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The Case for International Antitrust

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# THE CASE FOR INTERNATIONAL ANTITRUST

## I. INTRODUCTION

We already live in a world of international competition policy. Though no international institution or agreement governs competition policy, firms doing business internationally face a de facto regime generated by the overlap of domestic regimes. The question for those interested in antitrust and international cooperation, then, and the question addressed in this chapter, is not whether there should be an international competition policy system, but rather whether the existing system is better than what might otherwise exist.

## II. THE CASE FOR COOPERATION

The case for cooperation in international competition policy emerges from an examination of how globalization and trade interact with domestic competition policies. A simple analysis of the incentives of states and the consequences of regulating international competition through non-cooperative national regimes yields a strong case for cooperation.

The main problem with the current decentralized regime is easily stated. Regulation of international activity by national regulators generates a variety of costs and benefits that are not internalized by domestic decision makers. These stem from the fact that there is neither a single governmental body charged with establishing objectives and policies, nor a forum in which domestic authorities can negotiate effectively over their domestic policies and the international implications thereof. The costs generated by the

current non-cooperative system include, but are not limited to: the effect of multiple regulators reviewing a single transaction, redundant filing and reporting obligations imposed on firms, the risk of biased prosecutions based on the nationalities of the parties, and the impact of international activity on the substantive rules chosen by states.

Though neither the most the most interesting nor important, the most obvious problem with having multiple national authorities regulate international business activity is the duplication of costs. Firms must satisfy regulatory agencies in many countries – meaning that they must hire legal representation in each state and satisfy the reporting and disclosure requirements of each jurisdiction. At a minimum, this generates duplicative costs and wastes time. It may also impose conflicting requirements on firms. Additional costs are borne by the regulatory agencies that must review a firm's documents. Because each country's regulators act independently, each country must review and evaluate the firm's filing do novo, generating redundancy and waste in the review process.

An additional cost associated with review by national governments is the risk of bias. When transactions cross borders, regulatory authorities review the activities of both foreign and domestic firms. There is a temptation to be lenient toward locals and tough of foreigners in this review process, even if no such double standard is called for in the relevant legislation. And even if there is no bias in the process, foreign firms subject to review -- as well as their governments – may believe that an unfavorable ruling represents an attempt to penalize foreign firms. This perception is itself costly because it may chill firm behavior or generate hostility among states.

There is ample evidence that states are, indeed, biased in their application of competition policy. The most obvious such evidence is the existence of export exemptions. Virtually every state with a meaningful competition law provides an exemption from that law to firms that export all of their production.<sup>2</sup> Perhaps less obvious are the industry exemptions that American law provides for a number of privileged industries, including international aviation,<sup>3</sup> international energy agreements,<sup>4</sup> international ocean shipping,<sup>5</sup> and international communications,<sup>6</sup> among other industries.<sup>7</sup> To the extent local firms benefit from these exemptions, they enjoy an

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<sup>2</sup> American antitrust laws have long provided an explicit exception for export cartels. This was initially done through the Webb-Pomerene Act, 15 U.S.C. §§ 61 - 66 (1994), adopted in 1918, creates an exemption from the Sherman Act and from section 7 of the Clayton Act for export associations formed for the sole purpose of engaging in export trade and actually engaged solely in such export trade. Export associations must register with the FTC. The Act does not protect activity that has an anticompetitive effect within the United States, and there are other restrictions on its applicability. See A. Paul Victor, *Export Cartels: An Idea Whose Time Has Passed*, 60 ANTITRUST L.J. 571, 572 (1991). By the early 1980s, it was widely agreed that the Webb-Pomerene Act was, for various reasons, was not being used by exporters and was, in that sense, no longer effective. See *id.* at 573 - 74. Congress responded by enacting the Export Trading Company Act of 1982, 15 U.S.C. §§ 4001 - 4021, and the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a, 45(a)(3) (1994). “Through these Acts, Congress hoped to spur U.S. exports by removing alleged impediments to export trade arising from the antitrust laws.” *Id.* at 574. The Export Trading Act allows a firm to apply for and receive a Certificate of Review from the Secretary of Commerce by demonstrating that its activities will not have harmful effects on the United States. The Certificate does not grant complete immunity to the firm, but it does provide immunity from treble damage awards, and criminal liability as well as establish a presumption of legality for any activity that is covered by the Certificate. The Foreign Trade Act offers a more direct exemption for export activity. It exempts from Sherman Act prosecution activity that does not have a “direct, substantial, and reasonably foreseeable” effect on American commerce, 15 U.S.C. § 6a. Other countries have similar exemptions. For more on export cartels, see AMERICAN BAR ASSOCIATION, REPORT OF SPECIAL COMMITTEE ON INTERNATIONAL ANTITRUST 40 (1991); see also Nina Hachigian, *Essential Mutual Assistance in International Antitrust Enforcement*, 29 INT’L LAW. 117, 126-27 (1995).

<sup>3</sup> 49 U.S.C. §§ 1382, 1384 (1994).

<sup>4</sup> 42 U.S.C. § 6272 (1994).

<sup>5</sup> Shipping Act of 1984, 46 U.S.C. §§ 1701-1720 (1994).

<sup>6</sup> Communications Act of 1934, 47 U.S.C. §§ 151-156 (1994).

<sup>7</sup> There is nothing uniquely American about the provision of industry exemptions. American exemptions are listed here because they are the ones I am familiar with.

advantage over their foreign rivals.<sup>8</sup> Though it is more difficult to demonstrate bias at the administrative level, it is likely to exist in the selection of cases to pursue. One would expect more aggressive prosecution of violations by foreign firms than domestic firms, either because the regulators themselves view local firms more favorably, or because political leaders bring pressure to bear on regulators and encourage them to pursue foreign firms rather than national champions.

All of the above issues are familiar, so this chapter does not review them in detail. It focuses instead on the question of how and why international trade distorts substantive antitrust policies and makes sound policy making virtually impossible without cooperation.

### **A. The Effect of International Activity on Substantive Competition Policy**

Before discussing the way in which international business activity affects domestic competition policies, we must consider the way in which domestic governments make decisions. Making assumptions about government behavior is difficult because there is no consensus on how policy decisions are made or how they should be modeled. Fortunately, the analysis presented in this chapter can be carried out with relatively mild assumptions about state behavior. First, it is assumed that the relevant unit of analysis is the state, and that each state pursues its own interests without regard for the interests of

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<sup>8</sup> The political economy of competition policy also places local firms in a more favorable position than foreign firms. When firms lobby for exemptions, domestic firms have a significant advantage. Though lobbying by foreign firms is not unheard of, it is certainly less common and less effective than lobbying by locals. An industry dominated by domestic firms, therefore, is more likely to succeed than one dominated by local firms. This represents an implicit subsidy for local firms.

other states.<sup>9</sup> The next challenge is to determine how to identify the interests of states. Scholarship on both domestic and international law typically assumes that governments seek to maximize the well being of citizens.<sup>10</sup> The alternative model makes public choice assumptions under which it is the interests and objectives of decision makers that are served.<sup>11</sup>

This is not the place to resolve the question of how to model domestic decision making and, fortunately, the analysis developed in this chapter applies for any reasonable assumption about government behavior. The only necessary assumption is that local interests are favored over foreign interests. So, for example, if government officials behave as public choice models predict -- pursuing campaign contributions, political support, and a good public image -- the discussion that follows applies just as it does if governments pursue some measure of national welfare, as long as the goals of those

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<sup>9</sup> This assumption will seem obvious to some readers, but is nevertheless made explicit because other assumptions are sometimes made by scholars of international law and international relations. See Andrew T. Guzman, *A Compliance Based Theory of International Law*, forthcoming, 90 *Cal. L. Rev.* 1823 (2002).

<sup>10</sup> See, e.g., Merritt B. Fox, *Securities Disclosure in a Globalizing Market: Who Should Regulate Whom*, 95 *MICH. L. REV.* 2498 (1997); Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the Reach of Securities Regulation*, 71 *S. CAL. L. REV.* 903 (1998); Jay L. Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum* 65 *AM. BANKR. L.J.* 457 (1991); BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963); Kenneth J. Vandeveld, *U.S. Bilateral Investment Treaties, The Second Wave*, 14 *MICH. J. INT'L L.* 621 (1993).

<sup>11</sup> See, e.g., Warren F. Schwartz & Alan O. Sykes, *Toward A Positive Theory Of The Most Favored Nation Obligation And Its Exceptions In The WTO/GATT System*, 16 *INT'L REV. L. & ECON.* 27 (1996); Alan O. Sykes, *Protectionism As A "Safeguard": A Positive Analysis Of The GATT "Escape Clause" With Normative Speculations*, 58 *U. CHI. L. REV.* 255 (1991). See also Richard A. Posner, *Theories of Economic Regulation*, 5 *BELL J. ECON & MGMT. SCI.* 335, 344 (1974) (discussing public choice); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 *Colum. L. Rev.* 1, 37 (1998) (critiquing public choice theory). For a discussion of public choice issues in the antitrust context, see *THE CAUSES AND CONSEQUENCES OF ANTITRUST* 179-187, 180 (Fred S. McChesney & William F. Shughart II, eds 1995). See also Andrew T. Guzman, *Choice of Law: New Foundations*, 90 *Geo. L.J.* 883, 900 (2002) (discussing the ways in which public choice issues can be addressed international law scholarship).

officials are influenced primarily by domestic interests.<sup>12</sup> In other words, as long as campaign contributions are dominated by domestic contributors, important political supporters are locals, and the public image that matters is domestic, the discussion that follows is consistent with public choice assumptions.

To see how international trade can distort policy decisions in antitrust, suppose that a country exports virtually all of its production in imperfectly competitive industries.<sup>13</sup> When domestic firms engage in activities that might be considered anti-competitive, the great majority of the harm is felt by foreigners, while the benefits are felt by local firms. Policy makers, looking only to local costs and benefits, will take into account all of the benefits firms enjoy as a result of their actions, but will consider only the fraction of the harm that is felt by local consumers.

A government designing an antitrust policy in this context would, therefore, favor the interests of producers over those of consumers. This effect is in addition to any preference for one group or the other due to the domestic political economy. One way to think about this is to imagine that the policymaker adjusts the payoffs to local consumers and producers to reflect the relative weights or priorities that she assigns to each. In contrast to local interests, foreign interests are not considered at all – they receive a weight of zero. In the above example, then, trade causes the country to favor producers over consumers more than would be the case in the absence of international trade.

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<sup>12</sup> It is difficult to imagine any sensible model of government decision making in which foreign interests trump domestic ones. See Alan O. Sykes, Externalities in Open Economy Antitrust and Their Implications for International Competition Policy, 23 Harv. J.L. & Pub. Pol'y 89, 92 (1999).

<sup>13</sup> Only imperfectly competitive industries are of concern here because firms in competitive industries are not problematic from an antitrust perspective.

To make this clear, imagine that a state favors firm interests over consumer interests. If the country is a closed economy it will adopt policies that favor firms but in its evaluation of policy options will give consumer interests at least some weight. Now consider a country with the same political economy, but that exports most of its production in imperfectly competitive industries. Because the political economy favors firms, the interests of domestic producers are still weighted more heavily than those of domestic consumers. In addition to this effect, the impact of the antitrust regime on consumers is underestimated because foreign consumers receive zero weight in the governments calculus. This generates policies that are still more favorable to firms, at the expense of consumers, than was the case absent trade.

There are a number of ways to favor firms over consumers. When all consumers are abroad, the easiest solution is an export cartel exemption.<sup>14</sup> An exemption of this sort, however, is a relatively crude instrument because it only applies if all of a firm's production is exported. A more nuanced, alternative strategy is to change the state's substantive laws. This benefits all firms, including those that sell some of their goods domestically. Returning to the example of a country that exports most but not all of its production in imperfectly competitive industries, the government could weaken its

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<sup>14</sup> The United States provides just such an exemption. See Webb-Pomerene Act, 15 U.S.C. §§ 61 - 66 (1994); Export Trading Company Act of 1982, 15 U.S.C. §§4011-4021 (1994). For a detailed discussion of the Webb-Pomerene Act, see John F. McDermid, *The Antitrust Commission and the Webb-Pomerene Act: A Critical Assessment*, 37 Wash. & Lee L. Rev. (1980). See also *United States v. Concentrated Phosphate Export Ass'n*, 39 U.S. 199 (1968); FTC, *Webb-Pomerene Associations: Ten Years Later* 15 (Staff Analysis, Nov. 1978). For the Export Trading Act of 1982, see George E. Garvey, *Exports, Banking and Antitrust: The Export Trading Company Act -- A Modest Tool for Export Promotion*, 5 NW. J. INT'L L. & BUS. 818 (1983); Dennis Unkovic, *Joint Ventures and the Export Trading Company Act*, 5 J.L. & COM. 373 (1985); Donald Zarin, *The Export Trading Company Act: Reducing Antitrust Uncertainty in Export Trade*, 17 Geo. Wash. J. Int'l L. & Econ. 297 (1983); Lewis, *Title III of the Export Trading Company Act: A Case Study in Interagency Coordination to Promote Exports*, 5 J.L. & Com. 451 (1985).



competition laws. This opens the door to more anticompetitive activity by local firms than would be the case in the absence of trade, yet retains some limits on conduct to protect local consumers.

The above discussion has addressed the role of exports in competition policy. Imports generate an analogous distortion. If a country is able to regulate extraterritorially, it has an incentive to tighten its policy (relative to what a closed economy would do) in response to the importation of goods in imperfectly competitive markets. In the case of imports, the full amount of harm suffered by local residents is included in the policy calculus while only the benefits to local firms are considered. As with imports, this generates a predictable distortion regardless of how policy makers weigh the interests of firms and consumers.<sup>15</sup>

Taken together, then, exports and imports change the domestically optimal competition policy of states.<sup>16</sup> Specifically, the combination of trade and consumption patterns in imperfectly competitive markets is sufficient to generate a prediction about how a rational state's competition policy will differ from what it would adopt if it were a closed economy.<sup>17</sup> To see how such a prediction can be made, assume for simplicity that there are two kinds of goods, those that trade in competitive markets and those that trade in imperfectly competitive markets. Firms whose goods trade in competitive markets

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<sup>15</sup> See Andrew T. Guzman, *Is International Antitrust Possible*, 73 N.Y.U. L. Rev. 1501 (1998) (offering a more detailed discussion of the impact of trade on competition policies).

<sup>16</sup> By "optimal" I mean the policy preferred by the policy makers.

<sup>17</sup> To be precise, we also need to know how gains and losses from anti-competitive activity are distributed among affected firms and consumers. For simplicity, it is assumed here that the impact on a country's firms is proportional to the number of firms in the country, and the impact on consumers is proportional to the amount of local consumption. These assumptions are not necessary, but greatly simplify the presentation.

have no market power and, therefore, cannot engage in any conduct that raises competition policy concerns. Firms whose goods trade in imperfectly competitive markets, on the other hand, enjoy market power and states attempt to regulate these firms through the use of antitrust laws.<sup>18</sup> If a country's firms are responsible for  $x\%$  of global production of imperfectly competitive goods, it is assumed that those same firms enjoy  $x\%$  of the monopoly rents generated by the sale of those goods.<sup>19</sup> The government of that country, then, will take into account  $x\%$  of the producer surplus generated by a change in its policies. Thus, for example, if a country relaxes its competition policies, this might lead to an increase in producer surplus. Some of that surplus, however, is felt outside the country so the government ignores it. If the same country's consumers account for  $y\%$  of global consumption of goods sold in imperfectly competitive markets, then the government will take into account  $y\%$  of the global effect of their policies on consumers.

The net effect of trade, then, depends on the ratio of a country's global share of production and its global share of consumption. Notice that a closed economy would of course be one in which these are equal or, in terms of the discussion in the previous paragraph,  $x = 100 = y$ . If a country is a net exporter (meaning that its share of global production exceeds its share of consumption,  $x > y$ ) then the country will take into account a larger portion of its policy's impact on producers than on consumers. Relative to what it would do if it were a closed economy, then, the country will favor the interests of producers, yielding a more permissive competition policy regime. If a country is a net

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<sup>18</sup> We are assuming here that all imperfectly competitive goods are equally monopolistic. This is not necessary for the results but greatly simplifies the discussion.

importer of these goods ( $x < y$ ) the opposite is true – the preferred policy is stricter than would be the case in a closed economy.

The presence of international activity, then, causes a state's domestic antitrust laws to deviate in systematic and predictable ways from what it would choose if it were a closed economy. These deviations represent attempts to externalize the costs and internalize the benefits of the exercise of market power across borders.

## **B. International Activity and Choice of Law Implications**

In part because of the divergent interests outlined above, the current level of cooperation in international competition policy is quite modest. The fact that no international policy has been put in place, however, does not mean that there is no international competition policy. The lack of cooperation has generated an “accidental” competition policy – a de facto regime created by the interaction of national regimes and their choice of law rules. Because of these rules, a single activity may be over-regulated or under-regulated, depending on how it intersects with these jurisdictional policies. This section explains how the choice of law rules chosen by domestic systems interact to create a complex regulatory system that is not controlled by any single authority and that impacts international activity. The effects discussed here are independent from and in addition to those presented in Part II.A.

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<sup>19</sup> Here we assume that monopoly rents are distributed proportionately to the volume of sales of imperfectly competitive goods. The results of the analysis would remain intact if we relaxed this assumption.

## 1. An International Policy of Over-Regulation

The activities of firms doing business in the United States, the EU, and other states that apply their laws extraterritorially are often within the jurisdiction of two or more domestic regimes, the net effect of which is a more restrictive and burdensome set of substantive rules than exists under the legal regime of any single state.<sup>20</sup> To see why this is so, consider how a proposed merger of two or more large firms would be affected by existing competition laws. Assume that the firms do business in both the United States and the European Union.<sup>21</sup> Because the firms do business in these jurisdictions, the merger is potentially subject to review in both the U.S. and the EU.

First, firms operating in the United States and the EU face more regulation than they would under either of the domestic regimes because the economic activity in question is subject to more than one review. Even if substantive criteria for review of an activity were identical in the United States and Europe, the proposed activity could go forward only if both regulatory authorities permitted it to do so. This duplicative review would not matter if regulatory review were a precise science, but of course it is not. Any review by regulators is affected by the idiosyncratic views of the individual reviewers, the culture of the reviewing agency, the political climate in the country, and so on. Requiring the approval of two independent regulatory bodies, therefore, increases the

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<sup>20</sup> To be precise, the level of regulation varies based on the identity of the countries in which a given activity will have effects. See Andrew T. Guzman, Choice of Law: New Foundations, 90 Georgetown L.J. 883, 906-909 (2002) (discussing the effect of extraterritoriality on international regulation).

<sup>21</sup> The firm may also do business in other states, but to keep the example simple, we focus on just these two key jurisdictions.

likelihood that any given activity will be deemed a violation, and increases the regulatory burden.

Second, firms doing business in states that apply their laws extraterritorially face a heightened burden because the substantive provisions of those laws are not identical across jurisdictions. Where legal rules vary across jurisdictions, and all such rules must be followed, the relevant international legal regime consists of a medley of the strictest elements of each national regime. Suppose, for example, the activities of a firm are subject to the competition laws of Countries A and B. Assume that Country A has, relative to Country B, a restrictive policy with respect to horizontal restraints of trade, and a permissive policy with respect to vertical restraints. For its own policy reasons, Country A believes this combination to represent the optimal competition policy. Country B, on the other hand, believes that its regime – which is relatively permissive with respect to horizontal restraints but restrictive with respect to vertical restraints. Firms subject to the jurisdiction of both states face a de facto regime that includes the strict horizontal restraint regulations of Country A, and the strict vertical restraint regulations of Country B. This is a stricter policy than either Country A or Country B believes should exist.

For the above reasons, firms doing business in both the United States and the EU face an international competition policy regime that is more burdensome than the regime of either the EU or the United States currently has, and very likely more restrictive than what either jurisdiction would choose if it were a closed economy. The only way to prevent this sort of excessive regulation is to end the extraterritorial assertion of

jurisdiction – which would impose its own costs as discussed below -- or enter into some form of cooperative policy making.

## 2. An International Policy of Under-Regulation

The over-regulation discussed in the previous section exists because the relevant jurisdictions apply their laws extraterritorially. Many countries, however, either do not have effective competition laws or do not apply their competition laws to conduct that takes place beyond their borders. Business activity that takes place within these states also faces an accidental international competition policy, but its contours are more complex than is the case for business operating in the US and EU. This part provides a rough sketch of how activities in these states – including most developing states – are affected by the interaction of domestic competition policies.

Using the analysis developed in Part II.A we first consider the impact of international trade on the domestic competition policy of a country that does not apply its laws extraterritorially. With respect to imported goods, the country is unable to take any action to prevent anticompetitive activity by the foreign producers of those goods. Recognizing this, when policy makers shape the state's substantive competition policy they only consider the impact of the law on domestic production. Put another way, because the law cannot affect the behavior of foreign firms, the optimal policy for the state is the same as it would be if there were no imports. As long as domestic firms sell at least some of their products abroad, then, the state has an incentive to adopt

competition laws that are more permissive than would be the case in a closed economy.<sup>22</sup> This is so because a tightening of the antitrust laws affects both producers and consumers. Producers are hurt by more restrictive laws while consumers benefit from more competitive pricing.<sup>23</sup> Policy makers will tighten the laws until the marginal benefit to consumers equals the marginal cost to producers.<sup>24</sup> In the closed economy context, all gains enjoyed by consumers are taken into account because all consumers are local. In a trading economy, however, this is not so. At least some consumers are located abroad and the policy maker ignores all benefits conferred on these consumers by domestic laws. So in a closed economy the decision maker takes into account 100% of the benefits enjoyed by consumers but in a trading economy she takes into account some smaller percentage of benefits. The optimal policy for the state is less restrictive in the presence of trade, then, because some of the benefits of tougher laws are ignored.

One of the predictions of this analysis is that small open economies – whose firms export a high percentage of their goods and whose consumers import a high percentage of their consumption – will have weak or non-existent antitrust laws. This prediction is

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<sup>22</sup> If local producers in imperfectly competitive markets only sell domestically, the local competition policy will be the same as it would be in a closed economy.

<sup>23</sup> Consumers need not always be benefited from stricter antitrust laws, of course. In particular, they can be harmed if the tougher laws prevent firms from achieving efficiency gains. The point being made here – that domestic policies are weaker for a trading country without extraterritoriality than they are for a closed economy – remains true even if the closed economy policy is so restrictive as to harm the interests of consumers.

<sup>24</sup> Again, to account for the realities of the political economy, it is more accurate to say that policy makers will tighten the laws until the net marginal gain to those policymakers is zero. As long as the policy makers' gains from tougher laws stem from the benefits to consumers and the costs stem from the burden on producers, the analysis presented above applies. That policy makers may weigh producer interests more heavily than consumer interests (or vice versa) does not affect the results.

consistent with what we observe – small states rarely have significant antitrust laws.<sup>25</sup> It is also consistent with the experience of the EU. When competition policy was made at the national level, the competition policies of the EU were relatively permissive. When policy moved to the regional level (and as extraterritoriality came to be the practice), the EU adopted a much stricter antitrust regime.<sup>26</sup>

If no states applied their laws extraterritorially the analysis could end here, with the conclusion that substantive competition laws are systematically more lenient than they would be if all costs and benefits were taken into account. But, in fact, some states do apply their laws to conduct that takes place outside their borders, and the conduct of these states contributes to the legal regime facing many firms, including some that do business in states that do not apply their laws extraterritorially.

Consider, for example, the impact of US and EU laws. Because these jurisdictions apply their laws to foreign conduct that has a local effect, any goods sold in those markets are at least potentially subject to the laws of those jurisdictions. This is relevant to all states, including those that do not apply their laws extraterritorially, because the EU and US regimes affect the entire global operations of producers. Imagine, for example, that two or more producers of passenger airlines wish to merge. If they merge, they will enjoy greater market power, earn more profits for the new merged firm, and increase the price of aircraft. A state that does not apply its laws extraterritorially can only reach this proposed merger if one of the firms happens to be

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<sup>25</sup> Here we exclude states in the EU because EU competition policy is done at the regional rather than national level.

<sup>26</sup> See Guzman, *Is International Antitrust Possible?*, supra note xxx, at 1537-38.



located within its borders, and even then the most it can do is prevent its local firm from participating. The same proposed merger, however, will also trigger jurisdiction in both the EU and the US and can be blocked by either of those states. If the merger is prevented by, for example, the EU authorities, this affects all states, including those that do not apply their laws extraterritorially. Economic activity within these states, then, is influenced by the competition policies of foreign states. This can yield benefits for a state that does not apply its laws extraterritorially because it is able to free ride on the regulators supervision of those countries that do apply their laws in this way.

A free riding strategy is especially effective in the presence of an open trading regime because a firm can only retain local market power if it also has global market power. A firm that operates monopolistically locally but not internationally will earn excess profits from its local operations, attract competitors from abroad, and see its market power eroded. If, on the other hand, a firm has market power internationally, it is likely to sell its products into the US and/or the EU.

Although this free riding operates as a substitute for domestic competition policy, it falls short of a satisfactory legal regime for states that do not apply their laws extraterritorially. Not only will free riding states suffer from the distortions already discussed in Parts II.A and II.B, there are several additional reasons why free riding is likely to yield sub-optimal policy. First, if the impact of a particular activity is small in developed states but large in developing states, the EU and US may not bother to pursue a case. One example of such a product might be pharmaceuticals designed to treat tropical diseases. Firms with market power in this market may act in a way that would violate the substantive laws of the United States and the EU without attracting the

attention of regulators in either jurisdiction. More generally, there is no reason to think that the costs and benefits of an activity are the same in all countries, especially when comparing developing countries to developed ones. As a result, a decision on whether to bring a case in the US or EU may be quite different from what is in the interests of a developing country. Similarly, there are at least some goods that are sold only regionally (e.g., regional periodicals) and which, therefore, may not trigger jurisdiction in the US or EU.

Second, even when goods trade globally, the existence of a strong and effective competition policy, complete with extraterritorial application, in the US and EU may not prevent firms from engaging in anticompetitive conduct in other countries. Consider how a profit maximizing firm with market power and global sales would react if it faces effective competition laws in some of the states in which it does business, but not others. In states with an effective policy, the firm would restrain its anti-competitive activities so as to remain within the law. But there is no reason for the firm to sell at the same price everywhere. As long as arbitrage between markets is costly, the firm can charge higher prices in markets without effective competition laws or without laws that apply extraterritorially. Though the US and EU have jurisdiction over the firm, they have no reason to pursue a case against the firm if its conduct in the US and EU mimics that of a firm in a competitive industry. Countries whose laws cannot reach the firm, then, may not be able to free ride on the competition laws of the EU and the US. This sort of

market segmentation and price discrimination is more than just theory, it is also supported by empirical evidence.<sup>27</sup>

Overall, then, the de facto competition policy regime that applies in countries that do not apply their laws extraterritorially is almost certainly a mix of overregulation in some markets (where EU and US laws apply) and underregulation in other markets (where those laws do not apply or are not effective). Cooperation is valuable because it has the potential to reduce the level of regulation in the former markets and increase it in the latter.

### C. The Promise of Cooperation

Left to their own devices, then, non-cooperative states will adopt competition policies that are systematically different from what they would adopt in the absence of trade. Put another way, a closed economy internalizes the full costs and benefits of competition policy while a trading economy takes into account only some of those costs and benefits. Net importers of goods in imperfectly competitive markets will seek stricter laws that they otherwise would, and net exporters will seek weaker laws. The set of laws that actually governs international business activity in turn depends on the domestic laws that result and the extent to which those laws are applied extraterritorially, as discussed in Part II.B.

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<sup>27</sup> Levenstein, M.C. and V. Suslow. (2001). "Private International Cartels and The Effect on Developing Countries." Background paper for the *World Development Report 2001*. World Bank. Washington, D.C.; O'Connor, John M. (2001). *Global Price Fixing: Our Customers are the Enemy*. Kluwer Academic Publishing, Boston, MA.; White, Lawrence J. (2001). "Lysine and Price Fixing: How Long? How Severe?" *Review of International Organisation*; The Deterrent

If we assume that governments pursue some measure of national welfare, government decisions in a closed economy represent optimal decisions in the sense that they take into account all relevant costs and benefits. Deviations from this closed economy policy represent attempts by states to externalize cost while internalizing benefits. The resulting policies are, by assumption, domestically optimal, but sub-optimal from a global perspective because some costs and benefits are ignored. If we instead assume a public choice model of government, the analysis is more complex. Under this model trade causes policies to move away from the closed economy policy, which may represent a move toward or away from the optimal policy, depending on the way in which public choice issues affect decision making.<sup>28</sup>

To isolate the impact of trade on policy, assume for the moment that there is an international consensus on the objectives of antitrust policy and the appropriate way to achieve those objectives. Even under these assumptions non-cooperative states will not all adopt the same policies because net importers will adopt relatively strict antitrust laws (assuming they can apply their laws extraterritorially) while net exporters will adopt relatively permissive laws.

Because states have a shared view of the optimal antitrust law for a closed economy, they will be able, absent transactions costs, to reach an agreement that implements that policy on a global scale. That is, states will agree on the most efficient global antitrust regime. This result is an application of basic theories of federalism. One

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Effects of National Anti-Cartel Laws: Evidence from the International Vitamins Cartel, Julian L. Clarke & Simon J. Evenett, September 2, 2002.

<sup>28</sup> Part III.A discusses this issue in more detail.

normally seeks to regulate activity at the lowest possible level of government that is able to take all significant externalities into account. In the case of antitrust policy, the presence of externalities in the form already discussed is a strong argument for international regulation or cooperation of some kind.

Assuming a consensus of opinion on the optimal competition policy for a closed economy and zero transactions costs is, of course, somewhat fantastical in the international sphere. There is, in fact, tremendous disagreement on the proper role of competition policy and international negotiations are plagued by enormous transactions costs. In recognition of these realities, we now relax these assumptions.

For the moment, continue to assume that there are no transaction costs, but allow for the possibility that states have different objectives when they use competition policy. There is any number of reasons why states might have this sort of divergent goals. It may be, for example, that some countries understand what competition policy can and cannot do while others are simply mistaken. In this situation, agreement may be possible through the dialogue and debate. Over time, one view may come to be accepted while the other is discredited, and international agreement on a common policy will be possible.

Another possibility is that disagreements are not the result of differences in information, but rather differences in preferences. Diversity of preferences may exist for many reasons, ranging from differing priorities to differing conditions in domestic markets, to different political systems that generate different policies as interest groups compete for primacy.<sup>29</sup> If it is the preferences of states themselves that differ, the sharing

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<sup>29</sup> See, e.g., see Iacobbucci and Trebilcock, *supra* note xxx, at 8-9.

of information cannot by itself generate consensus. This will not prevent an optimal agreement, however, because states can compensate one another for accepting a policy that differs from their preferred policy. Just as the parties to a contract will bargain to maximize the joint value of the agreement, so states will bargain to maximize the joint value of competition policy. Imagine, for example, that one state prefers a relatively restrictive policy toward mergers – perhaps because it values the existence of small and medium sized businesses – while another prefers a more permissive merger policy based solely on efficiency grounds. This difference in preferences can be overcome in negotiations through the use of transfer payments. An agreement will be struck in which the party with the stronger preferences gets its preferred policy and in exchange makes a compensatory payment to the other state.

The same result holds if states have divergent preferences because of the distortion of policy preferences discussed in this chapter. Though net importers and net exporters have inconsistent preferences, in the absence of transactions costs agreement can be reached. More specifically, the parties would enter into an agreement that puts in place the globally optimal competition policy and provides for a transfer from states that benefits from this policy to states that lose as a result, relative to their non-cooperative payoffs. Because the cooperative policy is optimal, it must be the case that there are sufficient gains for a Pareto improving agreement to be reached.

The real impediment to achieving an optimal policy, then, is the presence of transactions costs. The divergent interests of net importers and exporters mean that cooperation can only be achieved if transfers are made from those that stand to gain from a particular agreement to those that stand to lose. Recognizing this problem, steps should

be taken to reduce the costs of negotiation and agreement. This means that ad hoc attempts at cooperation, limited to competition policy stand little chance of success because states that stand to gain from a particular agreement have no way to compensate those that stand to lose. Negotiation over competition policy, then must be in a broad enough context to allow for compensation in other areas such as trade, environment, and so on.<sup>30</sup>

### III. THE CASE AGAINST COOPERATION

Up to this point, this chapter has demonstrated that in the absence of international cooperation the de facto international competition policy will be too strict in some instances and too weak in others. The problems with non-cooperative policy combined with the realities of international business activity make it difficult to defend the status quo as an optimal competition policy regime. If there were a well-functioning international governmental system, the case for making antitrust policy decisions would be irrefutable. This analysis is consistent with standard arguments from the literature on federalism, which suggest that decision making responsibility should be assigned to a level of government that is capable of internalizing economic externalities.<sup>31</sup> This desire to internalize externalities explains why competition policy is carried out by the federal government in the US and the regional government in the EU.

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<sup>30</sup> See Andrew T. Guzman, *International Antitrust and the WTO: The Lesson from Intellectual Property*, mimeo (2000) (arguing that the TRIPs agreement was possible because negotiations took place in the WTO where transfer payments are possible).

<sup>31</sup> See, e.g., Robert P. Inman & Daniel L. Rubinfeld, *Rethinking Federalism*, 11 *Journal of Economic Perspectives*, no. 4, 43, 45 (1997).

Opponents of cooperation, then, must rely on a different set of arguments. Because claims that leaving regulation at the national level represents a better policy fail as a matter of theory, opponents must argue that cooperation is too difficult or costly as a matter of practice. The most common of these arguments is that policy making at the international level is too inefficient, undemocratic, and corrupt to be trusted with competition policy.<sup>32</sup> This line of reasoning, based on public choice concerns, is the most powerful of the arguments against cooperation. In addition to these public choice objections, this chapter addresses two potential arguments against cooperation. First, it responds to the claim that international activity has the desirable effect of frustrating the goals of domestic regulators, and that it would be a shame if cooperative efforts gave power back to regulators. Second, it considers whether antitrust regulation is even relevant in a truly global market. Perhaps international trade is the only weapon we need to encourage competition in international markets.

### **A. International Public Choice Problems**

Even skeptics of international cooperation must admit that it has proven effective in some instances. Few observers would argue that the GATT Agreement, the TRIPs agreement, the Basle Accord, NAFTA, and the EU have all generated net social costs. The point here is that it is not possible to simply discard international cooperation as

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<sup>32</sup> For a generalized argument opposing international cooperation on these grounds, see Paul B. Stephan, *Regulatory Competition and Competition; The Search for Virtue*, in *Transatlantic Regulatory Cooperation – Legal Problems and Political Prospects* 167 (George A. Bermann, Mathias Herdegen & Peter L. Lindseth, eds. 2000); Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents, and Legitimacy*, 17 *Nw. J. Int'l L. & Bus.* 681 (1996-97); Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 *Va. J. Int'l L.* 743 (1999); Paul B. Stephan, *The Political Economy of Choice of Law*, 90 *Geo. L.J.* 957 (2002).



undesirable. On the other hand, there is no doubt that international agreements come with costs. The question in any given case is whether the costs outweigh the benefits. The greatest risk posed by international cooperation in antitrust is that the international process itself will generate undesirable outcomes. One can imagine any number of reasons why cooperation may lead to bad outcomes. As it is not possible to address every conceivable argument, what follows identifies and discusses the most likely sources of value reducing cooperation. In the end, there is no way to prove whether cooperation in competition policy will reduce welfare, but I offer some thoughts on why I believe an increase in welfare is likely.

The most prominent reason why cooperation may be harmful is that negotiators might favor the interests of certain groups over those of others.<sup>33</sup> So, for example, business interests may enjoy greater influence than consumer interests, generating a bias toward lenient rules. Though this argument is certainly correct – there will be public choice issues at the international level – there is no way to know how large these effects will be, or if they will be larger or smaller than the existing domestic public choice problems. As a first cut, international public choice problems are likely to reflect domestic public choice problems. That is, interest groups will be able to influence negotiators because they can influence the politicians that control the negotiators. This influence is not created by internationalization, but rather by the political structure of domestic government. If policy is made domestically, the same interest group biases will be present. Furthermore, international negotiations may help to offset the power of

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<sup>33</sup> See Paul B. Stephan, *The Political Economy of Choice of Law*, 90 *Geo.L.J.* 957, 960 (2002).

interest groups. Interest groups in one country may have significant control over policy, but when governments must negotiate with one another, powerful interest groups in one state may be offset by opposing groups in the other. Thus, for example, if business interests dominate in one country, consumer interests may hold sway in the other, and the harmful effects of these groups may offset one another.

Without a well specified model of the political economy of domestic and international policy making, little more can be said about international public choice problems. Given the clear evidence that domestic policies are frustrated by a non-cooperative regime, it seems appropriate to demand that skeptics advance a more precise model of decision making and how it can be harmful. Unless such a model is presented, vague concerns about the role of interest groups should, for the most part, be greeted with skepticism.

John McGinnis' chapter in this volume advances the most comprehensive such argument of which I am aware. The thrust of the argument is that public choice problems on the international level are likely to likely to generate higher costs than domestic regulation. The validity of his argument ultimately turns on empirical questions that cannot be resolved here,<sup>34</sup> but it seems clear that the modest level of cooperation that I propose fails to trigger the most significant of the costs he identifies.<sup>35</sup>

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<sup>34</sup> I have previously outlined my views on how to proceed with international cooperation in the face of the inevitable uncertainty regarding public choice issues. See Andrew T. Guzman, Public Choice and International Regulatory Competition, 90 *Geo. L.J.* 971, 977-980 (2002).

<sup>35</sup> Though I support deeper cooperation than several other commentators, see McGinnis *supra* note xxx; Trebilcock & Iacobucci, *supra* note xxx; Stephan, *supra* note xxx, my proposal is nevertheless quite modest and falls far short of full scale harmonization or the creation of some sort of international bureaucracy. See Part IV.D.

McGinnis identifies three primary costs associated with cooperation in international antitrust. First, he expresses concern that monitoring is difficult because international bureaucrats “will have more ability to fashion more interventionary rules.”<sup>36</sup> The notion here is that international negotiators and functionaries have an interest in generating complex rules or otherwise acting to maximize their own influence.<sup>37</sup> Though this is a legitimate concern, it is not a reason to resist cooperation altogether. First, the same problem exists domestically as regulators seek to increase their own power and are able to do so through the elaboration of rules and agency practices. International bureaucrats typically have considerably less rule making authority than their domestic law counterparts, so they have a more limited ability to pursue their own interest in this way. Indeed, it is difficult to identify even a single instance (outside the EU) in which international bureaucrats have any policymaking authority that is independent of domestic governments. In the area of international antitrust there is no serious proposal for an international antitrust agency authorized to develop its own rules and policies.<sup>38</sup> In other words, international cooperation in antitrust can and should proceed without

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<sup>36</sup> McGinnis, at \*8.

<sup>37</sup> See Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents, and Legitimacy*, 17 *Nw. J. Int’l L. & Bus.* 681, 706 (1996-1997).

<sup>38</sup> This point is important as it diffuses several arguments advanced by McGinnis in his contribution to this volume. See, e.g., McGinnis, at \*8 (“[I]nternational regulators outside the control of government, become a distinct class with a distinctive interest – that of growing the international antitrust apparatus.”). The is a proposed “International Antitrust Code” which includes the establishment of an “international Antitrust Authority” that arguably would possess some of the bureaucratic characteristics that concern McGinnis. This proposal, however, is from 1993 and does not seem to have generated any significant support. Were it made as a serious proposal today I would share many of McGinnis’ objections. See *Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement (International Antitrust Code Working Group Proposed Draft 1993)*, published and released July 10, 1993, 64 *Antitrust & Trade Reg. Rep. (BNA) No. 1628* (Aug. 19, 1993) (Special Supp.). For a discussion of the Draft Code, See Daniel J. Gifford, *The Draft International Antitrust Code Proposed At Munich: Good Intentions Gone Awry*, [6 Minn. J. Global Trade 1](#) (Winter 1997).

significant bureaucracy.<sup>39</sup> Ultimately, the issue here concerns the form of cooperation rather than its merits. If cooperation is desirable, concerns about bureaucracy should not frustrate it. To the extent bureaucratic capture is a concern, there should be less delegation to those bureaucrats.<sup>40</sup>

Second he argues that centralized enforcement entails significant costs while decentralized enforcement will lead to divergent standards. This may well be correct in a regime of harmonization, but a more modest level of cooperation could avoid most of these costs by leaving the Appellate Body to adjudicate disputes that arise with respect a small number of rules and leaving other issues to the states themselves. The modesty of my proposal also allows room for innovation and experimentation, the elimination of which is McGinnis' third cost.

## B. Defeating Domestic Political Failures

Another possible argument against international cooperation is really an attempt to undermine domestic political decisions. In antitrust, as in many other areas, the internationalization of business activity poses a challenge for regulators. Until the *Alcoa* case in the United States and the *Wood Pulp* decision in Europe, for example, activities that took place offshore but that had an effect in the jurisdiction were (at least arguably) beyond the reach of local authorities. Even today, in many jurisdictions there is no attempt to exercise jurisdiction over foreign conduct. Where the application of law is

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<sup>39</sup> One might argue that the WTO's Appellate Body qualifies as a bureaucracy, but it does not fit the model of an agency charged with oversight and enforcement of a regulatory system. Rather it looks much more like a court, charged with interpreting rules laid down by member states.

<sup>40</sup> See Guzman, *Public Choice*, supra note xxx, at 974-975.

done on a strictly territorial basis, national laws may fail to reach conduct that is alleged to impose harm on local interests. If one believes that existing domestic antitrust laws are excessively tough or, indeed, entirely unnecessary, internationalization that removes conduct from the local jurisdiction may be seen as desirable. The internationalization of business in effect corrects a failure of the domestic political system, the argument goes, and reduces the authority of local regulators in a desirable way.<sup>41</sup>

Though there are other problems with this sort of argument, the most persuasive is that it is inconsistent with the current state of international antitrust. Both the United States and the EU now apply their laws to conduct that takes place abroad but that has local effects. Rather than undermining the authority of local regulators, a failure to cooperate will generate overlapping jurisdictional claims and more, rather than less, regulatory review.

In any event, choosing to avoid or pursue international cooperation in an effort to frustrate the objectives of domestic governments strikes me as not only undemocratic, but futile. National governments remain the relevant unit of analysis for questions of international cooperation. If cooperation undermines their objectives, they will avoid it; and if cooperation furthers their objectives they will pursue it. Put another way, there is no authority capable of structuring the international system so as to undermine their goals because these same governments also control that system. The lesson is that domestic

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<sup>41</sup> McGinnis advances precisely this argument. See McGinnis, at \*17 (“[F]oreign bias may counteract the public choice driven biases against wealth maximizing laws and thus move competition law toward a more optimal state.”).

failures must be addressed with domestic remedies, and not through international action or inaction.

### **C. Is Competition Policy Necessary in a Global Market?**

One could argue that international competition policy is simply not a problem because in a global market, there is so little potential for monopolization or other anti-competitive conduct that antitrust law is simply unnecessary. International trade, the argument goes, forces all firms to compete with other firms whether domestic or foreign, and prevents them from gaining market power.

It is certainly true that trade can be a substitute for competition policy in some instances. The clearest example would be the case of a small, closed country whose consumers are harmed by local monopolies. Opening the country to foreign trade would undermine the market power of local firms and force them to compete. For such a country trade can indeed work as a substitute for competition policy and has the advantage that competition is promoted without government intervention.

It does not follow, however, that trade works as a full substitute for competition policy. Trade can do the work of competition policy in the above example because the country at issue is small – meaning its firms have no market power on the global stage. Trade works because it changes the market conditions in which firms operate – turning the domestic, monopolistic market into a competitive global one. That the global market is competitive, however, is simply assumed.

If some firms have international market power one would expect them to behave as monopolists, just like domestic firms with market power. Though it may be more

difficult to establish and maintain market power internationally, there is no reason to believe that it is impossible or, for that matter, rare. Casual observation of industries such as pharmaceuticals, passenger aircraft, and software makes the claim that international market power cannot exist implausible.

#### IV. THE FORM OF COOPERATION

Up to this point, the chapter has sought to demonstrate that cooperation in antitrust is desirable. It has largely avoided a discussion of how cooperation should proceed, or the form it should take. This final section attempts to address these questions. Cooperative strategies relevant to the debate on international competition policy come in essentially four forms: (i) *laissez faire*, in which cooperation is not pursued; (ii) voluntary information sharing and consultation, which is the system that currently exists; (iii) procedural cooperation on choice of law rules, with an eye toward restricting the number of legal systems claiming jurisdiction; (iv) substantive cooperation, which imposes on states at least some requirements in terms of their domestic substantive rules. This final category includes a wide range of cooperative arrangements, some of which involve relatively mild commitments and others – such as full harmonization – that call for quite dramatic obligations.

There is no doubt that international cooperation in any area carries costs. At a minimum, as decisions are moved further from individual citizens, democratic control over the process is weakened. This is one reason why special efforts may be necessary to rein in international bureaucracies. In addition, when states cooperate, enforcement

problems arise because international enforcement mechanisms are weak and unreliable when compared to domestic structures.

International agreements are also problematic because they involve considerable transactions costs. They are slow to negotiate, distract officials from other tasks, and can cause animosity among states. Even when negotiations are successful, the ensuing cooperation can be costly, especially if new institutions are needed. In part because of these transaction costs, international agreements are difficult to change. Change is also difficult because it typically requires the unanimous consent of all parties. Attempts to reduce the cost of change by delegating authority to international bureaucrats generate their own costs in the form of entrenchment and lack of democratic control.<sup>42</sup> Here again, domestic institutions have clear advantages, advancing the case that policy should be made at the domestic level whenever possible.

The drawbacks of a cooperative approach, combined with the inability of a non-cooperative approach to generate sensible competition policy indicate that the preferred form of cooperation should be that lowest level that avoids the distortions of non-cooperative policymaking. With that in mind, the chapter now considers each of the potential cooperative regimes in an attempt to identify the most promising approach to competition issues.<sup>43</sup>

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<sup>42</sup> See *infra* xxx.

<sup>43</sup> I have previously written on the question of how to manage cooperation in a wider set of regulatory areas. See Andrew T. Guzman, *Choice of Law: New Foundations*, 90 *Geo. L.J.* 883 (2002).



## **A. Laissez-Faire**

One can imagine a laissez-faire regime, in which national authorities operate in complete isolation from one another, and neither offer nor request cooperation of any kind. To my knowledge nobody supports this approach in competition policy, and it is not the world we currently have. Such a system neither addresses the externalities associated with competition law, nor facilitates domestic enforcement when activities and evidence are located offshore.

## **B. Is Information Sharing Enough?**

Though little progress has been made toward cooperation with respect to the substantive regulation of antitrust when activities cross borders, regulators have developed a system of information sharing. Faced with continuing growth in international business activity, domestic antitrust authorities have been forced to adapt new strategies. Without at least some sharing of information among national regulators, it would often be difficult to build a case against international firms. If prosecutors were helpless beyond their own borders, a firm could violate the law with little risk by keeping key documents offshore, holding meetings among participants in a violative activity abroad, and residing in a foreign jurisdiction. If domestic regulators had no ability to reach beyond their borders for information, then, many illegal activities could evade prosecution.

To prevent erosion of their authority and enforcement powers, antitrust authorities have cooperated with one another. This cooperation, however, has been limited (with

few exceptions) to voluntary information sharing agreements.<sup>44</sup> A typical agreement calls for the sharing of information between enforcement authorities when the actions of regulators in one country affect the interests of the other state.<sup>45</sup> In addition, the agreements provide for consultation to resolve concerns between the states, indicate that the parties should cooperate in enforcement when this is possible,<sup>46</sup> and call for each state to take into account the effects of anticompetitive conduct on the other state when considering an enforcement action.<sup>47</sup> Taking into account the effect of conduct on other states would go a long way toward addressing the problems with the existing international competition policy regime. Unfortunately, the agreements that call for such cooperation do not lay out any details about how such consideration is to be given, do not include any sort of sanction for a failure to take the interests of the other party into account, and say nothing about how the interests of other states should affect domestic policy decisions.

Though these agreements play an important role in the international enforcement of antitrust, they are not and cannot be a solution to the problem of international

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<sup>44</sup> See Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. Rev. 1781, 1785-88 (2000); Diane P. Wood, *Soft Harmonization Among Competition Laws: Track Record and Prospects*, forthcoming *Antitrust Bulletin* (2003).

<sup>45</sup> See, e.g., *Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices*, June 23, 1976, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,501. The U.S. has entered into similar agreements with Australia, Canada, the European Communities, Israel, Japan, Brazil, and Mexico. For a detailed discussion of how these agreements operate, see John J. Parisi, *Enforcement Cooperation among Antitrust Authorities*, 12 Int'l Quarterly 691 (2000); see also Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. Rev. 343 (1997).

<sup>46</sup> See, e.g., *Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws*, Aug. 3, 1995, U.S.-Can., reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,503, art III (enforcement cooperation provisions).

<sup>47</sup> See *id.*, art. VI.1.

cooperation. First, they do not go beyond the sharing of information. There is, for example, no coordination of substantive laws, no compromise of domestic control, and no minimum standards. Furthermore, compliance with them is voluntary, and they do not compromise any element of domestic control over enforcement or policy.<sup>48</sup> Though the agreements facilitate cooperation among states, each state is free to refuse cooperation when it wishes to do so, and remains guided by its own interests when deciding when to do so.

Information sharing, or “soft” cooperation, has also been pursued at the OECD, which has generated a number of aspirational texts.<sup>49</sup> None of these impose obligations on states, nor are they intended to do so. Their goals are modestly limited to improving communication and dialog on competition issues. This dialog is important, and it is possible that it has contributed to greater harmonization of substantive laws than would otherwise exist,<sup>50</sup> but it does not represent substantive cooperation.<sup>51</sup>

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<sup>48</sup> There are two significant exceptions. Canada and the United States have entered into The Treaty on Mutual Legal Assistance in Criminal Matters, Mar. 18, 1985, Can.-U.S., 24 I.L.M. 1092 (1985) which provides for the use of compulsory powers to gather evidence in criminal antitrust cases, and allows the exchange of compulsory information. The United States has also entered into an agreement with Australia under the International Antitrust Enforcement Assistance Act of 1994, Pub. L. No. 103-438, codified at 15 U.S.C. §§ 6201-6212. The text of the agreement is available at <http://www.ftc.gov/os/1997/9704/lastaus.htm>

<sup>49</sup> See 1976 OECD Guidelines for Multinational Enterprises; 1978 Council Recommendations Concerning Actions Against Restrictive Business Practices Affecting International Trade Including Those Involving Multinational Enterprises, OECD Doc. C(78)133 (Final) (Aug. 9, 1978); 1978 Council Recommendation Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade, OECD Doc. C(79)154 (Final) (Oct. 1979); 1998 Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, OECD Doc. C(98) 35 (Final) (13 May 1998).

<sup>50</sup> See Diane P. Wood, *Soft Harmonization Among Competition Law: Track Record and Prospects*, forthcoming, xxx *Antitrust Bulletin* xxx (2003).

<sup>51</sup> Most recently, multilaterally cooperation has been pursued through the “International Competition Network” (ICN).

The information sharing and procedural cooperation that currently exists is what we would expect from self-interested states and administrative agencies seeking to preserve their own influence.<sup>52</sup> By sharing information, enforcement agencies cooperate in such a way as to allow both themselves and their sister agencies to continue their work, but they do not surrender any of their authority over domestic matters. This form of soft cooperation furthers the enforcement goals of regulators, but does virtually nothing to address the over- and under-regulation of antitrust at the international level.

### C. Choice of Law Strategies

Stepping one rung higher on the cooperative ladder, a state may set the terms of its interaction with other states through a unilateral selection of choice of law rules. This approach, like those already discussed, cannot correct the distorted domestic incentives created by international trade. A choice of law policy that assigns jurisdiction to single state based on some criteria may reduce some of the problems of over-regulation, but may also exacerbate the problem of under-regulation in other instances.<sup>53</sup>

Though no choice of law rule could resolve all the problems of international antitrust, at least some issues could be addressed. In particular, the problem of under-regulation in states that cannot extend their laws extraterritorially can be addressed through a choice of law rule that grants standing to plaintiffs if the relevant firm activity

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<sup>52</sup> See John J. Parisi, Enforcement Cooperation among Antitrust Authorities, 12 Int'l Quarterly 691, 691 ("As business concerns have increasingly pursued foreign trade and investment opportunities, antitrust compliance issues have arisen which transcend national borders and, thus, have led antitrust authorities in the affected jurisdictions to communicate, cooperate, and coordinate their efforts.") (2000); Edward M. Graham, Internationalizing Competition Policy: An Assessment of the Two Main Alternatives, mimeo, forthcoming, Antitrust Bulletin, \*16-20 (2003).

<sup>53</sup> See supra Part II.B.

took place within the jurisdiction, even if the injuries occurred abroad.<sup>54</sup> This rule would give injured plaintiffs a remedy against the actions of foreign firms that target states whose laws do not apply extraterritorially, as long as the conduct was within a state with effective antitrust rules. Such a rule would at a minimum ensure that western firms faced some regulation when selling into countries without extraterritorial reach. The justification for this rule is essentially the same as the justification for eliminating export cartels exemptions. In both cases a jurisdictional rule could force states to pursue some anti-competitive behavior even when it benefits local firms and harms foreign consumers.

This would, admittedly, be a dramatic change from the current choice of law rules, and implementation would face a variety of difficulties. It is mentioned not so much as a serious proposal, but rather to point out that such a rule would improve the functioning of the international system. If one concludes (as is almost surely correct) that the adoption and operation of such a rule in the current non-cooperative context is unrealistic, the lesson is that deeper cooperation is needed.

Notice that even the above choice of law solution addresses only one of the problems of international antitrust discussed in this article. Specifically, it discourages states from favoring local consumers over foreign consumers. It does not prevent the over-regulation discussed in Part II.B.1 or the distortions to substantive policy discussed in Part II.A. Those problems require a deeper level of cooperation, discussed in the next section.

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<sup>54</sup> An even more aggressive rule would grant standing to any plaintiff regardless of where the conduct took place.

## D. Deep Cooperation

Effective regulation of antitrust, then, requires at least some cooperation with respect to substantive laws. Though such a strategy has obvious disadvantages, including the fact that it may be difficult to reach any agreement, it represents the only way for states to address the externalities associated with international competition policy. As already discussed, absent transaction costs, states would be able to overcome their differences regarding the substantive content of competition laws and reach agreement. The challenge, then, is to reduce transactions costs as much as possible in the hope that an agreement will be achieved.

The precise question of how to reduce transaction costs is difficult, and I have argued elsewhere that the WTO represents the best forum for negotiations on the subject.<sup>55</sup> Regardless of the forum that is chosen, however, it remains the case that the simple distortion of domestic incentives cannot be corrected short of cooperation on substantive competition policy. This need not represent harmonization because states may conclude that policy differences across regimes are acceptable, but it does require negotiation over substantive policy in a forum where transfers are available.

A call for deep cooperation raised the question of exactly what that cooperation should look like. Given the challenge of achieving any progress, it seems prudent to start with a relatively modest agenda without foreclosing greater cooperation in the future.

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<sup>55</sup> See Guzman, *Antitrust and International Regulatory Federalism*, *supra* note xxx, at 1156-1158; Andrew Guzman, *Global Governance and the WTO*, mimeo (2003). At least two of the chapters in this volume argue against the inclusion of competition policy in WTO negotiations. See Michael Trebilcock & Edward Iacobucci, *National Treatment and Extraterritoriality: Defining the Domains of Trade and Antitrust Policy*, at \*31-33; Paul B. Stephan, *Competitive Competition Law? An Essay Against International Cooperation*, at \*21-22.

The agenda provided by the WTO's Doha Ministerial in 2001 represents a reasonable starting point for such negotiations.<sup>56</sup> It calls on the Working Group on the Interaction of Trade and Competition Policy to focus on “core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; [and] modalities for voluntary cooperation.”<sup>57</sup>

Consider first the possibility of negotiating a non-discrimination principle. This would ideally include both national treatment and most favored nation components, though national treatment is the more important element. Chapters in this volume by McGinnis and by Trebilcock & Iacobucci, as well as past writing of my own support the notion of a national treatment requirement.<sup>58</sup>

There is little to criticize about a national treatment obligation. It appeals to our sense of fairness, is consistent with existing WTO obligations, and would address at least the most obvious way in which states attempt to internalize benefits while externalizing costs, the export cartel exception. The problem with a national treatment obligation is not what it does but, rather, what it fails to do.

Though a national treatment obligation could eliminate explicit discrimination, it would be less successful at addressing the problem of discrimination in application and enforcement. That is, it could prevent the adoption of export cartel exemptions, but could

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<sup>56</sup> Ministerial Declaration, WT/MIN(01)/DEC/W/1 (Nov. 14, 2001).

<sup>57</sup> *Id.*, ¶ 25.

<sup>58</sup> See John O. McGinnis, *The Political Economy of International Antitrust Harmonization*; Michael Trebilcock & Edward Iacobucci, *National Treatment and Extraterritoriality: Defining the Domains of Trade and Antitrust Policy*; Guzman, *Antitrust and International Regulatory Federalism*, *supra* note xxx, at 1162. Trebilcock, Iacobucci, and McGinnis resist labeling a non-discrimination provision substantive

not easily prevent regulators from pursuing foreign parties with greater zeal than domestic parties. Trebilcock and Iacobucci duck the question of how to enforce a non-discrimination rule in antitrust by observing that international trade law addresses the problem is de facto discrimination in other contexts.<sup>59</sup> There are at least two serious problems with this argument.

First, the antitrust context is different from other areas in which discrimination is prohibited. In the trade context, for example, discrimination against an imported good is relatively easy to identify by comparing the treatment of one product with the treatment of another, “like product.”<sup>60</sup> One can carry out a meaningful inquiry into the question of whether a country that treats imported watches differently from locally produced watches. This sort of comparison is a great deal more difficult in the antitrust context because each prosecution turns on a unique set of facts. It will not typically be the case that the prosecution of an alleged price fixing scheme can be reviewed by looking to a domestic scheme carried out in the same fashion and in the same industry. It is more likely that there is no closely analogous setoff facts with which to make a comparison. It is true that some benchmarks may be possible, such as HHF indices, that would allow some comparison, but even in those cases the prosecution of antitrust violations involves a great deal of discretion and case-specific facts than a conventional trade case.

Second, even in those areas currently addressed non-discrimination is not always policed effectively, and the national treatment obligations is often more of a de jure than

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harmonization, though it is hard to know what else to call an obligation that forbids states from adopting substantive rules or practices that favor locals over foreigners.

<sup>59</sup> See Trebilcock and Iacobucci, *supra* note xxx, at \*8-9.



a de facto standard. This is especially true in areas where, like antitrust, fact-specific inquiries are involved. Under the WTO's SPS Agreement,<sup>61</sup> for example, WTO Members may adopt measures necessary "for the protection of human, animal or plant life or health,"<sup>62</sup> but such measures must not be applied in a manner which would constitute a disguised restriction on international trade."<sup>63</sup> As applied, however, this requirement is extraordinarily modest, and virtually any SPS measure that is not an obvious sham and for which there is any scientific justification will pass muster as long as the procedural requirements of the SPS agreement are satisfied.<sup>64</sup> Similar non-discrimination requirements exist in other parts of the WTO Agreements, and where the obligations go to non-trade issues, the result is virtually always the same – de facto discrimination is largely ignored because the WTO is hesitant to second guess domestic decisions with respect to such policies.<sup>65</sup>

A national treatment obligation for antitrust, then, can serve a useful purpose, but is primarily useful to prevent the use of export cartel exemptions and perhaps to constrain

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<sup>60</sup> See, e.g., GATT III:2.

<sup>61</sup> Agreement on the Application of Sanitary and Phytosanitary Measures.

<sup>62</sup> SPS art. 2.1.

<sup>63</sup> SPS art. 2.3.

<sup>64</sup> See, e.g., Michael J. Trebilcock & Robert Howse, *The Regulation of International Trade* 147 (2d ed 1999) ("[I]f countries generally feel committed to adopting more stringent health, safety, consumer protection, environmental or conservation standards for . . . they remain largely free to do so, subject to demonstrating that there is some rational scientific basis for their actions . . . and that such measures do not gratuitously encumber international trade."). Similar non-discrimination requirements exist in other parts of the WTO Agreements, and where the obligations go to non-trade issues, the result is virtually always the same – de facto discrimination is largely ignored because the WTO is hesitant to second guess domestic decisions with respect to such policies.

<sup>65</sup> Cf., *United States - Imp. Prohibition of Certain Shrimp and Shrimp Prod.*, Recourse to Art. 21.5 of the DSU by Malaysia, WT/DS58/AB/RW (reported, App. Body, Oct. 22, 2001).

egregious forms of de facto discrimination. It cannot realistically be hoped that it would prevent regulators from favoring locals in the day to day administration of the law.

National treatment also falls short because it cannot resolve the problems associated with the domestic adoption and enforcement of rules to govern international activity. It would not, for example, address the strategic choice of domestic law by states engaged in trade, as discussed in Part II.A. Nor would it alter the de facto international regime created by overlapping jurisdictions as discussed in Part II.B.

National treatment, then, is not enough to resolve the problems of cooperation that are present in international competition policy. The slightly more ambitious WTO agenda for reform is a sensible first step. Seeking cooperation on the most agreed upon violations such as hard-core cartels is sensible, as are efforts to increase transparency and voluntary cooperation. Eventually, it would be helpful to see others forms of cooperation emerge, including mandatory information sharing arrangements (subject to appropriate confidentiality provisions),<sup>66</sup> streamlining and cooperation in international merger review,<sup>67</sup> and jurisdictional agreement that at a minimum commit states to decline jurisdiction if the impact of a measure on their own citizens is sufficiently small. As I have observed in prior writing, there is no denying that cooperation of the sort described

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<sup>66</sup> See McGinnis chapter, at \*28 (supporting the notion that nations should be required to “permit the extraterritorial application of another nation’s laws, at least on the same antitrust theories deployed by the nation whose producers are the target of antitrust enforcement.”).

<sup>67</sup> For example, a firm proposing to merge might be required to seek approval for the merger from only one or two states (perhaps its home states or the states with the most affected consumers) and the same forms could then be submitted (with translations if necessary) to authorities in other states who would have the option of requesting further submissions. This could reduce the regulatory burden placed on firms when a merge must be reviewed by many jurisdictions and each requires full compliance with its particular reporting requirements.

here is difficult to achieve, but it is the only way to achieve a sensible competition policy in our globalizing world.<sup>68</sup>

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<sup>68</sup> See Guzman, *Is International Antitrust Possible?*, *supra* note xxx, at 1548.