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RETHINKING DECENTRALIZED ANTITRUST REGIMES: A WINDOW ON THE FUTURE OF PROTECTIONISM AND OVERREGULATION

Weimin Shen



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*Weimin Shen**

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ABSTRACT

Over 100 jurisdictions have a domestic competition law, making competition law one of the most widespread forms of economic regulation around the world. The existing decentralized antitrust regimes have increased transaction costs and uncertainties, enforcement conflicts, antitrust protectionism, and global overenforcement of antitrust laws. Yet international coordination has received little attention. Why? Two interest-based explanations suggest that the European Union and the United States have adopted different approaches to regulating competition, making the two leading regulators race to spread their regulatory models. Moreover, the balance of benefits under existing international legal rules continues to favor major corporations in both developed and developing countries. As a result, the developed world, particularly the United States, has viewed attempts at multilateral coordination as against its interests.

This Article challenges this conventional wisdom. It argues that the increasing heterogeneity among decentralized antitrust regimes poses a larger long-term threat to the United States than is commonly believed. A closer examination of the proliferation of antitrust laws demonstrates why antitrust protectionism and overregulation are not temporary and not destined to level off. In addition, as more developing countries have the capacity to prosecute multinationals and as the strictest jurisdiction has the power to set the de facto world standard, today's positive balance of benefits will disappear tomorrow. This Article argues that the United States should reverse its hands-off approach to international antitrust coordination and instead enact proposals that place greater convergence among national antitrust regimes. It highlights why the present moment is an opportune time to initiate, but notes that the window for initiation is likely to close as developing countries acquire increased economic strength and enforcement capacity.

INTRODUCTION

International cooperation is generally driven by a desire to offset a negative spillover imposed by other countries or to help governments overcome domestic political economy constraints that impede the adoption of welfare-enhancing policy changes.¹ In principle, both conditions are met in the context of competition policy for developing countries.² However, various attempts to initiate World Trade Organization (WTO) negotiations on antitrust have all failed.³ It is not surprising that the developed world, particularly the United States (U.S.), has little incentive to embrace such an agreement, as it would result in the contamination of antitrust “purity” and protect smaller competitors from efficient competition.⁴ However, what is

¹ See 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 (Simon J. Evenett & Bernard M. Hoekman eds., World Bank, 2006) (discussing the lessons that are suggested by the seven-year effort in the WTO to develop a competition negotiating/cooperation agenda).

² For example, developing countries need international antitrust cooperation because they worry about their inability to control the anticompetitive practices of multinationals, which increasingly affects their markets due to the global merger wave and the growing presence of multinationals in developing countries. See Ajit Singh & Rahule Dhumale, *Competition Policy, Development, and Developing Countries*, in WHAT GLOBAL ECONOMIC CRISIS? 122, 124–28 (Philip Arestis et al. eds., 2001). Developing countries are also disproportionately affected by international cartel activity. They 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 to developing countries. See generally Margaret Levenstein & Valerie Y. Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 ANTITRUST L.J. 801, 801–03 (2004); see also Margaret C. Levenstein & Valerie Y. Suslow, *The Changing International Status of Export Cartel Exemptions*, 20 AM. U. INT’L L. REV. 785, 796 (2005).

³ 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 officially to drop antitrust policy from the Doha Round negotiation agenda. See generally Ajit Singh, *Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions*, 12–15, UNCTAD, G-24 Discussion Paper Series No. 18, 2002, https://unctad.org/system/files/official-document/gdsmdpbg2418_en.pdf. See also World Trade Organization General Council, Decision Adopted by the General Council on 1 August 2004, WTO Doc. WT/L/579 (adopted Aug. 2, 2004).

⁴ Former Acting Assistant Attorney General for Antitrust, Joel Klein, made this position clear in his speech right before the opening of the Singapore Ministerial Conference. Klein stated, “we must guard against a lowest-common-denominator outcome in the development of competition rules by the WTO.” Joel I. Klein, Acting Assistant Attorney General, Speech Prior to Opening of Singapore Ministerial Conference: A Note of Caution with Respect to a WTO Agenda on Competition Policy (Nov. 18, 1996). See also generally WTO Competition Working Group, Communication from the United States, WTO Doc. WT/WGTCP/W/88 (Aug. 28, 1998).

more surprising is that the latest round of international antitrust negotiations collapsed at the 2003 Cancun Ministerial Meeting, largely due to opposition from developing countries.⁵

This earlier effort has been largely forgotten. Today, we live in a world of international competition policy. Although no international institution or agreement governs the subject, firms operating internationally face a *de facto* regime generated by the overlap of domestic regimes.⁶ The question, then, is not whether there should be an international competition policy, but rather whether the existing system is better than what might otherwise exist.

Until recently, there was little reason to pay attention to the antitrust practices of developing countries. As recently as 1990, only sixteen developing countries had a formal competition policy.⁷ With encouragement and technical assistance from the United States, the European Union, and other international institutions, fifty countries completed legislation for competition laws in the 1990s, and another twenty-seven are in the process of doing so.⁸ However, even with such legislation on the statute books, these countries may not have the power to restrain cartels and other uncompetitive conduct by large multinationals, due to inadequate development of legal and institutional frameworks, lack of information, and difficulties proving that prices are manipulated by international cartels.⁹ Much has been written about the influx of multinational corporations seeking a share of these growing

⁵ See generally Singh & Dhumale, *supra* note 2 (expressing serious misgivings about the WTO Working Group's analysis of competition policy for developing countries). See also Levenstein & Suslow, *supra* note 2, at 796.

⁶ See, e.g., Andrew Guzman, *The Case for International Antitrust*, 22 BERKLEY J. INT'L L. 355, 356–57 (2004); Andrew T. Guzman, *Antitrust and International Regulatory Federalism*, 76 N.Y.U. L. REV. 1142, 1154–55 (2001) (developing a theory on how trade flows across countries can impact the type of antitrust laws a country adopts).

⁷ See United Nations Conference on Trade and Development, *World Investment Report 2000* at 151, Table V.1, U.N. Doc. UNCTAD/WIR/2000 (July 2000).

⁸ See *id.*; see also William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 BROOK. J. INT'L L. 403, 407 (1997) (observing that the support of advisory bodies and multinational donors such as the World Bank, the OECD, and UNCTAD have played an active role in shaping developing countries' newly adopted laws).

⁹ See Pradeep Mehta, *Airline Cartel Fines Could Be Better Used*, FIN. TIMES (Oct. 15, 2007), <https://www.ft.com/content/bceef3d4-7b2d-11dc-8c53-0000779fd2ac> (explaining that developing country victims are often unable to recover compensation).

markets.¹⁰ What has gone unnoticed is how these jurisdictions seek to protect themselves by resorting to domestic antitrust laws.

Today, that dynamic has shifted, with over 100 jurisdictions having a domestic competition law, making competition law one of the most widespread forms of economic regulation worldwide.¹¹ “Most of these new competition law jurisdictions are developing countries” with vastly different domestic markets, levels of openness, political economies, and institutional capacities.¹² As their markets become more global and their antitrust authorities increasingly eager to enforce their domestic antitrust rules, firms doing business internationally are forced to navigate an increasingly complex regulatory environment that fails to advance global welfare.¹³ This happens especially when competition law is regulated rather than liberalized. For example, South Korea can ban Microsoft from merging, tell the company how to design its product, or determine what kind of discounts Intel is permitted to offer to its customers.¹⁴ China can impose conditions on Coca-Cola’s offshore merger.¹⁵ India, departing from its previous practice of denying the extraterritorial application of antitrust laws, has also revised its antitrust laws to embrace the effects doctrine.¹⁶

Yet, no one quietly speaks of needing to increase international coordination. Instead, international cooperation today consists of bilateral

¹⁰ See, e.g., MARTIN WOLF, *WHY GLOBALIZATION WORKS* 220–21 (Yale Univ. Press 2005).

¹¹ See Anu Bradford & Adam S. Chilton, *Competition Law Around the World from 1889 to 2010: The Competition Law Index*, 14 J. COMPETITION L. & ECON. 393, 395 (2018).

¹² See Umut Aydın & Tim Büthe, *Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits*, 79 LAW & CONTEMP. PROBS. 1, 2 (2016).

¹³ See generally Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT’L L. 478, 504 (2000). See also Andrew T. Guzman, *International Competition Law*, in RESEARCH HANDBOOK IN INTERNATIONAL ECONOMIC LAW 418, 428–29 (Andrew T. Guzman & Alan O. Sykes eds., Edward Elgar, 2012) (2007); Guzman, *The Case for International Antitrust*, *supra* note 6, at 356–57.

¹⁴ See *infra* Part III, Section C.

¹⁵ See *infra* Part III, Section B.

¹⁶ See Rahul Singh, *Shifting Paradigms, Changing Contexts: Need for a New Competition Law in India*, 8 J. CORP. L. STUD. 143, 153 (2008) (noting that the 1969 Monopolies and Restrictive Trade Practices Act was interpreted not to have extraterritorial application but that the new Competition Act of 2002 will apply to any practices that have “an anticompetitive effect in India”); see also Aditya Bhattacharjya, *India’s New Competition Law: A Comparative Assessment*, 4 J. COMPETITIVE L. & ECON. 609, 624, 627 (2008).

cooperation agreements among key jurisdictions and pursuits of voluntary multilateral convergence.¹⁷

This Article examines two questions. First, why have attempts to generate formal international antitrust cooperation triggered little concern? Offered here are two interest-based explanations to answer this question. The first explanation is that the world's two most prominent competition regulators—the European Union and the United States—are locked in a race to export their competition laws and become the world's dominant antitrust model.¹⁸ Therefore, they have not viewed the current system of multijurisdictional antitrust enforcement as problematic. Even though both jurisdictions recognize that increased coordination would lead to greater efficiency, each prefers to internationalize their respective domestic antitrust regimes.¹⁹ The prevailing attitude among American and European policymakers appears to be that so long as the new users are willing to play by “our” legal rules, there is no need to be perturbed by the rise of their antitrust regimes and antitrust intervention.²⁰

The second explanation is that the status quo international legal rules still work to the advantage of major corporations in both developed and developing countries.²¹ While the proliferation of antitrust laws increases transaction costs, causes delays and raises the likelihood of conflicting decisions, the costs arising from these problems still pale compared to the benefits these corporations derive from the existing system.²² Therefore, the support of powerful corporations has been largely absent from the quest for an international antitrust regime. While consumers are hurt by the existing rules, their interests are too diffuse to carry much weight. In the absence of support from strong domestic interest groups, governments have not invested their political capital in negotiating such an agreement that would give them limited political rents.

¹⁷ See generally Anu Pilola, *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 STAN. J. INT'L L. 207, 207–08 (2003) (arguing any workable global governance regime must incorporate intergovernmental, transgovernmental, and transnational models to avoid the pitfalls of each).

¹⁸ See *id.* at 242.

¹⁹ See *id.*

²⁰ See *id.* at 243.

²¹ See *id.* at 245–46.

²² See *id.*

This Article then moves on to examine the second question: is this complacent attitude warranted, or should the developed world, and particularly the United States, be more alarmed? To answer this question, this Article examines the recent proliferation of antitrust laws around the world, focusing on the degree of inconsistency between these laws. This highlights two leading problems embedded in the current system of multijurisdictional antitrust enforcement. First, the proliferation of antitrust laws, whereby each nation enacts its own antitrust laws and develops its own enforcement structure, has increased antitrust protectionism. Antitrust protectionism once manifested itself when the United States and the European Union (EU) claimed the right to enjoin offshore mergers of firms that sell in their markets. This Article illustrates how new antitrust jurisdictions have already started to follow suit.

Second, simultaneous application of over 100 antitrust laws increases the risk of enforcement conflicts and is likely to lead to global overenforcement of antitrust laws. This suggests that the balance of benefits under the existing legal standard is only temporary. If a leading antitrust regulator (such as the United States) chooses to underregulate, a stricter antitrust jurisdiction could effectively deny the country of the beneficial procompetitive effects of some behaviors or transactions. In other words, stringent antitrust jurisdictions create externalities in depriving consumers of the lenient antitrust jurisdiction of the efficiencies recognized by their own antitrust authorities. At worst, firms might be dissuaded from engaging in procompetitive behaviors because such behaviors may create antitrust liability in one or several jurisdictions that take a particularly restrictive, and in some cases misguided, approach to the conduct in question.

This Article therefore sounds the alarm that the United States has gravely underestimated the challenge of decentralized antitrust regimes. Current policy is driven by the assumption that the problems of antitrust protectionism and global overregulation are a passing phenomenon destined to stabilize. This is incorrect. Both issues are likely to continue increasing because: (1) the number of countries using antitrust laws is increasing; (2) many new users incorporate broader noneconomic policy goals into the law; (3) the only possible race in antitrust enforcement is the race to be the strictest jurisdiction among the s seeking to assert their norms globally. The latter indicates that the U.S. model is challenging to become the strictest antitrust jurisdiction since at least EU regulators typically take a more aggressive stance than U.S. regulators reviewing the very conduct under their

respective competition laws.²³ Therefore, the balance of benefits in favor of the United States is only temporary. If the United States chooses to simply maintain the status quo, then, in the long run, that balance will turn in the European Union or other stricter regimes' favor.

This Article argues that the United States would do well to abandon its hands-off approach to international antitrust coordination. Instead, the United States should step out front as a leader, because of the need for a world view and of the fact that conflicts will always be resolved in favor of the nation that imposes the most aggressive remedies. If the goal is to preserve the stability of the existing system, the best way to achieve it is to establish channels and multi-jurisdiction collaborations that would have the authority to scrutinize mega-mergers and deter mega-firms from abusing their dominant position.

Before proceeding, the reader should note that this Article examines the issues of decentralized antitrust enforcement from a U.S. perspective. Of course, these issues carry repercussions that extend beyond the perspective of the United States. As will be explained, the current system consisting of multiple, overlapping, and often inconsistent antitrust laws creates several externalities that fail to advance global welfare. While believing that the adoption of antitrust rules in a larger number of nations generates benefits and that that convergence of law will occur only to a point, this Article embraces but argues that the recent proliferation of antitrust laws is likely to increase antitrust protectionism and overenforcement.

Why then should the focus be on the United States instead of a global perspective? The reason is that the United States and the European Union have disagreements on the content and institutional form of such an international antitrust collaboration.²⁴ From a power-politics perspective, any change to the international law governing antitrust requires the consent of the Great Powers.²⁵ The Great Power most resistant to upgrading international

²³ See Anu Bradford, *The Brussels Effect*, 107 Nw. U. L. Rev. 1, 10–11 (2012) (“Only strict standards regulating targets that cannot move ensure that a country’s regulations will override alternative regulatory standards and make other jurisdictions’ regulatory authority obsolete without being punished by markets or constrained by other jurisdictions’ regulatory responses.”).

²⁴ See *infra* Part II, Section B.1.

²⁵ See Anu Bradford, *When the WTO Works, and How It Fails*, 51 VA. J. INT’L L. 1, 5 (2010) (“‘Great Power’ refers to a state [capable of] exert[ing] its influence—military, economic, political, or cultural—on a global scale.”).

antitrust cooperation is the United States. At present, the United States relies primarily on its persuasive powers rather than formal treaties in exporting its model of competition.²⁶ In contrast, the European Union initially proposed the WTO antitrust rules and has remained the antitrust agreement's strongest advocate.²⁷ In its trade agreements, the European Union explicitly conditions access to its markets on adopting a competition law, exporting its law in the process.²⁸ Achieving meaningful cooperation upgrades—and corresponding gains in global welfare—therefore requires convincing the United States that reform is in its interests. This Article represents an effort to highlight why the United States must explore how it can work with new users to advance a shared vision. In other words, while one may be sympathetic to the argument that the United States gets little economic benefit from international antitrust cooperation and hence has no incentive to embrace such a model, one must also recognize the limited saliency of this argument in a comparative and international context. Therefore, this Article attempts to recast the argument by focusing instead on the interests of the parties that currently resist more ambitious international antitrust cooperation.

This Article is organized as follows: Part I provides an overview of international spillovers created by anticompetitive practices or competition laws and discusses the extent to which existing WTO mechanisms can be used to address antitrust spillovers. Part II examines why attempts to generate formal international antitrust cooperation have been unsuccessful thus far. Further, Part II offers an interest-based explanation, demonstrating that the balance of benefits under the existing legal standard continues to favor U.S. multinationals. However, there is no guarantee that this positive balance will persist into the future. Part III argues that the prevailing belief in the United States—that decentralized antitrust enforcement is not a long-term threat—is incorrect. The variance between traditional and new uses is examined in three aspects of competition law: (1) the goals countries stipulate for their competition laws; (2) the various defenses and exemptions the laws provide; and (3) the various definition of important but elastic concepts. Part III suggests that contrary to the prevailing view, antitrust protectionism and

²⁶ See *infra* Part II, Section B.1.

²⁷ See generally *Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules*, COM (1995) 359 final (July 12, 1995) [hereinafter VAN MIERT REPORT]; *Towards an International Framework of Competition Rules*, COM (1996) 284 final (June 18, 1996).

²⁸ See *infra* Section II, Part B.1.

overregulation are likely to continue to increase in the years to come. Part IV considers the policy implications of these arguments and offers a series of reform proposals.

In short, this Article highlights how the recent proliferation of antitrust laws around the world poses a challenge to the balance of benefits under existing international antitrust laws—a challenge that has been largely overlooked. This challenge is not direct. Interestingly, it takes the form of embracing, rather than resisting, the legal rules that the United States, European Union, and other traditional users have established to benefit themselves. But unless international antitrust cooperation is enhanced to take account of the impact of these long-term threats, the stability of the current system will be placed at increased risk.

I. THE ORIGIN AND NATURE OF THE CONFLICTS

Traditionally, trade law has involved public restraints of trade; antitrust or competition law has concerned private restraints. Trade law, by definition, is internationally oriented, whereas antitrust law has national roots. At one time, competition law problems were primarily contained within a single nation, justifying the rubric that the law stops at the nation's shores. Over time, national antitrust policies' enforcement or non-enforcement may give rise to international pecuniary externalities. Such spillovers may arise for a few reasons, but terms-of-trade effects are frequently analyzed in the literature. These may be contemporary, reflecting cartels or monopolization, or, in the case of mergers and acquisitions, they may be prospective, reflecting potential abuse of dominance. In Part I, this Article provides a historical overview showing how international spillovers have emerged under international institutional settings and examines the capacity of the WTO to deal with these antitrust-related spillovers.

A. International Competition Policy Spillovers

1. (Export) Cartels with International Effects

Firms may collude to raise prices in export markets through an illegal international cartel. In the 1990s, the United States investigated a number of

international cartels in industries such as vitamins, steel, and animal feeds.²⁹ These cartels produce sophisticated manufactured goods or services; and their members are large multinational corporations in industrialized countries.³⁰ While some of these cartels lasted only a few months, several lasted many years and therefore may have had an impact not just on short-term transfers from consumers to producers, but also on the structure of the industry.³¹ There was also a growing recognition that the illegal cartels that were actually detected and prosecuted are merely the tip of a large iceberg, as many developing countries lack the capacity to break international cartels.³² Margaret Levenstein and Valerie Suslow have studied the effect of international cartels on developing countries.³³ They found that “in 1997, developing countries imported \$51.1 billion in goods from industries that saw international cartel activity during the 1990s.”³⁴ This “represent[ed] 3.7 percent of all imports to developing countries in 1997 and .79 percent of their combined GDP.”³⁵

Similar effects may result from export cartels—agreements between competitors that are designed to charge a specified export price or to divide export markets among them.³⁶ Export exemptions have been criticized for decades, as there is a growing “consensus both in favor of freer international trade and in opposition to price fixing and market division agreements.”³⁷ The Organisation for Economic Co-operation and Development (OECD) has voiced similar criticism, recommending a “worldwide repeal of cartel exemption coupled with an efficiency defense.”³⁸ “Whether in response to these criticisms or broader economic and political forces, . . . many countries

²⁹ See INT’L COMPETITION POL’Y ADVISORY COMM., FINAL REPORT 163 (2000), <https://www.justice.gov/atr/icpac> [hereinafter ICPAC REPORT].

³⁰ See generally Levenstein & Suslow, *supra* note 2 (discussing and quantitatively analyzing the cartels, which have been detected and presented during the 1990s).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 804.

³⁵ *Id.* at 816.

³⁶ See Levenstein & Suslow, *supra* note 2, at 799.

³⁷ *Id.* at 786 (“[Export exemptions from antitrust laws] authorize firms to collaborate to engage in anticompetitive behavior in foreign markets, at the expense of other countries’ consumers and producers, in a manner that would be unlawful if undertaken at home.”).

³⁸ JANUSZ A. ORDOVER, OBSTACLES TO TRADE AND COMPETITION 11 (Org. for Econ. Coop. and Dev., 1993).

have eliminated or limited explicit antitrust exemptions for exporters and the associated notification requirements.”³⁹ In contrast, some countries have defended the practice of exempting export cartels, claiming that their primary purpose is to create export opportunities for small- and medium-sized companies that do not have the resources to engage in export activity alone.⁴⁰ Hence, it is argued that export cartels generate trade opportunities and enhance competition on markets where exporters simply do not compete.⁴¹ Margaret Levenstein and Valerie Suslow have contributed significantly to understanding the prevalence and harmfulness of export cartels by examining exemptions “in fifty-five countries, including . . . all OECD countries, EU countries, and selected developing countries.”⁴² Of the fifty-five countries surveyed, seventeen countries (including the United States, Canada, and Australia) were found to have explicit exemptions, thirty-four countries (including the European Union and almost all EU Member States) had implicit exemptions, and four countries (including Russia) had no statutory exemptions.⁴³

In principle, national competition authorities can enforce domestic antitrust laws against these cartels that have effects within their territory.⁴⁴ However, many developing countries have limited capacity to do so.⁴⁵ As a result, these countries often rely on other aggressive jurisdictions with the resources to pursue anticompetitive cross-border conduct by multinationals, hoping to free-ride on their investigations.⁴⁶ However, if anticompetitive

³⁹ Levenstein & Suslow, *supra* note 2, at 787.

⁴⁰ See Working Group on the Interaction Between Trade and Competition Policy, Report on the Meeting of 20–21 Feb. 2003, WTO Doc. WT/WGTCP/M/21, 17 (May 26, 2003).

⁴¹ See *id.* at 30.

⁴² Levenstein & Suslow, *supra* note 2, at 800.

⁴³ *Id.* at 806.

⁴⁴ For example, Section 1 of the Sherman Act prohibits “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.” 15 U.S.C. § 1. This broad statutory language has enabled U.S. agencies and courts to apply the Sherman Act extraterritorially, including to cartels organized outside the United States. See Andrew T. Guzman, *Is International Antitrust Possible*, 73 N.Y.U. L. REV. 1501, 1506–08 (1998); see also generally John A. Trenor, *Jurisdiction and the Extraterritorial Application of Antitrust Laws after Hartford Fire*, 62 U. CHI. L. REV. 1583 (1995).

⁴⁵ See Levenstein & Suslow, *supra* note 2, at 802.

⁴⁶ An example comes from the graphite electrodes case. A group of non-U.S. steel producers has filed dozens of civil lawsuits in Canada and the United States after the GE firms pled guilty to the U.S. charges. See *id.* at 826, 838.

effects are not felt in jurisdictions with enforcement capacity, the risk of weak enforcement remains. The United States and other developed countries will not spend resources pursuing a cartel with little influence within their domestic jurisdictions.⁴⁷ Likewise, leaving the prosecution of export cartels to importing countries might still result in nonenforcement if the importing country lacks the resources to take legal action against them.⁴⁸

2. Merger Approval Spillovers

Another term of trade dimension of national antitrust enforcement are merger approval requirements. The issue here is the nationalistic focus that is taken by reviewing competition authorities, which can lead to global welfare and efficiency-improving mergers being rejected by authorities that conclude the impact on their jurisdiction is negative.⁴⁹ The controversial merger between Boeing and McDonnell Douglas in 1997 is an example.⁵⁰ While U.S. antitrust authorities cleared the merger on “pro-competitive” grounds, EU authorities threatened to block the transaction.⁵¹ The conflict escalated as the two sides accused each other of using antitrust laws to advance their respective industrial policy goals at the expense of consumer welfare.⁵² The Europeans saw the U.S. clearance decision “as an attempt to

⁴⁷ See Mehta, *supra* note 9.

⁴⁸ See Levenstein & Suslow, *supra* note 2, at 796 (“At a 2002 meeting, Thailand argued that most export cartels damage the economies of developing countries and should be illegal; but developing countries should be exempt since small exporters might need to join forces to increase bargaining power.”). See also 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* 82 (Simon J. Evenett & Swiss State Secretariat of Economic Affairs eds., 2003). One year later, China stated it “shared the view that had been expressed by Thailand that the future multilateral framework on competition policy should incorporate restrictions on the maintenance of export cartels by developed country Members.” See Working Group on the Interaction Between Trade and Competition Policy, Report on the Meeting of 26–27 May 2003, WTO Doc. WT/WGTCP/M/22, 11 (July 9, 2003).

⁴⁹ See Anu Bradford, *Antitrust Law in Global Markets*, in *RESEARCH HANDBOOK ON THE ECONOMICS OF ANTITRUST LAW* 306–08 (Einer Elhauge ed., 2012).

⁵⁰ See generally Commission Decision 97/816 of 30 July 1997, Case No. IV/M.877-Boeing/McDonnell-Douglas, 1997 O.J. (L 336) 16; Robert Pitofsky, Former Chairman, Roscoe B. Starek, III, Former Comm’r, & Christine A. Varney, Former Comm’r, Fed. Trade Comm’n, Statement in the Matter of the Boeing Company/McDonnell Douglas Corporation (July 1, 1997).

⁵¹ *Id.*

⁵² *Id.*

[establish] a U.S.-based [global] monopoly for large civil jet aircraft.”⁵³ The Americans, in contrast, saw the EU’s opposition to the merger as an effort “to protect [European-owned] Airbus [from its] more efficient foreign competitor.”⁵⁴

The European Commission’s decision to block the proposed acquisition in 2001 after U.S. antitrust authorities approved the acquisition of two U.S.-based companies, Honeywell and General Electric, triggered even more criticism.⁵⁵ The U.S. Antitrust Division has expressed its disagreement with the EU’s decision, both in private discussions with its counterparts at the European Commission, and in public fora.⁵⁶ Former U.S. Secretary of the Treasury, Paul O’Neill, described “the decision [as being] ‘off the wall’ and complained that there was no effective judicial recourse for decisions by ‘autocratic’ European antitrust enforcers.”⁵⁷

International spillovers related to mergers have also raised significant concerns in developing countries.⁵⁸ First, there are apparent problems with the “increased market power of large multinational corporations and their potential abuse of dominance.”⁵⁹ “Developing countries are [directly] affected by the monopoly power effects of international mergers when a foreign multinational acquires a domestic firm.”⁶⁰ “However, they are also affected indirectly even when mergers occur outside their jurisdictions.”⁶¹

⁵³ Wolfgang Kerber & Oliver Budzinski, *Competition of Competition Laws: Mission Impossible?*, in *COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE COMPETITION OF SYSTEMS* 31, 42 (Richard A. Epstein & Michael Greve eds., 2004).

⁵⁴ *Id.*

⁵⁵ See Press Release, U.S. Dep’t. of Justice, Justice Department Requires Divestitures in Merger Between General Electric and Honeywell (May 2, 2001), https://www.justice.gov/archive/atr/public/press_releases/2001/8140.htm; see also generally Commission Decision 2004/134 of 3 July 2001, Case No. COMP/M.2220-General Electric/Honeywell, 2004 O.J. (L048) 1.

⁵⁶ See U.S. Dep’t of Just., *GE-Honeywell: The U.S. Decision*, JUST. NEWS (Nov. 29, 2001), <https://www.justice.gov/atr/speech/ge-honeywell-us-decision>.

⁵⁷ See John R. Wilke, *U.S. Antitrust Chief Chides EU For Rejecting Merger Proposal*, WALL ST. J. (July 5, 2001, 12:01 AM), <https://www.wsj.com/articles/SB99428227597056929> (also 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.’”).

⁵⁸ See Ross C. Singleton, *Competition Policy for Developing Countries: A Long-Run, Entry-Based Approach*, 15 CONTEMP. ECON. POL’Y 1, 5 (1997); Singh & Dhumale, *supra* note 2, at 124–28.

⁵⁹ Singh, *supra* note 3, at 12.

⁶⁰ *Id.*

⁶¹ *Id.*

The “reduc[e]d . . . contestability of markets . . . is especially harmful to the interests of late industrializing countries whose firms are building up their capabilities to compete in international markets.”⁶² In this area, sound regulation requires coordination. Both the U.S. and the EU claim the right to prohibit offshore mergers of firms selling in their markets. Other jurisdictions may follow suit. As will be discussed later, decision-making under existing vague and subjective standards that plague unilateral conduct enforcement in the United States and the European Union, poses particular risks for new users struggling with corruption and lack of independence. The amorphous concepts inherent in merger review and monopoly analysis also leave too much room for error and arbitrary decisions.

3. Market Access Arguments

Additionally, the European Union, United States, and other OECD members are particularly concerned about market access restrictions.⁶³ The claim is that national enforcement or nonenforcement of antitrust laws could and did give rise to pecuniary externalities by impeding effective market entry and competition by foreign suppliers.⁶⁴ That is, private business practices might nullify the expected benefits of negotiated trade liberalization commitments.⁶⁵

The trade conflict between the United States and Japan is a noteworthy example. In the 1970s, the Japanese economy was hit by the oil shock and the Nixon shock.⁶⁶ Japan was very much like a developing country with a low level of industrialization and economic development.⁶⁷ The prospects for

⁶² *Id.*

⁶³ See Hoekman & Saggi, *supra* note 1, at 444–45 (reporting that the European Union, the United States, and other OECD members wanted the WTO to address antitrust because they did not want national idiosyncrasies to impede market access).

⁶⁴ *See id.*

⁶⁵ *See id.*

⁶⁶ See Akinori Uesugi, *Japan’s Cartel System and Its Impact on International Trade*, 27 HARV. INT’L L.J. 389, 389 (1986) (discussing “[t]he oil shocks . . . [that] drastically changed the relative competitiveness of different sectors of Japanese industry” and that “Japan’s manufacturing industries, particularly automobiles and electronics, remained highly competitive while its basic industries suffered from increased import competition and excess capacity”).

⁶⁷ *See id.*

industrialization at the time were considered completely precarious.⁶⁸ Given this, the government instituted a number of business practices—such as the *Keiretsu* and government interventions, in the form of industrial policy, spread across economic activities—that made the entry of foreign firms and imports difficult.⁶⁹ The government also saw cartels as an effective way to eliminate excess capacity by allowing troubled companies to solve mutual problems.⁷⁰ The U.S. government and commentators accused Japan of being excessively tolerant of arrangements that deprived outside companies of economic opportunities.⁷¹ In contrast, the Japanese government disagreed with that assessment and continues to permit such associations.⁷² Because of different approaches to antitrust laws, agencies on both sides were reluctant to help each other prosecute certain types of conduct.⁷³

In addition to Japan's market access issues, many East Asian countries broadly follow Japan's economic development strategy.⁷⁴ Rather than maximizing competition in their product, capital, or labor markets, these countries strived to achieve an optimal degree of cooperation and competition.⁷⁵ As in Japan, between 1950–1973, the Republic of Korea implemented selective import controls; fostered close ties between government, business, and finance; and discouraged foreign investment, while importing technology from abroad by other means.⁷⁶ This may be a

⁶⁸ *See id.*

⁶⁹ *See generally* DANIEL I. OKIMOTO, *BETWEEN THE MITI AND THE MARKET* 38–39 (Stan. Univ. Press 1989).

⁷⁰ *See* Uesugi, *supra* note 66, at 390 (“Since 1953 Japan has had a system of depression and rationalization cartel systems as important policy tools for adjustment.”).

⁷¹ *See* Robert L. Cutts, *Capitalism in Japan: Cartels and Keiretsu*, *HARV. BUS. REV.*, July–Aug. 1992, at 48. *See also* Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 *AM. J. INT’L L.* 1, 10–12 (1997) (noting that Japan and the United States have undertaken a series of negotiations known as the Structural Impediments Initiative, which has addressed the issue of Japanese antitrust enforcement).

⁷² *See* Fox, *supra* note 71, at 10–12.

⁷³ *See id.*

⁷⁴ *See* Singh & Dhumale, *supra* note 2, at 134–35.

⁷⁵ *See generally* THE WORLD BANK, *THE EAST ASIAN MIRACLE: ECONOMIC GROWTH AND PUBLIC POLICY* (Oxford Univ. Press 1993).

⁷⁶ There is a vast literature on this subject. *See, e.g.*, ALICE H. AMSDEN, *ASIA’S NEXT GIANT: SOUTH KOREA AND LATE INDUSTRIALIZATION* (Oxford Univ. Press 1989); DANI RODRIK, *KING KONG MEETS GODZILLA: THE WORLD BANK AND THE EAST ASIAN MIRACLE* (Ctr. for Econ. Pol’y. Rsch. Press 1994); Ajit Singh, *Corporate Financial Patterns in Industrializing Economies: A Comparative International Study* (Int’l Fin. Corp., Dep’t of Econ. Working Paper No. 2, 1995); ROBERT WADE, *GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION* 3–7 (Princeton Univ. Press 2003). *See generally* Ha-Joon-Chang, *The Political*

plausible model in practice, but in theory it did not meet the Washington Consensus “that the fastest growing countries were those with the most rapid growth of Total Factor Productivity (TFP).”⁷⁷ The latter, in contrast, relies “on domestic and foreign competition achieved through free markets.”⁷⁸ This could be a source of international tension, as exemplified by the recent trade friction between the United States and China.⁷⁹ “The experience of China, which for the last two decades has had one of the fastest growth rates in the world, is also consistent with this East Asian story.”⁸⁰ That is, “a policy of promoting dynamic efficiency . . . through an institutional structure that combines both co-operation and competition between firms.”⁸¹

The above review suggests two conclusions. First, antitrust enforcement is a complex endeavor requiring substantial technical expertise inputs. Second, a prominent distributional conflict exists between developed and developing countries. The latter helps explain why WTO members have failed to reach an agreement to launch negotiations for a multilateral framework to enhance the contribution of competition policy to international trade.

B. Existing WTO Disciplines and Agreements

An important question is how the WTO allows members to deal with these competition law-related terms-of-trade spillovers. In general, WTO members are free to adopt any competition law they wish—the only restriction that is imposed is nondiscrimination.⁸² National treatment covers national competition laws as long as their enforcement is a “requirement

Economy of Industrial Policy in Korea, CAMBRIDGE J. ECONS. 131 (1996) (arguing the Republic of Korea chaebol displays highly competitive behavior, and in the areas where the Republic of Korea has been internationally successful, these companies have been subject to intense national and international competition).

⁷⁷ Singh, *supra* note 3, at 7–8.

⁷⁸ *Id.*

⁷⁹ See Mark Wu, *The “China, Inc.” Challenge to Global Trade Governance*, 57 HARV. INT’L L.J. 261, 270–71, 313 (2016) (discussing China’s SOEs are controlled by the SASAC, developing a different model for state economic oversight and deployment of state assets).

⁸⁰ Singh, *supra* note 3, at 8.

⁸¹ *Id.* at 18.

⁸² See General Agreement on Tariffs and Trade, art. III, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

affecting” trade.⁸³ The 1980s *Alcoholic Beverages* cases made it clear that WTO members are required to provide foreign products with the same opportunities for access to distribution channels as domestic products.⁸⁴ The 1997 panel report in *Kodak-Fuji Firm* made it clear that the national treatment obligation covers competition laws, explicitly by subjecting Japanese competition law to the national treatment obligation and implicitly by accepting that the term “affecting” extends to national competition laws.⁸⁵

While the practical implication suggests that national competition laws should treat foreign and domestic products equally, the threshold issue is whether there is a government measure. To illustrate this, suppose a company incorporated under U.S. law and another incorporated under EU law both abuse their dominant position in the European Union but produce different goods. If the EU competition authority intervenes only against the U.S. firm, it does not violate national treatment under the General Agreement on Tariffs and Trade (GATT).⁸⁶ The purpose of Article III:4 of GATT is whether a government measure treats like foreign products less favorable than that accorded to like national products.⁸⁷ Moreover, the terms “laws,” “regulations,” and “requirements” in Article III:4 indicate some form of positive action by governments.⁸⁸ Mere tolerance of restrictive business practices is not enough.

With respect to international cartels, the WTO may relate to this through GATT Article XI, which states: “no prohibitions or restrictions . . . shall be instituted or maintained . . . on the exportation or sale for export. . . .”⁸⁹ As with national treatment, the complaining party is not allowed to challenge

⁸³ *Id.*

⁸⁴ See generally Panel Report, *Canada—Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, WTO Doc. DS21/R (adopted Feb. 18, 1992); Panel Report, *United States—Measures Affecting Alcoholic and Malt Beverages*, WTO Doc. DS23/R (adopted on June 19, 1992).

⁸⁵ See generally Panel Report, *Japan—Measures Affecting Consumer Photographic Film and Paper*, WTO Doc. WT/DS44/R (Mar. 31, 1998) [hereinafter *Japan—Film and Paper*].

⁸⁶ See GATT, *supra* note 82.

⁸⁷ GATT, *supra* note 82 (with art. III:4 of GATT providing in relevant part: “The products of the territory of any [Member] imported into the territory of another [Member] shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.”).

⁸⁸ *Id.*

⁸⁹ GATT, *supra* note 82, art. XI.

private anticompetitive practices under the WTO dispute settlement.⁹⁰ In this regard, the panel in *Japan—Semiconductor* argued that a government measure would exist if an anticompetitive activity by a private entity depends upon a governmental decision, and the government provided an incentive for a private entity to carry out such activities.⁹¹ Unfortunately, the precise degree of government involvement was not specified.⁹² It is therefore questionable whether merely tolerance of the cartel is sufficient.

Non-violation complaints could be a valid channel for attacking restrictive business practices.⁹³ In order for a plaintiff to prevail on a non-violation claim, they must satisfy three elements: (1) the application of the measure is attributable to a WTO member,⁹⁴ (2) “the existence of a benefit accruing . . . under the relevant agreement,”⁹⁵ and (3) “the benefit accruing to the WTO Member (e.g., improved market access from tariff concessions) is nullified or impaired as the result of the application of a measure by another WTO Member.”⁹⁶ The *Kodak-Fuji Film* case was the first example in which this approach was used.⁹⁷ Again, the term “measure” requires some form of

⁹⁰ *Id.*

⁹¹ See Report of the Panel, *Japan—Trade in Semi-Conductors*, L/6309–35S/116 (May 4, 1988) GATT B.I.S.D. (35th Supp.), at 31, ¶ 117 (1989).

⁹² In *Japan—Film and Paper*, the panel considered that the mere “fact that an action is taken by a private party does not [necessarily] rule out the possibility” that there exists a governmental measure for purposes of Article XXIII:1(b) if there is a sufficient degree of governmental intervention. *Japan—Film and Paper*, *supra* note 85, ¶¶ 10.52–10.56. Although the panel tried to envision some objective criteria for this determination, it ultimately held that it was “difficult to establish bright-line rules in this regard,” and suggested examination “on a case-by-case basis.” See *id.* ¶ 10.56. The panel’s application of this case-by-case approach resulted in the failure of the United States to demonstrate the necessary existence of a government measure in many of the eighteen contested measures. See *id.* ¶¶ 10.122, 10.136, 10.148, 10.194 (finding that several U.S. claims did not constitute governmental “measures”).

⁹³ GATT, *supra* note 82, Article XXIII.1(b) states as follows: “1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of . . . (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, . . .” This action is called “non-violation complaint,” since it does not require proving a violation of certain obligations under the GATT. See generally JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS, CASES, MATERIALS, AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS (West Grp., 3d ed. 1995) (explaining the meaning of non-violation complaints).

⁹⁴ See *Japan—Film and Paper*, *supra* note 85, ¶ 10.42.

⁹⁵ *Id.* ¶ 10.61.

⁹⁶ See *id.* ¶ 10.82.

⁹⁷ See *id.* ¶ 10.113.

positive action by the government.⁹⁸ It is also worth noting that the remedies for a non-violation complaint differ from those for violation complaints. Even if the complaining party prevails on a non-violation claim, there would be no obligation for the defending party to withdraw the relevant measures. This means that non-violation complaints have inherent limitations in addressing competition concerns. Instead, the WTO adjudicating body would recommend that the Member concerned “make a mutually satisfactory adjustment.”⁹⁹

II. TOWARDS AN INTERNATIONAL ANTITRUST REGIME?

Part II of this Article presents an overview of the current of antitrust cooperation and explains why, despite the well-accepted inefficiencies embedded in the current system, no global antitrust regime exists. Offered are two explanations for this complacent attitude. First, powerful antitrust regulators—the European Union and the United States—have adopted different approaches to regulating competition, making them race to export their regulatory models. Second, powerful interest groups have been largely absent from the quest for an international antitrust regime. Neither multinational corporations in developed countries nor national corporations in developing countries have reason to view the recent proliferation of antitrust laws around the world as a threat. Instead, the balance of benefits under decentralized antitrust regimes continues to favor them. This Part will expound briefly on the first explanation before focusing on the second.

A. Current Status of International Antitrust Cooperation

The terms-of-trade effects of national antitrust laws offer a compelling rationale for including competition law disciplines in the global trade agenda. At the request of the European Union, competition policy was put on the agenda at the Singapore Ministerial meeting in 1996 to review the

⁹⁸ See *id.* ¶ 10.42.

⁹⁹ WTO, *WTO Analytical Index*, WTO Doc. DSU—art. 26(1)(b) (Dec. 2022), https://www.wto.org/english/res_e/publications_e/ai17_e/dsu_art26_jur.pdf.

relationship between trade and investment.¹⁰⁰ In 1997, a Working Group was established in the WTO to pay particular attention to the development dimension of competition policy.¹⁰¹ The 2001 WTO Ministerial Meeting in Doha produced an agreement that negotiations would take place after the fifth session of the Ministerial Conference, based on a decision to be taken, by explicit consensus, at that session on modalities of negotiations.¹⁰² At the 2003 Cancun Ministerial Meeting, however, resistance from developing countries stalled the negotiations.¹⁰³ The proponents of such negotiations—specifically, the European Community (EC) and the so-called Like-Minded Countries—failed to persuade developing countries that a multilateral framework agreement on the interaction between trade and competition policy is beneficial to their national interests.¹⁰⁴ In addition, the United States was passive in this matter, by taking a pessimistic stance on a further move towards a multilateral framework agreement on the interaction between trade and competition policy.¹⁰⁵ Efforts by the WTO General Council to refresh antitrust negotiations also failed in 2004, and antitrust was officially removed from the Doha agenda at that time.¹⁰⁶ Following this, any further efforts to adopt antitrust rules within the WTO have been abandoned.

However, the need for coordination remained, and the international community has periodically tried to revive antitrust negotiations in some other form.

¹⁰⁰ See generally World Trade Organization, Ministerial Declaration of 18 December 1996, WTO Doc. WT/MIN(96)/DEC.

¹⁰¹ See *id.* at 7.

¹⁰² See World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 5, 41 ILM 746 (2002) (being on a conditional negotiation track made it subject to an explicit decision on the scope and timeframe of negotiations at the 2003 Cancun Ministerial Conference).

¹⁰³ World Trade Organization, Ministerial Declaration of 14 September 2003, WTO Doc. WT/MIN(03)/DEC.

¹⁰⁴ See Inst. for Agric. & Trade Pol’y, *Cancun Demise Over Singapore Issues Allows U.S. to Avoid Blame*, INSIDE U.S. TRADE (Sept. 15, 2003), <https://www.iatp.org/news/cancun-demise-over-singapore-issues-allows-us-to-avoid-blame>.

¹⁰⁵ See generally Klein, *supra* note 4.

¹⁰⁶ See World Trade Organization General Council, *supra* note 3, at 3.

1. *Bilateralism*

The United States, for example, appears to have advocated for networks of bilateral cooperation mechanisms to create a “fast, flexible, and effective” network among antitrust authorities.¹⁰⁷ A key reason for the U.S. position is that a direct connection between antitrust authorities can enhance s’ ability to cooperate in antitrust without the need for “centralized bureaucracy and burdensome procedures of formal international institutions.”¹⁰⁸

A bilateral agreement between the European Union and the United States was signed in 1991 (1991 Agreement).¹⁰⁹ It provides for a “positive comity” procedure by virtue of which either party can invite the other party to take, based on the latter’s legislation, appropriate enforcement activities regarding anticompetitive behavior implemented within its territory and which affects the requesting party’s important interests.¹¹⁰ The requested party is required to “consider” the matter and to inform the requesting party of its decision and the relevant investigation results.¹¹¹ The use of this process does not preclude the requesting party from taking its own enforcement action.¹¹²

In June 1998, the United States entered into a supplemental agreement to the above 1991 Agreement.¹¹³

¹⁰⁷ See Bradford, *supra* note 23, at 213.

¹⁰⁸ See *id.* at 238. In general, there are several reasons why countries enter into bilateral cooperation arrangements: they 1) aim to “avoid problems arising from the exercise of extraterritorial jurisdiction”; 2) “facilitate[e] the investigation and enforcement of international antitrust cases by providing access to essential evidence . . . [that] is often located beyond the reach of the national antitrust enforcement officials and can only be obtained with the help of foreign authorities”; 3) “can prevent conflicts in drawing conclusions and assessing remedies”; and 4) help avoid “unnecessary duplication of work, . . . [thereby] saving transaction costs.” *Id.* at 239.

¹⁰⁹ See *generally* Agreement between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, E.C.-U.S., Sept. 23, 1991, 30 I.L.M. 1491 [hereinafter Competition Laws Agreement]; Council and Commission Decision, 98/386/EC, 1998 O.J. (L 173) 26 (EC).

¹¹⁰ The term positive comity is not used in the agreement, the concept is contained in Article V. See Competition Laws Agreement, *supra* note 109, art. V.

¹¹¹ *Id.* at art. V(3).

¹¹² *Id.* at art. V(4).

¹¹³ See *generally* Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, E.C.-U.S., June 4, 1998, <https://www.justice.gov/atr/agreement-between-united-states-and-european-communities-application-positive-comity-principles>.

The core substance of this side agreement is that, under certain conditions, a requesting party would refrain from enforcing its own competition laws and would agree to request the requested party to apply its domestic laws. In such instances, the requesting party agrees not to apply its domestic laws extraterritorially—if it wishes to do so, it is required to explain the reasons for such action.¹¹⁴ The requested party must thoroughly investigate the matter and report the results to the other party, and also comply with the other party's request to the extent reasonable.¹¹⁵

Between 1991 and 1999, a total of 473 cases of cooperation concerned transatlantic mergers.¹¹⁶ Strategic alliances and monopolization resulted in cooperation in 216 cases.¹¹⁷ The European Commission notified the United States in 358 cases, while U.S. notifications were almost as frequent, at 331.¹¹⁸ These figures suggest that the cooperation is based on well-balanced mutual notification practice.¹¹⁹ Most prominently, such cooperation has facilitated antitrust enforcement in mutual interest cases and has often led to adopting a common approach, such as when the EU and U.S. antitrust authorities jointly investigated the Microsoft case in 1994.¹²⁰ Microsoft consented to an exchange of confidential information, thus enabling the two competition authorities to jointly negotiate a settlement with Microsoft.¹²¹

As of this writing, the United States has bilateral agreements with Australia, Brazil, Canada, Chile, China, Colombia, the European Union, Germany, India, Israel, Japan, Mexico, Peru, Republic of Korea, and Russia.¹²² Bilateral agreements among similar antitrust regimes are characterized by genuine regulatory cooperation with sincere efforts to address common goals and shared concerns. Day-to-day interactions between the authorities have led to increasingly cooperative attitudes among

¹¹⁴ Seung Wha Chang, *Interaction Between Trade and Competition: Why a Multilateral Approach for the United States?*, 14 DUKE J. COMP. & INT'L L. 1, 31 (2004).

¹¹⁵ *Id.*

¹¹⁶ Youri Devuyt, *Transatlantic Competition Relations*, in TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY 127, 128 (Mark A. Pollack & Gregory C. Shaffer eds., 2001).

¹¹⁷ *Id.* at 138.

¹¹⁸ *Id.*

¹¹⁹ *See id.*

¹²⁰ *See* Anne K. Bingaman, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Speech Before the American Law Institute 72nd Annual Meeting, 1, 8 (May 16, 1996) (discussing cooperation by enforcement in international antitrust matters).

¹²¹ *See id.*

¹²² *See Antitrust Cooperation Agreements*, U.S. DEP'T OF JUST. (2021), <https://www.justice.gov/atr/antitrust-cooperation-agreements>.

antitrust enforcers in developed countries. Instead of being guardians of the interests of their national industries, the antitrust enforcers have come to redefine their roles as members of a transatlantic antitrust community who share common concerns with their professional counterparts.

In sharp contrast, “the United States rarely engages in bilateral cooperation on positive comity with developing countries or emerging market economies that are adopting antitrust regimes.”¹²³ There are several reasons for this. For instance, “[p]ositive comity is generally only applicable in the cases where there is a violation of the antitrust law of the requested party.”¹²⁴ “Thus, if the anticompetitive activity at issue was exempt from the laws of the requested party, or if it fell under exceptions under such laws, positive comity would fail.”¹²⁵ As discussed, the current competition policy in the United States is unsuitable for many developing countries.¹²⁶ A good model for many emerging countries with effective governance structures is the Japanese competition policy during 1950–1973, which used competition and cooperation to promote rapid industrialization.¹²⁷ This considerable variance among competition policies indicates that a certain practice may not be in violation of its own antitrust law.¹²⁸ In contrast, the requesting party may view such a practice as being anticompetitive, and thus it might once again have incentive to apply its own laws extraterritorially.¹²⁹

Another reason is that positive comity “requires a certain degree of trust and confidence by the referring agency that the referred jurisdiction has and

¹²³ See Weimin Shen, *Assessing the Strategic Situation Underlying International Antitrust Cooperation*, 36 EMORY INT’L L. REV. 484, 530 (2022) (discussing when domestic competition law and policy can address trade concerns arising from competition-related matters and when it fails to do so).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *See id.* at 530–31.

¹²⁷ *See id.* at 495.

¹²⁸ *See* Chang, *supra* note 114, at 33 (“In the eyes of the United States, for example, positive comity could overcome the theoretical and practical limitations of extraterritorial application of its antitrust law in export-restraint cases. . . . [However,] export restraints are often subject to the rule of reason. Therefore, even if such practices produced trade-restrictive effects, the importing country’s antitrust authority may still determine that the rule of reason justifies non-regulation of such practices on the basis of the finding that procompetitive effects outweigh anticompetitive effects.”).

¹²⁹ *See id.*

will undertake a serious investigation.”¹³⁰ In this regard, the referral process would “introduce some accountability into the investigation.”¹³¹ However, it will not change the fundamental nature of the agency that is the recipient of the referral.¹³² “Hence, if the [antitrust agency] that receives the referral is . . . weak . . . [without] compulsory powers, [law enforcement] tradition, . . . independent authority, etc., [it] will not” gain power by relying on the referral.¹³³

2. Multilateralism

Given that international spillovers created by anticompetitive practices or competition laws cannot be disregarded, multilateral institutions have complemented bilateral efforts to foster nonbinding international antitrust cooperation. The United Nations Conference on Trade and Development (UNCTAD)¹³⁴ and the OECD¹³⁵ have antitrust issues on their agenda. As an informal network of antitrust agencies, the International Competition Network (ICN) has identified, developed, and published policy recommendations and best practices.¹³⁶

With respect to UNCTAD, broad subjects such as restrictive business practices and a code of conduct for transnational corporations have been studied in-depth and discussed by members for decades.¹³⁷ While UNCTAD

¹³⁰ See Merit E. Janow, *Public, Private, and Hybrid Public/Private Restraints of Trade: What Role for the WTO*, 31 LAW & POL’Y INT’L BUS., 977, 979 (2000) (arguing positive comity can be a useful tool, under certain circumstances).

¹³¹ *Id.*

¹³² See *id.*

¹³³ *Id.*

¹³⁴ See generally U.N. Conf. Trade & Dev., *Competition Law and the State: Competition Laws’ Prohibitions of Anti-Competitive State Acts and Measures*, U.N. Doc. UNCTAD/DITC/CLP/2015/3 (2015).

¹³⁵ See generally OECD, *Recommendations and Best Practices on Competition Law and Policy*, <https://www.oecd.org/daf/competition/recommendations.htm> (last visited Apr. 3, 2022).

¹³⁶ See generally INT’L COMPETITION NETWORK’S MERGERS WORKING GRP. & NOTIFICATIONS & PROCS. SUBGROUP, REPORT ON THE COSTS AND BURDENS OF MULTIJURISDICTIONAL MERGER REVIEW, 10–12 (Int’l Competition Network, 2004) [hereinafter ICN REPORT].

¹³⁷ In the 1970s, there was active discussion within the United Nations on the need to discipline restrictive business practices by multinational corporations. In 1980, the United Nations General Assembly adopted a nonbinding set of rules for the control of restrictive business practices (RBP Code). The RBP Code recommends member states to eliminate restrictive business practices by encouraging them to establish domestic antitrust regimes. In addition, the RBP Code urges businesses to refrain from

has played an active role in shaping developing countries' newly adopted laws, its role in international antitrust governance today is limited to education and capacity-building work.¹³⁸

The OECD has more influence, and its Council has adopted a series of nonbinding recommendations and best practice guidelines to facilitate cooperation and convergence among national antitrust regulators and their respective antitrust policies.¹³⁹ Earlier OECD recommendations on antitrust cooperation focused on international consultation, notification, investigative assistance, and information exchange among agencies.¹⁴⁰ More recent OECD recommendations focused on merger review and action against hard-core cartels.¹⁴¹

Following the collapse of the WTO antitrust negotiations, the ICN has become the most influential international mechanism for promoting multilateral antitrust cooperation. The ICN voluntarily agreed to enhance policy convergence, reduce transaction costs, and encourage domestic reforms.¹⁴² The ICN also provides technical assistance to developing

engaging in anticompetitive practices. The RBP Code also established an Intergovernmental Group of Experts. The Group of Experts and the UNCTAD Secretariat have provided education and technical assistance to facilitate the adoption of antitrust laws in developing countries. See U.N. Conference on Trade and Development, *The United Nations Set of Principles and Rules of Competition*, U.N. Doc. TD/RBP/CONF/10/REV.2 (1980).

¹³⁸ See *id.* (arguing that UNCTAD's mandate does not lend itself to enhancing antitrust convergence on practical law enforcement issues). See also Ioannis Lianos, *The Contribution of the United Nations to the Emergence of Global Antitrust Law*, 15 TUL. J. INT'L & COMP. L. 415, 455–61 (2007) (explaining that UNCTAD may play a role in garnering international support by facilitating antitrust negotiations with developing countries).

¹³⁹ See generally OECD, *supra* note 135.

¹⁴⁰ The Recommendation Concerning Cooperation Between Member Countries on Anti-Competitive Practices Affecting International Trade was adopted in 1967 and amended in 1973, 1979, 1986, and 1995 (OECD Recommendation). See generally Organisation for Economic Co-operation and Development [OECD], Revised Recommendation of the Council concerning Co-operation between Member Countries on Restrictive Business Practices affecting International Trade, OECD Doc. C(95)130/Final (July 26, 1995), <https://www.oecd.org/daf/competition/21570317.pdf>.

¹⁴¹ See generally Organisation for Economic Co-operation and Development [OECD], Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations (Oct. 2005), <https://www.oecd.org/competition/cartels/35590548.pdf>; Organisation for Economic Co-operation and Development [OECD], Recommendation of the Council Concerning Effective Action Against Hard Core Cartels (1998), <https://www.oecd.org/daf/competition/2350130.pdf>.

¹⁴² See generally ICN Report, *supra* note 136.

countries to strengthen antitrust advocacy, build institutional capacity, and support market reforms in those countries.¹⁴³

The above discussion suggests that none of the more ambitious proposals for an international antitrust regime have been realized in practice. Despite the well-accepted inefficiencies embedded in the current system, an overarching international antitrust regime has not yet been established. Instead, international cooperation today consists of bilateral cooperation agreements among key jurisdictions and pursuits of voluntary multilateral convergence. Why did WTO members fail to reach an agreement to launch negotiations for a multilateral framework to enhance the contribution of competition policy to international trade? At least two plausible explanations can be pointed out, as elaborated below.

B. What Underlies this Complacency?

1. The Global Regulatory Race Between the United States and the European Union

As discussed, the failure to negotiate a binding international antitrust agreement has prompted s to mitigate the negative externalities embedded in decentralized antitrust enforcement through bilateral cooperation and voluntary multilateral norms. A major focus of antitrust collaboration at this stage is to provide technical assistance and capacity building to developing countries that may not be able to combat the anticompetitive behavior of foreign firms in their markets. At first glance, these efforts to globalize competition law appear to have been a great success: more than 100 jurisdictions now have a domestic competition law, making competition law one of the most widespread forms of economic regulation around the

¹⁴³ See OLIVER BUDZINSKI, *THE GOVERNANCE OF GLOBAL COMPETITION: COMPETENCE ALLOCATION IN INTERNATIONAL COMPETITION POLICY* 228 (Edward Elgar Publ'g, 2008) (describing the ICN's functions and proposing to develop the ICN further to create an International Competition Panel that can exercise lead jurisdiction); Frederic Jenny, *International Cooperation on Competition: Myth, Reality and Perspective*, 48 ANTITRUST BULL. 973, 976–77 (2003) (discussing in more general terms the efforts between national competition authorities to enhance cooperation and advocate policy).

world.¹⁴⁴ Yet the European Union and the United States have taken different approaches to regulating competition.¹⁴⁵ This has not only put the European Union and United States at odds in high-profile investigations of anticompetitive conduct but also made them race to export their regulatory models.¹⁴⁶

Specifically, the European Union's competition law consists of Articles 81 and 82 of the Treaty of Rome and the national competition laws of the

¹⁴⁴ See Anu Bradford, Adam S. Chilton, Chris Megaw & Nathaniel Sokol, *Competition Law Gone Global: Introducing the Comparative Competition Law and Enforcement Datasets*, 16 J. EMPIRICAL LEGAL STUD., 411, 411–12 (2018).

¹⁴⁵ See Eleanor M. Fox, *Monopolization and Abuse of Dominance: Why Europe Is Different*, 59 ANTITRUST BULL. 129, 129 (2014) (arguing “EU law has moved toward more appreciation of outcome-focused economics while preserving other Community perspectives, values, and objectives. [However], . . . the size of the gap between the U.S. law of monopolization and the EU law of abuse of dominance remains approximately the same [given] the significant movement of U.S. law in the direction of nonintervention.”); ROBERT W. HAHN, ANTITRUST POLICY AND VERTICAL RESTRAINTS 1, 1–6 (Robert W. Hahn ed., 2006) (arguing monopolization and vertical restraints generally are significant points of disagreement between U.S. and EU approaches to antitrust).

¹⁴⁶ See Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781, 1799 (2000). Commentators often cite the divergent outcomes in the Microsoft monopoly case and the GE/Honeywell merger as the most prominent examples of the remaining transatlantic differences. On the Microsoft market dominance issue, compare *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144 (D.D.C. 2002), and *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76 (D.D.C. 2002) (endorsing the settlement between the United States and Microsoft), with Commission Decision of 24 March 2004, COMP/C-3/37.792 Microsoft, 2007 O.J. (L 32) 23 (imposing a fine after concluding that Microsoft had abused its dominant position in violation of Art. 82 EC). On the GE/Honeywell merger, compare Press Release, U.S. DEP'T JUST., *Justice Department Requires Divestitures in Merger Between General Electric and Honeywell* (May 2, 2001), https://www.justice.gov/archive/atr/public/press_releases/2001/8140.htm (approving the merger subject to limited divestitures), with Commission Decision of 3 July 2001, COMP/M.2220 General Electric/Honeywell, 2004 O.J. (L 48) 1 (declaring the merger “to be incompatible with the common market”). More recently the European Union and the United States divide on investigations include the *Google/Comparative Shopping/Android/AdSense* cases. In contrast, the U.S. Federal Trade Commission found no “search bias” and concluded instead that Google’s behavior benefited consumers. See Eleanor M. Fox, *Platforms, Power, and the Antitrust Challenge: A Modest Proposal to Narrow the U.S.-Europe Divide*, 98 NEB. L. REV. 297, 308 n.36 (2019). In 2019, the European Commission has fined an even higher fine of \$5 billion on Google for competition abuses related to its Android phone software, followed by a 2019 fine of \$1.7 billion in a case involving Google’s AdSense online advertising program. Again, equivalent conduct has not been challenged in the U.S. to date. See Press Release, EUROPEAN COMM’N, *Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google’s search engine* (July 18, 2018), https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581; Press Release, EUROPEAN COMM’N, *Antitrust: Commission Fines Google €1.49 Billion for Abusive Practices in Online Advertising* (Mar. 20, 2019), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770.

member s.¹⁴⁷ These laws aim to create the single European market while protecting consumer welfare.¹⁴⁸ This goal of integration has led to the European Union taking a stricter approach on vertical agreements, both in statutory provisions and in enforcement, especially when those agreements involve non-price vertical restraints such as exclusive dealing or territorial and customer restrictions.¹⁴⁹ Moreover, “[t]he EU is more likely to conclude that a company has a ‘dominant position’ on the market and, once . . . established,[that] the company is abusing its dominant position.”¹⁵⁰ In terms of merger control, the European Union tends to challenge conglomerate and vertical mergers,¹⁵¹ regardless of the home jurisdiction of the merging firms.¹⁵²

For the United States, the goal of competition law has been almost entirely dominated by concerns about efficiency and consumer welfare.¹⁵³ Its default presumption is that the market works effectively.¹⁵⁴ This presumption limits the need for possible regulatory intervention.¹⁵⁵ In other words, the

¹⁴⁷ See, e.g., Sigfrido M. Ramírez Pérez & Sebastian van de Scheur, *The Evolution of the Law on Articles 85 and 86 EEC [Articles 101 and 102 TFEU]: Ordoliberalism and its Keynesian Challenge*, in *THE HISTORICAL FOUNDATIONS OF EU COMPETITION LAW* 19–53 (Kiran Klaus Patel & Heike Schweitzer eds., 2013); David J. Gerber, *Comparative Antitrust Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 1193, 1209–14 (Mathias Reimann & Reinhard Zimmermann eds., 2012).

¹⁴⁸ See generally Ramírez Pérez & van de Scheur, *supra* note 147.

¹⁴⁹ See, e.g., Case C-8/08, *T-Mobile Netherlands BV/Raad van bestuur van de Nederlandse Mededingingsautoriteit*, ECLI:EU:C:2009:343, ¶ 38 (June 4, 2009); Case C-501/06 P, *GlaxoSmithKline Services Unlimited v. Comm’n European Communities*, ECLI:EU:C:2009:409 (Oct. 6, 2009) ¶ 63 (Neth.).

¹⁵⁰ See Anu Bradford et al., *The Global Dominance of European Competition Law Over American Antitrust Law*, 16 *J. EMPIRICAL LEGAL STUD.* 731, 739–40 (2019) (“For example, the EU bans practices such as excessive pricing, which the US antitrust statutes do not expressly restrict and which the U.S. courts have not read into the broader provisions of the law. [Additionally], many types of conduct recognized in both jurisdictions as potentially abusive have a higher evidentiary threshold in the US. For instance, these include prohibition of predatory pricing or anticompetitive discounts or refusal to deal.”).

¹⁵¹ See William J. Kolasky, Deputy Assistant Att’y Gen., U.S. Dep’t Just., *Speech on Conglomerate Mergers and Range Effects: It’s A Long Way from Chicago to Brussels* (Nov. 9, 2001), <https://www.justice.gov/atr/speech/conglomerate-mergers-and-range-effects-its-long-way-chicago-brussels>.

¹⁵² See Anu Bradford & Adam S. Chilton, *Trade Openness and Antitrust Law*, 62 *J.L. & ECON.* 29, 61–62 (2019).

¹⁵³ See Eleanor M. Fox, *Competition Policy: The Comparative Advantage of Developing Countries*, 79 *LAW & CONTEMP. PROBS.* 69, 73 (2016).

¹⁵⁴ *Id.* at 74.

¹⁵⁵ See *id.*; see also Eleanor M. Fox, *What Is Harm to Competition? Exclusionary Practices and Anticompetitive Effect*, 70 *ANTITRUST L.J.* 371, 372 (2002).

United States “is more fearful of false positives”—erroneously condemning procompetitive or neutral conduct—as well as a reluctance to engage in the judicial intervention of complex unilateral business practices.¹⁵⁶ In particular, this view is suspicious of the claims of anticompetitive effects of monopolization cases or vertical restraints.¹⁵⁷ While there is some debate as to whether efficiency should be associated with greater consumer welfare or total welfare,¹⁵⁸ there have been limited sustained efforts to incorporate broader non-economic policy goals into the law.¹⁵⁹

The European Union and the United States not only disagree but want the rest of the world to follow their respective regulatory models.¹⁶⁰ Both jurisdictions actively promote their competition laws abroad as “best practices,” urging developed and developing countries to adopt domestic competition laws and build institutions to enforce them.¹⁶¹ Similarly, they disagree on the content and institutional form of such an international antitrust collaboration. Since establishing the single market is a fundamental objective of EU competition law, the European Union is willing to link antitrust more closely to trade policy.¹⁶² In its trade agreements, the European

¹⁵⁶ See Bradford et al., *supra* note 144.

¹⁵⁷ See generally KEITH N. HYLTON, *ANTITRUST LAW: ECONOMIC THEORY AND COMMON LAW EVOLUTION* 40–43 (Cambridge Univ. Press 2003); James C. Cooper et al., *A Comparative Study of United States and European Union Approaches to Vertical Policy*, 13 *GEO. MASON L. REV.* 289, 294–97 (2005).

¹⁵⁸ Economists debate whether there should be a consumer welfare or total welfare standard to promote greater economic efficiency. Within the European Union, the standard is consumer welfare. See generally ROBERT O’ DONOGHUE & A. JORGE PADILLA, *THE LAW AND ECONOMICS OF ARTICLE 82 EC 4* (Hart Publ’g, 2006). The United States also bases its standard on consumer welfare. See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979). There is some debate as to whether or not consumer welfare really refers to consumer welfare or total welfare. See generally Kenneth Heyer, *Welfare Standards and Merger Analysis: Why not the Best?*, U.S. DEP’T OF JUST. (Mar. 2006), <https://www.justice.gov/atr/welfare-standards-and-merger-analysis-why-not-best>.

¹⁵⁹ See James Keyte, *Why the Atlantic Divide on Monopoly/Dominance Law and Enforcement Is So Difficult to Bridge*, 33 *ANTITRUST* 113, 115–16 (2018) (“U.S. courts [] have remained fairly dedicated to the idea, even in the context of Post-Chicago economics, that consumer welfare (in the sense of harm to ultimate consumers) must be diminished, which requires proof of market-wide anticompetitive effects (e.g., on price, quality, or output) that are not outweighed by procompetitive efficiencies or justifications.”).

¹⁶⁰ See Fox, *supra* note 145; see also Bradford et al., *supra* note 144 (examining 126 countries first competition law adopted and finding that more countries have implemented laws similar to the European Union than to the United States).

¹⁶¹ Bradford et al., *supra* note 144, at 733 (discussing how motivations for exporting domestic competition laws vary).

¹⁶² See Mario Monti, European Commissioner for Competition Policy, *A Global Competition Policy?*, Address at the European Competition Day Copenhagen (Sept. 17, 2002), <https://ec.europa.eu/>

Union explicitly conditions access to its markets on adopting a competition law, exporting its law in the process.¹⁶³ In contrast, the United States has long supported the separation of trade and competition law, mostly to ensure the purity of its antitrust law and hence the focus on economic efficiency.¹⁶⁴ In addition, the United States relies primarily on its persuasive powers rather than formal treaties in exporting its antitrust model.¹⁶⁵

Overall, the United States and European Union have not viewed the current system of multijurisdictional antitrust enforcement as problematic. While both jurisdictions acknowledge that greater coordination would lead to greater efficiencies, each prefers to internationalize their respective domestic antitrust regimes. The prevailing attitude among American and European policymakers appears to be that so long as the new users are willing to play by “our” legal rules, there is no need to be perturbed by their antitrust enforcement.

2. *The Existing Balance of Benefits*

An additional explanation for this complacency is that the status quo decentralized antitrust enforcement still works to the advantage of multilateral corporations and large developing country corporations. While existing decentralized antitrust enforcement has increased transaction costs, caused delays, and increased the likelihood of conflicting decisions, the costs arising from these investigations still pale in comparison to the benefits that these corporations derive from the existing system. Therefore, the support of powerful corporations has been largely absent from the quest for

commission/presscorner/detail/en/SPEECH_02_399. *See generally* Working Group on the Interaction Between Trade and Competition Policy, *Communication from the European Community and Its Member States*, WT/WGTCP/W/1 15 (May 25, 1999).

¹⁶³ *See* Bradford & Chilton, *supra* note 152, at 33–34 (arguing that the regulatory similarity with the EU is expected to reduce the costs for EU companies to access third markets, as the EU companies already comply with similar standards domestically).

¹⁶⁴ *See, e.g.*, A. Douglas Melamed, 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), <https://www.justice.gov/atr/speech/antitrust-enforcement-global-economy>; Spencer Weber Waller, *National Laws and International Markets: Strategies of Cooperation and Harmonization in the Enforcement of Competition Law*, 18 CARDOZO L. REV. 1111, 1128 (1996).

¹⁶⁵ *See* William E. Kovacic, *The United States and Its Future Influence on Global Competition Policy*, 22 GEO. MASON L. REV. 1157, 1204 (2015).

international antitrust rules.¹⁶⁶ In the absence of strong domestic interest group support, governments have not invested their political capital in negotiating such an agreement that would give them limited political rents.¹⁶⁷

What explains the relative passiveness of corporations in the antitrust domain? In general, corporations operating in world markets know that they would benefit from a lenient international antitrust standard.¹⁶⁸ Post-cartel joint ventures offer an example of this.¹⁶⁹ Even after cartels are broken up, the existence of cartel-created barriers may force former cartel member firms into joint ventures, limiting their distribution or restricting sales to certain markets.¹⁷⁰ Such joint ventures could then function as a way for colluding firms to accommodate developing countries entering into cartels on terms favorable to incumbent firms, or to engage in implicit cooperative pricing arrangements among incumbents.¹⁷¹ These arrangements provide developing country producers with access to world markets, but doing so may incur some competition costs that the industry would otherwise gain.¹⁷² For example, post-cartel joint ventures have been established in industries such as graphite electrodes, citric acid, and seamless steel tubes following the forced break-up of the cartels.¹⁷³ This may reflect attempts to consolidate and restructure the industries, in light of the break-up of the cartels.

One may wonder why firms in developing countries would not lobby for international antitrust rules that would more effectively discipline multinational corporations operating in their domestic markets. It may be interesting to observe that there has been an ironic reversal of roles here. In the past, developing countries were in favor of multilateral action to restrict the business practices of large multinational corporations. At the insistence of developing countries, the United Nations General Assembly in December

¹⁶⁶ See, e.g., Bradford, *supra* note 23, at 28–32 (making a similar argument).

¹⁶⁷ *Id.* at 28.

¹⁶⁸ See *supra* note 134 (arguing that Microsoft recently lobbied the European Commission to block Google's acquisition of DoubleClick and therefore advocated for more stringent antitrust scrutiny, but in most cases, Microsoft knew it would benefit from looser antitrust laws).

¹⁶⁹ See Levenstein & Suslow, *supra* note 2, at 824–26; see also Bradford, *supra* note 23, at 28–32 (arguing corporations are expected to often resist rules that facilitate cooperation in cartel cases in the fear of one day being the target of a cartel investigation).

¹⁷⁰ See Levenstein & Suslow, *supra* note 2, at 824–26.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 824–26, 841–42.

1980 adopted, by Resolution 35/63, a Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (The UN Set).¹⁷⁴ The UN Set is a multilateral agreement on competition policy that covers a wide range of restrictive business practices by multinationals, including the abuse of their dominant positions, whether achieved through mergers and acquisitions or joint ventures.¹⁷⁵ At that time, developing countries were in favor of making the UN Set legally binding.¹⁷⁶ However, this is unacceptable for developed countries.¹⁷⁷ The position today is the opposite, with developed countries seeking a binding multilateral agreement through the WTO and developing countries opposing it.

Why did developing countries, struggling in the 1970s to negotiate and gain international recognition of rules to deal with the anticompetitive business practices of multinational corporations, refuse to consider a much smaller system in the WTO? The formal position of developing countries suggests that many have no experience in competition policy; they are simply not ready to negotiate the issue.¹⁷⁸ However, competence is not the only explanation. Some semi-industrial countries have strong and effective governments but disagree on the merits of binding competition law disciplines into the WTO.¹⁷⁹ The real reason for the opposition from developing countries is that the proposed competition policy is too narrow to consider their development dimension.¹⁸⁰

More specifically, the fate of competition policy in Cancun was linked to the so-called “Singapore issues,” that is, investment, competition policy, transparency in government procurement, and trade facilitation, as a single

¹⁷⁴ See UNCTAD, *The United Nations Set of Principles and Rules on Competition: The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, TD/RBP/CONF/10/Rev.2 (2000), <https://unctad.org/system/files/official-document/tdrbpconf10r2.en.pdf>.

¹⁷⁵ *Id.*

¹⁷⁶ See generally Schaun Griffin, *United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, *General Assembly Resolution 35/63 (1980)*, 11 GA. J. INT'L & COMP. L. 709 (1981).

¹⁷⁷ *Id.*

¹⁷⁸ See Hoekman & Saggi, *supra* note 1, at 446.

¹⁷⁹ For example, the Like-Minded Group including India, Pakistan, and Malaysia, opposes the adoption of a binding antitrust agreement in the WTO. See BRIDGES (International Centre for Trade and Sustainable Development), Year 5, No. 9, Nov./Dec. 2001, at 1.

¹⁸⁰ See Singh, *supra* note 3, at 18–21.

undertaking.¹⁸¹ Under the proposed agreement, multinational corporations from developed countries would be permitted to invest anywhere they like in any quantity and at any time without any government hindrance.¹⁸² In addition, multinational corporations from developed countries would have “national treatment,” the same as domestic firms.¹⁸³

However, such an agreement is especially harmful to the interests of developing countries, whose firms are building up their capabilities to compete in international markets. Firms in developing countries are relatively small with relatively little experience. Unlike the established foreign firms that operate globally, they do not have the same access to finance.¹⁸⁴ They especially lack the less tangible but critical assets such as brand recognition or global marketing networks.¹⁸⁵ Over the past fifty years, many NICs in Asia and Latin America have been able to foster the development of large enterprises, which in turn benefits the overall economic development of these countries. This has usually been achieved through various support.¹⁸⁶ These large domestic corporations have often been the leaders in the diffusion of new technologies and the adaptation of imported technologies to domestic circumstances.¹⁸⁷

From the standpoint of developing country corporations, existing decentralized antitrust regimes would have two benefits. First, competition authorities in developing countries may prohibit some merger activities by foreign multinationals because they are already large enough to achieve either static or dynamic economies of scale in this sense.¹⁸⁸ Second, competition authorities in many developing countries allow large domestic firms to merge to compete on more equal terms with foreign multinationals.¹⁸⁹ Greater size may still foster dynamic efficiencies, given that firms need to meet a minimum threshold to finance their own R&D

¹⁸¹ See, e.g., Taimoon Stewart, *The Fate of Competition Policy in Cancun: Politics or Substance?*, 31 LEGAL ISSUES ECON. INTEGRATION 7, 7 (2004).

¹⁸² See Singh, *supra* note 3, at 19–20.

¹⁸³ *Id.*

¹⁸⁴ See generally Singh & Dhumale, *supra* note 2 (arguing even the largest developing country corporations tend to be much smaller than the industrial country multinationals).

¹⁸⁵ *Id.*

¹⁸⁶ See generally AMSDEN, *supra* note 76; Singh, *supra* note 76.

¹⁸⁷ *Id.*

¹⁸⁸ See Singh, *supra* note 3, at 19–20.

¹⁸⁹ *Id.*

activities.¹⁹⁰ For these corporations, the mechanical application of the “national treatment” principle would remove the government protection they enjoy, thereby reducing their capabilities to compete with foreign multinationals in international markets.

Rather than lobbying efforts on international antitrust negotiations, developing country corporations prefer to employ their political strength to compete in domestic markets. A significant part of the competition is that these corporations compete for the non-market variety supported by the government.¹⁹¹ The latter is given to meet specified performance targets for exports, new product development, and technological change.¹⁹² In the marketplace, they compete for market share, which determines their subsequent investment allocations in specific industries.¹⁹³ Such political action is rational for these government-support national corporations because they would gain more from being able to apply the existing development-friendly antitrust laws than vice versa. While consumers are hurt by the existing rules, their interests are too diffuse to carry much weight. As with large multinationals in developing countries, developing country corporations are largely complacent about the current system.

Taken together, pursuing a WTO antitrust agreement would be costly for developing countries as their import-competing industries and former stated-owned enterprises would resist any reforms that would remove the government protection they enjoy. The optimal policy will differ between countries depending on their stage of development and the effectiveness of their governments, as well as the supporting institutional framework. Consequently, the degree of coherence between these regimes varies considerably. The proliferation of antitrust laws, whereby each nation enacts its own antitrust laws and develops its own enforcement structure, has raised a number of questions, as described below.

¹⁹⁰ *Id.*

¹⁹¹ See THE WORLD BANK, *supra* note 75 (discussing governments in some developing countries organized contest-based competitions for state subsidies which were conditioned on the achievement of certain performance standards such as export targets, foreign exchange earnings, and technological upgrading, with the winners receiving greater aid from the government). See also ALICE H. AMSDEN, *THE RISE OF “THE REST”: CHALLENGES TO THE WEST FROM LATE-INDUSTRIALIZING ECONOMIES* 190 (2001). For a theoretical analysis, see Barry J. Nalebuff & Joseph E. Stiglitz, *Information, Competition, and Markets*, 73 AM. ECON. REV. 2, 278, 278–83 (1983).

¹⁹² See THE WORLD BANK, *supra* note 75.

¹⁹³ *Id.*

III. THE CHALLENGES AHEAD

This Part reviews the recent proliferation of antitrust laws around the world, focusing on the degree of inconsistency between these regimes, the emergence of antitrust protectionism, and the risk of antitrust overregulation. It highlights how this process of decentralization poses a challenge to the balance of benefits under existing international antitrust laws—a challenge that has been largely overlooked. This challenge is not direct. Interestingly, it takes the form of embracing, rather than resisting, the legal rules that the United States has supported to benefit itself.

A. Growing Heterogeneity Among Antitrust Users

Many of today's 100-plus competition law jurisdictions are newcomers—more than two-thirds of them have adopted their first competition laws in the past thirty years.¹⁹⁴ Most of these new competition law jurisdictions are developing countries, where economic realities are materially different from developed countries.¹⁹⁵ In general, markets do not work well. Most major businesses grew up as state-owned entities with rich privileges.¹⁹⁶ Capital markets are not for people without wealth and connections.¹⁹⁷ Barriers to entry are high, in part because of the persistence

¹⁹⁴ See Tim Büthe & Shahryar Minhas, *The Global Diffusion of Competition Laws: A Spatial Analysis*, Paper presented at the 6th Meeting of the UNCTAD Research Partnership Platform on Competition and Consumer Protection (July 10, 2015), https://unctad.org/system/files/non-official-document/CCPB_RPP2015_PRES_ButheMinhas_en.pdf; Tim Büthe & Cindy Cheng, *The Effect of Competition Law on Innovation: A Cross-National Statistical Analysis*, in *A STEP AHEAD: COMPETITION POLICY FOR SHARE PROSPERITY AND INCLUSIVE GROWTH* 187, 187–225 (Org. for Econ. Coop. and Dev., 2016).

¹⁹⁵ See generally Aydin & Büthe, *supra* note 12; Aditya Bhattacharjee, *Who Needs Antitrust? Or Is Developing Country Antitrust Different? A Historical Comparative Analysis*, in *COMPETITION L. & DEV.* 52, 57–58 (D. Sokol, T. Cheng & I. Lianos eds., 2013); A.E. Rodriguez & Ashok Menon, *The Causes of Competition Agency Ineffectiveness in Developing Countries*, 79 *LAW & CONTEMP. PROBS.* 4 (2016).

See Philippe Brusick & Simon J. Evenett, *Should Developing Countries Worry About Abuse of Dominant Power?*, 2008 *WIS. L. REV.* 269 (2008); Eleanor Fox, *Economic Development, Poverty and Antitrust: The Other Path*, 13 *SW. J.L. & TRADE AM.* 211, 229–30 (2007).¹⁹⁶

¹⁹⁷ See HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* (HarperCollins, 1990) (arguing that launching a new business in emerging markets is relatively difficult due to complex government regulations and bureaucracy).

of privileged monopolies.¹⁹⁸ Severe poverty and corruption are the norm.¹⁹⁹ Inequality of wealth, power, and economic opportunity are pervasive and are often considered to be issues that all disciplines of law must address.²⁰⁰ Personal mobility may be virtually non-existent.²⁰¹ The economic reality of developing countries is in stark contrast to that of developed countries such as the United States, which at least calls into question the portability of Western antitrust models.

Data in Table 1 provide some support for the increasing heterogeneity among antitrust users.²⁰² Although efficiency is considered to be a common goal of competition law, in 2010, it was still explicitly identified by only 31% of the jurisdictions. Consumer welfare is the most common goal of competition law, found in 40% of the jurisdictions. In addition to these two common goals, 19% of jurisdictions have employed competition law for development, 14% of jurisdictions have employed competition law for total welfare, 7% of jurisdictions have employed competition law for social policy, and 5% of jurisdictions have employed competition law for protecting small businesses. This considerable variance in these goals may reflect a development-oriented competition policy for new users. Unlike traditional users such as the United States, many developing countries believe that an appropriate competition policy for late industrializing economies must at least be able to (a) restrain anticompetitive behavior by domestic privatized large firms; (b) limit abuses of monopoly power by mega-corporations; and (c) promote development.²⁰³

¹⁹⁸ *Id.*

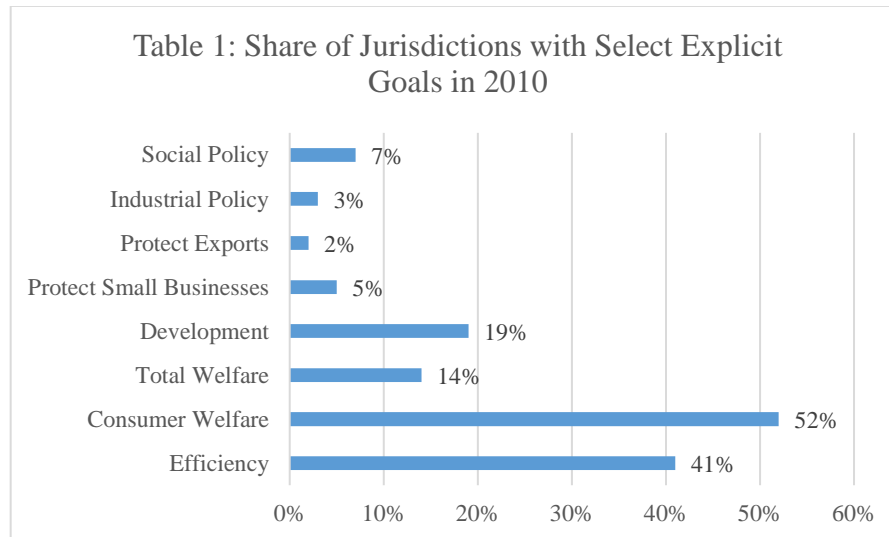
¹⁹⁹ *See* Fox, *supra* note 196.

²⁰⁰ *Id.*

²⁰¹ *Id.*; *see also* Brusick & Evenett, *supra* note 196, at 176–77.

²⁰² Figure is based on data in Figure 4 from Bradford et al., *see supra* note 144.

²⁰³ *See* Singh, *supra* note 3, at 15.



The proliferation of antitrust laws has also increased a variety of various defenses. According to data in Table 2, by 2010, forty-five countries had an efficiency defense.²⁰⁴ On the merger control front, sixty-nine countries include an efficiency defense into the competition statute.²⁰⁵ The presence of such a defense reduces the competition risk because the merging parties can escape prohibition, divestiture, or other remedies by showing the efficiencies that the merger generates.²⁰⁶ As with mergers, some competition statutes regulating anticompetitive agreements also recognize the efficiencies that some of the potentially anticompetitive conduct entails.²⁰⁷ By 2010, ninety-two countries had this efficiency defense.²⁰⁸

Another example comes from public interest defense. U.S. antitrust law does not consider “public interest” because it is an amorphous concept that may reduce efficiency.²⁰⁹ The definition of public interest may vary among

²⁰⁴ Figure is based on data from Bradford & Chilton, see *supra* note 11, at 410.

²⁰⁵ *Id.* at 402 (Figure 2).

²⁰⁶ *Id.* at 405–06.

²⁰⁷ *Id.* at 406.

²⁰⁸ *Id.* at 402 (Figure 2).

²⁰⁹ See Harry First & Eleanor Fox, *Philadelphia National Bank, Globalization, and the Public Interest*, 80 ANTITRUST L.J. 307, 319–28 (2015).

policymakers. The arbitrary use of this factor is thought to confuse the “pure” aspects of antitrust as well as bring inefficiencies into the law and harm consumers.²¹⁰

In many developing countries, ignoring public interest is not an option.²¹¹ There would be no competition law without room for consideration of the public interest, such as protecting jobs and empowering the previously excluded and disadvantaged poor; the legislature would not have enacted it.²¹² Jurisdictions therefore might choose to include a public interest factor in their law, and many have already done so. As Table 2 suggests, by 2010, twenty-nine countries had a public interest defense for abuse of dominance, and sixty-six countries had a public interest defense for anticompetitive conduct.²¹³ In addition to the efficiency defense, the other type of defense common in the merger area is the failing firm defense, which allows a firm on the verge of bankruptcy to be acquired, otherwise the assets would disappear entirely from the market.²¹⁴ By 2010, twenty-three countries had such a defense.²¹⁵ Moreover, fifty-two jurisdictions are willing to consider a broader set of reasons that contribute toward public interest as grounds for approving an otherwise anticompetitive merger.²¹⁶

²¹⁰ *Id.* at 308.

²¹¹ See generally DAVID LEWIS, THIEVES AT THE DINNER TABLE: ENFORCING THE COMPETITION ACT, A PERSONAL ACCOUNT 40–43 (Jacana Media, 2012) (explaining how South Africa balanced the desires of labor organizations and businesses to satisfy the interests of the public when creating antitrust legislation).

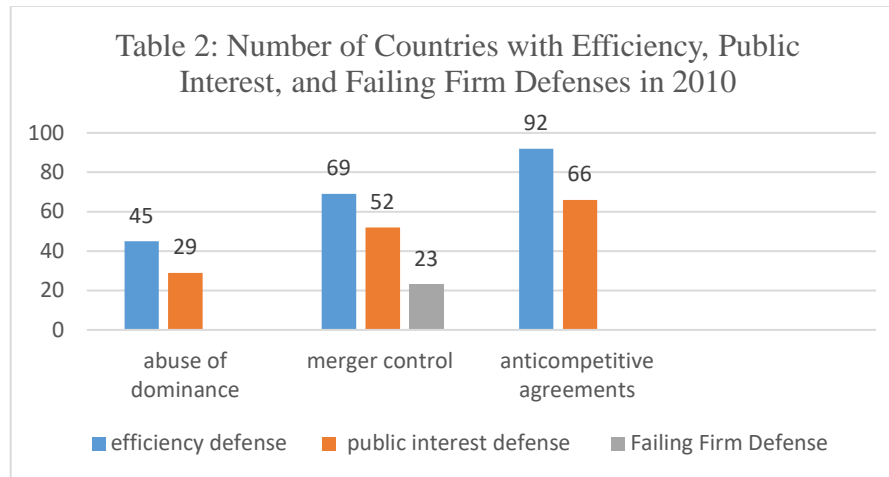
²¹² See Bhattacharjea, *supra* note 195, at 58 (arguing developing countries generally lack unemployment and social security benefits: “[w]ithout such safety nets, it is difficult for policy makers and judges to privilege economic efficiency to the complete exclusion of concerns about unemployment, which is an inescapable consequence of vigorous competition”).

²¹³ See Bradford & Chilton, *supra* note 11, Figure 2.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*



It is worth mentioning that jurisdictions can define important but elastic concepts such as “efficiency” in their own terms.²¹⁷ As mentioned earlier, the U.S. antitrust rules and standards are based on efficient market assumptions, reflecting greater trust in the market’s ability to correct itself and skepticism about the government’s ability to intervene.²¹⁸ This is inconsistent with the aforementioned economic realities of developing countries. In contrast, market access, survival, and development of firms may be essential elements for developing countries to increase their efficiency.²¹⁹ It is based on the belief that markets fail and governments can often intervene to improve outcomes.²²⁰ In other words, developed countries fear “false positives” where

²¹⁷ See Fox, *supra* note 153, at 69–70.

²¹⁸ *Id.* at 74–75 (“[T]he antitrust rules and standards are based on various assumptions about efficiency, including: markets are generally robust and work well; market power is hard to get and keep; business firms generally act to please consumers because that is how they make their profits, and competition forces them to do so; mergers are generally efficient; vertical restraints (for example, restraints in the course of distributing products) are generally efficient; and law that prohibits exclusionary conduct and vertical restraints has a high probability of blocking efficiencies and protecting inefficient competitors.”). See also Eleanor M. Fox, *Monopolization and Dominance in the United States and the European Community: Efficiency Opportunity and Fairness*, 61 NOTRE DAME L. REV. 981, 982 (1986) (noting that the United States puts more stress on a single outcome-oriented efficiency rule).

²¹⁹ See Fox, *supra* note 153, at 74.

²²⁰ See Singh, *supra* note 3, at 3–7 (arguing there was considerable state control over economic activity and if the government thought there was anti-competitive behavior by some corporations or industries, it intervened directly and fixed prices such as for medicines and other essential products).

the government erroneously restricts competitive behavior. In contrast, developing countries fear “false negatives” where the government fails to restrict anti-competitive behavior.²²¹ These differences reflect not only ideological differences about how sound markets work, but also how markets in developing and developed countries actually work.

Against this backdrop, several trends are emerging that threaten to upset the relative stability of the current system to date. Each raises questions about whether the balance of benefits under the current system of multijurisdictional antitrust enforcement continues to favor large multinational corporations based in industrialized countries. Below are elaborations on each phenomenon.

B. The Emergence of Antitrust Protectionism

There is no doubt that a vigorous competition policy is beneficial for developing countries. Many countries with limited experience in the antitrust field are taking things very seriously. Brazil, for example, is particularly active and apparently wants to join the “super league” of antitrust enforcement agencies.²²² With substantial resources managed by educated leaders, these agencies often go beyond competition advocacy missions and consider the full range of conduct that may raise antitrust issues, including abuse of dominance and mergers.²²³

²²¹ The U.S. model is one of the two dominant models for antitrust in the world. It is not always in sympathy with the other dominant model, that of the European Union. The U.S. model is more fearful of false positives than the EU model. See Keyte, *supra* note 159, at 114.

²²² On 18 November 2020, the Korean Prosecution Service signed a memorandum of understanding with the U.S. Department of Justice designed to promote cooperation in criminal enforcement of cross-border antitrust cases, including international cartel cases. See *Justice Department Signs Antitrust Memorandum of Understanding with Korean Prosecution Service*, U.S. DEP’T OF JUST. (Nov. 18, 2020), <https://www.justice.gov/opa/pr/justice-department-signs-antitrust-memorandum-understanding-korean-prosecution-service>. The United States and Brazil have signed a bilateral antitrust cooperation agreement in 1999, see *Antitrust Cooperation Agreements*, U.S. DEP’T OF JUST., <https://www.justice.gov/atr/antitrust-cooperation-agreements>. In addition, Brazil has a track record as an active cartel enforcer. See generally JOHN M. CONNOR, *Latin America and the Control of International Cartels*, in COMPETITION LAW AND POLICY IN LATIN AMERICA 291, 315–16 (Eleanor M. Fox & D. Daniel Sokol eds., 2009).

²²³ For example, in 2006, the Korea Fair Trade Commission imposed corrective orders on Microsoft Corporation and Microsoft Korea for their abuse of market dominance. See Daniel J. Silverthorn, *Microsoft Tying Consumers’ Hands—The Windows Vista Problem and the South Korean Solution*, 13 MICH. TELECOMM. & TECH. L. REV. 617, 621–22 (2007). In 2021, the Korea Fair Trade Commission fined Alphabet Inc. (Google) for abuse of its dominant position in the market for mobile operating

The question is whether some less established antitrust regimes with fewer institutional guarantees are more vulnerable to antitrust protectionism. While antitrust authorities are typically sheltered from political power and business-interest interferences, this is not always the case.²²⁴ The idea of an “independent” regulator is new in many countries, especially those that had operated under government planning for most or all of the twentieth century.²²⁵ The difficulty with antitrust rules is that they are drafted in broad terms and thus leave a great deal of discretionary power to the enforcing authorities.²²⁶ These authorities are usually subject to judicial review, but generalist courts often lack the relevant skills to properly review complex antitrust decisions, and thus tend to defer to specialized authorities.²²⁷ This is not to say that antitrust authorities are generally “captured.”²²⁸ Still, the risk of political and business-related interferences remain when the welfare effects of conduct are ambiguous and the standards applied are vague.

China’s recent development under its newly adopted Anti-Monopoly Law (AML) offers an example of this. After thirteen years of drafting, China passed the AML in August 2008.²²⁹ A year later, the law entered into force, stating consumer welfare and efficiency as its goal.²³⁰ However, the law also aims to advance fair market competition, public interest, and the amorphous term of “promoting the healthy development of a socialist market economy.”²³¹ The legislative history revealed mixed motivations: some domestic groups favored the law as a tool to control the behavior of state-

systems. See Competition Policy International, *South Korea Fines Google \$177M For Abusing Market Dominance*, Competition Policy International (Sept. 14, 2021), <https://www.competitionpolicyinternational.com/south-korea-fines-google-177m-for-abusing-market-dominance/>.

²²⁴ For example, the Sherman Act is widely understood to follow a tradition designed to control political power by decentralizing economic power. See David K. Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1220 (1988).

²²⁵ See generally Hew Pate, *What I Heard in the Great Hall of the People—Realistic Expectations of Chinese Antitrust*, 75 ANTITRUST L.J. 195, 209 (2008).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ See Anti-monopoly Law of the People’s Republic of China (promulgated by the Standing Committee of the National People’s Congress on Aug. 30, 2007 and effective on Aug. 1, 2008), <http://fldj.mofcom.gov.cn/article/c/200811/20081105917420.shtml>, translated at <http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml> [hereinafter AML].

²³⁰ *Id.*, art. 1.

²³¹ *Id.*

owned enterprises and abolish trade barriers among different regions within China;²³² others saw the new law as an opportunity to challenge foreign multinationals that are increasingly controlling the Chinese economy.²³³

The drafting process for the AML was stagnant for a decade, and it was not until 2004 that the drafting efforts were suddenly revived and expedited.²³⁴ Why? According to Chinese media reports, an incident in 2003 involving alleged anticompetitive practices by a foreign firm in China led to the sudden acceleration of the drafting process for the AML. In 2003, Tetra Pak, a Swedish company specializing in aseptic packaging equipment and supplies for dairy and beverage products, was accused of tying the sale of packaging equipment to the sale of packaging supplies in China.²³⁵

After receiving complaints from domestic firms competing with Tetra Pak for packaging supplies, the antitrust agencies, the Chinese State Administration for Industry and Commerce (SAIC) and the China's Ministry of Commerce (MOFCOM), launched a series of investigations into anticompetitive conduct by foreign companies in China.²³⁶ In April 2004, the SAIC reported its findings in an internal publication, providing detailed data on market shares of foreign companies in seven product groups or industries,

²³² See Yong Huang, *Pursuing the Second Best: The History, Momentum, and Remaining Issues of China's Anti-Monopoly Law*, 75 ANTITRUST L.J. 117, 121–22 (2008) (noting that some of the driving forces behind the AML were the government's desires to promote the development of the market and to contain abusive state power).

²³³ See Bruce M. Owen, Su Sun & Wentong Zheng, *China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond*, 75 ANTITRUST L.J. 231 (2008) (explaining that administrative monopolies could create regional blockage leading to protectionism); Salil K. Mehra & Meng Yanbei, *Against Antitrust Functionalism: Reconsidering China's Antimonopoly Law*, 49 VA. J. INT'L L. 379 (2008) (noting that China still needs to clarify how the Antimonopoly Law will balance social welfare concerns while avoiding improper protectionism).

²³⁴ See, e.g., Huang, *supra* note 232, at 118 (“The drafting of the Chinese AML bill commenced in 1994, but it was not enacted until 2007.”); Zhenguó Wu, *Perspectives on the Chinese Anti-Monopoly Law*, 75 ANTITRUST L.J. 73, 76 (2008) (“It is well known that the AML was on the legislative agenda for the Eighth, Ninth, and Tenth National People's Congresses. Thirteen years have passed since 1994, when the former State Economic & Trade Commission (SETC) was first responsible for the drafting of the AML.”).

²³⁵ See generally ZHIGANG TAO & REBECCA CHUNG, *TETRA PAK VERSUS GREATVIEW: THE BATTLE BEYOND CHINA* (Univ. of Hong Kong Press 2013).

²³⁶ *Id.* (noting that Greatview Aseptic Packaging Company Limited, a Chinese national champion, has actively influenced the Chinese government to establish and enforce an antitrust law, which supports the company as it positions itself as the best alternative to Tetra Pak for reducing customers' single-supplier risks and costs). See also Wentong Zheng, *Transplanting Antitrust in China: Economic Transition, Market Structure, and State Control*, 32 U. PA. J. INT'L L. 643, 718 (2010).

and warning of a tendency for foreign companies to monopolize the Chinese market.²³⁷

It is vital to bear in mind that the Tetra Pak incident and subsequent investigations by the SAIC and the MOFCOM took place in a more globalized economy in the post-WTO era. Upon its accession to the WTO in 2001, China made a wide range of commitments, including commitments on tariff reductions and binding for a large number of products and commitments on trade in services in a large number of sectors.²³⁸ A direct result of these WTO commitments is an increased opportunity for foreign companies to access the Chinese market, from both inside and outside China.²³⁹ With the elimination of many policy tools that used to be available to protect China's domestic industries from multinational corporations, Chinese firms are increasingly facing direct competition from multinational corporations, which are generally considered in China to be stronger competitors because of their advantages in financial resources, technologies, and management skills.²⁴⁰ It is therefore not surprising that the alleged anticompetitive practices of Tetra Pak and possibly other multinational corporations have received a strong reaction in China.

As of August 2010, the MOFCOM has rejected one proposed merger and approved six others with conditions.²⁴¹ All seven transactions involved foreign companies, six of which were transactions initiated overseas between multinational corporations that had operations in China.²⁴² In terms of mergers notified to MOFCOM, foreign companies accounted for the majority of them. According to statistics provided by the MOFCOM, as of June 2009, of the fifty-eight mergers accepted by the MOFCOM for review under the

²³⁷ See Zheng, *supra* note 236, at 718.

²³⁸ See Julia Ya Qin, "WTO-Plus" Obligations and Their Implications for the WTO Legal System: An Appraisal of the China Accession Protocol, 37 J. WORLD TRADE 483 (2003).

²³⁹ *Id.*

²⁴⁰ See Zheng, *supra* note 236, at 719.

²⁴¹ In March 2009, China prohibited Coca-Cola's proposed acquisition of a Chinese juice maker, Huiyuan. See Deborah Healey, *Anti-Monopoly Law and Mergers in China: An Early Report Card on Procedural and Substantive Issues*, 3 TSINGHUA CHINA L. REV. 17, 45 (2010). The six mergers that were approved by MOFCOM with conditions were the InBev/Anheuser-Busch, Mitsubishi Rayon/Lucite, GM/Delphi, Pfizer/Wyeth, Panasonic/Sanyo, and Novartis/Alcon mergers. See Zheng, *supra* note 236, at 709 n.274.

²⁴² Zheng, *supra* note 236, at 709 n.275.

AML, forty involved multinational corporations.²⁴³ More recent statistics on merger review cases released by the MOFCOM in a press conference in August 2010 did not provide the exact number of notified mergers involving foreign companies, but a MOFCOM official said at the press conference that “the majority of mergers accepted for review involved foreign companies.”²⁴⁴

While it is too soon to draw drastic conclusions based on China’s limited enforcement record, the possibility of China becoming a major antitrust force that repeatedly applies its antitrust laws strategically to block the market entry of foreign companies has reinforced concerns about antitrust protectionism.

C. The Risk of Global Overregulation

Another question is whether decentralized antitrust enforcement, consisting of both under- and overenforcement, is more susceptible to global overregulation. Anu Bradford illustrates this by offering a hypothetical example in the merger-control arena:

[A]ssume that both A and B choose suboptimal antitrust laws: A underregulates and B overregulates. State A may choose to underregulate for protectionist or nonprotectionist reasons. It may be a net-exporter wishing to extract welfare gains at the expense of the importing jurisdiction or it may simply not believe in the benefits of strong antitrust intervention. In contrast, B may choose to overregulate, similarly for a variety of protectionist and legitimate reasons. Assuming that A (underregulator) and B (overregulator) investigate the same transaction, B prevails. This example exposes the key international antitrust paradox: the strictest regime wins.²⁴⁵

She concludes by observing that “[t]he only possible race in antitrust enforcement is therefore the race to be the strictest jurisdiction among the s seeking to assert their norms globally, given that all other jurisdictions yield to the most aggressive regulator in case of a conflict.”²⁴⁶

²⁴³ *Id.* at 709.

²⁴⁴ *Id.*

²⁴⁵ See Bradford, *supra* note 49, at 308–09.

²⁴⁶ *Id.* at 311. Additionally, two-minds corporations may exacerbate this problem by forum shopping. While they cannot engage in forum shopping for their own merger approvals, they can still choose the forum that’s most receptive to their complaints against competitors’ mergers. The European Commission, for example, has a reputation for aggressive investigation of anticompetitive practices, and

The above example also exposes a more general phenomenon that decentralized antitrust enforcement, consisting of under- and overenforcement, is likely to lead to global overregulation. Suppose a transaction has different effects on the A and B markets: the merger would increase consumer welfare in A and reduce consumer welfare in B. Suppose further that the expected efficiencies of the merger in A would offset its alleged competitive harm in B. Given that advancing domestic consumer welfare rather than global welfare is consistent with B antitrust laws, B antitrust authorities would ignore the possible efficiencies that mergers would create in A. However, assuming that the expected aggregate global efficiencies of the merger outweighed its expected aggregate global anticompetitive harm, B's decision to ban the merger would be domestically optimal but suboptimal from a global perspective.²⁴⁷ This is expected to happen when States A and B are equally likely to have under- and overregulation across the range of antitrust cases.²⁴⁸ The net effect is global overregulation.²⁴⁹ This is true even though more than seventy countries have domestic merger control regimes. Other jurisdictions are likely to follow suit. As a result, overregulation is more and more likely to occur.

The phenomenon of global overregulation may arise in other areas of antitrust law, such as abuse of dominance. To illustrate this, assume that both C, A and B choose suboptimal antitrust laws: A underregulates and B overregulates.²⁵⁰ State A may be a prominent tech leader looking to help consumers by encouraging technological innovation and competing vigorously, or it may simply not believe in the benefits of strong antitrust intervention. Conversely, B may choose to overregulate for various protectionist and legitimate reasons. Firm X, a multinational technology company, decides to integrate a software application into its hardware system. Firm Y, which offers the relevant software application, launched a complaint of unlawfully bundling before antitrust authorities in jurisdictions A and B following lost sales. Suppose that the antitrust authority of

hence Google joined Opera's complaint against Microsoft in the EU after it had attempted to launch a complaint with the U.S. Department of Justice. *See id.* at 310 n.164.

²⁴⁷ *See* Bradford, *supra* note 49, at 309–10.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *See* Guzman, *supra* note 6, at 1154–55 (arguing each state pursues its own interests without regard for the interests of other states. The resulting policies are domestically optimal but are suboptimal from a global perspective.).

jurisdiction A observes consumer demand for the integrated product and decides that Firm X's conduct is procompetitive. It is further assumed that the decision follows a sound economic analysis. However, Jurisdiction B omits any effects-based analysis and declares that Firm X's conduct constitutes anticompetitive tying. It orders Firm X to disintegrate the product and imposes a substantial fine. The easiest way out for Firm X is give up the business that State B governs. But this is generally an option only when State B is insignificant enough to make abandonment commercially viable. If the consumer market in State B is large and abandoning it is not a realistic option, Firm X may have no choice but to disintegrate the product that is considered procompetitive in A.²⁵¹

Further explanation of this issue can be found in the field of rebates. Multinationals operating in world markets may be faced with a situation where one rebate regime may be lawful in A and unlawful in B. Intel, for instance, has been condemned by the Japan Fair Trade Commission (JFTC) on the ground that it had offered discounts and incentives to computer makers based on their commitments to stop or severely limit purchases from other chip makers.²⁵² The JFTC recommended Intel take several steps, including ending its practice of promising funds to companies that agree not to use or limit their use of competitor's processors.²⁵³ While disagreeing with the

²⁵¹ This example comes from Microsoft antitrust litigation and settlement in the United States, the European Commission's ruling against Microsoft in the European Union, and the Korea Fair Trade Commission's decision against Microsoft in South Korea. The European Commission concluded that Microsoft had anticompetitively tied its Windows operating system to the Windows Media Player and required Microsoft to offer an unbundled version of its products for European customers. The Korean authorities' approach was similar to the Europeans': they also required Microsoft to unbundle its products. In contrast, the U.S. authorities did not require a comparable remedy in their settlement decree. *See generally* Silverthorn, *supra* note 223.

²⁵² *See The JFTC rendered a recommendation to Intel K.K.*, JAPAN FAIR TRADE COMM'N (Mar. 8, 2005), https://www.jftc.go.jp/en/pressreleases/yearly_2005/mar/2005_mar_8_files/2005-Mar-8.pdf; Todd Zaun, *Japan Says Intel Violated Antimonopoly Law*, N.Y. TIMES (Mar. 9, 2005), <https://www.nytimes.com/2005/03/09/technology/japan-says-intel-violated-antimonopoly-law.html>. On June 4, 2008, the Korea Fair Trade Commission imposed a corrective order and a punitive surcharge on Intel Corporation, Intel Semiconductor Limited, and Intel Korea (hereinafter "Intel") for abuse of market dominance. The KFTC found that Intel leveraged its dominant market position in the CPU market by providing a royalty inducing financial arrangement to Samsung Electronics and Sambo Computer, who are the number one and number two players in the local PC market respectively, and conditioning such royalty on them not purchasing CPUs from AMD, for purposes of excluding its competitor AMD. *See South Korea says Intel abused dominant position*, REUTERS (June 4, 2008), <https://www.reuters.com/article/intel-korea/south-korea-says-intel-abused-dominant-position-idUSSEU00002620080605>.

²⁵³ *See* JAPAN FAIR TRADE COMM'N, *supra* note 252.

JFTC's facts, Intel decided to accept the findings since "it was the easiest route for the company to take while maintaining its basic opposition to the report."²⁵⁴

Intel is also the subject of a similar investigation by the Korea Fair Trade Commission (KFTC).²⁵⁵ The Commission imposed a corrective order to cease all conduct consisting of the provision of a royalty-inducing financial arrangement to the local CPU market in exchange for not purchasing CPUs from its competitor.²⁵⁶ The KFTC also imposed a surcharge of approximately 26 billion won (\$25.57 million) on Intel.²⁵⁷ Intel protested against the disposition imposed by the Commission and filed a lawsuit before the Seoul High Court to seek a revocation thereof.²⁵⁸ The court dismissed all claims made by Intel against the commission.²⁵⁹ This decision became final, given that Intel failed to file an appeal to the Supreme Court.²⁶⁰

One could argue that this problem may be easier to address than the product-integration problem discussed above since the dominant corporation in the relevant market can offer rebates to its EU customers rather than its Japanese (or Korean) customers.²⁶¹ But this approach is unlikely to work, as it may not be easy to distinguish customers in the European Union or other countries, some of which may be truly global firms. In addition, giving rebates to some customers while denying others may raise complex discrimination issues that can damage a company's business reputation.

²⁵⁴ See Martyn Williams, *Intel agrees to abide by Japanese FTC ruling*, INFOWORLD (Apr. 1, 2005), <https://www.infoworld.com/article/2668505/intel-agrees-to-abide-by-japanese-ftc-ruling.html>.

²⁵⁵ See Shu-Ching Jean Chen, *Korean Watchdog Says Intel Doesn't Play Fair*, FORBES (June 5, 2008), https://www.forbes.com/2008/06/05/intel-korea-antitrust-markets-equity-cx_jc_0605markets03.html?sh=23ef5cd49b8d.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ See Bae, Kim & Lee LLC, *Court dismisses Intel's claims in landmark loyalty rebate case*, LEXOLOGY (July 25, 2013), <https://www.lexology.com/commentary/competition-antitrust/south-korea/bae-kim-lee/court-dismisses-intels-claims-in-landmark-loyalty-rebate-case>.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ For example, the European Commission fined €1.06 billion (\$1.45 billion then; \$1.2 billion now) over Intel's practice of giving secret or partially hidden rebates to PC makers such as Dell and HP, and electronics retailers such as Germany's Media-Saturn Holding, in exchange for their not offering products using processors from rival chipmaker AMD. This year the General Court of the European Union overturned the fine, stating that the Commission's analysis is incomplete and "does not make it possible to establish to the requisite legal standard that the rebates at issue were capable of having, or likely to have (an) anticompetitive effect." See General Court of the European Union Press Release No. 16/22, *The General Court annuls in part the Commission decision imposing a fine of €1.06 billion on Intel* (Jan. 26, 2022), <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-01/cp220016en.pdf>.

Faced with these difficulties, the global corporation may have to play it safe and offer rebates to all customers in line with the strictest antitrust regimes, even if this prevents it from realizing efficiencies and deprives its customers of the benefit of lower prices.

The above discussion forces us to reconsider the position held in Part II that the current system of multijurisdictional antitrust enforcement continues to benefit the interests of large multinationals in developed countries. Instead, this balance of benefits is only temporary. If a developed country chooses to underregulate, the strictest regime wins phenomenon could effectively deny the country of the beneficial procompetitive effects of some behaviors or transactions. In this case, the stringent antitrust jurisdiction creates an externality in depriving consumers of the lenient antitrust jurisdiction of the efficiencies recognized by their own antitrust authorities. In a worst-case scenario, firms might be dissuaded from adopting procompetitive behaviors due to the risk that such behaviors may create antitrust liability in one or several jurisdictions that take a particularly restrictive, and in some cases misguided, approach to the conduct in question.

IV. TACKLING THE CHALLENGE: OPPORTUNITIES AND POLICY IMPLICATIONS

If the emergence of protectionism and overregulation cannot be destined to subside, then how should the United States respond? Currently, the international legal standard still works to the United States' advantage, with the overall balance of benefits still favoring large multinationals. But Part III raised the possibility that, in the longer run, this balance may tilt in favor of the strictest regime. In addition, the European Union and the United States are locked in a race to export their competition models, urging developed and developing countries alike to adopt domestic competition laws and build institutions to enforce them. Nonetheless, it is in the interest of the European Union and the United States to create stable and efficient antitrust regimes all over the world. From a U.S. perspective, this Part presents two opportunities that require work on merger control.

A. Develop a Common Clearinghouse for Premerger Notification

Over seventy countries have domestic merger control regimes, and the number of jurisdictions is growing.²⁶² This growth has increased the costs imposed on transnational mergers that require clearance in several jurisdictions.²⁶³ The substantive standards in the competition laws and regulations of nations differ, presenting challenges both for the merging parties and for reviewing antitrust authorities.²⁶⁴

For merging parties, the costs associated with multijurisdictional merger review can be divided into three categories. First, merging parties must spend management time and legal fees to ascertain whether notification is required in a particular jurisdiction.²⁶⁵ In many jurisdictions, filing requirements are vague, subjective, and difficult to interpret, leading to unnecessary costs and burdens for merging parties.²⁶⁶ Second, the process of notifying an upcoming merger to multiple authorities increases filing fees, attorney fees, document production fees, and possible translation fees.²⁶⁷ These fees are especially high in jurisdictions that require extensive information from merging parties, even for mergers with little market effect.²⁶⁸ Finally, multiple notification requirements may cause unnecessary delays in implementing the merger.²⁶⁹ These delays further increase external and internal costs to businesses.²⁷⁰ In the worst case, they could lead to the abandonment of procompetitive transactions.²⁷¹

The challenges facing antitrust authorities in the multijurisdictional merger review arena are equally significant. Antitrust enforcers are reviewing an increasing number of transactions in which firm assets and production facilities, as well as documents and witnesses, may be located

²⁶² See Bradford & Chilton, *supra* note 11, at Figure 2.

²⁶³ See ICN Report, *supra* note 136, at 10–12.

²⁶⁴ *Id.*; see also ICPAC Report, *supra* note 29, at 41.

²⁶⁵ See ICN Report, *supra* note 136, at 10–12.

²⁶⁶ *Id.* at 11.

²⁶⁷ See *id.* at 12–15.

²⁶⁸ See *id.* See also ICPAC report, *supra* note 29, at 94–95 (arguing only a small percentage of all notified mergers ultimately are either prohibited or restructured by competition authorities).

²⁶⁹ See ICN Report, *supra* note 136, at 15–18.

²⁷⁰ *Id.* at 18.

²⁷¹ See *id.* at 15–18.

outside the reviewing jurisdiction.²⁷² Thus, an antitrust authority might create international friction by imposing remedies with extraterritorial effects. The remedies imposed by one reviewing jurisdiction might prevent another jurisdiction from obtaining the relief it seeks.²⁷³ In addition, merger reviews often require antitrust enforcers to cooperate in obtaining information and arriving at consistent outcomes and compatible remedies around the world.²⁷⁴ When disagreements arise, the agencies must explain their differences to reconcile them, which in the worst case could lead to trade wars.²⁷⁵

Given these challenges, the OECD has attempted to streamline transnational merger regulation by issuing a “Report of Notification of Transnational Mergers.”²⁷⁶ The OECD Recommendation includes a draft “Framework for Notification and Report Form for Concentrations.”²⁷⁷ However, until today, not even procedural harmonization has been achieved among merger regimes. Eleanor M. Fox, the preeminent expert in this area, proposes a common clearinghouse for first filings, providing jurisdictions with sufficient information to request a tailored second filing if needed.²⁷⁸ This Article suggests that U.S. antitrust agencies should start such a scheme, submit it to the ICN, and then advocate it to others for further consensus building.

B. Develop a Global Approach to Mega-Mergers

Another significant opportunity for the United States as the antitrust leader derives from the huge international cross-border merger movement that has been reshaping the world economy for decades.²⁷⁹ The work of leading scholars in the field argues that mergers, on average, do not appear to improve economic efficiency. In contrast, large mergers have the potential

²⁷² ICPAC report, *supra* note 29, at 41.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ See Comm. on Competition Law & Policy, Report on Notification of Transnational Mergers, OECD Doc. DAFFE/CLP(99)2/Final (Feb. 23, 1999).

²⁷⁷ *Id.* at 5–10.

²⁷⁸ See Eleanor Fox, Separate Statement of Advisory Committee Member, Annex 1-A (June 25, 2015), <https://www.justice.gov/atr/annex-1>.

²⁷⁹ See Singh & Dhumale, *supra* note 2.

to increase market dominance and reduce contestability.²⁸⁰ They further suggest that positive efforts to limit such mergers are needed to enhance global competition and global economic efficiency while at the same time being distributionally more equitable.²⁸¹

In the twenty-first century, however, leading regulators—the United States and the European Union—have embraced the idea that even the biggest mergers should be blessed and protect their own jurisdictions by spin-offs.²⁸² Lafarge/Holcim is an excellent example of this.²⁸³ The two largest cement companies merged in 2015 to form a cement giant with operations in ninety countries, owning 168 plants and having an annual cement production capacity of 386 million tons.²⁸⁴ The merger has drawn regulatory scrutiny in several jurisdictions, with spin-offs in the United States, Europe, Brazil, Canada, India, Philippines, and Mauritius to convince those regulators that their dominant position would not reduce competition.²⁸⁵

²⁸⁰ See AJIT SINGH & TATLA DAR SINGH, TAKEOVERS: THEIR RELEVANCE TO THE STOCK MARKET AND THE THEORY OF THE FIRM (Cambridge Univ. Press 1971) (arguing a large unprofitable firm has a better chance of survival than a small, relatively more profitable firm). See also Ajit Singh, *Takeovers, Economic Natural Selection and the Theory of the Firm: Evidence from the Post-War UK Experience*, 85 ECON. J. 339 (1975). For studies by industrial organization economists, see Simon Evenett, Margaret Levenstein & Valerie Suslow, *International Cartel Enforcement: Lessons from the 1990s*, 24 WORLD ECON. 1221 (2001) (arguing reduced profitability after mergers, or, at the best, no change, after controlling for all the relevant factors). On the question of whether mergers lead to concentration or monopoly power, see Gunther Tichy, *What do we know about success and failure of mergers?*, Paper presented at UNIP conference in Vienna, December 2001 (arguing concentration is a quickly increasing problem); Klaus Gugler, Dennis C. Mueller, B. Burcin Yurtoglu & Christine Zulehner, *The Effects of Mergers: An International Comparison*, Paper presented at UNIP conference, Vienna, December 2001 (arguing effects of mergers on profitability are positive but insignificant. In addition, the impact on sales and market value are strongly negative and statistically significant from the merger year onwards.). For distributional consequences of mergers, see Andrei Shleifer & Lawrence H. Summers, *Breach of Trust in Hostile Takeovers*, in CORPORATE TAKEOVER: CAUSES AND CONSEQUENCES 33 (Alan J. Auerbach ed., 1988) (arguing the benefits of mergers may go to shareholders while the costs may be borne by workers who lose their jobs as a result of rationalization).

²⁸¹ For example, Ajit Singh is proposing to establish an International Competition Authority to control anticompetitive conduct of the world's large multinational corporations as well as to control their propensity to grow by takeovers and mergers. See Singh, *supra* note 3, at 20–22.

²⁸² See Harry First & Eleanor M. Fox, *Biden Antitrust: The Middle Way*, CONCURRENCES (Feb. 2021), <https://www.concurrences.com/en/review/issues/no-1-2021/dossier/98407>.

²⁸³ See generally Surbhi & Sandeep Viji, *Post-Merger Integration Challenges in Lafarge-Holcim Merger*, 11 PAC. BUS. REV. INT'L, No. 9, 2019, at 62–76.

²⁸⁴ *Id.* at 52.

²⁸⁵ *Id.* at 65.

Leaving aside India, Brazil, and perhaps a handful of relatively advanced newly industrializing countries, most developing countries would find it difficult to protect themselves from such mergers.²⁸⁶ These corporations may behave competitively within industrial countries because of the effective competition regulations of the latter but may indulge in anticompetitive practices in developing countries.²⁸⁷ A Tanzania or a Malawi is likely to have a hard time proving, let alone punishing predatory or collusive pricing by corporations in large industrial countries. From the perspective of developing countries, it is therefore necessary to have development-friendly national competition policies and an appropriate framework for international cooperation on competition issues.

The U.S. competition agencies should take the lead in establishing channels and forums for multi-jurisdiction collaborations that would give courage of convictions to control anticompetitive conduct of the world's large multinational corporations (above a certain threshold of size) as well as to control their propensity to grow by takeovers and mergers. While such collaboration would benefit developing countries, it also has useful features to assist large multinational corporations. For example, as mentioned above, the forum would be able to provide multinationals under its purview with unambiguous decisions on mergers and other competition-related matters. Instead of being subject to the often-conflicting decisions of many different jurisdictions (for example, BRICS countries such as Russia and China), its rulings would prevail over national and regional jurisdiction.

It is, however, recognized that the advanced countries are not yet ready to cede sovereignty for such close cooperation.²⁸⁸ Therefore, the evolution of building a forum can be done in stages. As a first step, the forum could be entrusted only with fact-finding and monitoring anticompetitive behavior and threats to the contestability of international markets. Such monitoring would itself be beneficial to many developing countries as it would provide them with information on cartels and on market power abuses of multinationals. Developing countries would find it challenging to acquire such information otherwise. With the experience gained from this kind of limited international

²⁸⁶ See First & Fox, *supra* note 282 (indicating cement is the industry that ranks first in the world for cartels, and probably first for procuring anti-dumping action whenever cheaper foreign product threatens the incumbents' turf).

²⁸⁷ See Levenstein & Suslow, *supra* note 2.

²⁸⁸ See, e.g., Fox, *supra* note 153, at 80 (making a similar argument).

cooperation, nations can, over time, achieve greater collaboration by giving the forum the necessary powers to enforce its rules. As with a system of common merger filings, this proposal should be developed and submitted to the ICN.

CONCLUSION

Like many other scholars, this author supports the development and adoption of antitrust law regimes in a growing number of jurisdictions. There is no doubt that properly structured and enforced antitrust rules will contribute to consumer welfare in countries that have adopted such laws. While the proliferation of antitrust laws has the potential to create benefits for society, the same laws also increase significant transaction costs and uncertainties, enforcement conflicts, antitrust protectionism, and overenforcement of antitrust laws. While some countries thought that adopting antitrust rules in fast-growing economies would benefit their corporations by ensuring that the barriers to entry removed by free trade agreements would not be recreated through restrictions of competition, they probably overlooked the fact that these corporations could be targeted by long, overwhelming investigations, leading to decisions that could potentially affect corporate behavior beyond the relevant jurisdiction.

Can international antitrust regulation achieve voluntary convergence? Or will the proliferation of antitrust laws exacerbate enforcement conflicts and nationalism? At present, the latter looks increasingly to be the case. The international consensus on competition law principles is shattering, replaced by different national legal approaches reflecting different political and economic policies, growing nationalism, and potential criticism of conventional wisdom on antitrust.

The main purpose of this Article is to examine the virtues and limitations of decentralized antitrust regimes. It argues that dramatic change is needed to enhance international antitrust cooperation, despite critical roadblocks to that agenda in the near future. The developed world, especially the United States, has little incentive to embrace such an agenda, as it would give up power and gain almost nothing. In addition, the European Union and the United States have adopted different approaches to regulating competition, making them race to export their regulatory models. On the other hand, developing countries are at many different stages of implementing competition laws and policies. The increasing heterogeneity among

developing countries suggests that competition policy cannot be a unique, one-size-fits-all model for all developing countries. Some developing countries have learned to play the game, but more in a harmful manner. Vague standards and amorphous terms result in wide discretion for the enforcing agencies, create ambiguity for businesses, open the door for abuse by enforcers, and might lead to a lack of transparency for the public.

True, there may not be an immediate cause for concern. Scholars and policymakers have assumed that conflict associated with decentralized antitrust regimes is a fleeting anomaly, destined to stabilize. In fact, this is not fully correct. The current international antitrust laws continue to favor leading regulators and their producers. For the United States, if the current rules remain unchanged, the net advantage it enjoys will disappear one day in the not-too-distant future. Therefore, while developing countries remain supportive of the international coordination with developed countries to monitor anticompetitive behavior by large multinationals, the United States should take the lead. Failure to do so risks that the standard will soon serve the protectionist interests of other countries rather than its own.