrust. See Kal Raustiala, *Form and Substance in International Agreements*, 99 *AM. J. INT’L. L.* 581, 600 (2005) (noting that informal cooperation mechanisms emerge in the areas of “technocratic cooperation” where domestic interest groups are less active, mentioning antitrust laws as an example of an area where “technocratic cooperation” is dominant and domestic interest groups less active).

ence, reduce transaction costs and uncertainty, and ameliorate the current situation where the strictest antitrust laws determine the legality of the transaction.¹⁷² Conversely, corporations commonly oppose intensified cooperation in the abuse of dominance cases and resist rules that would facilitate the exchange of information in cartel cases if they ever have been, or conceive themselves as potentially one day being, the government's target in a cartel or abuse of dominance investigation.¹⁷³ Further, corporations that would support limited international cooperation relating to a selected set of antitrust issues (for instance, in merger cases) might also be hesitant to lobby for it as they fear that opening negotiations on one subset of international antitrust rules would spill over to other, less desirable areas.

In addition, while some firms may, in general, value the freedom to monopolize and cartelize more than they value the protection antitrust laws give against such behavior by other firms (or the other way around),¹⁷⁴ most corporations are assumed to be of two minds about increased international antitrust regulation, depending on which side of the dispute they stand in each case. Any given corporation's support for enhanced cooperation in merger or cartel enforcement is likely to depend on whether it or its competitors are merging or, alternatively, are alleged to be participating in a collusive behavior.¹⁷⁵ As firms cannot easily predict which general policy will favor them more in the long run, *ex ante* lobbying for any given all-encompassing policy proposal is difficult. A corporation vested with lobbying power is, therefore, likely to find it more rational to use its organizational and political strength case-by-case, depending on which side of the antitrust dispute the company finds itself.

The lack of coherent interest group support endorsing an international antitrust agreement can also be contrasted with the extremely influential and organized lobby resisting concessions in agriculture.¹⁷⁶ To win the support of developing countries that currently resist an international antitrust agreement would most likely require further notable concessions from the developed countries regarding their agricultural subsidies. Faced with strong domestic resistance lobbying against the removal of agricultural subsidies and little domestic pressure to push for negotiations on international

172. MULTI-JURISDICTIONAL MERGER SURVEY, *supra* note 75, at 5. (Noting that 56 percent of the businesses see scope for improving and harmonizing merger notification processes); *see also* International Chamber of Commerce & Business and Industry Advisory Committee to the OECD, *supra* note 169.

173. *See, e.g.*, Jenny, *supra* note 94, at 995. Corporations can, however, be expected to prefer coordination among antitrust agencies regarding the remedies imposed.

174. The majority of firms can, however, be assumed to find it easier to define their interests case by case rather than *ex ante* predict the frequency at which they would benefit from lax antitrust laws allowing them to engage in anticompetitive behavior versus stricter antitrust laws preventing their competitors from engaging in anticompetitive behavior.

175. Corporations are also likely to form their opinions differently if they themselves are merging or engaging in collusive behavior than if those with whom they have relationships (such as customers or suppliers) are under antitrust investigation for similar transactions or behavior.

176. *See also* discussion on the interest group dynamics in case of the TRIPs Agreement *infra* p. 434.

antitrust rules, states' reluctance to keep antitrust on the forefront of the negotiations is hardly surprising.

C. *Coordination in the Simultaneous Presence of the Distributional Problem and the Informational Problem*

While the standard CGDC illustrates well the problem of distribution, it fails to capture the other impediment to successful coordination of antitrust regimes: uncertainty over the outcomes under any given regulatory model. Thus, it seems more accurate to modify the CGDC to include the informational problem that adds to the preexisting problem of distribution. To illustrate this combination of the two problems, this Article draws on a game theoretic model developed by James Morrow. Morrow formalizes a setting where the actors have different preferences over the solutions that are available (*distributional problem*) even though they at the same time remain somewhat uncertain about the value of the solutions (*informational problem*).¹⁷⁷

In this modified CGDC, the players are assumed to have some sense of which solution they prefer, given the constraint of their uncertainty over the payoffs that each solution would provide in the end. However, the players are assumed not to be certain that their preferred solution would actually yield the highest payoffs in the end. It is therefore assumed that the United States believes that its antitrust regime would most probably be the optimal model to project internationally, while it remains uncertain about its own as well as other states' exact payoffs under an "internationalized U.S. regime." In other words, *given the constraint of ex ante uncertainty*, the United States still believes that it prefers the focal point US,US ("coordinating at the U.S. model") to EU,EU ("coordinating at the EU model") and both US,US and EU,EU to the status quo. Similarly, the model assumes that the EU believes that it prefers the focal point EU,EU to US,US and both focal points EU,EU and US,US to the status quo.

The players also hold some private information about the value of various strategies and would be better off if they shared it honestly. If they pooled their information, they might be able to determine that one antitrust regime is clearly preferable to the other and choose their strategies accordingly. The distributional problem, however, creates the incentive to dissemble or misrepresent information in the hope of obtaining what one party believes would be a more favorable solution for itself. Morrow demonstrates that these two problems exacerbate one another as the distributional conflict thwarts the honest sharing of information which again would be necessary to solve the informational problem. States could solve the two problems in isolation but their combination impedes the solution of either. The equilib-

177. See Morrow, *supra* note 12.

rium that will be chosen in the end depends on the relative importance of the distributional and the informational problems.¹⁷⁸

This combination of the distributional and informational problems can be illustrated by envisioning the United States and the EU playing one of three two-by-two games. In Morrow's model, which combines the distributional problem and the informational problem, there are three possible games. The first is the CGDC ("game 1") (see *Figure 3* above). Two other games are so-called "both prefer" games where the United States and the EU still need to coordinate their actions but they prefer to coordinate on the same move: US,US ("both prefer U.S. model" or "game 2") or EU,EU ("both prefer EU model" or "game 3") (see *Figure 4* below). In this scenario, the distributional problem is represented by including the CGDC as one of the possible games that the United States and the EU are playing. The informational problem is incorporated into the model by assuming that the United States and the EU do not actually know whether they are playing game 1, 2, or 3.

Irrespective of which of the three games the United States and the EU are playing, they would be better off if they agreed on one coordinated move: US,US (U.S. model) or EU,EU (EU model) in game 1, US,US (U.S. model) in game 2 and EU,EU (EU model) in game 3. Neither the United States nor the EU, however, knows for sure whether they are playing game 1 or 2 or 3, thus creating an informational problem. The informational problem generates an incentive for both players to share information that could help them determine which game they are playing and hence coordinate their moves accordingly. The possibility that they are playing the CGDC, however, gives both players an incentive to dissemble or misrepresent some of the information. The United States, for instance, would have the incentive to refrain from exchanging information that would improve the EU's bargaining position in the event they were playing the CGDC, even though that information would give parties relevant information on the available payoffs. As a result, the coexistence of these two problems intensifies the coordination problem and increases the prospect that coordination fails and the status quo prevails.

The strategic structure could be complicated by adding a fourth game, where both the United States and the EU recognize the efficiency gains from coordination but believe that the adjustment costs resulting from coordinating at the other state's preferred equilibrium exceed the expected benefits of policy coordination (Deadlock where $d > \pi$ for both parties or "game 4") (see *Figure 2* above). In this game, the United States would ultimately prefer coordinating at the U.S. model but prefers the status quo if the choice is presented between "no coordination" and "coordination at the EU model." The EU would similarly prefer the status quo to coordinating at the U.S. model. Again, the distributional problem is incorporated in the model by

178. *Id.* at 395.

FIGURE 4

“Game 2”

		THE EU	
		<i>Coordinate to the U.S. Model (US)</i>	<i>Retain the EU Model (EU)</i>
THE U.S.	<i>Retain the U.S. Model (US)</i>	a,a	0,0
	<i>Coordinate to the EU Model (EU)</i>	0,0	b,b

“Game 3”

		THE EU	
		<i>Coordinate to the U.S. Model (US)</i>	<i>Retain the EU Model (EU)</i>
THE U.S.	<i>Retain the U.S. Model (US)</i>	b,b	0,0
	<i>Coordinate to the EU Model (EU)</i>	0,0	a,a

(In Game 2 and Game 3, $a > b$)

including the CGDC as one of the possible games that the United States and the EU are playing, while the informational problem is inserted in the model by assuming that players are not sure whether they are playing game 1, 2, 3, or 4. While the informational problem would call for the sharing of information in order for the parties to determine which game they are playing and coordinate (or, in case of game 4, not to coordinate) their moves accordingly, the possibility that they are playing the CGDC gives both players an incentive to hide or misrepresent some of the information. Again, the coexistence of these two problems confounds the coordination dilemma.

Similarly, in the case of the earlier illustrated conflict between developed countries and developing countries, developing countries can be assumed not to be able to accurately evaluate the costs and benefits of an interna-

tional regime. They may thus remain somewhat uncertain whether the adjustment costs (d) are, in fact, higher than efficiency gains (π) from an international regime. The developing countries' decision to block the negotiations on antitrust in Cancun might, however, be interpreted to suggest that their perception at least was that $d > \pi$ which made them play their dominant strategy: "no coordination." Without the distributional conflict, however, honest sharing of information could have taken place, and the developing countries could possibly have been in a position to better evaluate whether no coordination did, in fact, constitute a superior strategy or whether they would have benefited more from supporting the launch of the negotiations.

The coexistence of the distributional problem and the informational problem also has significant implications for the discussion regarding the WTO's role in fostering international antitrust cooperation. While the WTO could facilitate the agreement if the negotiations were stalled only due the distributional problem or the informational problem, the coexistence of the two problems exacerbates the coordination dilemma and increases the likelihood that coordination fails.

IV. THE INABILITY OF THE WTO TO MITIGATE THE COORDINATION PROBLEM

As discussed above, there has been a growing trend to broaden the WTO's negotiation agenda in an attempt to bring new issues under the auspices of the organization. This development can be attributed partly to the WTO's comparatively successful track record in embracing a variety of more or less trade-related areas, partly to regime persistence and path dependency,¹⁷⁹ and partly to the undeniable substantive links trade policy has with other policy domains.¹⁸⁰

This Article, however, claims that despite the many established advantages of the WTO, the institution is unlikely to be able to facilitate the

179. The WTO member states have incurred considerable sunk costs in establishing the organization. Thus, it is rational for the states to remain involved with an existing regime as opposed to creating a new institution (such as a stand-alone international antitrust authority), which would generate significant replacement costs. This tendency also leads to path dependence, as increasing returns on scale can be exploited by adding more issues to an existing institution with a relatively good track record of facilitating international economic cooperation. See, e.g., Jose E. Alvarez, *The Boundaries of the WTO: The WTO as Linkage Machine*, 96 AM. J. INT'L L. 146, 146-47 (2002); Robert O. Keohane, *International Institutions: Two Approaches*, 32 INT'L STUD. Q. 379, 389 (1988).

180. Instead of pursuing negotiations on an ad hoc basis, agreements are commonly nested within a more comprehensive regime that covers a range of issues. The regimes are considered particularly useful when a stand-alone agreement is difficult to reach. Many trade-related agreements, for example, have been negotiated under the auspices of the WTO due to the high issue density of the trade regime and the various benefits that the nesting strategy is perceived to convey. The WTO is frequently argued to present a natural forum to host an international antitrust agreement. This perception is to a large extent attributable to the apparent interdependence between trade and antitrust policies and the need to ensure that the policies are enforced in a consistent way. See Klein, *supra* note 99.

conclusion of a binding international antitrust agreement. Section A below discusses why the successful conclusion of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs Agreement") does not form an instructive precedent to international antitrust negotiations. Section B explains why the comparative institutional advantages of the WTO seem irrelevant in the international antitrust context.

A. *Why TRIPs Was Different*

It has been argued that the TRIPs Agreement demonstrates that an international agreement on antitrust is feasible despite the presence of a stark distributional conflict, provided that negotiations take place within the WTO, which allows for a formation of strategic linkages.¹⁸¹ Even though incorporating intellectual property ("IP") protection into the WTO framework was a very contentious issue with enormous distributional consequences, the matter was effectively brought within the WTO in 1995 as a result of the Uruguay Round negotiations.

There are, however, at least five fundamental differences between IP and antitrust, explaining why the dynamics of the antitrust negotiations would be unlikely to resemble the negotiations of the TRIPs Agreement. First, great economic powers were largely in agreement on the need for and the content of the TRIPs Agreement. Second, the gains and losses that the TRIPs Agreement was to produce were relatively unambiguous prior to the conclusion of the agreement, enabling countries to determine the distributional consequences and design issue linkages that compensated the developing countries that were to lose from the agreement. Third, the business community unequivocally supported the TRIPs Agreement. Fourth, harnessing the enforcement powers of the WTO was relevant in the case of IP. Finally, the opportunity costs from not cooperating in the case of the TRIPs Agreement were significantly higher than they appear to be in the case of antitrust.

Unlike a prospective agreement on antitrust, on which the major antitrust powers hold very different views, the United States and the EU were largely in agreement on the need for and the substance of the TRIPs Agreement.¹⁸² That the United States, the EU, and the other economic powers acted in concert significantly facilitated the conclusion of the agreement.

Prior to the commencement of the negotiations, it was clear that developed countries, where the majority of research and development takes place,

181. Andrew T. Guzman, *International Antitrust and the WTO: The Lesson from Intellectual Property*, 43 VA. J. INT'L L. 933, 935 (2003) (arguing that the successful conclusion of the TRIPs Agreement within the WTO provides "especially powerful" lessons for international antitrust as "IP and antitrust have very similar strategic implications for countries' domestic laws and negotiating positions.").

182. Sylvia Ostry, *Intellectual Property Protection in the WTO: Major issues in the Millenium Round*, Address at the Fraser Inst. Conference 3 (Apr. 19, 1999), available at http://www.utoronto.ca/cis/ostry/docs_pdf/fraser.pdf.

were going to be the unquestionable beneficiaries of the agreement and that developing countries, where IP-protected products are mainly consumed or copied, stood to lose from the agreement. The main challenge in the TRIPs negotiations was therefore to win the support of the developing countries. They were eventually bought into the agreement by offering them concessions in agriculture and textiles. The unambiguous distributional consequences made it possible to seek transfer payments that compensated developing countries for the losses they were to incur under the TRIPs Agreement.¹⁸³

The distributional consequences within states were equally clear. The TRIPs Agreement was perceived unequivocal in its ability to benefit corporations that are the holders of IP rights. Powerful U.S. corporations, especially in the pharmaceutical, movie, and computer industries, assumed an unprecedented role in promoting the inclusion of TRIPs into the WTO agenda. Together with their Japanese and European counterparts, they ensured that the TRIPs Agreement was kept a top priority in the negotiation agenda and, ultimately, was agreed upon despite the fierce opposition by the developing countries.¹⁸⁴ In contrast, the power of the MNCs has not been harnessed to support international negotiations on antitrust laws. Many corporations with significant lobbying power remain ambivalent about the payoffs the negotiations could produce, distinguishing the TRIPs negotiations from any impending antitrust negotiations on very clear domestic political economy grounds.

Proponents of the TRIPs Agreement also emphasized that once international minimum standards for IP protection were agreed upon, a mechanism for their enforcement was required to ensure ongoing compliance. The WTO dispute settlement mechanism was therefore seen as crucial in ensuring that no state would defect from their international commitments.¹⁸⁵ In contrast, the likelihood of non-compliance with international rules in the antitrust domain is low.¹⁸⁶ The WTO's enforcement powers are therefore less relevant in the context of international antitrust than they have been in international IP protection.

Finally, the opportunity costs of not pursuing cooperation in the intellectual property domain were much higher than the costs of maintaining a decentralized antitrust regime. While domestic antitrust laws can often be applied extraterritorially to curtail the anticompetitive practices of foreign corporations that have an effect on the domestic market, the infringement of

183. In the case of antitrust, it is not even clear that developed countries should compensate developing countries and not vice versa. Unlike in the case of TRIPs, the direction of the quid pro quo in antitrust would depend on the specific content of the final agreement. See, e.g., Hoekman & Saggi, *supra* note 144, at 453–54 (noting that developing countries would be required to compensate developed countries in the event of a WTO agreement banning export cartels).

184. Ostry, *supra* note 153, at 55–57.

185. Ostry, *supra* note 182, at 2.

186. See discussion *supra* p. 415.

an IP right on a foreign market is practically impossible to prevent by resorting to the enforcement of domestic IP laws. An international agreement was therefore even more necessary in the case of IP than it appears to be in the case of antitrust.

B. *The Comparative Advantage of the WTO and Its Questionable Relevance for Antitrust Regulation*

The WTO is also seen as a particularly attractive organization due to some unique institutional properties that it can “lend” to policy areas that are incorporated in its framework.¹⁸⁷ At least four characteristics that the WTO possesses make it often superior to other (institutionalized and non-institutionalized) regimes. First, the WTO is exceptional in the international arena in its ability to enforce commitments. WTO law is “hard law” in the sense that the institution can authorize sanctions and hold states accountable through its dispute settlement mechanisms.¹⁸⁸ Second, the negotiation dynamics in the WTO are generally conducive to the formation of strategic linkages across different issue areas, which are often perceived as necessary to overcome distributional inequalities that arise from the adoption of international norms. Third, the WTO is considered effective in overcoming domestic resistance for contemplated liberalization reforms. Binding WTO rules can be employed to “lock in” gains from international cooperation vis-à-vis not only other negotiating parties but also regime supporters’ domestic opponents and future governments.¹⁸⁹ Finally, the broad membership of the WTO is regarded as useful particularly when pursuing regulatory objectives that require broad implementation for any gains to be effective.¹⁹⁰

The comparative institutional advantages of the WTO do not, however, seem all that central to international antitrust regulation, particularly when the majority of the collective action problems are formalized as a Deadlock or a CGDC and when uncertainty is introduced to the model. The Deadlock situations call into question altogether the rationale for any binding international antitrust agreement, rendering the discussion on the WTO’s role in this connection largely futile. International institutions can only facilitate cooperation when states have common interests. This fundamental principle of regime theory is lacking in the Deadlock setting.

187. Leebron, *supra* note 8, at 14. Leebron uses the concept “regime borrowing” when a linkage is formed “to obtain the institutional and procedural benefits of an existing regime.” *Id.* An example of this concept is the linkage of issues to the WTO in order to benefit from its capacity to impose sanctions.

188. Abbott, *supra* note 23, at 358–59.

189. HOEKMAN & KOSTECKI, *supra* note 112, at 247–48.

190. This final advantage does not single out the WTO as the only potential regime to host an international antitrust agreement. If the agreement was negotiated in the U.N. Conference on Trade and Development framework, like many developing countries would prefer, the agreement would encompass an even greater number of signatories.

In the case of a CGDC, international coordination of antitrust policies is unlikely to necessitate extensive enforcement provisions, as opportunistic behavior is unlikely to be common. States do not have the incentive to defect from the established point of coordination once the focal point has been agreed upon. The agreement—once reached—is therefore largely self-enforcing. One state might at some later point attempt to deviate from the commonly agreed solution in an effort to shift the point of coordination to its preferred equilibrium.¹⁹¹ However, as opportunistic behavior and cheating do not generally characterize coordination games, institutions or other elaborate mechanisms to monitor and enforce compliance are rarely necessary.¹⁹² This allows states to move from devising institutional mechanisms that inhibit cheating, raise costs of illegal behavior, and monitor parties' behavior to instruments that can be employed to facilitate coordination in the first place.¹⁹³

Considering that one of the main obstacles to reaching an international antitrust agreement is the distributional conflict that exists, the most persuasive argument for incorporating the antitrust agreement in the WTO would seem to be the possibility to negotiate across issue areas and offer transfer payments to compensate losers.¹⁹⁴ The distributional problem with respect to the U.S.-EU conflict on one hand, and the developed country-developing country conflict on the other, ought to be solvable by way of transfer payments. In fact, conceptualizing the collective action problem predominantly as a CGDC rather than PD should make cooperation easier as parties generally have the incentive to play the same move.

While issue linkages can offer an important tool for facilitating some international negotiations, they are unlikely to help states overcome obstacles impeding antitrust negotiations. Various difficulties undermine efforts to establish effective linkages and reach a consensus on highly complex, multi-issue negotiations where stakes are high, participants numerous, and interests diverge. Linking more issues into the WTO has been opposed on many grounds, some of which relate to the institution's "analytical deficit" in diverse and only partly trade-related issues, others to fears of institutional overload if the WTO's agenda is expanded beyond its capacity.¹⁹⁵ Recently stalled Doha Round negotiations also illustrate how the organization is cur-

191. Abbott, *supra* note 23, at 358–59, 363–74. See also Martin, *supra* note 132, at 776 (noting that this type of departure from the established equilibrium is not comparable to cheating as the deviating state would intentionally make the defection public in order to force other states to move to the new equilibrium).

192. Martin, *supra* note 132, at 776.

193. Snidal, *supra* note 128, at 923–26 (discussing how institutions can facilitate cooperation in market failure situations).

194. Guzman, *supra* note 8, at 1163.

195. See Leebron, *supra* note 8, at 25. Inclusion of additional issues in the WTO could have the negative effect of undermining the normative framework of the institution and weakening its members' commitment to its original goals. At worst, the mismatch between the WTO's mandate and its capabilities could destabilize the whole trade regime.

rently struggling to move forward even with its traditional agenda, as countries have failed to come forward with concessions that would form a basis for meaningful exchanges and lead to any progress in the reduction of prevailing tariff barriers.

Besides various deficiencies that can be attributed to the WTO process in general, prospects for successful linkages appear particularly dim in the antitrust domain. An effective linkage strategy presumes that states are able to evaluate the distributional consequences of various proposals. Yet, as long as states remain unable to quantify the aggregate and distributional effects of various restrictive business practices and *ex ante* identify the winners and losers under an agreement negotiated to their removal, linkages will continue to be difficult to negotiate. Similarly, without clear domestic signals as to whom would benefit from an international agreement and how much, the coordination dilemma caused by the simultaneous existence of the distributional problem and the informational problem is prone to persist.

Even under the assumption that the strategic structure of the state interaction in the antitrust domain was more accurately captured by a PD than a CGDC, the prospects for a WTO agreement on antitrust would remain weak. While the WTO's enforcement capacity would be relevant in a PD setting where cheating is assumed to be a significant problem, the formation of issue linkages would continue to be difficult due to the simultaneous existence of the distributional problem and the informational problem.

Further, as domestic interests are diffuse rather than concentrated against establishing effective antitrust regimes, WTO rules cannot be argued to be necessary to overcome domestic resistance except in some developing countries where the opposition for any efforts to liberalize markets provokes resistance to domestic antitrust norms. The recent proliferation of antitrust regimes around the developing world, however, suggests that domestic resistance has not been insurmountable and, consequently, that the WTO rules can hardly be argued necessary on these grounds.

The fourth advantage—the WTO's broad membership—is certainly a legitimate advantage in the case of coordinating antitrust laws. The larger the number of countries signing on to an international antitrust agreement, the greater gains the agreement could produce. This apparent advantage however has the flip side of making a multilateral agreement among a large number of countries with divergent preferences difficult to accomplish. In sum, the comparative institutional advantages of the WTO fail to directly address the key impediments to international antitrust cooperation, explaining why the efforts to pursue cooperation within its framework have thus far proved unsuccessful.

CONCLUSION

The purpose of this Article has been to develop a more accurate description of the strategic situation surrounding states' attempts to align their antitrust policies and, with the help of those insights, to provide an explanation for why the many attempts to negotiate a binding international antitrust agreement have thus far failed.

This Article has argued that while states should generally prefer seeking enhanced convergence of their antitrust laws to capture efficiency gains, a binding international agreement on antitrust has been difficult to reach for one of two primary reasons. First, cooperation has at times failed because some states have perceived the political and economic costs to exceed the expected benefits of cooperation. In the presence of the relatively low opportunity costs of not pursuing formal cooperation in antitrust matters, cooperation has not been a priority for the parties and, consequently, they have preferred focusing their efforts to achieve progress on more compelling matters on the trade agenda. Second, in situations where parties have concluded that cooperation is Pareto-superior to non-cooperation, cooperation has been obstructed by the simultaneous existence of a distributional problem and an informational problem.

Enhanced understanding of the strategic structure characterizing international antitrust negotiations leads to the re-evaluation of the feasibility of various available governance instruments. First, the Deadlock situations challenge the rationale for pursuing any binding international antitrust agreement, within or outside of international regimes. The current literature on international antitrust regulation endorsing a WTO agreement on antitrust without acknowledging this hence contravenes the fundamental principle of regime theory, which concedes that international institutions can only work when states have common interests. Second, the CGDC situations suggest that international coordination of antitrust policies, when desirable, is unlikely to necessitate extensive enforcement provisions in the majority of antitrust issues. The case for incorporating antitrust into the WTO thus seems less compelling as the organization's ability to facilitate linkages is challenged and its capacity to enforce compliance is not called for by the underlying strategic situation.

While the strategic situation characterizing international antitrust cooperation has so far made the emergence of a formal multilateral antitrust regime impossible, it has not prevented the states from pursuing informal coordination of their domestic antitrust policies. The Article therefore not only demonstrates the limits of international law and international regimes in generating cooperation in the presence of an identified set of constraints. It also suggests that the same set of constraints might still enable the employment of non-binding governance instruments, steering rational states

toward voluntary cooperation and informal regimes instead of legally binding commitments.

Although the above discussion is largely descriptive, it can also guide the normative debates on the various forms of international antitrust cooperation and lead to a more critical examination of the desirability of any prospective WTO rules on antitrust. As long as the preference heterogeneity, distributional conflict, and underlying uncertainty prevail, negotiations in the WTO framework are unlikely to show any significant progress, especially if the benefits from formal cooperation remain debatable and the costs of non-cooperation acceptable. Under these conditions, any meaningful binding international antitrust agreement continues to be implausible. Any WTO agreement reached in the current circumstances would most likely amount to a weak, "watered-down" agreement containing only general provisions coupled with numerous escape clauses and open-ended exceptions.

Consequently, states are likely to find it rational to continue to rely on informal antitrust cooperation. One of the advantages of voluntary cooperation is states' willingness to enter into deeper substantive commitments if those commitments are kept non-binding.¹⁹⁶ And deeper yet voluntary commitments may be preferable to shallow yet binding WTO commitments, especially if it is true that the major obstacle to an international antitrust agreement is not the difficulty of ensuring compliance but the difficulty of reaching an agreement in the first place, as this Article has argued.

Finally, even though the conditions surrounding international antitrust cooperation are not presently conducive to negotiating a legally binding agreement, the payoffs available from cooperation may change with time. Dissemination of economic theories underlying antitrust enforcement and informal cooperation among states might gradually reduce existing uncertainty and reconcile divergent preferences among states. The voluntary alignment of preferences is also likely to reduce the costs of cooperation, as states would no longer need to incur significant adjustment costs when bringing their domestic regimes closer to that sought by an international agreement. These developments can be expected to improve the prospects of cooperation in the CGDC situations or to transform a Deadlock into a solvable CGDC.

With increased informal cooperation, however, the benefits of formal cooperation should also decrease. The ongoing voluntary convergence of domestic regimes will likely reduce the negative externalities of decentralized antitrust enforcement, decreasing the need for and the gains from binding international rules. Thus, as an informal consensus continues to emerge, the added value from codifying the status quo through binding international rules becomes increasingly questionable, making the pursuit of formal cooperation neither inevitable nor ultimately desirable.

196. Raustiala, *supra* note 171, at 601.

