10. International competition law

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1. Introduction
The phrase 'international competition law' is something of a misnomer. There is no supranational authority charged with generating, applying, or enforcing competition law, there are almost no binding international agreements on the subject, and there are no international requirements with respect to substantive or procedural rules. Indeed, there is not even a forum from which one can imagine a coherent transnational policy on competition emerging.

There is, of course, plenty of business activity that is transnational in scope, and this activity is regulated by competition laws, but for better or worse, only by domestic competition laws. Because these domestic laws operate almost entirely independently of one another, firms engaged in cross-border activities must determine which domestic laws apply to their activities, what those laws require, and how to comply. Depending on how aggressively domestic regimes apply their own laws beyond their borders, firms may find themselves simultaneously subject to numerous competition laws. Furthermore, because the costs and benefits of regulation may fall in different countries, domestic lawmakers may face incentives to alter their domestic laws in an attempt to extract the largest possible gain for their own residents at the expense of foreigners.

This chapter describes the modest state of current cooperative efforts, the ways in which domestic competition laws and international business interact, and some of the possible options for the international community as it moves forward.

2. The regulation of international competition
When domestic laws regulate international activity there is always a question about which laws apply to which activity. It is the task of jurisdictional

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1 For the purposes of this chapter I will refer to EU competition policy as a 'domestic' or 'national' policy. Though not wholly accurate, it is appropriate in this context because legal policy is set through a formal legislative process (as opposed to a treaty process) at the European level.
rules to sort out this question, and so the jurisdictional reach of domestic laws plays a critical role in determining how international business activity is regulated. These rules are also the central policy tool relevant to discussions of international competition policy. This chapter begins with a brief history of approaches used in the two most important jurisdictions, the United States and the European Union. It begins with the United States, which was the first, and for many years the only, country to apply its laws extraterritorially.

2.1. Jurisdictional approaches

2.1.1. United States Rules The American position on jurisdiction in competition policy was first laid out in the 1909 case, American Banana Co. v. United Fruit Co. The US Supreme Court, in an opinion by Justice Holmes, held that the American defendant’s conduct was beyond the reach of the Sherman Act because the alleged conduct took place in Panama and Costa Rica. In upholding a purely territorial jurisdictional approach, Holmes wrote that ‘the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done’. Under this holding, domestic law extends to the geographic borders of a country and only acts that take place within its borders are subject to local law.

In the decades that followed the American Banana case, the Supreme Court heard a series of antitrust cases in which it gradually moved away from a strictly territorialist approach and focused more on the domestic effects of foreign acts. The fatal blow to territorialism came in United States v. Aluminum Co. of America (Alcoa). The Second Circuit, hearing the case in lieu of the Supreme Court, formally held that the jurisdictional reach of American competition law extended beyond the borders of the country. Judge Learned Hand stated that it ‘[is] settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state apprehends’. The Alcoa case adopted a new ‘effects test’ that allowed the exercise of jurisdiction over extraterritorial activities ‘if they were intended to affect imports and did affect them’. Following the Alcoa decisions,

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4 148 F.2d 416 (2d Cir. 1945).
5 United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945).
6 Id. at 444. Although the Alcoa case was decided by the Second Circuit, it had
American authorities began a long period of aggressive extraterritorial enforcement of antitrust laws (Wood 1992). The basic effects test was reaffirmed by the Supreme Court in *Hartford Fire Insurance Co. v. California*, where it was stated that 'the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States'.

Some American courts eventually sought to soften the application of the effects test (Swain 2001), in particular when foreign states had an interest in the disputes. The most important case in this effort was *Timberlane Lumber Co.* In that case, American and Honduran defendants allegedly conspired with Honduran officials to prevent an American company from milling Honduran lumber and exporting it to the United States. Although the plaintiffs had demonstrated the requisite effects of the anticompetitive conduct, the Ninth Circuit adopted a test that sought to take into account the interests of foreign states and criticized the lower court for 'fail[ing] to consider other nations' interests'. The court held that conflicts of law principles in customary international law required the weighing of foreign and domestic interests affected by the exercise of jurisdiction. The court concluded that 'it is evident that at some point the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction. What that point is, or how it is determined, is not defined by international law'.

The Supreme Court had an opportunity to address the *Timberlane* balancing test and the Alcoa effects test in the early 1990s when it heard *Hartford Fire Insurance Co. v. California*. The plaintiffs in *Hartford Fire*, nineteen

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10 Id. at 603-4.
11 *Timberlane*, 549 F.2d at 611–12.
12 Id.
states and a number of private parties, alleged that the defendants, who included certain London reinsurers, had violated the Sherman Act. The defendants argued that the Court should decline jurisdiction on international comity grounds. This jurisdictional conflict was critical because the laws of the United Kingdom permitted the alleged anticompetitive activities while the laws of the United States prohibited them.

The Hartford Fire case seemed to offer the Supreme Court an opportunity to establish how comity should be used in the event of a conflict between legal systems. Rather than doing so, however, the Court narrowed the application of comity in such a way as to exclude its use in the case. It held that the principles of international comity should only be applied in the case of a ‘true conflict’ between American and foreign law, and that a true conflict does not exist if a ‘person subject to regulation by two states can comply with the laws of both’. Absent a true conflict, the Court held that the Alcoa ‘intended effects’ test applied.

Though this ruling allowed the Court to avoid the difficult question of how comity should be applied, it also increased the potential for tension among national regulators. If the laws of the United States and those of another country (assuming both are applying the Hartford Fire rule) regulate the same activity, both legal regimes can assert jurisdiction, meaning that the stricter of the laws will govern. To appreciate the full implications of Hartford Fire, imagine a situation where almost all the plaintiffs and defendants are British and only a few plaintiffs are American. Even though the Americans make up a small part of the market, the Court’s holding would require that the defendants comply with both countries’ laws. Because the American law is stricter, it would govern the case.

The Supreme Court returned to the question of extraterritorial application of antitrust laws in F. Hoffman-La Roche Ltd. v. Empagran S.A., a case in which comity was again relevant. In Empagran, vitamin purchasers filed a class action alleging that vitamin manufacturers and distributors had engaged in a price-fixing conspiracy, raising vitamin prices in the United States and foreign countries in violation of the Sherman and Clayton Acts.

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15 See Hartford Fire, 509 US at 769.
16 See Hartford Fire, 509 at 797.
17 See id. 798–99.
19 See id. at 796–7; see also US Department of Justice and Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations, April 1995, at 24 (‘[T]he Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.’).
At the heart of the jurisdictional issue was the reach of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA). The FTAIA excludes from the Sherman Act’s reach most anticompetitive conduct that causes only foreign injury, with the exception of conduct that significantly harms imports, domestic commerce, or American exporters. The particular activity in question was a price-fixing scheme that caused domestic injury sufficient for jurisdiction. The same activity also caused injuries to foreigners abroad, but this injury was not related to any injury within the United States. Appealing in part to notions of comity, the Supreme Court held that where a plaintiff’s claim rests entirely on a foreign injury that is independent from any domestic harm, there is no jurisdiction under the FTAIA.

2.1.2. European Union For several decades after the Alcoa case, the European Union and its member states refused to apply their own competition laws extraterritorially, despite the American practice of doing so (Stevens 2002). It was not until 1985, in the Wood Pulp case, that the European Court of Justice (ECJ) first applied a jurisdictional test that led to the extraterritorial application of laws. In that case, forty-one producers and two trade associations were accused of having implemented an illegal pricing agreement. The ECJ applied what it called an ‘implementation test’, under which the territorial scope of Article 85 included not only the place where the parties formed an agreement, but also the place of implementation of the anticompetitive agreement or concerted practice (see Breibart 1989). To meet the jurisdictional test under Wood Pulp, there must be (i) an agreement, decision or concerted practice entered into by two or more undertakings; and (ii) the actual implementation within the EU of that agreement, decision or concerted practice.

In addition to Article 85, the Commission’s authority to regulate concentrations is based on Council Regulation 4064, which gives the Commission authority to review all concentrations that have any impact on the EU. The concentration is deemed to impact the EU if the companies involved have combined worldwide sales of ECU 5 billion or if at least two of the companies involved each have sales in the EU of ECU 250 million. Even if the

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21 Id. at 2363.
22 Id.
23 The Court wrote that ‘this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations’ id. at 2366.
25 Id.
26 See id. at 166.
concentration does not meet one of these two tests, the EU may still exercise jurisdiction if the concentration passes one of several supplementary tests (Fiebig 1998). The Commission has exercised jurisdiction over the acquisition of joint control over a non-EU firm by an EU firm and a non-EU firm, the acquisition of sole control of a non-EU firm by a non-EU firm, the acquisition of joint control over a non-EU firm by a non-EU firm, and the merger of two non-EU firms.

2.2. Current cooperation

Though there have been a number of past efforts to achieve more substantial cooperation with regard to competition policy, there has been little movement in that direction. The stillborn International Trade Organization (ITO)

27 Supplementary tests include (i) the combined aggregate worldwide sales of all the undertakings concerned are more than ECU 2.5 billions; (ii) in each of at least three Member States, the combined aggregate sales of all the undertakings concerned are more than ECU 100 million; (iii) in each of these three Member States, the aggregate sales of each of at least two of the undertakings concerned are more than ECU 25 million; (iv) the aggregate Community-wide sales of at least two of the undertakings concerned are more than ECU 100 million. Id.


31 See, for example, Commissions Decision of April 2, 1998, 1998 OJ (C 144) 4, Case IV/M.1138 (LEXIS, Eurom Library, Legis.) (Royal Bank of Canada/Bank of Montreal); October 15, 1997, 1997 OJ (C 341) 8, Case IV/M.985 (LEXIS) (Credit Suisse/Winterthur); October 26, 1995, 1996 OJ (C 33) 7, Case IV/M.642 (LEXIS) (Chase Manhattan/Chemical Banking).
made the first significant effort to establish an international framework for competition policy in its proposed Havana Charter shortly after World War II. The US Congress rejected the ITO's proposed charter, effectively preventing the organization from coming into being, in part due to objections to the antitrust provisions. In the early 1950s, the United States similarly rejected an attempt by the Economic and Social Council (ECOSOC) of the United Nations to formulate an international antitrust policy.

In 1993, a group of antitrust scholars met in Munich, Germany and drafted an International Antitrust Code, which they proposed as a GATT-MTO-Plurilateral Trade Agreement (Gifford 1997). This proposal represented an attempt at true international cooperation on substantive competition issues. For example, Article 4 of the Code was to govern horizontal agreements. It defined some that were per se illegal, and others that were to be treated under a rule of reason approach. Similar substantive provisions were present with respect to vertical restraints (Article 5), mergers (Article 11), abuse of dominant position (Article 14), and so on. The Draft Code was intended to be a true source of international competition law and, perhaps for this reason, was never adopted.

The WTO's Doha Round negotiations saw the most recent attempt at international cooperation. The agenda established for the Doha Round (the 'Doha Declaration') stated that 'further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building.' Notice that this charge does not indicate an intention to carry out negotiations between member states during the round of trade talks, and there is no indication that any such discussions took place.

The current state of international competition law reflects the failure of

34 Draft Antitrust Code, supra note 31, art. 4, s 1, at S-11.
these past efforts at cooperation. There is no significant international agreement that requires cooperation by states in the identification or prosecution of conduct that violates competition laws. What exists is a variety of informal agreements among regulators. The most common form of cooperation is the bilateral agreement. By mid-2000, for example, the United States had entered into bilateral competition agreements with Germany, Australia, Canada, Brazil, Israel, Japan, Mexico, and the European Union. Though there are differences among the agreements, they tend to have certain common features, as illustrated in the EC-US agreement.

The EC-US agreement provides notification provisions that call on each party to notify the other when its enforcement activities ‘may affect important interests of the other Party’. The agreement also seeks to facilitate information sharing, and provides that the officials of the parties should meet at least twice a year (unless otherwise agreed) to (a) exchange information on their current enforcement activities and priorities, (b) exchange information on economic sectors of common interest, (c) discuss policy

37 This excludes the EU. See supra note 1.
46 Id. art. II.1.
changes which they are considering, and (d) discuss other matters of mutual interest.\textsuperscript{47} Some limited information sharing intended to assist in enforcement is also provided. Article III.4 states that the parties will provide relevant information within their possession that is relevant to an enforcement activity.\textsuperscript{48} Either party may refuse to provide information, however, if that information is ‘incompatible with the important interests of the Party possessing the information’.\textsuperscript{49} With respect to cooperation in enforcement, the agreement merely provides that the parties ‘may agree that it is in their mutual interest to coordinate their enforcement efforts’,\textsuperscript{50} but there is no requirement that either side cooperate. Should one party believe that activities taking place within the border of the other party are adversely affecting the former’s important interests, it may request that the latter initiate enforcement proceedings, but ‘[n]othing in this Article limits the discretion of the notified Party . . . as to whether or not to undertake enforcement activities’.\textsuperscript{51}

This form of agreement and the information sharing it provides is clearly of use to competition authorities. At a minimum it improves the channels of communication between regulators, lowers the cost of obtaining and sharing information, and provides guidelines with respect to how regulators from different jurisdictions will interact. Without denying the relevance of information sharing, however, it is important to note that the EC–US agreement and most other bilateral agreements are almost entirely limited to that function. They provide very little access to information about a firm or business activity that could not otherwise be obtained by foreign competition authorities, and confidential business information is not shared without the consent of the relevant firm.

Consider what is omitted from these agreements. There is no compromise of domestic control over enforcement, no binding commitment to share information, no commitment to cooperate in any particular instance, no coordination of substantive laws, no establishment of minimum standards, and no accounting for the impact of local laws on other states.\textsuperscript{52} Ultimately,

\textsuperscript{47} Id. art. III.2.
\textsuperscript{48} Id. art. III.4
\textsuperscript{49} Id. art. VIII.1.
\textsuperscript{50} Id. art. IV.2.
\textsuperscript{51} Id. art. V.4.
\textsuperscript{52} There are two notable exceptions of which I am aware. First, Canada and the United States have entered into The Treaty on Mutual Legal Assistance in Criminal Matters, March 18, 1985, Can.–US, 24 ILM 1092 (1985), which provides for the use of compulsory powers to gather evidence in criminal antitrust cases, though this is limited to criminal cases and gives each country the right to refuse cooperation on national interest grounds. The United States has also entered into an agreement with
these agreements are useful but extremely limited tools that facilitate the sharing of information that both parties wish to share.

One might wonder why states that seem to want to cooperate would not prefer a deeper form of commitment. The most likely answer is that what we observe in bilateral agreements is largely what one would expect from bureaucrats and regulators trying to protect their authority. As international activities grow in frequency and importance, the task of ensuring compliance with domestic antitrust laws becomes more challenging. Without some minimal level of cooperation, much of the information and evidence needed to investigate and prosecute a case may be outside the reach of domestic authorities. And what is true of evidence is also true of individuals — those suspected of having violated local laws may be beyond the subpoena power of officials. As international activities reduce the ability of competition officials to enforce their laws, cooperation with foreign enforcement agencies represents a way to protect their power.

Notice, for example, that there is generally no commitment to provide any specific form of cooperation. Each set of domestic regulators retains the discretion to refuse cooperation in a particular case or to decide the extent and form of the cooperation that is provided. Notice also that there is a heavy emphasis on exchanging information about policies, generally getting to know one another, and keeping one another informed of one's own activities. This commitment does not entail any compromise of control, but it does facilitate coordination and cooperation between the competition authorities so that cooperation can take place when it suits all sides.

In terms of the functioning of the international system, there is little indication that existing cooperation represents an effort to construct a sensible international approach to competition issues or address the ways in which domestic laws interact. It is true that bilateral agreements often call on states to take into account the impact of anticompetitive conduct on the other party to the agreement, but there is no explanation of how this sort of consideration should be carried out, no sanction for a failure to consider the interests of other states and no discussion of how foreign interests should be weighed against domestic ones. All of this means that it is almost certainly a mistake to view existing agreements as the beginning of a trend toward cooperation. It is more accurate to describe these agreements as the effort of domestic authorities to adapt to an internationalizing environment. As such, they

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Australia under the International Antitrust Enforcement Assistance Act of 1994, Pub. L. No. 103-438, codified at 15 USC §§ 6201–12, which is discussed briefly later in this chapter.

53 For example, the US–EC agreement calls for twice yearly meetings to discuss policy issues.
represent neither a hopeful sign of future agreement nor an indication that states are interested in further cooperation.

There are a very small number of more substantive agreements in existence, and this chapter will mention one to give a sense of what is possible. In 1994 the United States enacted legislation to permit the negotiation of international agreements that would permit the sharing of confidential information and allow the US to use its domestic tools of compulsory process to assist foreign governments in the gathering of information. In the more than a decade since that law was established, however, only one such agreement has been reached (with Australia) and there is little evidence that others will be forthcoming.

One additional form of international cooperation is worth mentioning. Recently, competition authorities from a number of countries have established the ‘International Competition Network’ (ICN). This network has as its stated purpose the facilitation of ‘procedural and substantive convergence in antitrust enforcement through a results-oriented agenda and informal, project-driven organization’. Despite this ambitious statement of purpose, the ICN is not, and is not intended to be, a forum in which binding agreements are reached. Rather its intention is to try to reach consensus on recommendations or best practices for domestic authorities. It is then up to those domestic authorities to implement the recommendations if they choose or to pursue international agreements of some sort. Once again the focus is on low levels of cooperation and information sharing.

3. The costs of non-cooperation
The failure to achieve meaningful cooperation in the regulation of competition generates costs for consumers and firms alike. These include the bureaucratic costs of coming into compliance with multiple jurisdictional requirements, the risk of biased prosecutions by domestic authorities, and distortion of the substantive rules put in place by domestic authorities. In this section I discuss each of these costs in turn.

3.1. Costs of ensuring compliance with multiple laws
The most obvious cost associated with non-cooperation is simply the cost of ensuring compliance with the various requirements of multiple regimes. The most dramatic example of how non-cooperation can increase the costs of

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54 International Antitrust Enforcement Assistance Act, 15 USC 6201 (1994).
ensuring compliance is in the merger area. Firms planning to merge face three major categories of costs: (1) the direct and indirect costs of determining whether notification to the state is required, including legal fees, management and employee time and possibly fees for an economic expert; (2) direct and indirect costs of filing, which again include legal fees, filing fees and document production costs and possibly translation fees; and (3) costs that arise from the filing and review requirements when they cause delays in implementing the transaction.57 These costs increase, and will continue to increase as more jurisdictions enact antitrust regulation, because firms must hire legal representation in each jurisdiction to meet the diverse reporting and disclosure requirements of each state. Even if the legal obligations do not vary across countries, redundant filing obligations generate duplicative costs and wasted time. In addition to these costs, the need to satisfy multiple, independent regulators results in costly delay. Furthermore, the regulatory agencies themselves are engaged in redundant reviews of the activity, further increasing the waste caused by the failure of cooperation.

3.2. Regulatory bias
Because cross-border transactions require the authorities to monitor the activities of both domestic and foreign firms there is a real danger that local firms will be favored over foreign ones, and that discretion in the hands of regulators will be used to apply the law more aggressively to the latter than the former. Indeed, even a totally unbiased regulatory structure may create the perception of bias. This perception is costly because if foreign firms and their governments believe that locals are favored over foreigners, their behavior may be affected. They may be reluctant to take certain actions or enter into certain dealings out of a fear that they face a higher level of scrutiny than do locals.

There is no shortage of evidence that states do, in fact, apply their competition policy prejudicially. The best example of this is the common use of export cartel exemptions.58 Other examples include industry-level exemp-

58 The Webb-Pomerene Act, Pub. L. No. 65-126, 40 Stat. 516 (1918) (codified at 15 USC §§ 61–6 (1994)) creates an exemption from the Sherman Act and from section 7 of the Clayton Act for export associations that register with the Federal Trade Commission, are formed for the sole purposes of engaging in export trade, and actually engaged solely in such export trade. This exemption does not include export activity that has anticompetitive effects within the United States. When it became evident that exporters were no longer using the Webb-Pomerene Act and therefore
tions from competition laws. In the United States, for example, firms in the following industries enjoy such exemptions: international aviation, international energy, international ocean shipping, and international communications. When local firms benefit from such exemptions they enjoy an advantage that their foreign rivals do not.

Despite these examples, it is true that the bulk of competition laws do not explicitly discriminate based on nationality. But the problem remains because even facially neutral laws can be applied in a discriminatory way by regulators. In fact, one would expect that in most political systems there would be a tendency to favor local firms over foreign competitors. Whether this is because the individuals charged with enforcing competition policy are themselves more favorably disposed to local firms or because political leaders respond to the efforts of local interest groups by putting pressure on these individuals to favor influential locals, there is no reason to think that the administration of competition laws takes place without a national bias.

3.3. Distorted domestic laws
The absence of cooperation in international competition policy also has an effect on the substantive laws adopted by policy makers. To demonstrate, suppose that a country exports virtually all of its production in imperfectly competitive industries. (Only imperfectly competitive industries are of concern here because firms in competitive industries are not problematic from a competition perspective.) When domestic firms engage in activities that might be considered anticompetitive, the great majority of the harm is felt by foreigners, while the benefits are enjoyed by local firms. Policy makers, looking only to local costs and benefits, will take into account all of the resulting benefits enjoyed by firms, but will consider only that fraction of the harm that is felt by local consumers.

A government designing a competition policy in this context would, therefore, favor the interests of producers over those of consumers. Note that this effect is in addition to any preference for one group or the other gener-

ated by domestic political concerns. One way to think about this is to imagine that the policy maker adjusts the payoffs to local consumers and producers to reflect the relative weights or priorities that he assigns to each. In contrast to local interests, foreign interests are not considered at all—they receive a weight of zero. Thus, in our hypothetical, trade causes the country to favor producers over consumers more than would be the case in the absence of international trade.

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

There are a number of strategies available to governments who wish to favor firms over consumers. The easiest of these is the already-discussed export cartel exemption. An exemption of this sort, however, is a relatively crude instrument because it only applies if all of a firm’s production is exported. A more nuanced strategy is to change the state’s substantive laws. This benefits all firms, including those that sell some of their goods domestically. Returning to the example of a country that exports most but not all of its production in imperfectly competitive industries, the government could react to this pattern of trade by weakening its competition laws. This strategy opens the door to more anticompetitive activity by local firms than would be the case in the absence of trade, yet retains some limits on conduct to protect local consumers.

Imports generate a distortion analogous to the above export distortion. If a country is able to regulate extraterritorially, it has an incentive to tighten its policy (relative to what a closed economy would do) in response to the importation of goods in imperfectly competitive markets. In the case of imports, the full amount of harm suffered by local residents is included in the policy calculus while only the benefits to local firms are considered. As with imports, this generates a predictable distortion regardless of how policy makers weigh the interests of firms and consumers (Guzman 1998).

The combination of trade and consumption patterns in imperfectly competitive markets suggests how a rational state’s competition policy will differ from what it would adopt if it had a closed economy.59 Assume that

59 For simplicity, it is assumed here that the impact on a country’s firms is
there are two kinds of goods: those that trade in competitive markets and those that trade in imperfectly competitive markets. Firms whose goods trade in competitive markets have no market power and, therefore, cannot engage in conduct that raises competition policy concerns. Firms whose goods trade in imperfectly competitive markets, on the other hand, enjoy market power and states attempt to regulate these firms through the use of competition laws. If a country’s firms are responsible for $x\%$ of global production of imperfectly competitive goods, it is assumed that those same firms enjoy $x\%$ of the monopoly rents generated by the sale of those goods. The government of that country, then, will take into account $x\%$ of the producer surplus generated by a change in its policies. Thus, for example, if a country relaxes its competition policies, this might lead to an increase in producer surplus. But since some of that surplus is felt outside the country, the government ignores it. If the same country’s consumers account for $y\%$ of global consumption of goods sold in imperfectly competitive markets, then the government will take into account $y\%$ of the global effect of their policies on consumers.

The net effect of trade, then, depends on the ratio of a country’s global share of production to its global share of consumption of imperfectly competitive goods. Notice that a closed economy would be one in which these are equal ($x = 100 = y$). If a country is a net exporter (meaning that its share of global production exceeds its share of consumption, $x > y$) then the country will take into account a larger portion of its policy’s impact on producers than on consumers. Relative to what it would do if it were a closed economy, then, the country will favor the interests of producers, yielding a more permissive competition policy regime. If a country is a net importer of these goods ($x < y$), the opposite is true – the preferred policy is stricter than would be the case in a closed economy.

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

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proportional to the number of firms in the country, and the impact on consumers is proportional to the amount of local consumption. I will also assume here that all imperfectly competitive goods are equally monopolistic and that monopoly rents are distributed proportionately to the volume of sales of imperfectly competitive goods. These assumptions are not necessary, but greatly simplify the presentation.
4. The de facto global regime

4.1. The problem of excessive regulation

Firms doing business in states that apply their laws extraterritorially have an increased burden because regulations are not identical across jurisdictions. When firms must follow several sets of legal rules at once, the de facto international regime is one that consists of the most stringent elements of each national regime and that is likely to be more restrictive than any individual state would choose for itself. For example, imagine a firm subject to the competition laws of countries A and B. Assume that country A has a more restrictive antitrust policy than country B with respect to horizontal restraints of trade, but a more permissive policy with respect to vertical restraints. Country A believes that this combination represents the optimal competition policy. Country B, on the other hand, believes its regime of permissive policies with respect to horizontal restraints but restrictive policies with respect to vertical restraints is the optimal policy. Firms subject to the jurisdiction of both countries A and B face a de facto regime that includes the strict horizontal restraint regulations of country A and the strict vertical restraint regulations of country B. Neither country A nor country B believes that a competition policy should be this strict.

Nor is it only differences between legal regimes that influence the effective level of regulation. The mere fact that a firm is subject to the regulation of two or more countries increases the regulatory burden. This is most obvious in the merger context where pre-approval of a transaction is often required. Imagine a merger of two or more firms doing business in both the United States and the EU, and subject to merger review in both jurisdictions. Assume further (and counter-factually) that the substantive rules in the two jurisdictions are identical. Being subject to review in both jurisdictions means, in practice, that the merger can only go forward if it is approved by both regulatory authorities. The assumption that the substantive rules are identical makes it more likely that the US and EU authorities will reach the same conclusion, but certainly does not guarantee that outcome. This is so because merger review (or any other form of competition policy review) is carried out by humans with different backgrounds, different interpretations of existing rules, and different attitudes about potentially anticompetitive activity. Furthermore, the reviewing agencies in different countries have

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60 In the US, companies considering a merger must comply with the Sherman and Clayton Acts as well as US Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (1992), and in the EU, the same companies must comply with the Council Regulation 4064/89, known as the Merger Control Regulation.
different cultures, different political climates, and different biases. In addition there is the possibility that reviewing agencies are biased in favor of locals and against foreigners, in which case the application of the law depends on the identity of the firm. Even with identical substantive laws, then, a proposed merger may be approved in one jurisdiction and not in the other. The requirement that the merger be approved by both jurisdictions amounts to an increase in the effective level of regulation.

In short, firms that have to submit to jurisdiction in two or more countries face a more burdensome international competition policy regime than what is applied by either country on its own, and probably more restrictive than any one of those states would choose if either were a closed economy.

One country's extraterritorial application of competition law can also undermine enforcement efforts in other countries. This is most easily seen in leniency programs used by several jurisdictions, including the United States. These programs provide leniency to corporations reporting their illegal activity at an early stage. The primary appeal of such programs is that they encourage parties to come forward with information that may assist authorities to prosecute other parties. But taking advantage of, for example, the leniency program in the United States would not shield a firm from prosecution in another jurisdiction. Indeed, taking advantage of a leniency program in one state may increase the firm’s risk of prosecution in another state because the firm will lose control over relevant information. For a firm subject to jurisdiction in many states, then, the incentive to come forward and take advantage of a leniency program may be undercut by the risk of prosecution elsewhere.⁶¹

Prohibiting extraterritorial assertion of jurisdiction would prevent such overregulation, but this prohibition would have its own costs. Alternatively, the countries could prevent overregulation by entering into some form of cooperative policymaking.

4.2. The problem of too little regulation

Although some jurisdictions, such as the United States and the EU, assert their jurisdictions extraterritorially, many countries (including most developing states) either do not have effective antitrust laws or do not apply those laws extraterritorially. Because the extraterritorial application of laws increases the set of policies available to a state, the decision to not apply

⁶¹ A variation on this problem was present in Empagran v. Hofman-LaRoche, 315 F.3d 338 (DC Cir. 2003). In that case the concern was that allowing foreign private plaintiffs to file complaints would undermine leniency programs. See Brief for the Government of Canada as Amicus Curiae Supporting Reversal of February 3, 2004. Empagran, available at 2004 WL 226389; Mehra (2004).
one's laws in this way requires explanation. Though there may once have
been a norm against such application, that is no longer the case. With the
United States and Europe (among others) both applying their laws extrater-
ritorially it is hard to imagine that there is some form of informal sanction
imposed on countries that follow suit. A better explanation is that the deci-
sion to not apply one's laws extraterritorially is a pragmatic one reflecting
the fact that a state lacks the power to enforce its laws abroad or the capac-
ity to pursue cases that involved events outside the country. Firms doing
business in these jurisdictions face an accidental international competition
policy, but its contours are more complex than the regime faced by busi-
nesses operating in the United States and the EU.

Consider first the effect of international trade on the domestic competition
policy of a country that does not apply that policy beyond its borders. With
respect to imports, the country cannot prevent anticompetitive activity by
foreign producers. With this in mind when creating substantive competition
policy, the policy makers will only consider the effect of the law on domestic
production. In other words, because domestic competition policy will have no
impact on the behavior of foreign firms, the optimal policy for the state is the
same as it would be if there were no imports. Because restrictive antitrust laws
affect both producers and consumers, as long as domestic firms export some
of their products, the state has a motivation to adopt more permissive competi-
tion laws than would be the case in a closed economy. (If local producers in
imperfectly competitive markets only sell domestically, the local competition
policy will be the same as it would be in a closed economy.) This is so because
the benefits of a tougher competition policy flow to consumers. If some of the
consumers of a good are located abroad, the policy maker ignores that portion
of the benefit that is enjoyed by foreign consumers. In selecting an optimal
policy the decision maker takes into account all the costs of tougher policies,
but only a fraction of the benefits - leading to more permissive laws.

This analysis predicts that small, open economies, where firms export a
high percentage of production and consumers import a high percentage of
consumption, will have weak or ineffective antitrust laws. The fact that
small states rarely have substantial antitrust laws is fully consistent with this
prediction. The EU experience is similarly consistent with the theory. When
the EU's competition policy moved from the national level to the regional
level (and extraterritoriality came into practice), the relevant policy went
from being relatively permissive to relatively restrictive.

The analysis of states that do not apply their laws extraterritorially does
not end here, however. Though the domestic laws adopted by these states are
likely to be weaker than would be the case in the absence of trade, the de
facto regime for many firms doing business in such countries is affected by
other states that apply their laws extraterritorially.
For instance, firms which conduct business in the United States and the EU are potentially subject to the laws of both jurisdictions. Consider the example of two or more passenger aircraft producers that wish to merge. Assume that the merged firm will have increased market power, increased prices, and earn higher profits. A territorialist state can only reach the proposed merger if one of the firms is located within its borders, and even then it can only hope to prevent the local firm from participating. However, both the United States and the EU will have jurisdiction over the proposed merger and either state can block it. If the EU or the United States blocks the merger, this action will affect all states. The competition policies of states that apply their laws extraterritorially, therefore, can influence economic activity in other states. In particular, states without extraterritorial jurisdiction are able to free ride on the regulatory supervision of those countries that do apply their laws in this way. Free riding is especially effective for countries that engage in a great deal of trade. Local firms with market power will be disciplined by international firms, and international firms are likely to do business in the EU, the US, or both – meaning that they will be subject to competition policy in those jurisdictions.

Although states that do not apply their laws extraterritorially can substitute free riding for a domestic competition policy, that strategy falls short of a fully effective legal regime. First, the EU and the United States may not bother to pursue a case that only minimally impacts them, even if it has a major impact on the free-riding state. The costs and benefits of an activity are obviously not the same in all countries, especially when comparing developing countries to developed ones. For example, anticompetitive conduct in the market for pharmaceuticals that treat tropical diseases may be enormously costly for some developing countries, but may not attract the attention of US or EU regulators.

Second, free riding is only effective to the extent that the firms in question are doing business in the US or the EU. Regional anticompetitive activities (such as regional periodicals) may not trigger jurisdiction in the US or the EU, and yet may impose significant costs on states.

An additional problem with free riding is that strong and effective enforcement of US and EU antitrust laws in those countries will not prevent firms from engaging in anticompetitive activities in other countries, outside the reach of the United States and the EU. Firms do not need to have a uniform pricing model for all the countries where they do business; they only have to restrain their anticompetitive activities in countries with effective competition policies. The United States and the EU have no reason to pursue a firm as long as it abides by their policies in their respective countries. Therefore, those countries whose laws cannot reach the firm cannot depend on free riding on the competition laws of the EU and the United
States. The empirical evidence suggests that exactly this sort of market segmentation and price discrimination has taken place (Levenstein and Suslow 2001; O’Connor 2001; White 2001; Clarke and Evenett 2002).

In conclusion, the de facto competition policy regime that exists in countries that do not apply their laws outside their borders is one created by a combination of overregulation (from markets where the EU or the US laws apply) and underregulation (where those laws do not apply). Cooperation could bring the regulation to a more optimal level.

5. Options for cooperation
The case for cooperation laid out above turns on the argument that the failure to cooperate generates unnecessary costs. This is, of course, only half the story because cooperation may also be costly. In this section I discuss the costs associated with several alternative forms of cooperation. In considering these different cooperative strategies, it is useful to remember that as we move to higher levels of cooperation, the associated costs increase. Greater cooperation moves decisions and policies further from individual citizens and the conventional domestic political process, and gives greater authority to domestic and, potentially, international bureaucracies. Greater cooperation also raises enforcement problems both because states may fail to comply with their commitments and because a truly international enforcement strategy may require some new form of cooperative transnational enforcement authority, which at the moment is difficult to imagine. Finally, cooperation is costly because the negotiation and maintenance of international cooperative agreements consume resources. The negotiation of agreements is time consuming and politically difficult, as is the establishment of new institutions, and the need for unanimity with respect to changes in agreements generates a powerful status quo bias that can prevent a cooperative regime from adapting to changes in the world.

Where possible, states should avoid these costs. This counsels for the lowest level of cooperation possible, consistent with an effort to avoid the major costs of non-cooperation (Guzman 2002). With this in mind, I turn to consider the three general forms of cooperation that might be envisioned for competition policy: the status quo of information sharing, agreement on choice of law rules, and cooperation on substantive laws.

5.1. Information sharing
As already discussed, current cooperation is almost entirely limited to voluntary information-sharing agreements. This minimal level of cooperation is required for regulators to successfully prosecute international firms doing business in their countries. If prosecutors could not seek help outside their borders, there is little to stop firms from violating the law, residing in a
foreign jurisdiction, and simply keeping important documents and meetings pertaining to the violative activity offshore. It is hardly surprising, then, that competition policy authorities have achieved this modest level of cooperation.

The information-sharing agreements that currently exist are a relevant and important tool in the international regulation of competition. They are not, however, sufficient to address the regulatory challenge of regulating international business activity with domestic laws. Without any compromise of domestic authority, coordination of jurisdictional reach, or agreement on minimum standards, information sharing cannot address the main costs of non-cooperation discussed in this chapter.

5.2. Choice of law
States could engage in a higher level of cooperation without surrendering any control of domestic substantive laws by agreeing to some coherent system of choice of law rules for competition policy. There are standard touchstones that one could use to determine the applicable law, including the location of the anticompetitive activity, the location of the most significant effects, the principal place of business of the firm, and so on. All of these pose problems in application, and one would have to decide whether the goal is to assign jurisdiction exclusively to one state or to some larger number, but despite these problems at least some activities and transactions could be addressed through an agreement on choice of law rules.

Unless a choice-of-law system were able to establish exclusive jurisdiction in most cases, however, it could not resolve the problem, already discussed, of overlapping jurisdiction. Firms that do business in both the EU and the US will continue to face excessive regulation as long as both states exercise jurisdiction over the activities and transactions of these firms. Nor can choice-of-law rules discourage states from distorting their substantive laws in an attempt to favor local firms. A choice-of-law system that assigns jurisdiction to more than one state will lead to overregulation and a system that assigned jurisdiction to a single state will lead to underregulation. Furthermore, a choice-of-law system cannot resolve the problem of local bias and trade-induced distortions of national substantive policies.

Theoretically, the problem of underregulation in states that cannot extend their laws extraterritorially could be addressed through a choice-of-law rule that grants standing to plaintiffs if the relevant firm activity took place within the jurisdiction, even if the injuries occurred abroad. (An even more aggressive rule would grant standing to any plaintiff regardless of where the conduct took place.) This rule would give injured plaintiffs a remedy against the actions of foreign firms that target states whose laws do not apply extraterritorially, as long as the conduct was within a state with effective
antitrust rules. Such a rule would at a minimum ensure that western firms faced some regulation when selling into countries without extraterritorial reach. The justification for this rule is essentially the same as the justification for eliminating export cartel exemptions: it requires states to regulate some anticompetitive behavior even when it benefits local firms and harms foreign consumers. This arrangement would obviously be a dramatic change from the status quo, and implementation would face numerous difficulties. If one concludes (as is almost surely correct) that the adoption and operation of such a rule in the current context is unrealistic, the lesson is that deeper cooperation is needed.

5.3. Substantive cooperation
The inability of either information sharing or choice-of-law rules to resolve the problems of international competition policy leads us to consider more substantive cooperation. By substantive cooperation I mean cooperation that deals with the content of the actual antitrust rules governing transactions. Cooperation at this level is necessary if international competition is to be regulated in a sensible and effective way.

At this point it is appropriate to address a source of confusion that exists in the international competition literature. When one discusses cooperation in competition policy, some observers immediately assume that what is being proposed is the harmonization of domestic laws. This need not be the case, however, and many forms of cooperation short of harmonization are possible. That said, it is also true that virtually any cooperation involves the surrender of some level of domestic control. Suppose, for example, that the US and the EC were to enter into an agreement that places an obligation on the competition authorities to share information with one another under certain conditions. If this agreement is effective, it will make it easier, for example, for EU authorities to pursue a case against American firms. This represents a de facto increase in the regulatory burden on those US firms. The agreement in question is far from a rule of harmonization, but it increases the reach of both states' laws and, therefore, makes it more likely that a firm must satisfy both sets of laws. For firms subject to the laws of both jurisdictions, then, there is a de facto harmonization – regardless of where they are from, they face a regulatory system that includes the laws of both systems.

The history of attempts at cooperation as well as the theory of international cooperation in the area tell us that achieving cooperation on substantive issues

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62 In fact, even the current system of informal cooperation could lead to this result as voluntary information sharing can increase the effective reach of domestic authorities.
is difficult (Guzman 1998). It is difficult because of differences in priorities, perceptions, and legal culture across countries, but also because different states are in different positions. As discussed in Section 3.3, the domestic policies chosen by states and the global policies preferred by states depend on the pattern of trade in imperfectly competitive markets. States that are net importers of such goods will prefer a strict policy and states that are net exporters will prefer a weak policy, relative to what each state would prefer absent this distortion. This problem, along with others already mentioned, suggests that the best strategy for cooperation is to start small.

The most realistic area in which agreement might be reached is a non-discrimination principle, including both national treatment and most favored nation elements (McGinnis 2004; Trebilcock and Iacobucci 2004; Guzman 2001). Non-discrimination is attractive because it is consistent with basic notions of fairness and with established rules in international trade. It would also address at least one problem – the use of export cartels. A national treatment obligation may also be of some use in addressing discrimination in application, though one wonders how successful that would be. Even if one imagines using some form of dispute resolution to determine if a state has complied with a non-discrimination requirement, experience at the WTO suggests that it is difficult to monitor discrimination of this sort. This is especially true because comparisons across transactions are difficult in this area. An alleged price-fixing scheme at the international level, for example, cannot easily be compared to some domestic analog to determine if both were treated in the same way by regulators.

Beyond a non-discrimination agreement, states could consider the WTO’s proposed ‘core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; [and] modalities for voluntary cooperation’. This more ambitious set of issues is still rather modest and focuses on issues that have widespread agreement – the need for transparency, non-discrimination, and the need to address hardcore cartels.

Whatever form of cooperation one envisions, there remains the question of where negotiations should take place. This is more than simply a detail because the forum in which negotiation takes place is likely to affect the chance of an agreement. I have argued that the WTO provides the most proper forum for these negotiations (Guzman 2003). Some commentators disagree and believe that WTO business and negotiations on antitrust policy should not mix (Fox 1999; Tarullo 2000). Furthermore, Michael Trebilcock

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63 WTO Ministerial Declaration, Doha Ministerial Conference Fourth Session. WTO Doc. WT/MIN(01)/DEC/1 (November 20, 2001), ¶ 25.
and Edward Iacobucci argue that the failure of the members to come to an agreement during the Doha Round, and the EU’s subsequent proposal at Cancun in September 2001 to withdraw competition policy from the WTO’s negotiating agenda due to sharp opposition from developing countries, demonstrates that the WTO is not the ideal forum to negotiate cooperation (Trebilcock and Iacobucci 2004).

The advantage of negotiating at the WTO is that doing so provides a setting where many issues can be negotiated at once, and therefore allows for concessions in one area in exchange for agreement in another. This ability to negotiate across a range of topics is crucial in achieving an international antitrust agreement because it reduces transaction costs which, in turn, increases the likelihood that the parties will reach the optimal result.

The WTO’s dispute settlement system provides an additional advantage to using this forum. Without enforcement procedures, parties to an agreement have little incentive to honor their commitments. Though the dispute settlement system within the WTO is imperfect, it currently provides the best mechanism for ensuring compliance with an antitrust agreement. Additional advantages offered by the WTO include universal membership, relatively transparent procedures, and experience managing the negotiation and implementation of international agreements.

References


Guzman, Andrew T. (2004), ‘The Case for International Antitrust’, in Michael S. Greve and


Wood, Diane P. (2004), 'Cooperation and Convergence in International Antitrust: Why the
