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## **Monopolists without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age**

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# Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age

D. Daniel Sokol†

**ABSTRACT:** *Antitrust has entered a gilded age of increased international cooperation and enforcement at levels never before seen. Yet, increased globalization creates challenges to combat international anticompetitive conduct. Part I introduces the Article. Part II provides a brief overview of the history of international antitrust. This overview departs from previous historical analyses as it focuses on participation within each of the international antitrust institutions to explain these historical limitations. Part III identifies and explores three case studies which are generally representative of international antitrust. These case studies have been chosen because the issues they address have been at the top of the agenda of international antitrust in the past decade: mergers, cartels, and market access.*

*Part IV introduces the theoretical tools to address the problems of international antitrust. This Part makes the analytical case for the application of comparative institutional analysis, an analysis of the choice of the decision-making process, to international antitrust. It addresses how a comparative institutional analysis framework allows for a more complete examination of both international and domestic institutions. It also explains the participation model as the organizing principle for the analysis of institutions, as participation affects each institution's ability to create policy remedies. The second theoretical tool that Part IV introduces is international relations theory. Comparative institutional analysis works with international relations theory to provide an effective way to understand the interplay of institutions at the domestic and international levels, as well at the level of international institutions vis-à-vis each other.*

*Part V offers an analysis of the efficacy of various types of antitrust institutions to determine which of these institutions are best suited to address the problems of international antitrust. This Part evaluates the capacity of each institution to address problems that the case studies implicate. These institutions include the World Trade Organization (WTO), regional and bilateral trade agreements, the United Nations Conference on Trade and Development (UNCTAD), the International Competition Network (ICN),*

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*domestic legislatures, courts, and agencies, and the market as an institution.*

*Part VI concludes that existing institutions each have limitations in their ability to address any of the issues in international antitrust exclusively. This Article argues that the ICN is the institution best suited to address these issues. This approach may assist to identify other regulatory areas in which an ICN modeled “soft law” transnational institutional choice may prove to be the most effective way to address international issues.*

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# Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age

D. Daniel Sokol

## I. INTRODUCTION

### A. Overview

Antitrust has entered a gilded age of increased international cooperation and enforcement at levels never before seen. A considerable literature exists on domestic and international institutions that make up the international antitrust system.<sup>1</sup> However, the conceptualization of this system needs revisiting due to limitations in the scholarship on how best to utilize these institutions. There are two reasons for this reconceptualization. First, in the fifteen or so years during this most recent era of increased antitrust internationalization, institutions have shifted in their capabilities and experiences. Second, much of the existing scholarly literature advocates solutions across only one or two possible institutional alternatives. What this area of law requires is comparison of all

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1. See, e.g., Oliver Budzinski & Mariana Bode, *Competing Ways Towards an International Competition Policy Regime: An Economic Perspective on ICN vs. WTO*, in NEW DEVELOPMENTS IN ANTITRUST (Frank Columbus ed., forthcoming 2006); Sadao Nagaoka & Akira Goto, *Vertical Restraints and Market Access*, 24 EMPIRICA 21 (1997); COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY (Michael S. Greve & Richard A. Epstein eds., 2004); Jim Chen, *The Vertical Dimension of Cooperative Competition Policy*, 43 ANTITRUST BULL. 1005 (2003); KEVIN C. KENNEDY, COMPETITION LAW AND THE WORLD TRADE ORGANIZATION: THE LIMITS OF MULTILATERALISM (2001); Paul B. Stephan, *Global Governance, Antitrust, and the Limits of International Cooperation*, 38 CORNELL INT'L L.J. 173 (2005); PHILIP MARSDEN, A COMPETITION POLICY FOR THE WTO (2003); Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT'L L. 911 (2003); Eleanor M. Fox, *Antitrust and Regulatory Federalism—Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781 (2000); Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501 (1998); Christian A. Conrad, *Strategies to Reform the Regulations on International Competition*, 26 WORLD COMP. 101 (2003); Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343 (1997); Michael J. Trebilcock, *Competition Policy and Trade Policy—Mediating the Interface*, 30 J. WORLD TRADE 71 (1996); Andre Fiebig, *A Role for the WTO in International Merger Control*, 20 NW. J. INT'L L. & BUS. 233 (2000); Ariel Ezrachi, *The Role of Voluntary Frameworks in Multinational Cooperation Over Merger Control*, 36 GEO. WASH. INT'L L. REV. 433 (2004); Josef Drexler, *International Competition Policy After Cancun: Placing a Singapore Issue on the WTO Development Agenda*, 27 WORLD COMP. 419 (2004); Damien J. Neven & Lars-Hendrik Röller, *The Allocation of Jurisdiction in International Antitrust*, 44 EUR. ECON. REV. 845 (2000); Ignacio Garcia Bercero & Stefan D. Amarasingha, *Moving the Trade and Competition Debate Forward*, 4 J. INT'L ECON. L. 481 (2001); Frank R. Schoneveld, *Cartel Sanctions and International Competition Policy: Cross-Border Cooperation and Appropriate Forums for Cooperation*, 26 WORLD COMP. LAW & ECON. REV. 433 (2003); Edward T. Swaine, *Against Principled Antitrust*, 43 VA. J. INT'L L. 959 (2003); Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478 (2000); Diane P. Wood, *Antitrust at the Global Level*, 72 U. CHI. L. REV. 309 (2005).

possible solutions—a comparative institutional analysis.

The application of comparative institutional analysis to international antitrust serves a critical purpose. However, previous scholarship has not applied comparative institutional analysis to study the effects of particular proposals that address international antitrust.<sup>2</sup> Any analysis or policy prescription that fails to examine each of the potentially relevant institutions, both international and domestic, is incomplete. Such lack of comparative institutional analysis has significant repercussions as to the choice of an effective antitrust institution. In particular, assigning policy prescriptions to a less adequate institution increases costs globally and frustrates attempts to enhance societal welfare and lift people out of poverty.

This Article provides an in-depth study of how one area of regulatory law responds to globalization. This response requires increased internationalization where traditional domestic capacities seem inadequate to address globalization's challenges. Moreover, the dynamics of internationalization in this area suggest lessons for other areas of international regulation. Therefore, the Article examines how various domestic and international institutions work with each other to reduce anticompetitive conduct that has international effects. Following such an approach provides guidance more generally on how international organizations can improve the capacity of domestic institutions to address difficult cross-border regulatory issues.

### *B. Article Roadmap*

Part II provides an historical overview of international antitrust. This overview departs from previous accounts as it focuses on participation in each of the international antitrust institutions. Participation helps to explain the effectiveness—or lack thereof—of a particular institutional choice. Participation plays a critical role in framing comparative institutional analysis. The purpose of the historical discussion is to put various international institutions and approaches in context. This discussion also illustrates how institutions change over time and respond to each other. The structure of these institutions and the capacity of potential parties to participate within them provide a framework that applies specifically to international antitrust institutions. Part III introduces the problems of international antitrust. It identifies and explores three case studies involving the key issues of international antitrust: mergers, cartels, and market access.

Part IV introduces the theoretical tools to address the problems of international antitrust. This Part makes the analytical case for the application of

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2. NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994); NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS (2001).

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comparative institutional analysis to international antitrust. It addresses how a comparative institutional analysis framework allows for a more complete examination of both international and domestic institutions. It also explains the participation model as the organizing principle for the analysis of institutions, for participation affects each institution's ability to create policy remedies. Participation in a comparative institutional analysis model depends on costs and benefits to participation. Participation in a given institution is a function of the costs and the benefits of participation.<sup>3</sup> Policy alternatives come with certain costs, such as transaction costs. The benefits of participation include the distribution of benefits across the affected population both on a per capita basis and in terms of variance across the population.<sup>4</sup>

Participation frames the way to view costs and benefits of a particular institutional choice as results of the decision making process to address societal problems. The costs affect any given institution and the ability of actors to participate in it. The lower the cost of participation, the more effective the institution may be. This relationship also works in reverse. As more parties participate, information costs decrease. This increases the benefits to parties participating in the institution.

The second theoretical tool that Part IV introduces is international relations theory. International relations explain the different models of organization of international institutions. Hard law institutions favor a binding international adjudicatory institutional choice. The soft law approach, whether transgovernmental<sup>5</sup> or transnational,<sup>6</sup> favors an administrative agency to agency nonbinding institutional model. Comparative institutional analysis works with international relations theory to provide an effective way to understand the interplay of institutions at the domestic and international levels as well at the level of international institutions vis-à-vis each other.

Part V explores how both comparative institutional analysis and international relations theories of international governance apply to international antitrust institutions and affect the capacity of these international organizations to address critical issues in international antitrust. Part V offers an analysis of the efficacy of various types of antitrust institutions to determine which of these institutions are best suited to address the problems of international antitrust. This Part evaluates the capacity of each institution to address problems that the case studies implicate and the ability of parties to participate in each of the institutions. These institutions include the World

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3. This can be understood in the equation  $P = f(c \cdot b)$ , where  $P$  is institutional participation;  $c$  is the cost of participation and  $b$  the benefit of participation.

4. KOMESAR, *LAW'S LIMITS*, *supra* note 2, at 30.

5. Agency to agency interaction is described in greater detail in Part IV.

6. Sub-state level interaction, which also includes non-state actors, is described in greater detail in Part IV.



Trade Organization (WTO), regional and bilateral trade agreements, the United Nations Conference on Trade and Development (UNCTAD), the International Competition Network (ICN), domestic courts and agencies, and the market as institution. Earlier work has underemphasized the importance of the participatory aspect in international antitrust institutions. From this analysis, the importance of the ICN emerges as a soft law institution that can create antitrust compliance more effectively than other institutional alternatives.

Part VI concludes that existing institutions each have limitations in their ability to address any of the issues in international antitrust exclusively. This Article argues that the ICN is the institution best suited to address these issues. This approach may assist to identify other regulatory areas in which an ICN modeled solution may prove to be the most effective way to address international issues.

## II. INTERNATIONAL ANTITRUST HISTORY

### *A. Early Attempts at International Antitrust Institutions*

Increased globalization has opened markets to anticompetitive conduct by foreign actors or exported anticompetitive practices to other countries.<sup>7</sup> The internationalization of antitrust enforcement is a response to this globalization of anticompetitive conduct. Integrated international attempts to control anticompetitive practices are for the most part a post–World War II endeavor.<sup>8</sup> For much of its history, coordinated international antitrust has been a history of ineffective efforts. Institutional constraints and the lack of analytical convergence on enforcement approaches have hampered coordinated international antitrust efforts. The ineffectiveness of these efforts has been a function of the type of participation in international antitrust institutions and the costs and benefits of such participation. This Part introduces the institutional alternatives, whereas Part V examines the costs and benefits that underlie the potential effectiveness of each institutional alternative as the most effective decision maker to address international antitrust issues.

The first significant multilateral attempt to remove international anticompetitive barriers occurred at the Bretton Woods Conference of July 1944. Participants there suggested the creation of three pillars for a postwar economic order: the International Monetary Fund, the International Bank for Reconstruction and Development (later the World Bank), and the International

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7. This hearkens back to earlier periods of globalization. For example, international cartels played an important role in the pre–WWII world. WYATT WELLS, *ANTITRUST AND THE FORMATION OF THE POSTWAR WORLD* (2002); RUDOLF K. MICHELS, *CARTELS, COMBINES, AND TRUSTS IN POST-WAR GERMANY* (1928).

8. However, the League of Nations made an initial foray into this area. Waller, *supra* note 1, at 349.

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Trade Organization (ITO). In particular, the ITO charter provided for increased trade liberalization. It included a section on restrictive business practices. The ITO would have allowed for dispute resolution for violations of anticompetitive conduct. Specifically, members were to take measures against “business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control whenever such practices have harmful effects on the expansion of production or trade.”<sup>9</sup> The ITO would have been empowered to investigate such conduct and recommend remedial action to member governments.<sup>10</sup> The ITO also previewed many of the issues discussed in the current international antitrust circles—public and private restraints, cartels, monopolization, and market access.

However, the ITO faced resistance from a number of countries, including the United States. The U.S. Congress feared a loss of sovereignty and the limitations that the charter might impose upon U.S. businesses. Developing countries also felt that the costs of participation outweighed the benefits, because of these countries’ increased focus on an import substitution industrial policy.<sup>11</sup> The differences in conceptualization of economic policy and government control in the economy precluded consensus on the ITO. Without U.S. support, the organization did not materialize.<sup>12</sup>

During the early postwar period, the U.S. Department of Justice undertook successful aggressive criminal prosecution of many of the international cartels that had been active in the interwar period.<sup>13</sup> This was a push specific to the international cartel as a business model.<sup>14</sup> As a result of the ineffectiveness of international efforts to create the ITO, the United States took a unilateral approach to international cartels through the application of its antitrust laws extraterritorially.<sup>15</sup> Starting in 1945 with the *United States v. Aluminum*

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9. 62 U.S. DEP’T OF STATE, PUB. NO. 3206, HAVANA CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION: INCLUDING A GUIDE TO THE STUDY OF THE CHARTER, Art. 46 (1948).

10. MICHAEL TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 592 (3d ed. 2005).

11. WELLS, *supra* note 7, at 43-137.

12. See JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT (1969). GATT members later adopted a limited Decision on Arrangements for Consultations on Restrictive Business Practices in 1960, BISD 9S/ 28-29, that had little effect.

13. WELLS, *supra* note 9, at 43-137.

14. Helen Mercer, *The Rhetoric and Reality of Anti-cartel Policies: Britain, Germany and Japan and the Effects of US Pressure in the 1940s*, in CARTELS AND MARKET MANAGEMENT IN THE POST-WAR WORLD (LSE Business History Occasional Paper, No. 1, London School of Economics, Carlo Morelli ed., 1997).

15. Because of the economic and political weakness of postwar Europe, the United States did not press European countries on their toleration and sometimes active support of cartels. The EU did not take an active role in cartel enforcement until the 1990s. This had to do with greater tolerance of cartels in some countries as a way to better organize their export activity or a different sense of what was critical in promoting “competition” within the nascent European community. Generally, the EU avoided areas of disagreement in enforcement of competition law where there was the possibility of political resistance from Member States. DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS 358 (1998).

*Company of America*,<sup>16</sup> the United States began to apply its antitrust laws extraterritorially against anticompetitive conduct.<sup>17</sup> Extraterritorial applications of domestic antitrust laws provide an alternative “self-help” approach to international spillover concerns.<sup>18</sup>

Extraterritoriality exemplifies the costs that limited participation creates vis-à-vis benefits. Other countries do not appreciate extraterritorial reach into their domestic antitrust systems, especially when they do not have a similar belief as to what constitutes anticompetitive harm. The use of extraterritoriality for self-help does not allow for any input from other countries. This reduces these countries’ participation in prosecutorial decision making. Such countries may respond by creating roadblocks to effective extraterritorial action by the intervening nation’s antitrust agency.

Sovereignty concerns limit the potential benefits of extraterritoriality. Extraterritoriality meant that, to a certain extent, the United States became the antitrust enforcer of the world. At the time of early U.S. extraterritorial enforcement, many countries did not view cartels as a particularly serious problem relative to their perceived benefits of helping to strengthen domestic economies at the expense of foreign consumers. The most famous case of opposition to U.S. antitrust action abroad was the U.S. effort to break up the international uranium cartel. As a consequence of U.S. action against the cartel, European countries and Canada enacted blocking statutes to limit cooperation with the United States on the litigation.<sup>19</sup> It was not until the late 1980s that the EU recognized extraterritoriality in its own antitrust system.<sup>20</sup> Similarly, not until 1969 did the EC successfully prosecute its first case against a secret cartel.<sup>21</sup>

### *B. Modern International Antitrust Institutions*

Even as the United States undertook unilateral efforts, attempts to create

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16. 148 F.2d 416 (2d Cir. 1945).

17. Focusing on extraterritorial application may still create gaps in enforcement. See *F. Hoffmann-La Roche Ltd. v. Empagran S. A.*, 542 U.S. 155, 173 (2004), where the U.S. Supreme Court limited the extraterritorial reach of U.S. antitrust laws. The Court held that foreign purchasers that claimed injury from international price fixing could not sue in U.S. courts absent allegations that an injury to U.S. consumers facilitated the harm to the foreign purchasers.

18. Trebilcock and Howse would apply extraterritoriality so as to create a cause of action for any violation that harms a country’s consumers for imports. TREBILCOCK & HOWSE, *supra* note 10, at 602.

19. Robert Pitofsky, *Competition Policy in a Global Economy—Today and Tomorrow*, 2 J. INT’L ECON. L. 403 (1999).

20. See the cases jointly referred to as the Wood Pulp cartel cases, Joined Cases 89, 104, 114, 116, 117 & 125 to 129/85, *A. Ahlstrom Osakeyhtio v. Commission*, 1988 E.C.R. 5193, established the effects test. For a more detailed explanation of antitrust extraterritoriality, see Edward T. Swaine, *The Local Law of Global Antitrust*, 43 WM. & MARY L. REV. 627, 641-46 (2001).

21. Mario Monti, Address at the EMAC in Brussels, Belgium: The Fight Against Cartels (Sept. 11, 2002). EC efforts against global cartels occurred in earnest after 1995. See John M. Connor, *Private International Cartels: Effectiveness, Welfare, and Anticartel Enforcement* 30-31 (Purdue Univ., Staff Paper No. 03-12, Nov. 5, 2003).

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global institutions did not end with the ITO. The Organization for Economic Co-operation and Development (OECD) first addressed antitrust issues in 1961, when it formed the Competition Law and Policy Committee (CLPC). The CLPC's purpose was to serve as a talking shop for OECD member agencies, to collect and discuss information on antitrust, and to promote harmonization.<sup>22</sup> During the 1990s the OECD expanded its discussions specifically to the international trade and antitrust interface. In 1996, the OECD created the Joint Group on Trade and Competition to discuss this interface.<sup>23</sup>

Participation in the OECD is a function of its membership. Its members are antitrust regulators from OECD member and observer countries. The OECD accommodates participation by member countries with similar economic development and antitrust systems. It is essentially a club of developed countries, which set the antitrust agenda of the organization. The CLPC provides a forum for OECD members to come to understandings on international antitrust issues.

Over the years, the OECD has promulgated a number of nonbinding recommendations to improve antitrust coordination and foster harmonization—in 1967, 1973, 1979, 1986, 1995, 1998, and 2005.<sup>24</sup> These recommendations include increased cooperation and coordination among agencies, as well as specific recommendations regarding cartels and mergers. In a number of cases, these recommendations have served as the template for best practices across OECD member nations. However, these recommendations have not created significant compliance among OECD members. The nonbinding nature of the recommendations based on the OECD's institutional capacity did not create an incentive for countries to undertake their implementation, as the discussion in Part V lays out in greater detail.<sup>25</sup> As to global adoption of OECD recommendations, the power dynamics of the OECD, in which there is no meaningful developing world participation in shaping the agenda or norms,

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22. A lack of a belief in markets hobbled early OECD efforts to impose voluntary recommendations on anticompetitive conduct. During the 1970s, when the United States experienced its antitrust revolution, it was a solitary voice at OECD meetings that sought to use antitrust to create more efficient markets. John H. Shenefield, *Coherence or Confusion: The Future of the Global Antitrust Conversation*, 49 ANTITRUST BULL. 385, 392 (2004).

23. It did so after the WTO created a similar group for possible inclusion of antitrust in the current trade negotiation agenda.

24. OECD, Recommendation of the Council of 5 October 1967 [c (567) 53 (Final)]; OECD, Recommendation of the Council of 3 July 1973 [C (73) 99 (Final)]; OECD, Recommendation of the Council of 25 September 1979 [C (79) 154 (Final)]; OECD, Recommendation of the Council of 21 May of 1986 [C (86) 44 (Final)]; OECD, Recommendation of the Council of 27 and 28 July 1995 [C (95) 130 (Final)]; OECD, Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, 25 March 1998 [C(98)35/FINAL]; OECD, Recommendation of the Council on Merger Review, 23 March 2005 - C(2005)34; OECD, BEST PRACTICES FOR THE FORMAL EXCHANGE OF INFORMATION BETWEEN COMPETITION AUTHORITIES IN HARD CORE CARTEL INVESTIGATIONS (2005).

25. The most recent iteration of progress on implementation based on case studies can be found at OECD, *Hard Core Cartels—Third Report on the Implementation of the 1998 OECD Recommendation*, 8 OECD J. COMP. L. & POL'Y 1, 9 (2006).

contribute to the lack of adoption.

Unlike the OECD, where membership is open only to developed countries, membership in the UNCTAD is open to all UN members. The UNCTAD undertook a role in antitrust beginning in the 1970s. It was during this period that UNCTAD members began negotiations on a restrictive business practices code. The code negotiations allowed for developing-world countries, the vast majority of which lacked their own antitrust regimes at the time, to create an alternative approach to that of the OECD. The developing world's vision for the UNCTAD code was twofold. On the one hand, the code was to limit the ability of multinational corporations (MNCs) to operate in their countries. On the other hand, the code was to condone developing-world anticompetitive practices.<sup>26</sup>

In 1980, the UNCTAD adopted the nonbinding code.<sup>27</sup> Ultimately, the UNCTAD code was a compromise of the developing world with the United States and European countries rather than the original vision of developing-world countries. This compromise led to vagueness in many of the code provisions. The code focused on domestic implementation of antitrust law rather than on increased coordination across countries. It placated developing-world interests, but, because of U.S. hostility, it did not frame the debate on international antitrust or antitrust generally. Given that most countries of the world lacked any antitrust agency at that time, the code may have been largely aspirational. For many countries, it had little lasting effect.<sup>28</sup>

The code's impact was a product of participation in the UNCTAD process. Part V explores more generally the costs and benefits of UNCTAD participation and their implications on its effectiveness as an institution. As to how participation explains the adoption and the provisions of the code, participation within UNCTAD consists largely of country delegates to UNCTAD meetings. Developing countries' interests have a more powerful voice in the UNCTAD than in other international antitrust organizations. This allowed many countries that lacked antitrust laws, market-based economies, and competition cultures to play an important role in shaping the debate in creating the code. U.S. participation in this process was diluted because of its less hegemonic role. The United States could limit the excesses of some of the

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26. Shenefield, *supra* note 22, at 391.

27. UNCTAD, *Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Anticompetitive Practices*, TD/RBP/CONF/10/REV.1 (Geneva: UNCTAD, 1980).

28. The William Baxter-led Reagan antitrust team, who came to office shortly after the code's adoption, viewed the code with mistrust and sought to limit its impact. Some scholars believe that the impact of the code was more far reaching. They argue the impact of the code was to help push for the creation of antitrust laws and agencies in a number of countries. Douglas E. Rosenthal & Phedon Nicolaides, *Harmonizing Antitrust: The Less Effective Way to Promote International Competition*, in *GLOBAL COMPETITION POLICY* 355, 370 (Edward M. Graham & David J. Richardson eds., 1997). Yet, it was not until the 1990s that such antitrust laws became common as part of a general shift of macro- and micro-economic liberalization in developing-world and transitional countries.

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proposals but could not shape the UNCTAD's agenda (as it could in other international antitrust organizations).

### *C. The Contemporary Debate*

For the next decade, outside of continuing OECD meetings, countries undertook few significant international antitrust efforts within an international institutional context. This changed when Lord Brittan, then the head of antitrust for the EU, articulated a contemporary vision for international antitrust in his 1992 speech at the World Competition Forum.<sup>29</sup> He suggested a three-part focus. First, a purely domestic focus on antitrust policy could not address aspects of international anticompetitive conduct. Second, the nonbinding nature of current international agreements was ineffective. Third, the lack of any antitrust law in a number of jurisdictions added to the international problem. The linkage Brittan made between trade and antitrust was that with increased trade liberalization, private firms could erect barriers to entry in the place of the dismantled government barriers, harming societal welfare.

Others contributed to this modern conception of an international institutional response to antitrust issues. A number of scholars prepared a systemic attempt at international antitrust called the Munich Draft Code. These experts suggested plurilateral agreement to the General Agreement on Tariffs and Trade (GATT).<sup>30</sup> The experts behind the Draft Code believed that the Draft Code and GATT could provide the basis for an international agenda for discussion and potential agreement.<sup>31</sup> A report by a group of experts to the EU's antitrust regulators suggested an approach similar to the Draft Code's. The experts proposed internationally binding minimum standards that would be incorporated into domestic antitrust laws.<sup>32</sup> However, because the experts did not represent countries' antitrust agencies, they did not account for the political economy realities that shape agency- and country-level acceptance of proposals, as agency participation in developing the work product would have.

These efforts created momentum for discussions of new institutional approaches to address international antitrust issues. The Singapore Ministerial Declaration of 1996 created a new WTO mandate to study antitrust and its interaction with trade policy. The declaration articulated a desire to "establish a

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29. Lord Brittan, Address at the World Competition Forum in Davos, Switzerland: A Framework for International Competition (Feb. 3, 1992).

30. Draft International Antitrust Code as a GATT-WTO Plurilateral Agreement (Int'l Antitrust Code Working Group Proposed Draft 1993), published & released July 10, 1993, *reprinted* in 64 Antitrust & Trade Reg. Rep. (BNA) (Aug. 19, 1993) (Special Supp.).

31. David J. Gerber, *The U.S.-European Conflict over the Globalization of Antitrust Law: A Legal Experience Perspective*, 24 NEW ENG. L. REV. 123, 127-28 (2002).

32. European Commission, Directorate-General IV, Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules: Report of the Group of Experts, COM(95)0359-C4-0352/95 (July 3, 1995).

working group to study issues raised by Members relating to the interaction between trade and competition policy, including anticompetitive practices, in order to identify any areas that may merit further consideration in the WTO framework.”<sup>33</sup> Participation in the Working Group on the Interaction Between Trade and Competition Policy was open to WTO member countries. Participation dynamics were different than in the UNCTAD setting of the late 1970s because of the relative power of the developed world (particularly the United States and EU) in the WTO and because more countries of the developing world had adopted economic liberalization, including creation or planned creation of their own antitrust regimes.

Once underway, the scope of the Working Group grew. In 1997, its initial report set out the major issues for discussion.<sup>34</sup> This agenda included most if not all of the major issues that linked antitrust to international trade and development. Because of the breadth of this agenda, many contentious issues in the antitrust and trade interface made the list. Decisions on how to address or not address these issues helped narrow the scope of what the Working Group, which met from 1997 to 2003, discussed.

In 1998, the Working Group began discussing issues on the checklist.<sup>35</sup> One concern was how market access issues could distort antitrust objectives.<sup>36</sup> Differing opinions as to the appropriate role of market access, as it related to antitrust, remained significant. Countries could not break the impasse with revised proposals.<sup>37</sup> Consequently, over the course of Working Group deliberations, the focus of proposals shifted from market access to politically less difficult issues.<sup>38</sup>

The WTO articulated the Working Group’s new focus on “core” principles in the 2001 Doha Declaration. These core principles included transparency, nondiscrimination, procedural fairness, voluntary cooperation, capacity building, and discipline of hard-core cartels.<sup>39</sup> Among substantive antitrust provisions, cartel enforcement seemed to be the one area in which countries

33. World Trade Organization, Ministerial Declaration of 13 December 1996, WT/MIN(96)/DEC [hereinafter Singapore Declaration].

34. Working Group on the Interaction between Trade and Competition Policy, *Draft Report (1997) to the General Council*, WT/WGTCP/W/49 (Nov. 25 1997).

35. Working Group on the Interaction Between Trade and Competition Policy to the General Council, *Report of the Working Group on the Interaction Between Trade and Competition Policy to the General Council*, WT/WGTCP/2 (Dec. 8, 1998).

36. Philip Marsden, *The Impropriety of WTO “Market Access” Rules on Vertical Restraints*, 21 WORLD COMP. 5 (1998); WTO Working Group on the Interaction between Trade and Competition Policy, *Annual Report of the Working Group on the Interaction between Trade and Competition Policy to the General Council*, WT/WGTCP/5 (Oct. 8, 2001).

37. PHILIP MARSDEN, A COMPETITION POLICY FOR THE WTO ch. IV (2003).

38. Robert Anderson & Peter Holmes, *Competition Policy and the Future of the Multilateral Trading System*, 5 J. INT’L ECON. L. 531 (2002).

39. World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).

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might agree on a definition and set of approaches. However, even with a proposed reduction in scope at the WTO, there remained significant divergence in views, preventing advanced negotiations on binding antitrust WTO rules.<sup>40</sup> By 2003, the Working Group agreed that any binding standards for antitrust law were not feasible or desirable. In 2003, at its Cancun Ministerial, the WTO ended the Working Group on the Interaction Between Trade and Competition Policy and dropped antitrust from the trade agenda. Similarly, by 2006, the OECD, in response to U.S. concerns, had dropped the Joint Group on Trade and Competition.

To shift the focus of the Working Group, the United States undertook a domestic review of how to frame the internationalization of antitrust law and reshape the international debate. The U.S. International Competition Policy Advisory Committee (ICPAC) studied international antitrust issues, held hearings, and in 2000 issued a report outlining an alternative approach to the WTO on international trade and antitrust. ICPAC promoted soft law harmonization to address the “entire global competition agenda.”<sup>41</sup> It also opposed any dispute resolution at the WTO.<sup>42</sup> To promote soft law harmonization, ICPAC proposed a Global Competition Initiative as a forum for the discussion antitrust issues.<sup>43</sup>

This vision of the Global Competition Initiative actualized in the ICN, which agencies from twelve countries founded in 2001.<sup>44</sup> Soon, all antitrust agencies joined the ICN. The critical components of ICN participation are that all antitrust agencies are members and that active stakeholder participation augments agencies’ participation. In the ICN, all the world’s antitrust agencies and stakeholders discuss policy issues and work to implement best practices. This provides the potential for increased developing-world involvement, as Part V details. Agencies, bar associations, consumer groups, and the business

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40. Julian L. Clarke & Simon J. Evenett, *A Multilateral Framework for Competition Policy?*, in *THE SINGAPORE ISSUES AND THE WORLD TRADING SYSTEM: THE ROAD TO CUNCUN AND BEYOND 77* (State Secretariat for Economic Affairs (Switzerland) & Simon J. Evenett eds., 2003).

41. International Competition Policy Advisory Committee, *Final Report to the Attorney General and Assistant Attorney General for Antitrust*, at 281 (2000), available at <http://www.usdoj.gov/atr/icpac/icpac.htm> [hereinafter ICPAC Report].

42. *Id.* at 286.

43. One of the most thorough and thoughtful conceptualizations and one that had implications on the future of the trade and competition interface came from Eleanor Fox. The Fox proposal foresaw some of the developments of the ICN, and some of Fox’s suggestions were incorporated (though with even less specifics) into the ICPAC Report. See ICPAC Report at 281-84. Fox’s proposal included items that were more conceptual and harder to galvanize agreement. She proposed a World Competition Forum that addressed a number of substantive issues. However, her agenda did not account for bargaining power constraints across countries and which parties’ interests set the antitrust agenda. Eleanor M. Fox, *Competition Law and the Millennium Round*, 2 J. INT’L ECON. L. 665, 675-77 (1999) [hereinafter *Millennium Round*].

44. The founding members of the ICN were Australia, Canada, the European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, the United Kingdom, the United States, and Zambia. See the discussion on the ICN in Part V *infra* for more detail.



community generally have been receptive to the agenda and work product of the ICN. This is due to their participation in ICN discussions and outputs.

Throughout the history of international antitrust, the participatory approach suggests that exit and voice play critical roles in international organizations.<sup>45</sup> If powerful countries dislike the lack of consensus or the state of debate in an organization, they can exit and move discussions to another pre-existing or new organization. The United States was unhappy with the WTO as an institutional choice for international antitrust. It therefore created the ICN as an institutional home for the U.S.-framed antitrust agenda. As the EU saw that consensus was not possible in the WTO, it too moved its efforts to the ICN on those issues where consensus could be reached.

Alternatively, countries and antitrust agencies can exercise voice to change an organization. This too has been the history of international antitrust. The United States in particular has used voice to shape its participation in international organizations. The U.S. voice has persuaded organizations to adopt a view of antitrust that accepts at some basic level the tenets of the Chicago School antitrust revolution, which are based on price, quantity and quality. The general lesson from this history is that each institutional structure suffers from problems of participation and power dynamics. However, each institution responds differently to these problems. Moreover, the historical analysis suggests that the United States cannot go it alone to create system-wide change to address international antitrust problems. Rather, substantial change only seems to occur if the United States can obtain buy-in from others (particularly the EU). Additionally, if existing institutions seem to be unable to create effective solutions, new institutions can be created that can better overcome the weaknesses of existing institutional alternatives.

The ability of each of these modern and contemporary institutions to address issues in international antitrust remains a work in progress. Part IV of this Article explains in greater detail how participation shapes the analysis of these institutions. Utilizing comparative institutional analysis, Part V examines the relative strengths and weaknesses of these institutions. To the extent that an institution improves the quality of enforcement at a manageable cost, that institution may be the appropriate means to address international antitrust issues generally.

### III. INTERNATIONAL PROBLEMS THAT CONFRONT ANTITRUST

As an explanatory device, this Article employs three case studies. Case studies provide examples for more general normative conclusions regarding

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45. For the general conceptualization of voice and exit see the seminal ALBERT HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970). In the international legal context see Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339, 349 (2002).

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appropriate international antitrust institutions. These conclusions may allow antitrust to achieve optimal results to improve the lives of consumers around the world through the choice of the most effective institution.<sup>46</sup> The issues raised by the case studies are ones familiar to current antitrust institutions and debates surrounding international antitrust. The case studies reveal different aspects of the antitrust spectrum. The case study of hard-core cartels illustrates the challenges of addressing behavior that is presumptively illegal. The case study of mergers examines behavior that is presumptively legal. Both of these are case studies in which the primary problem is one of coordination costs across jurisdictions. The third case study, of market access, highlights the difficulty in addressing exclusionary behavior whose effects may or may not be anticompetitive and where the primary problem is substantive disagreement rather than procedural coordination.

Greater harmonization of merger and cartel enforcement has been the focus of many antitrust agencies and the private antitrust bar for some time. These issues have been critical in discussions within the ICN and the OECD CLPC. Market access has been a focus in WTO antitrust discussions and in discussions held by the UNCTAD and the OECD Joint Group. Though the discussions have shifted to less contentious topics within the antitrust and international trade interface, market access issues remain one of the core difficulties that arise in this interface. The ability of antitrust institutions to address issues that interface with other areas of law has become increasingly relevant in a globalized world economy. Shortcomings of antitrust in addressing the effects of trade distortions threaten to limit the potential gains of trade liberalization.

### A. Cartels

#### 1. Harms

Hard-core cartels involve agreements among competitors to fix prices, allocate customers or markets, and restrict output.<sup>47</sup> There is a presumption that hard-core cartel activities are illegal. Indeed, a recent U.S. Supreme Court opinion states that cartels are “the supreme evil of antitrust.”<sup>48</sup> Scholars have

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46. On the rationale for the case study method, see John Gerring, *What Is a Case Study and What Is It Good For?*, 98 AM. POL. SCI. REV. 341 (2004). An application of comparative institutional analysis to other specific issues within international antitrust may yield a different set of institutional choices. This remains an area for further research.

47. Michael K. Vaska, *Conscious Parallelism and Price Fixing: Defining the Boundary*, 52 U. CHI. L. REV. 508, 511 (1985).

48. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). The U.S. system and increasingly the rest of the world now view cartels this way. On the other hand, similar type of monopoly power by single firm conduct tends to be viewed through a less harsh lens because of possible efficiencies that unilateral conduct may provide. See Peter C. Carstensen, *False Positives in Identifying Liability for Exclusionary Conduct: Conceptual Error, Business Reality and Aspen* (2005) (unpublished manuscript, on file with Berkeley Business Law Journal).

documented the economic harm of international cartels in a number of recent works.<sup>49</sup> These cartels have had a negative spillover effect in many jurisdictions.

The extent of the international cartel problem remains a mystery, as private international cartels operate in secret. Estimates as to the number and impact of international cartels vary. According to the OECD, antitrust enforcers detect and prosecute as few as one in six cartels.<sup>50</sup> Academic work suggests agencies identify and successfully prosecute between ten and thirty percent of cartels.<sup>51</sup> Since U.S. enforcers, the most experienced in cartel investigations, continue to find cartels operating in the United States, even with a combination of civil (including treble damages) and criminal penalties for cartel activity, it seems likely that international cartels remain significant in every jurisdiction.

Cartels affect both developed and developing-world economies.<sup>52</sup> The total damage by cartels may be significant. In developing countries, scholars estimate that in 1997 alone, the value of known cartel effects by international cartels was \$51.1 billion (and undetected cartel damage was not computed). To put this figure in perspective, these cartel overcharges surpass the amount of *all* foreign aid to developing countries that year—\$39.4 billion.<sup>53</sup> Cartel overcharges in 1997 reflected anticompetitive conduct that affected 4.7 percent of developing-world imports and 0.9 percent of developing-world Gross Domestic Product. Overcharges by cartels to developed countries are even larger. International hard-core cartels created a consumer welfare loss of \$140.8 billion in high-income countries in 1997.<sup>54</sup>

The percentage overcharges that cartels impose are also significant. A recent study on U.S. cartels shows a median and average cartel overcharge between fifteen and thirty-six percent. Most of these overcharges fell within the

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49. See, e.g., SIMON EVENETT, VALERIE SUSLOW & MARGARET LEVENSTEIN, *INTERNATIONAL CARTELS IN GLOBAL MARKETS* (2006); Margaret Levenstein, Valerie Suslow & Lynda Oswald, *International Price-Fixing Cartels and Developing Countries: A Discussion of Effects and Policy Remedies* (Nat'l Bureau of Econ. Research, Working Paper No. 9511, 2003); Frédéric Jenny, *Cartels and Collusion in Developing Countries: Lessons from Empirical Evidence*, 29 *WORLD COMP.* 109 (2006).

50. OECD, *HARD CORE CARTELS: RECENT PROGRESS AND CHALLENGES AHEAD* 28 (2003).

51. It may be that cartels that are detected and prosecuted are different from cartels that remain hidden and may be more durable in duration. However, discovered cartels may be the function of the proclivity of company management to serve as whistleblowers for a cartel. See Connor, *supra* note 21, at 12.

52. Julian L. Clarke & Simon J. Evenett, *Tackling International Anticompetitive Practices in the Americas: Implications for the Free Trade Area of the Americas*, in *INTEGRATING THE AMERICAS: FTAA AND BEYOND* 345 (Antoni Estevadeordal, Dani Rodrik, Alan M. Taylor & Andrés Velasco eds., 2004).

53. Margaret Levenstein & Valerie Y. Suslow, *Contemporary International Cartels and Developing Countries Economic Effects and Implications for Competition Policy*, 71 *ANTITRUST L.J.* 801 (2004).

54. *Id.*

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twenty to thirty percent range.<sup>55</sup> These overcharges are particularly striking given that, since the mid-1990s, hard-core cartel prosecution has been a priority of both U.S. and EU antitrust enforcers. The current fight against hard-core cartels enjoys broad international support and differs from historic attempts to combat them, in which some major jurisdictions opted not to take action against cartels.

### *2. Cartels and Their Implications for Law and Development*

Cartels play an important role in law and development. Overcharges allow for the misallocation of resources from more productive uses. This has a particularly important impact for developing-world countries. Where countries have fewer resources, the misallocation of these resources may limit opportunities for economic growth. Inputs for various products or services may be higher as a result of international cartels. This may lead to an increased cost of production in a country, making it less competitive for foreign direct investment (FDI) from other countries.

Recent scholarship regarding cartels suggests an urgent need to combat cartels with appropriate institutions and remedies.<sup>56</sup> The developing world has limited capacity to protect its consumers from overcharges by international cartels. Of countries that lack antitrust agencies, nearly all are in the developing world. The lack of antitrust law and an antitrust agency seems to invite international hard-core cartel conduct. For example, in the international vitamin cartel, countries that lacked antitrust agencies had higher overcharges than those that had agencies.<sup>57</sup> Further, cartels can take advantage of weak antitrust agencies without the resources necessary to address international cartels.

Even when another antitrust agency (usually that of the United States, the EU, or an EU member state) uncovers an international cartel that also affects a developing country, this does not necessarily remedy the international damage that such a cartel may cause there. Often developing-world antitrust agencies fail to respond even to uncovered international hard-core cartels.<sup>58</sup> There are capacity constraints to developing-world cartel enforcement. Many developing-world agencies do not have the expertise or resources to combat hard-core cartels. Domestic agencies may be unable to prosecute cartels because they lack

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55. John M. Connor & Robert H. Lande, *How High Do Cartels Raise Prices? Implications for Reform of the Antitrust Sentencing Guidelines*, 80 TUL. L. REV. 513 (2006).

56. ICN WORKING GROUP ON CARTELS, *DEFINING HARD CORE CARTEL CONDUCT: EFFECTIVE INSTITUTIONS, EFFECTIVE PENALTIES* (Building Blocks for Effective Anti-Cartel Regimes Vol. 1, 2005), [http://www.internationalcompetitionnetwork.org/media/library/conference\\_4th\\_bonn\\_2005/Effective\\_Anti-Cartel\\_Regimes\\_Building\\_Blocks.pdf](http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/Effective_Anti-Cartel_Regimes_Building_Blocks.pdf).

57. Julian L. Clarke & Simon J. Evenett, *The Deterrent Effects of National Anti-Cartel Laws: Evidence from the International Vitamins Cartel*, 48 ANTITRUST BULL. 689, 692 (2003).

58. Levenstein & Suslow, *supra* note 53, at 803.

domestic evidence and the means to obtain evidence abroad.<sup>59</sup> When developing agencies decide to take on international cartels, it may take them time to develop the capabilities to attack the cartels effectively. For example, though the Korean Free Trade Commission was set up in 1980, it took until 2002 for the agency to fine an international cartel.<sup>60</sup> Similarly, Brazil's anticartel efforts languished until 2002, even though Brazil enacted its most recent antitrust law in 1994 and a previous antitrust law had existed since 1962.<sup>61</sup>

### *3. Domestic Institution Capacity Constraints Against Cartels*

Even with domestic limitations, domestic cartel enforcement shows increased effectiveness in terms of the ability of agencies to enforce their laws against hard-core cartels. Within recent years, a number of countries have begun to catch up with more advanced antitrust regimes.<sup>62</sup> Nevertheless, significant gaps remain in enforcement.

There are two types of concerns regarding the capacity of domestic antitrust regimes. First, there are those regimes with no underlying competition culture. In such regimes, the public has not been educated as to cartel harms. In these situations, where there is an antitrust agency but no competition culture, cartels may operate transparently and still go unpunished. In such settings, consumers may not understand that cartels cause them significant economic losses.<sup>63</sup>

In other cases, antitrust authorities have established a competition culture in which the public understands the economic harms of cartels. This presents a different set of enforcement challenges. A competition culture pushes cartel behavior underground. When cartels operate in secret, this increases the costs of detection. When these cartels are international cartels, cartel members have better coordination than do enforcers across jurisdictions. Cartels can hide documents and meetings in other jurisdictions, which makes getting evidence and witnesses more difficult.<sup>64</sup>

Combating international cartels requires coordination among agencies across countries. In some cases, legal or operational impediments may limit information sharing between agencies. Moreover, detection can prove difficult when necessary information is scattered across jurisdictions. Addressing international cartels places increased capacity constraints on agencies by

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59. Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT'L L. 911, 917 (2003).

60. Levenstein & Suslow, *supra* note 53, at 843.

61. Geraldo Samor, *Trustbusters Take Aim in Brazil—Illegal Cartels Feel the Heat*, WALL ST. J., July 12, 2005, at A15.

62. OECD, *supra* note 25, at 9.

63. Mark Tilton, *The Difference Government Policy Makes: The Case of Japan*, in HOW CARTELS ENDURE AND HOW THEY FAIL: STUDIES OF INDUSTRIAL COLLUSION 191 (Peter Z. Grossman ed., 2004).

64. JOHN M. CONNOR, GLOBAL PRICE FIXING: OUR CUSTOMERS ARE THE ENEMY 66-69 (2001).

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raising the cost of effective enforcement. It also involves domestic and international political concerns with respect to cooperating with other agencies, sharing information (including confidential information), and, potentially, extraditing nationals for trial and incarceration in other jurisdictions. Not all countries have criminal penalties for cartel-related conduct. Moreover, there are additional coordination problems, as agencies need to coordinate predawn raids, searches, and interviews across multiple jurisdictions.

For these reasons, part of effective enforcement against cartels is the creation of effective domestic institutions. An additional element to increased enforcement is the creation of effective penalties.<sup>65</sup> The threat of treble damages, for example, may deter potential cartel members in the United States.<sup>66</sup> This chilling effect occurs even though settlements in cartel cases tend to be closer to single damages than treble damages.<sup>67</sup> Nevertheless, at present companies seem to be under-deterred globally to put an end to hard-core cartel behavior.

Another way to strengthen enforcement penalties is to increase nonfinancial penalties. This means meting out criminal sentences to executives who participate in cartels. There is some evidence that criminal penalties deter cartel membership.<sup>68</sup> Among ICN members surveyed, forty-two percent of existing anticartel laws allow for jail time.<sup>69</sup> However, even where there are criminal sentences, there is not always cooperation across jurisdictions in enforcing them. Some jurisdictions are less willing to cooperate with enforcement that entails foreign incarceration of their citizens.

Sometimes a cartel's anticompetitive behavior has no domestic effects. This may encourage exporting countries to pursue policies that create domestic benefits but negative externalities.<sup>70</sup> This is particularly true in the case of non-secret cartels. The international diamond cartel, for example, had no U.S. operations for years. Overcharge profits to the cartel leader, South African company de Beers, may have had positive spillover effects on the South African economy. Similarly, OPEC member countries may reap benefits from their cartel's setting a price that yields a higher than competitive rate of return where the price exceeds marginal cost for petroleum. Insulation from extraterritorial effect may check domestic agencies' motivation to fight international cartel behavior that helps their own countries but increases overall

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65. John M. Connor & Robert H. Lande, *How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines*, 80 TUL. L. REV. 513 (2005).

66. Harry First, *Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST L.J. 711 (2001).

67. Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115 (1993).

68. OECD, *supra* note 25, at 27; ICN, *supra* note 56, at 74.

69. ICN, *supra* note 56, at 3.

70. Joseph F. Francois & Henrik Horn, *Antitrust in Open Economies* (Tinbergen Inst., Discussion Paper No. 2006-006/2).

global costs.

#### 4. Cooperation Costs

Cooperation among antitrust enforcers may improve cartel enforcement.<sup>71</sup> Cooperation on hard-core cartels reduces enforcement costs where the cartel affects many countries but no one agency can remedy this on its own. When countries investigate the same behavior, information sharing reduces costs of an investigation. Information sharing across agencies has increased over time. Indeed, in the United States it has become routine.<sup>72</sup> However, agencies do not share as much confidential and nonconfidential information as they need to for effective international cartel enforcement. Laws bar many antitrust agencies from sharing information gained during a cartel investigation, even if the information is not confidential.<sup>73</sup> In other cases, agencies may be reluctant to share confidential information because they do not trust that their sister agency will keep it confidential.

Parallel investigations into the same case across jurisdictions present some problems for cooperation. Generally, agencies are unlikely to share information about a cartel member unless it participates in leniency programs in more than one country.<sup>74</sup> Leniency entails immunity from or reductions in legal sanctions, compared to what prosecutors might seek in the absence of full and voluntary cooperation.<sup>75</sup> On the one hand, the introduction of a leniency program may help to limit the viability of international cartels. On the other hand, discussions as to which firm to offer leniency (especially if different firms come forward for leniency across jurisdictions) may affect the ability to get information and cooperation from parallel investigations around the world and may increase coordination costs.

Some solutions to cartel enforcement may be primarily domestic. This Part makes clear the limitations of purely domestic institutions and responses. In some countries, there may be no criminal penalties for cartel behavior. In other countries, there may be no multiplier for cartel penalties. Prosecuting cartels may be insufficient deterrent because the penalties imposed are too low.<sup>76</sup>

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71. BRUNO ZANETTIN, COOPERATION BETWEEN ANTITRUST AGENCIES AT THE INTERNATIONAL LEVEL (2002).

72. R. Hewitt Pate, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust in a Transatlantic Context—From the Cicada's Perspective, Address Before the Antitrust in a Transatlantic Context Conference (June 7, 2004), [available at](http://www.useu.be/Categories/Antitrust/June0704PateSpeech.html) <http://www.useu.be/Categories/Antitrust/June0704PateSpeech.html>.

73. OECD, *supra* note 25, at 7.

74. Clarke & Evenett, *supra* note 40.

75. ICN, ANTI-CARTEL ENFORCEMENT MANUAL ch. 2 (2005).

76. OECD, *supra* note 25, at 25. John Connor suggests that most cartel members in a global cartel may have a reasonable expectation that if they are caught, the financial penalties for their cartel participation will be significantly below their expected profits. Connor argues that to chill cartel behavior, the sanction against cartel members should be increased to approximately four times the

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Improved ability to fight international hard-core cartels requires more cooperation and information sharing, increased coordination on leniency, improved domestic capacity to try cases, improved investigative techniques, and effective penalty regimes. Domestic institutions alone seem limited in their ability to take on these tasks, particularly the operational issues of international coordination. A review of international institutional options in Part V provides institutional alternatives to improve the global capacity to fight hard-core cartels.

### *B. Mergers*

#### *1. Costs to the Current System*

Mergers and acquisitions play an important role in the global economy. In 2005, global mergers and acquisitions totaled \$2.9 trillion.<sup>77</sup> This activity serves as a driver in the global economy. Additionally, mergers serve as a mechanism for increased FDI into countries.<sup>78</sup> Empirical work suggests that mergers may be the primary vehicle for FDI flows worldwide.<sup>79</sup> Just as mergers have increased, so has the regulation of mergers. More countries have introduced merger control systems. At present, over sixty countries have some sort of merger law in place.<sup>80</sup> The reach of international merger regulation and high coordination costs therefore has important effects for both developed and developing countries.

The purpose of merger control is to protect consumers from merging firms acquiring and exercising market power. Though there are benefits to merger control, it also creates costs. Substantive costs occur when agencies make Type I or II enforcement errors. In Type I errors, agencies attempt to block a merger that will have procompetitive effects. Type II errors occur when agencies fail to

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expected global cartel profits. To ensure the deterrence of cartel members, penalties in each of the geographic regions of the cartel's operation should be equal to eight times global cartel overcharges. John M. Connor, *Optimal Deterrence and Private International Cartels* (Purdue Univ. Dep't of Agric. Econ., Working Paper, 2005), available at <http://ssrn.com/abstract=787927>. Robert Lande is also critical of the under-deterrence of cartel fines. See Robert H. Lande, *Why Antitrust Damage Levels Should Be Raised*, 16 LOY. CONSUMER L. REV. 329 (2004). For a view that suggests that fines have been too large, see Bruce H. Kobayashi, *Antitrust, Agency, and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations*, 69 GEO. WASH. L. REV. 715 (2001).

77. Stephen Taub, *M&A Activity Highest since Dotcom Days*, CFO.com, Dec. 28, 2005, <http://www.cfo.com/article.cfm/5350017?f=related>.

78. Volker Nocke & Stephen Yeaple, *Cross-Border Mergers and Acquisitions Versus Greenfield Foreign Direct Investment: The Role of Firm Heterogeneity*, J. INT'L ECON. (forthcoming 2007).

79. OECD, *NEW PATTERNS OF INDUSTRIAL GLOBALISATION: CROSS-BORDER M&AS AND ALLIANCES* (2001); Nam-Hoon Kang & Sara Johansson, *Cross-border Mergers and Acquisitions: Their Role in Industrial Globalisation* (STI Working Papers, 2000/1).

80. William J. Kolasky, *Comparative Merger Control Analysis: Six Guiding Principles for Antitrust Agencies—New and Old*, Remarks Before the International Bar Association Conference on Competition Law and Policy in a Global Context, Cape Town, South Africa (Mar. 18, 2002), available at <http://www.usdoj.gov/atrp/public/speeches/10845.pdf>.



block anticompetitive mergers. These errors can affect economic efficiency, growth, and development.

Most mergers do not create serious competitive risks. Roughly two thirds of reportable mergers in the United States receive “early termination.”<sup>81</sup> In the remainder of cases, agencies investigate the mergers for competitive effects. Of the total number of investigations, agencies undertake more advanced investigations of only twenty percent of them.<sup>82</sup> Government enforcers challenge a much smaller number. In 2003 for example, the DOJ and FTC challenged only fifteen merger transactions out of 1,014 total notified transactions. Similarly, in the EU, over ninety percent of notified cases receive no intervention by EU authorities after the initial investigation.<sup>83</sup> These figures are a bit misleading, since both jurisdictions have filing thresholds based on the size of the companies and size of the transaction. Thus, many unreported mergers occur in both jurisdictions because they are presumptively procompetitive.

Even with a merger regime that limits Type I and Type II errors, the merger control process remains costly. Merger control creates transaction costs, delay, and uncertainty for international business.<sup>84</sup> There are two dimensions to merger transactional costs. First, there are the operational costs of a merger in any one jurisdiction and across multiple jurisdictions. Second, managing divergent requirements in different jurisdictions is another type of transaction cost based on the cost of coordination across jurisdictions. Any merger across multiple jurisdictions presents potential substantive costs in evaluation. There may be very different ways of viewing the potential effects of a merger across jurisdictions. In measuring the possible economic harm of a potential merger, the standards to use, factors to review, and economic tests to apply vary across jurisdictions. Not only the evaluation of the proposed merger, but also the evaluation of the ways to evaluate it, can represent significant transaction costs.

The costs of a given merger or acquisition are both direct and indirect. Both sets of costs may be significant. Direct costs of merger regulation include the fees for legal services and filing fees. Indirect costs are more difficult to quantify monetarily. They include the companies’ time spent working on a merger and the corresponding productivity loss. Delays in approving a merger may cause companies to forego the efficiencies that merger would have created or lose key staff uncomfortable with the uncertainty. A long delay may imperil the deal itself: companies may decide to scuttle their proposed merger as the delay drags on.

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81. Howrey & Simon, *Trends in US Government Antitrust Enforcement*, ANTITRUST REV. AM. 48 (Global Competition Review Special Issue, 2005).

82. *Id.* at 49.

83. *Id.* at 51.

84. F.M. SCHERER, COMPETITION POLICIES FOR AN INTEGRATED WORLD ECONOMY (1994).

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Merger costs may also impose costs equivalent to a tax on various international deals. A recent study finds that the average external cost per merger transaction was €3.28 million (with a median cost of €821,000), plus an external filing cost of €540,000. Internal costs to the merger (time spent on merger review by merging firms) are also sizable. The cost in hours for a merger review was 81 person weeks (with a median of 25 person weeks). In-depth investigations consumed an average of 120 person weeks (with a median of 29 person weeks).<sup>85</sup> Streamlining practices across jurisdictions could reduce a number of these costs. Harmonized practices may reduce delays and differential timing and better tailor investigations to determine if a proposed transaction raises anticompetitive concerns. Merger review may take up significant resources within an antitrust agency. Better coordination means fewer resources expended in the document-intensive merger review process, freeing up resources to focus on other conduct where anticompetitive conduct is more likely. Nevertheless, despite their costs and potential inefficiencies, merger control regimes assume that they create more benefits than costs overall.<sup>86</sup>

### *2. The Weakness of Existing Domestic Merger Review*

International mergers present a number of potential costs that may increase costs and delays beyond those faced in domestic mergers. Competitors may use international merger control to manipulate government investigations and raise merger costs for efficient merging parties. In other situations, countries and their antitrust agencies may hold up mergers that have only limited anticompetitive effects. Merger remedies may be incompatible across jurisdictions. On the substantive merger analysis level, different substantive standards may lead to disparate results across jurisdictions. Divergent remedies may lead to potentially contradictory results.

Accordingly, domestic systems seem unable to control the international spillover costs of international mergers. To say this is a problem presumes that reducing the operational costs of mergers is desirable. An alternative to reducing operational costs is to keep the cost of merger review purposely high. Government may want to keep the cost high in order to ensure that firms will go through the expense of mergers only if they are sure that efficiencies would result.<sup>87</sup> Mainstream industrial organization and regulatory economics thinking

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85. ICN, REPORT ON THE COSTS AND BURDENS OF MULTIJURISDICTIONAL MERGER REVIEW 7-9 (2004).

86. Any antitrust system that has merger control makes this assumption. Systematically proving this assumption remains an academic challenge. See Thomas B. Leary, *The Dialogue Between Students of Business and Students of Antitrust*, 47 N.Y.L. SCH. L. REV. 1, 9-12 (2003).

87. Knowledge@Wharton, *Why Do So Many Mergers Fail?*, <http://knowledge.wharton.upenn.edu/article.cfm?articleid=1137> (March 30, 2005) (between 50 and 80 percent of all mergers fail to create efficiencies over the long run).

tends to push for the former solution rather than the latter, as over-interference by regulators in markets may create more harms than benefits.<sup>88</sup>

Sovereignty concerns affect an agency's decision to hold up a merger even if it would enhance allocative efficiency globally. As more jurisdictions have accepted extraterritoriality, a unified approach to mergers has become more difficult.<sup>89</sup> In many cases, a merger may have only a small impact on a particular country. Where the country-specific impact is negligible and the deal is global, it may be more efficient for countries only tangentially affected not to challenge a proposed merger.<sup>90</sup>

Decisions to approve mergers may have both national and global welfare enhancing effects. In some cases, a country may approve a domestic merger or not because of a national benefit or loss even where the effect globally would be the opposite. Because of global reach and impact, firms may decide to go through with their mergers no matter what the economic consequences to a particular country, particularly if that country has only a small economy. Thus some countries lack the ability to participate in the regulation of international mergers and the means to protect themselves from potentially harmful effects.<sup>91</sup> This is a long-term problem that implicates the ability of agencies—and indeed countries—to participate in the shaping of international merger control.

Of course, the opposite is also possible. A single country can hold up consummation of a merger, adding significant costs to or even scuttling the proposed deal entirely. Mergers may have different effects in different jurisdictions based on the size and the dynamics of a particular economy. If a single agency can hold up an international merger, merger control becomes a function of the weakest link on substantive concerns. One way to reduce costs is to have the agency most affected by a proposed merger take the lead in global efforts. This may result in fewer information costs and potentially better knowledge and decision making. When this happens, which agency takes the lead in merger review becomes an issue. The choice can potentially alter the coordination costs of review. For agencies to decide on one of their number to take the lead, they must trust in their sister agency's methods of analysis of the potential effects of a merger.

Issues that affect the operations of a domestic merger control system create additional transaction costs. Some merger systems have onerous filing

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88. ROBERT H. BORK, *THE ANTITRUST PARADOX* 145 (1978). (noting that markets may be better than regulators at punishing bad corporate decision making).

89. William Blumenthal, *The Challenge of Sovereignty and the Mechanisms of Convergence*, 72 ANTITRUST L.J. 267, 272 (2004).

90. Similar sentiments exist regarding state antitrust enforcement in the U.S. context. See Robert H. Lande, *When Should States Challenge Mergers: A Proposed Federal/State Balance*, 35 N.Y.L. SCH. L. REV. 1047, 1064 (1990).

91. Fox, *supra* note 1, at 922; Ajit Singh, *Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions* (Harvard University/UNCTAD-G24, Working Paper No. 18, 2002).

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requirements that require notification of transactions for review even when the jurisdiction in question lacks any nexus to the transaction. Additionally, systems may create unnecessary restrictions as to the timing of filing. This implicates the triggering of a transaction's formal review. In other settings, initial filing requirements may ask for information not necessary for an initial determination of whether a proposed transaction might require a more in-depth investigation. The increase in the number of merger regimes worldwide, each with its own standards, suggests that a purely domestic solution to reduce inefficient operational standards of merger review may be inadequate.<sup>92</sup> Instead, the problem may require a supranational solution.<sup>93</sup>

Merger control may fix a potentially anticompetitive problem in one country but not in others. A divestiture in a third country might be the best outcome, but current global merger control does not allow for this (except in the EU). A firm that pursues anticompetitive conduct may benefit a country if the rents extracted from overcharges as a result of the merger can accrue in the home jurisdiction of the merged company. If all the anticompetitive effects occur abroad but the benefits occur in the home jurisdiction, this presents a strategic trade rationale for a country to support a globally anticompetitive merger.<sup>94</sup>

### C. Market Access

#### 1. Problem Defined

Market access refers to the conditions for the entry of goods and services into a country's markets.<sup>95</sup> It is an area in which antitrust interfaces with international trade. The issue of market access illustrates the difference between trade and antitrust. Trade practitioners view discrimination between foreign and domestic companies as a potential problem even if there is no antitrust harm.<sup>96</sup> If there is discrimination between foreign and domestic producers, this may serve as the basis for a trade complaint over market

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92. See, e.g., BUS. AND INDUS. ADVISORY COMM. TO THE OECD [BIAC], RECOMMENDED FRAMEWORK FOR BEST PRACTICES IN INTERNATIONAL MERGER CONTROL PROCEDURES (2001); ICN, IMPLEMENTATION OF THE ICN RECOMMENDED PRACTICES (2005).

93. Eleanor M. Fox, *Antitrust Law on a Global Scale—Races Up, Down and Sideways*, in REGULATORY COMPETITION AND ECONOMIC INTEGRATION 358 (Daniel C. Esty & Damien Geradin eds., 2001).

94. Such concerns may be theoretically possible but unlikely. Recent work shows that the allocation of jurisdiction for mergers between national and a supranational regulator has only a small effect on the outcome of a merger. Neven & Röller, *supra* note 1.

95. For a summary of the various approaches to measure market access, see R. Preston McAfee, Hugo M. Mialon & Michael A. Williams, *What Is a Barrier to Entry?*, 94 AM. ECON. REV. 461 (2004).

96. Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478, 489-94 (2000).

access.<sup>97</sup> In contrast, antitrust generally looks at consumer harm, whether or not there is access for competitors. How best to address market access in which both international trade and antitrust play a role remains contentious.<sup>98</sup> Both antitrust and trade address similar but not the same types of concerns.

Issues of market access implicate the larger question of what makes a market contestable. A contestable market does not have significant barriers to deter new entrants.<sup>99</sup> Though it is difficult to measure market contestability, market concentration, prices, profits, and modeling provide a better sense of the contestability of such markets.<sup>100</sup> A number of factors affect the degree of market contestability, including economies of scale, history and experience in a market, natural and geographic barriers, government-erected barriers, and private restraints.<sup>101</sup> The question of market contestability concerns both antitrust and trade because increased trade liberalization might allow privately imposed restraints to replace government-imposed barriers.

## 2. Lack of Agreement Between Antitrust and International Trade

Antitrust and international trade take substantively different analytical approaches to determine whether there is sufficient market access. As a result, what one field views as sufficient access the other may view as insufficient. Likewise, there are cases in which antitrust and international trade find overlapping agreement on market access. The differences in the systems have potentially significant consequences. There may be cases in which anticompetitive behavior that limits market access may escape remedy in either trade or antitrust.<sup>102</sup> In other cases, trade and antitrust may lead to conflicting remedies (or nonremedies).

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97. PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* §§ 4.4-4.5 (2005).

98. Bernard Hoekman & Petros C. Mavroidis, *Economic Development, Competition Policy, and the World Trade Organization* 18-19 (World Bank Policy Research Working Paper No. 2917, 2002). See, e.g., Fox, *Millennium Round*, *supra* note 43, at 671-72 (advocating a choice of law principle to discipline private market access restraints); KYLE BAGWELL & ROBERT W. STAIGER, *THE ECONOMICS OF THE WORLD TRADING SYSTEM* 148-62 (2002) (advocating increased non-violation WTO cases); John O. McGinnis, *The Political Economy of International Antitrust Harmonization*, 45 WM. & MARY L. REV. 549 (2003) (arguing for national treatment to overcome market access problems to open domestic markets); Michael J. Trebilcock & Edward M. Iacobucci, *National Treatment and Extraterritoriality: Defining the Domains of Trade and Antitrust Policy*, in *COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY*, *supra* note 1, at 152 (advocating national treatment to open up foreign markets).

99. Barriers may be permanent barriers or barriers that can be used to delay for a significant period of time. See Richard Schmalensee, *Sunk Costs and Antitrust Barriers to Entry*, 94 AM. ECON. REV. 471 (2004).

100. Edward M. Graham & Robert Z. Lawrence, *Measuring the International Contestability of Markets: A Conceptual Approach*, 30 J. WORLD TRADE 5 (1996).

101. *Id.*

102. Eleanor M. Fox, *The WTO's First Antitrust Case—Mexican Telecom: A Sleeping Victory for Trade and Competition*, 9 J. INT'L ECON. L. 271, 271 (2006).

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The differences between trade and antitrust play themselves out when foreign firms try to enter new markets. Smaller economies in particular tend to have more concentrated markets.<sup>103</sup> Competition by foreign producers overcomes this concentration. Concentrated markets may be more likely to create opportunities for anticompetitive conduct. International trade can reduce concentration in tradable sectors. It provides for effective rivalry between domestic and foreign sources where a market might otherwise not have domestic rivals.<sup>104</sup> However, where there are concentrated markets, existing firms may be able to lock up distribution channels. This conduct implicates what antitrust terms “vertical restraints.”

### 3. Vertical Restraints and Market Access

The issue of vertical restraints is tied to market access issues of international trade. Intellectual divergence in how to view vertical restraints adds to the complexity of coming to consensus on how to address them. Vertical restraints are more pronounced in concentrated markets if competitors control vertically linked markets.<sup>105</sup> Exclusive dealing arrangements may foreclose markets to efficient competitors.<sup>106</sup> This can occur as incumbent suppliers share their rents with certain distributors when they deal with other distributors. Often foreign producers are the potential entrants into new markets. When vertical restraints reduce entry into these markets, the restraints may have a protectionist effect.<sup>107</sup> Thus, vertical distributional restraints take on both trade and antitrust dimensions.

Vertical market access restraints are an area of particular disagreement around the world, both within antitrust and between antitrust and international trade. Vertical restraints create potential higher search costs for customers.<sup>108</sup> Whereas some countries believe that market access solutions to vertical restraints and allocative efficiency are symbiotic, the Chicago School of economics does not.<sup>109</sup> Rather, the Chicago School views vertical restraints as

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103. MICHAL S. GAL, COMPETITION POLICY FOR SMALL MARKET ECONOMIES (2003).

104. World Trade Organization, *Report (1998) of the Working Group on the Interaction between Trade and Competition Policy to the General Council*, ¶39, WT/WGTCP/2 (Dec. 8, 1998).

105. MICHAL S. GAL, COMPETITION POLICY FOR SMALL MARKET ECONOMIES 22 (2003).

106. Patrick Rey, *The Economics of Vertical Restraints*, in *ECONOMICS FOR AN IMPERFECT WORLD: ESSAYS IN HONOR OF JOSEPH STIGLITZ* 247 (Richard Arnott, Bruce Greenwald, Ravi Kanbur & Barry Nalebuff eds., 2003).

107. William Comanor & Patrick Rey, *Competition Policy Towards Vertical Foreclosure in a Global Economy*, 23 INT'L BUS. L. 465, 468 (1995).

108. Patrick Rey & Joseph Stiglitz, *The Role of Exclusive Territories in Producers' Competition*, 26 RAND J. ECON. 431 (1995).

109. Eleanor M. Fox, *US and European Merger Policy—Fault Lines and Bridges: Mergers That Create Incentives for Exclusionary Practices*, 10 GEO. MASON L. REV. 471, 478 (2002); Michael H. Riordan, *Anticompetitive Vertical Integration by a Dominant Firm*, 88 AM. ECON. REV. 1232 (1998).

presumptively procompetitive.<sup>110</sup>

According to the Chicago School, vertical restraints create potential efficiencies that generally outweigh their costs. Vertical restraints eliminate the free rider problem, for example. Without addressing the free rider problem, companies lack an incentive to invest in research and development. Vertical restraints allow companies to coordinate decision making.<sup>111</sup> They also allow companies to eliminate the double margin problem, in which both upstream and downstream monopolists charge monopoly prices.<sup>112</sup>

This approach has implications on how to analyze market contestability in vertically integrated markets. If a market is already contestable, firms price their products competitively rather than at a price higher than the competitive price. A competitive price does not encourage foreign producers to enter a market. The mere threat of entry (and competition) should in theory prevent an incumbent from demanding a supracompetitive price lest the incumbent be undercut by a competitively priced entrant.<sup>113</sup> Nor does a highly concentrated market in itself necessarily mean that the market is not competitive. Rather, high concentration may reflect economies of scale where inefficient competitors have exited a market.<sup>114</sup>

A lack of foreign competitors in a market should not lead to presumptions that the market has significant anticompetitive problems and that government- or firm-erected barriers may be preventing foreign firm entry. Many factors can explain lack of market access, and not all of them result from anticompetitive behavior. A lack of entrants may result from other prohibitive costs, such as international transportation costs, production costs, and the costs of catching up to a domestic firm's first-mover advantage in setting up a distribution network.<sup>115</sup> Because of the multiple explanations for a lack of market access, antitrust experts are reluctant to accept sweeping claims of market access problems without a fact-intensive inquiry to establish consumer harm from a market access or refusal-to-deal situation.<sup>116</sup>

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110. Richard A. Posner, *Vertical Restraints and Antitrust Policy*, 72 U. CHI. L. REV. 229, 240-41 (2005); JEAN TIROLE, *THE THEORY OF INDUSTRIAL ORGANIZATION* 186 (1988); Alan J. Meese, *Exclusive Dealing and the Theory of the Firm*, 50 ANTITRUST BULL. 371 (2005). This explains the rule of reason approach in the United States and a number of other jurisdictions.

111. Michael H. Riordan, *What is Vertical Integration?*, in *THE FIRM AS A NEXUS OF TREATIES* 94 (Masahiko Aoki, Bo Gustafsson & Oliver E. Williamson eds., 1990).

112. Patrick Rey & Jean Tirole, *A Primer on Foreclosure*, in *HANDBOOK OF INDUSTRIAL ORGANIZATION VOLUME 3* (Mark Armstrong & Rob Porter eds., forthcoming).

113. William Baumol & Robert Willig, *Fixed Costs, Entry Barriers and the Sustainability of Monopoly*, 96 Q. J. ECON. 405 (1981).

114. See, e.g., MARK J. ROBERTS & JAMES R. TYBOUT, *INDUSTRIAL EVOLUTION IN DEVELOPING COUNTRIES: MICRO PATTERNS OF TURNOVER, PRODUCTIVITY, AND MARKET STRUCTURE* (1996).

115. Simon Evenett & Valerie Suslow, *Preconditions for Market Access and International Cartels*, 3 J. INT'L ECON. L. 593 (2000).

116. Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why Aspen and Kodak Are Misguided*, 68 ANTITRUST L.J. 659 (2001).

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Different antitrust jurisdictions may have alternative conceptualizations of vertical restraints. Even when countries have many of the same substantive provisions in their antitrust laws, they may still apply these laws differently.<sup>117</sup> Other jurisdictions may have noneconomic concerns that compete with efficiency rationales for vertical restraints.<sup>118</sup> Noneconomic concerns may have objectives other than efficiency. These goals may include protection of smaller firms, social justice, countering the power of upstream firms, or political populism that distrusts concentrations of power.<sup>119</sup> Such differences in rationale speak to the larger question of the possible goal(s) of antitrust.<sup>120</sup> Moreover, even in the United States, some post-Chicago School antitrust thinking suggests that there may be reason for concern as to vertical restraints.<sup>121</sup>

A second divergence within antitrust is that a number of developing countries view the Chicago School understanding of market access and vertical restraints as based on assumptions best suited to a developed world, mature economy model. They may argue that the situation in the developing world requires a less permissive view of vertical restraints. Likewise, some within the developed world take a more populist view that each country should decide on its own what a market access restraint might mean in terms of vertical restraints.<sup>122</sup>

### 4. *The Limits of Antitrust*

In many cases, international market access problems may be a function of government restraints. Market access barriers are a cost caused by legislative and regulatory malfunctions. Government-created barriers are particularly difficult to measure.<sup>123</sup> In some cases, the government itself blocks competition through tariff barriers and regulations that prevent entry of other firms to compete against government enterprises. In still other situations, government action or inaction facilitates the existing anticompetitive practices of private

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117. Eleanor M. Fox, *What Is Harm to Competition? Exclusionary Practices and Anticompetitive Effect?*, 70 ANTITRUST L.J. 371 (2002).

118. Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1, 16 (1997). What is meant by "efficiency" also varies across jurisdictions. Fox, *supra* note 117.

119. ANDREW GAVIL, WILLIAM KOVACIC & JONATHAN BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 31-33 (2002).

120. Robert Pitofsky as Chairman of the FTC stated, "You can't expect countries at such different levels of economic development to have all the same answers to competition policy issues." *FTC Chairman Says World Competition Rules Currently Not Feasible*, INSIDE US TRADE, Apr. 26, 1996, at 15.

121. Increasingly, post-Chicago School antitrust has used game theory to find situations that justify a less permissive view of vertical restraints. See, e.g., Michael H. Riordan, *Competitive Effects of Vertical Integration* (Working Paper, 2005); Peter C. Carstensen, *The Competitive Dynamics of Distribution Restraints: The Efficiency Hypothesis Versus the Rent-Seeking, Strategic Alternatives*, 69 ANTITRUST L.J. 569 (2001), for a number of Chicago School critiques.

122. Fox, *supra* note 118, at 23-24; Fox, *Millennium Round*, *supra* note 43, at 670-73.

123. OECD, *Barriers to Entry*, DAF/COMP(2005)42, 10.



firms.

Antitrust may have trouble remedying the potential harm of vertical restraints where the government itself has imposed them. It can be difficult to determine whether a particular case of limited market access harms efficiency. Antitrust is not always equipped to address cases in which the government acts to insulate anticompetitive behavior from antitrust, as when sector regulation exempts market participants in the sector from antitrust scrutiny. Given their current capacities and methodologies, domestic trade and antitrust agencies and courts may be unequipped to address on their own how these issues interface. These institutions may see only part of a problem rather than the market access issue in its totality.

For example, as part of a privatization process, a country may grant a monopoly to protect against competition.<sup>124</sup> Similarly, antitrust has limitations in its ability to address situations in which government distorts competition in other ways. Governments can erect various regulatory barriers creating explicit or implicit subsidies that grant companies anticompetitive advantages. Through government-facilitated conduct, firms may use “cheap” exclusions to raise the cost for rivals in non-price-based ways, limiting or deterring competition.<sup>125</sup> Firms in a monopolized field may apply their market power in the monopoly sector to a related sector.<sup>126</sup>

Such exclusions may allow firms to use regulation to assist in successful predation strategies. Predation strategies may succeed when firms can cross-subsidize from a regulated sector to an unregulated sector. Information asymmetries prevent regulators from determining which costs come from efficient operations and which derive from predatory pricing.<sup>127</sup> Existing domestic legal doctrine often fails to capture such strategies in its test for predatory pricing.<sup>128</sup> Where companies need not be concerned with pricing below marginal cost, as is the case with some state-owned firms, predation tests, such as those the United States uses, may not detect the anticompetitive behavior. When predation strategy creates market access barriers to foreign

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124. OECD, A POLICY FRAMEWORK FOR INVESTMENT: COMPETITION POLICY, GLOBAL FORUM ON INTERNATIONAL INVESTMENT 5 (2005).

125. Susan A. Creighton, D. Bruce Hoffman, Thomas G. Krattenmaker & Ernest A. Nagata, *Cheap Exclusion*, 72 ANTITRUST L.J. 975 (2005).

126. See, e.g., RICK GEDDES, SAVING THE MAIL: HOW TO SOLVE THE PROBLEMS OF THE U.S. POSTAL SERVICE (2003); D. Daniel Sokol, *Express Delivery and the Postal Sector in the Context of Public Sector Anti-Competitive Practices*, 23 NW. J. INT'L L. & BUS. 353 (2003).

127. Antoine Faure-Grimaud, *The Regulation of Predatory Firms*, 6 J. ECON. & MGMT. STRATEGY 850 (1997).

128. The United States tests for predation would not capture pricing below marginal cost by state owned enterprises (SOEs). For the U.S. tests see *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2589 (1993); *United States v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003). On an alternative approach that would capture SOE anticompetitive behavior, see David E. M. Sappington & J. Gregory Sidak, *Incentives for Anticompetitive Behavior by Public Enterprises*, 22 REV. INDUS. ORG. 183 (2003).

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entrants, it distorts trade.

Even when antitrust agencies have knowledge of and the ability to act on anticompetitive conduct, prosecutorial discretion may restrain them from taking action. Antitrust agencies that can act may simply choose not to act.<sup>129</sup> Inaction may result from public choice concerns.<sup>130</sup> An agency may fear that legislators will oppose its taking on a powerful local interest to benefit the country's consumers (perhaps because this would also benefit foreign entrants). These legislators could threaten to cut funding to the agency or create antitrust exemptions allowing anticompetitive behavior to continue without any agency-level check. Thus, an antitrust agency's prosecutorial discretion is a potential market access barrier.<sup>131</sup> Similarly, a country's weak antitrust system may serve as a nontariff barrier deterring foreign entrants into its market, because the system permits domestic firms to create anticompetitive barriers which raise costs for rivals.<sup>132</sup> Domestic antitrust may not function as well as international antitrust to resolve these concerns.

## IV. THEORETICAL TOOLS

### *A. Using Comparative Institutional Analysis*

The purpose of this Part is to provide an overall framework of comparative institutional analysis to apply to the problems of international antitrust. This Article undertakes much of the detailed examination of comparative institutional analysis and international relations through a discussion of the case studies and the institutional alternatives. Comparative institutional analysis determines each potential institutional alternative's ability to allocate resources within society effectively.<sup>133</sup> Single institution analyses, or analyses that do not address all relevant and critical institutions, can only fail to establish the optimal institutional response. A limited analysis of institutional choices may overlook other institutions that are already available, better suited, or more easily reformed to address policy concerns more effectively. Where institutions succeed and fail relative to other institutional choices determines the optimal

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129. Eleanor Fox, *Should Competition Join the WTO?*, in *THE NEXT TRADE NEGOTIATING ROUND: EXAMINING THE AGENDA FOR SEATTLE* 121 (Jagdish Bhagwati ed., 1999).

130. See DENNIS C. MUELLER, *PUBLIC CHOICE* (3d ed. 2003) (reviewing recent literature in public choice theory).

131. World Trade Organization, Panel Report, *Japan—Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (Mar. 31, 1998).

132. World Trade Organization, *European Communities—Measures Affecting Asbestos and Asbestos-containing Products*, WT/DS135/AB/R (Mar. 12, 2001), at para. 186; Stephen F. Hamilton & Kyle W. Stiegert, *Vertical Coordination, Antitrust Law, and International Trade*, 43 J. L. & ECON. 143 (2000); Patrick Rey, *Competition Policy and Economic Development* 33 (World Bank Working Paper, 1997).

133. KOMESAR, *LAW'S LIMITS*, *supra* note 2, at 31.

institutional policy response.

Comparative institutional analysis provides a framework to understand institutional choice as the decision-making process. Comparative institutional analysis focuses on a cost-benefit analysis of potential institutions.<sup>134</sup> The decision-making process arrives at its choice through comparative cost-benefit analysis of available institutions. Every institution has its imperfections. These imperfections vary across institutions both domestically and internationally. Each institution requires different intervention strategies to make it more effective. Yet, these very interventions create potential problems due to the particular malfunctions of each institution.

Costs shape the ability of institutions to be effective.<sup>135</sup> Benefits of membership shape the distribution of participants' stakes in particular institutions. Institutional behavior is a function of participation in an institution. It is participation that shapes this cost-benefit analysis. Participation looks to the distribution of benefits. Participation is effective when the benefits of participation outweigh its costs. As a consequence of the international dimension of antitrust, this cost-benefit analysis must address both horizontal (domestic) and vertical (international) axes. That is, such an analysis must examine institutions at the domestic level (courts, legislatures, and regulatory agencies) as well as at the level of different international institutions (the ICN, WTO, regional trade agreements, UNCTAD, and OECD).

Whenever government and market interact, this creates difficult issues for institutional choice.<sup>136</sup> Antitrust is a question of when to rely on markets as an institution and when to choose a nonmarket institutional response. Comparative institutional analysis for antitrust does not ask, for example, how well the market works on its own as an institution. Rather, it asks whether markets work *better* than administrative agencies or courts. Put differently, participation costs are present in markets, the courts, and domestic or international regulatory systems. Each institution creates waste or friction. Therefore, the *best* question to ask (and answer) is which system will create the *least* waste or friction.<sup>137</sup>

## *B. Institutions, Costs, and Benefits*

### *1. Costs and Complexity*

Policy choices must consider transaction costs of particular institutional choices.<sup>138</sup> These costs help to determine the appropriate institutions.

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134. *Id.* at 23.

135. *Id.* at 42-60.

136. KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 2, at 122.

137. *See id.* at 29.

138. AVINASH K. DIXIT, THE MAKING OF ECONOMIC POLICY: A TRANSACTION-COST

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Williamson defines transaction costs as the “comparative costs of planning, adopting and monitoring task completion under alternative governance structures.”<sup>139</sup> The transaction costs of particular institutional alternatives may explain countries’ use of more formal or informal agreements and institutions.<sup>140</sup> Any agreement or institution involves costs.

Transaction costs help determine whether to choose domestic or international institutions to benefit countries involved in these institutions.<sup>141</sup> When transaction costs are high, the transaction takes effect through more formal organizations. When there is a higher potential return on such a transaction, countries may be more willing to overcome the high transaction cost for the negotiation of binding rules.<sup>142</sup> Where the costs of binding rules are too high, informal mechanisms (such as soft law) may be set up in their place.<sup>143</sup> Even with the use of informal mechanisms such as benchmarking and the creation of best practices, the payoff for benchmarking appropriate behavior determines whether the transaction costs of negotiating such benchmarks within a soft law institution are too high. Part V discusses the nature of these cost-and-benefit tradeoffs in detail.

Increased complexity reduces the effectiveness of any institutional alternative. In like manner, factors that make the market less effective also make courts or agencies less effective.<sup>144</sup> Issues of power dynamics, participation, coordination costs, and substantive disagreement occur in each of the case studies examined in the previous Section. Choosing the best institutional alternative may require better information. A lack of information may implicate high participation costs in the institution. Moreover, the decision-making process may suffer from lack of resources or an inability to resolve issues quickly.<sup>145</sup> The previous Section, which examines the complexity of cartels, mergers, and market access, also illustrates that complexity’s impact on domestic institutions and their capacity to address the problems in these areas. Information costs also play an important role in a legal system. Any legal

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PERSPECTIVE (1996); OLIVER E. WILLIAMSON, *THE MECHANISMS OF GOVERNANCE* (1996).

139. Oliver Williamson, *Transaction Cost Economics*, in 1 *HANDBOOK OF INDUSTRIAL ORGANIZATION* 135, 142 (Richard Schmalensee & Robert Willig eds., 1989).

140. Michael J. Gilligan, *A Defense of the Transactions Costs Approach to Understanding International Institutions*, in *POWER, INTERDEPENDENCE AND NON-STATE ACTORS IN WORLD POLITICS: RESEARCH FRONTIERS* 10 (Helen V. Milner & Andrew Moravcsik eds., forthcoming).

141. ROBERT O. KEOHANE, *INTERNATIONAL INSTITUTIONS AND STATE POWER: ESSAYS IN INTERNATIONAL RELATIONS THEORY* 166-67 (1989). Note, however, that in Keohane’s model, the primary actors in international relations are states.

142. Gilligan, *supra* note 140.

143. Armin Schäfer, *Resolving Deadlock: Why International Organizations Introduce Soft Law*, 12 *EUR. L.J.* 194 (2006). Informal mechanisms make it more likely that some level of compromise among parties can be reached because they are not rules as much as benchmarks for behavior. The discussion *infra* details the mechanisms that make soft law more flexible than hard law.

144. KOMESAR, *IMPERFECT ALTERNATIVES*, *supra* note 2, at 23.

145. Richard A. Posner, *Antitrust in the New Economy*, 68 *ANTITRUST L.J.* 925 (2001).

institution requires information to make policy. High information costs may undermine the ability of any institution to make optimal choices regarding consumption, production, or investment.<sup>146</sup>

## 2. Participation

A discussion of participation's effects leads to questions of institutional legitimacy. All institutions face questions of legitimacy.<sup>147</sup> This holds for both international and domestic institutions. For example, in any representative democracy, legislators at the national level look to constituent interests in the aggregate rather than individually. In some countries there is no direct election of the executive or judges. The executive often appoints the heads of regulatory agencies and judges. International organizations are yet a further step removed from direct voter preferences. The ways these different institutions function reflect efforts to reduce malfunctions caused by limits on direct participation of all stakeholders. Comparative institutional analysis examines these institutional alternatives' participatory strengths and weaknesses, which helps to answer questions of institutional legitimacy.

Participation occurs at a number of levels. This is clear from the historical analysis provided in Part II. The dynamics of participation and its costs and benefits become even clearer in Part V's discussion of the various antitrust institutions. Each individual participant may participate in the market or the state through the legislative or legal process. However, the effectiveness of participation varies based on the costs and benefits of participation. Indeed, the nature of participation varies across institutions, as do the costs of participation.<sup>148</sup> If participation costs are high, many potential participants may be uninformed, due to the high cost of information.<sup>149</sup> As a result, actors may make decisions not in their own interests. In the market, consumers with incomplete information may purchase overpriced products available elsewhere

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146. See Damian Geradin & J. Gregory Sidak, *European and American Approaches to Antitrust Remedies and the Institutional Design of Regulation in Telecommunications*, in HANDBOOK OF TELECOMMUNICATIONS ECONOMICS 1, 2 (Martin E. Cave, Sumit K. Majumdar & Ingo Vogelsang eds., 2006).

147. KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 2, at 122.

148. Abilities and dynamics of domestic institutions vary across countries. The nature of adjudication is different for example in common law versus civil law jurisdictions. The role and power of administrative agencies also vary across jurisdictions. The specific nature of these institutions and their capabilities may vary based on the legal system and tradition in a given country. Rafael La Porta, Florencio Lopez de-Silanes, Andrei Shleifer & Robert W. Vishny, *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997); Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Law and Finance*, 106 J. POL. ECON. 1113 (1998). The discussion in this Part on participation reflects an attempt to draw more general lessons for each type of institutional choice and structure as they concern international antitrust issues. The application of this discussion to particular institutions, though stronger in the aggregate, may be weaker as it pertains to individual cases.

149. R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

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for less.<sup>150</sup> In the political process, participation costs may cause consumers to support legislation that is not in their interest.<sup>151</sup> For example, proponents may sell legislation as benefiting the economy when in fact it helps only a single interest group. This can result from public choice problems, in which small interest groups push for legislation that favors them at the expense of society overall. In antitrust, this might include special provisions that exempt an industry from antitrust scrutiny. For example, the United States and EU each offer some form of antitrust immunity for their airline industries.<sup>152</sup> Such antitrust immunities may not serve the aggregate interests of consumers. Rather, these immunities may raise prices for consumers.<sup>153</sup>

In courts or administrative agencies, whether domestic or international, regulatory complexity and voluminous paper records increase participation costs. Increased costs have implications for participation in these institutions, as well as for who sets the agenda of these institutions. Those who participate more effectively have an increased opportunity to shape the outputs of the institution.<sup>154</sup> Individual actors with deeper pockets can participate more effectively than those with fewer financial resources.<sup>155</sup> Likewise, larger-sized firms with deep pockets can participate more effectively than smaller firms.<sup>156</sup>

Because there is an international dimension to participation, some ascribe a single voice to a state, particularly as it participates in the creation of binding international commitments. However, participation has various components at both national and international levels. As international relations scholars explain, domestic and international decisions are intertwined.<sup>157</sup> This introduces the second analytical tool this Article employs—international relations theory.

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150. Howard Beales, Richard Craswell & Steven C. Salop, *Information Remedies for Consumer Protection*, 71 AM. ECON. REV. 410 (1981); Howard Beales, Richard Craswell & Steven C. Salop, *The Efficient Regulation of Consumer Information*, 24 J.L. & ECON. 491 (1981).

151. Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the "Central Obsession" of Constitutional Theory*, 89 IOWA L. REV. 1287 (2004).

152. Airline Flight Schedule Exemption, 49 U.S.C. § 40129 (2003); REGULATION 1617/93 (IATA Tariff and Slot Conferences).

153. Alden F. Abbott, Associate Director for Policy and Coordination, Bureau of Competition, Federal Trade Commission, Prepared Statement Before the Antitrust Modernization Commission Hearings on Immunities and Exemptions (Dec. 1, 2005). See generally MUELLER, *supra* note 130.

154. KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 2, at 99.

155. Roland Benabou, *Unequal Societies: Income Distribution and the Social Contract*, 90 AM. ECON. REV. 96 (2000).

156. Matilde Bombardini, *Firm Heterogeneity and Lobby Participation* (Working Paper, on file with the University of British Columbia Department of Economics, June 2005).

157. Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-level Games*, 42 INT'L ORG. 427 (1988); Bruce Bueno de Mesquita, *Domestic Politics and International Relations*, 46 INT'L STUD. Q. 1 (2002); Andrew Moravcsik, *Introduction: Integrating International and Domestic Theories of International Bargaining*, in DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS 3 (Peter B. Evans, Harold K. Jacobson & Robert D. Putnam eds., 1993).

*C. International Organizations and Antitrust*

Scholars have applied international organization theory to antitrust. Yet, this international organization literature omits several critical antitrust institutions in its analysis. This creates gaps in previous work.<sup>158</sup> Earlier scholarship incorporating socio-legal explanations of international relations argues that all models of global governance need to operate in international antitrust.<sup>159</sup> Such an approach is incomplete. It fails to provide a framework to determine the best institutional form to address a given problem. It also does not account for “who decides who decides.”<sup>160</sup> That is, these previous approaches do not address who to choose among institutions as to the most effective decision maker. To create effective policy prescriptions on the appropriate design of international antitrust institutions requires filling in these theoretical gaps.

International institutions play an increasingly large role as regulatory issues globalize.<sup>161</sup> International regulatory law allows countries the freedom to create new commitments and institutional arrangements. This makes the use of comparative international analysis more compelling.<sup>162</sup> Institutions can evolve as they adopt the best practices of other institutions. Alternatively, an institution may evolve as states choose it over other existing institutions because it better serves a particular function.

International organizations help create rules and norms. A norm is a common belief or standard of what is acceptable (i.e., normal). Norms function to create order in society by creating customs of reiterated behavior. Internationally, norm creation occurs when multiple countries (or their sub-state decisionmakers) view a particular type of conduct through a similar

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158. For example, these works ignore the importance of the ICN, which this paper discusses in detail in Part V. Anu Piilola, *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 STAN. J. INT'L L. 207 (2003); Imelda Maher, *Competition Law in the International Domain: Networks as a New Form of Governance*, 29 J.L. & SOC'Y 111 (2002); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 86 (2002). Anne-Marie Slaughter provides a brief, one-paragraph description of the ICN in her book on the new order of soft law institutions. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 175 (2004). Many of the international antitrust works on institutions also fail to address the proliferation of the use of regional and bilateral trade agreements with antitrust chapters.

159. Piilola, *supra* note 158, at 209.

160. KOMESAR, *IMPERFECT ALTERNATIVES*, *supra* note 2, at 3.

161. Steinberg, *supra* note 45; Barbara Koremenos, Charles Lipson & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761 (2001). This Article does not seek to create a larger theory of why states may comply with international law. Rather, within the examination of institutions, it has the more modest goal of exploring what sort of institutional choices and arrangements may lead to increased compliance for issues involving international antitrust. The examination of international antitrust institutions provides a multicausal explanation of the dynamics of international organizations.

162. Joel P. Trachtman, *The Theory of the Firm and the Theory of the International Economic Organization: Toward Comparative Institutional Analysis*, 17 NW. J. INT'L L. & BUS. 470, 503 (1996).

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conceptual framework. Sub-state actors repeat behavior that follows from this group conceptualization. As these norms take hold, international relations theory suggests that such behavior in turn creates domestic compliance.<sup>163</sup> These customs in turn reinforce compliance. Assuming that such behavior leads to compliance, as discussed in Part V, it can benefit those actors, such as antitrust agencies, that hold to norms. Each such actor therefore has a rational basis for norm creation.

From a game theory perspective, parties conform to norms because they will receive long-term benefit from doing so.<sup>164</sup> International antitrust institutions offer such potential benefits to participants. Participation allows members of these organizations to increase cooperation and share information, resources, and expertise. Because of increased cooperation, international organizations constrain behavior through norm-facilitation. This reduces transaction costs.<sup>165</sup> Over time, rules of international organizations become accepted norms. States internalize them. In this way, international law can diffuse into domestic laws.<sup>166</sup> Imbedded localized norms may increase compliance. Part V's discussion provides examples of norm-facilitation in international antitrust.

Just as international organizations create incentives for compliance, they create disincentives for noncompliance, in the form of punishments. For example, international organizations can impose reputational costs on states for noncompliance.<sup>167</sup> Loss of reputation matters when the loss has consequences.<sup>168</sup> In addition, organizations can impose financial penalties or other forms of retaliation. These costs may increase compliance among members of international organizations.

### *D. The Role of International Institutions and its Application to International Antitrust*

International organizations reflect different institutional styles. The basic divide of institutional structure is between hard and soft law institutions. These organizations constrain behavior for domestic institutions differently. The discussion of hard and soft law and their costs and benefits requires

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163. Martha Finnamore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887 (1998).

164. See generally ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000).

165. Finnamore & Sikkink, *supra* note 163.

166. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997).

167. Koremenos, et al., *supra* note 161, at 790; Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2032 (1996).

168. Edith Brown Weiss, *Conclusions: Understanding Compliance with Soft Law*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 541 (Dinah Shelton ed., 2000); George W. Downs & Michael A. Jones, *Reputation, Compliance and Development*, in THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES 121 (Eyal Benvenisti & Moshe Hirsch eds., 2004).



international organization literature to explain how international antitrust institutions may create mechanisms for antitrust compliance.

### *1. The Use of Hard Law Institutions*

The international organization literature describes hard law as part of a two-level game. At Level I, governments bargain among themselves to institutionalize arrangements and commitments that maximize benefits for their domestic constituents.<sup>169</sup> At Level II, on the other hand, domestic constraints limit the ability of governments to pursue foreign policy objectives. Domestically, interest groups seek to shape government policy so as to further their own interests. In game theory terms, policy at the domestic level establishes the possible win-set for a country in international negotiations. Countries enter into a Level I international agreement only when it falls within their respective Level II win-sets.

Countries address the two-level game by creating international commitments that lock in domestic policies to international policies. To increase compatibility, countries lock in domestic policies to international ones in order to make domestic compliance more credible.<sup>170</sup> The types of commitments undertaken express preference as to institutional choice. This suggests foreign economic policy is an effort to synchronize domestic policies with the international political economy.<sup>171</sup>

Once countries create a binding agreement, the nature of participation varies because the institutional mechanisms change. The two-level game for treaty negotiation favors executive power as the institutional choice.<sup>172</sup> It is the executive branch that sets the negotiating agenda and negotiates treaties. Once an agreement is established, however, institutional choice may shift. In the antitrust setting, a binding international commitment changes the institutional choice. As Part V.A.1 explores in detail, the institution of choice for binding antitrust is the WTO.

Binding international commitments show a preference for international adjudication as the institutional choice. Hard law involves precise obligations that bind state actors. WTO provisions are vague, so adjudication plays a significant role in determining meaning of the text. Under hard law delegation,

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169. Helen Milner, *Rationalizing Politics: The Emerging Synthesis of International, American, and Comparative Politics*, in *EXPLORATION AND CONTESTATION IN THE STUDY OF WORLD POLITICS* 139 (Peter J. Katzenstein, Robert O. Keohane & Stephen D. Krasner eds., 1999).

170. Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-level Games*, 42 INT'L ORG. 427, 457-59 (1988).

171. Peter J. Katzenstein, *Introduction: Domestic and International Forces and Strategies of Foreign Economic Policy*, in *BETWEEN POWER AND PLENTY: FOREIGN ECONOMIC POLICIES OF ADVANCED INDUSTRIAL STATES* 3, 3-4 (Peter J. Katzenstein ed., 1978).

172. Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT'L L. 501, 540 (2005).

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countries cede their authority to a neutral implementing institution.<sup>173</sup> This makes WTO adjudicators the primary institutional movers in the WTO.<sup>174</sup>

Antitrust hard law operates within the context of trade agreements. Increased centralization of authority under hard law may increase compliance through the threat of enforcement via dispute settlement.<sup>175</sup> Trade agreements may lead to increased compliance because they tie the hands of domestic-level participants (courts, legislators, and executives). Such agreements also tend to strengthen the hand of domestically based exporters. Exporters benefit from compliance with trade agreements, in the form of increased exports to other markets. Thus exporters have a vested interest in the domestic political process to ensure that domestic noncompliance does not threaten these foreign market opportunities.<sup>176</sup>

In this manner, trade agreements have two levels of domestic commitment-making. At one level, trade agreements limit the discretion of domestic governments to pursue certain policies. At another level, they serve as commitments to voters for less protectionist policies.<sup>177</sup> These commitments may limit the market access and spillover problems that concern international antitrust.

### 2. The Design of Soft Law Institutions

Soft law institutions have become increasingly important among international institutions.<sup>178</sup> One international relations theorist defines soft law as “rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects.”<sup>179</sup> Soft law allows for multiple approaches within a common framework to solve problems. Because soft law lacks the power to bind through treaty, soft law institutions allow greater flexibility and adaptability in their recommendations and norms.<sup>180</sup> Part V.B’s

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173. Judith Goldstein, Miles Kahler, Robert O. Keohane & Anne-Marie Slaughter, *Introduction: Legalization and World Politics*, 54 INT’L ORG. 385 (2000).

174. Gregory C. Shaffer, *Recognizing Public Goods in WTO Dispute Settlement: Who Participates? Who Decides?*, 7 J. INT’L ECON. L. 459, 470 (2004).

175. Rachel Brewster, *Rule-Based Dispute Resolution in International Law*, 92 VA. L. REV. 251, 259 (2006).

176. Eric A. Posner, *International Law and the Disaggregated State*, 32 FLA. ST. U. L. REV. 797, 814 (2005).

177. Helen V. Milner, B. Peter Rosendorff & Edward D. Mansfield, *International Trade and Domestic Politics: The Domestic Sources of International Trade Agreements and Institutions*, in THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES 216 (Eyal Benvenisti & Moshe Hirsch eds., 2004).

178. Anne-Marie Slaughter, *Breaking Out: The Proliferation of Actors in the International System*, in GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY 12 (Yves Dezalay & Bryant G. Garth eds., 2002).

179. Francis Snyder, *Soft Law and Institutional Practice in the European Community*, in THE CONSTRUCTION OF EUROPE: ESSAYS IN HONOUR OF EMILE NOËL 197, 198 (Stephen Martin ed., 1994).

180. Soft law involves weaker levels of one or more of (1) obligation; (2) precision; or (3) delegation. Soft law is dynamic as it can occur at one or more of these dimensions. Kenneth W. Abbott

discussion of the OECD, UNCTAD, and ICN explains these dynamics.

The literature on the two-level game has, for the most part, focused on the relationship between the executive and legislative branches. Cooperation through soft law, however, is usually the domain of domestic regulators across jurisdictions.<sup>181</sup> The choice of soft law institutions over international adjudication is an institutional choice made for administrative agencies. This changes Level II of the game, substituting agencies for the legislature. In this new two-level model, the relationship between the executive and the antitrust agency is one of principal-agent.<sup>182</sup>

Where the principal is the executive and its agent is an antitrust agency, the forum for antitrust problem is inter-agency deliberation through transgovernmental or transnational international organizations. The agent's interests may not align with those of the principal. Delegation to international organizations may involve a moral hazard problem. An agent may pursue his own objectives rather than those of his principal. The principal must create mechanisms, *ex ante* through bonding and *ex post* through monitoring, to limit the agent's opportunity to seek his own preference set.<sup>183</sup> Relaxing the assumption that an antitrust agency operates with a single voice makes understanding its participation in international organizations more complex. Different components within the agency may be involved in these organizations. Moreover, nonstate actor involvement in such organizations increases the number of direct participants.

Transgovernmentalism involves this two-level game of soft law in terms of increased rule-making and coordination at the sub-state level. The transgovernmental organization disaggregates the function of the state to lower levels.<sup>184</sup> There has been increasing growth in the use of transgovernmental networks, particularly in regulatory fields.<sup>185</sup> This growing participation is revolutionizing international organizations because it shifts the institutional preference from the executive to the administrative agency. In international antitrust, the OECD and the UNCTAD have transgovernmental structures. Such transgovernmental networks have two important functions. First, they may encourage harmonization across jurisdictions, particularly toward the system of the dominant country within the network. Second, they affect the distribution of regulatory power. Where power is diffuse, regulatory

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& Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 434 (2000).

181. Chad Damro, *Transatlantic Competition Policy: Domestic and International Sources of EU-US Cooperation*, 12 EUR. J. INT'L REL. 171, 172 (2006).

182. *Id.* at 174.

183. For a general discussion on agency problems, see JEAN JACQUES LAFFONT & DAVID MARTIMORT, *THE THEORY OF INCENTIVES: THE PRINCIPAL-AGENT MODEL* (2002).

184. HAROLD K. JACOBSON, *NETWORKS OF INTERDEPENDENCE: INTERNATIONAL ORGANIZATIONS AND THE GLOBAL POLITICAL SYSTEM* (1984); Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183, 184 (1997).

185. Slaughter, *supra* note 184, at 184; Raustiala, *supra* note 158, at 4-5.

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cooperation strengthens compliance as well as the effectiveness of both formal and informal obligations. The discussions of the OECD and UNCTAD in Parts V.B.1 and 2 illustrate these dynamics.

In contrast with transgovernmentalism, transnationalism is a hybrid structure that includes participation by both state and nonstate actors.<sup>186</sup> The ICN, for example, is transnational in nature. This has implications for both its model of global governance and its participants.<sup>187</sup> Transnationalism suggests that the states rely on their own subunits to work with nonstate actors such as nongovernmental organizations (NGOs), academics, and MNCs. From a more general view, transnational actors seek to change countries' policy preferences.<sup>188</sup> Nongovernmental actors help transform state actors.<sup>189</sup> A constructivist approach argues that through interactions with other actors, soft law allows states' preferences to change and institutions themselves to be transformed.<sup>190</sup> Part V.B.3's discussion of ICN dynamics explains how this plays out in international antitrust and has profound implications for antitrust institutions. As Part V.B.3 explores, the ICN has fostered increased intellectual convergence among agencies, created compliance, and strengthened domestic institutions.

### 3. Dynamics of Soft Law Institutions

Soft law systems use consensus to reach positions. Consensus requires that countries share information about their preferences with one another. Shared information allows countries to determine a common position that they all can accept. This type of system works even when the cost of agreement outweighs the cost of acceptance. As discussed in Part II, for example, the potential cost of an antitrust agreement in the WTO was too much for certain countries to

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186. THOMAS RISSE-KAPPEN, BRINGING TRANSNATIONAL RELATIONS BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES AND INTERNATIONAL INSTITUTIONS 3 (1995).

187. Mark Pollack & Gregory C. Shaffer, *Transatlantic Governance in Historical and Theoretical Perspective*, in TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY 3, 33 (Mark Pollack & Gregory C. Shaffer eds., 2001).

188. Joseph S. Nye, Jr. & Robert O. Keohane, *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 264, 271 (Roger B. Porter, Pierre Sauve, Arvind Subramanian & Americo Beviglia Zampetti eds., 2001).

189. See generally ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS (1999).

190. MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 141 (1996); David M. Trubek, Patrick Cottrell & Mark Nance, 'Soft Law,' 'Hard Law,' and European Integration: Toward a Theory of Hybridity, in NEW GOVERNANCE AND CONSTITUTIONALISM (Gráinne de Búrca & Joanne Scott eds., forthcoming 2006) ("From an epistemological standpoint, the constructivist approach is not interested in how things are, but in how they became what they are."). How exactly constructivism explains this effect systematically rather than in specific situations remains underdeveloped. Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Right Law*, 54 DUKE L.J. 621, 624 (2004); Stephen D. Krasner, *International Law and International Relations: Together, Apart, Together?*, 1 CHI. J. INT'L L. 93, 98 (2001); Jeffrey T. Checkel, *The Constructivist Turn in International Relations Theory*, 50 WORLD POL. 324, 325 (1998); Alastair Iain Johnston, *Treating International Institutions as Social Environments*, 45 INT'L STUD. Q. 487, 488 (2001).

bear. This helped lead to the demise of the Working Group on Trade and Competition. Similarly, the OECD Joint Group could not come to any consensus on issues of market access. This limited the effectiveness of the Joint Group, which led to its dissolution. When the lowest common denominator of acceptance is too low, this outcome will be too costly for countries or their sub-units to undertake such a commitment. Put differently, the costs of participation outweigh the benefits.

Participation may vary across soft law institutions as well as within them. Not all countries have the same bargaining power in shaping consensus within an international organization. Two concerns within soft law institutions are creating opportunities for meaningful participation by developing countries and retaining the buy-in of developed countries. As Part V illustrates, some international antitrust institutions have succeeded in fostering developing countries' meaningful participation.

Groups with significant interests and resources may have the opportunity to participate the most in international soft law institutions. Jacobs and Page have studied how much impact various groups have generally at the sub-state level. They argue that, from most important to least, international business, experts, labor, and public opinion shape U.S. foreign policy.<sup>191</sup> This hierarchy of influence also seems to hold true for international antitrust at the ICN and OECD. The antitrust areas that have received the most coverage, particularly at the ICN, are those which have the biggest impact on international business mergers and, to a lesser extent, cartels and implementation of competition/antitrust policy.

Even with agency-level participation, transgovernmental and transnational institutions contribute to concerns of democratic accountability. As disaggregated units become actors in international networks, power shifts farther from democratically elected legislators, toward the executive and administrative agencies. As regulators share technical expertise, they may exclude domestic political economy concerns in international decision making and limit deliberative democracy.<sup>192</sup>

Generally, it remains an open question whether agency cooperation through soft law institutions creates compliance or whether national governments allow agencies to comply in order to further government interests.<sup>193</sup> In antitrust, this question is under-explored. One scholar suggests that antitrust regulators may react to internationalization of antitrust only to the extent that their domestic

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191. Lawrence R. Jacobs & Benjamin I. Page, *Who Influences US Foreign Policy?*, 99 AM. POL. SCI. REV. 107 (2005).

192. Antitrust may be the function of a domestic political bargain. Jonathan B. Baker, *Competition Policy as a Political Bargain*, 73 ANTITRUST L.J. 486 (2006).

193. Compare Raustiala, *supra* note 158, at 86 (transgovernmental organizations shape compliance), with Posner, *supra* note 176 (compliance only goes so far as domestic governments want it to proceed).

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political institutions allow them to do so.<sup>194</sup> Yet, specific to the antitrust setting, this international relations approach does not explain why different soft law institutions yield different results in antitrust, as with the OECD, UNCTAD, and ICN. Comparative institutional analysis offers a framework to evaluate the relative strengths and weaknesses of these soft law institutions, as Section V explores.

### V. INSTITUTIONS AND THEIR APPLICATION TO THE PROBLEMS OF INTERNATIONAL ANTITRUST

Because institutions change and respond to each other over time, a number of the earlier writings on international antitrust do not address more recent institutional shifts. In particular, recent years have seen important changes suggesting that a reconsideration of the efficacy of international antitrust institutions is in order. This Part details the dynamics of such institutions. It analyzes their strengths and weaknesses in terms of the costs and benefits of participation in each, in order to address the issues that the case studies present.

#### A. Hard Law Institutions

##### 1. The World Trade Organization

###### a. Introduction

The WTO serves as a hard law institution in which countries commit to reducing their trade barriers in exchange for other countries' commitment to the same. The WTO operates through the process of legalization—the institutionalization of legal governance. Legalized commitments under the WTO alter a state's ability to interpret and change its commitments unilaterally.<sup>195</sup> This makes the state's international commitments more credible.<sup>196</sup> The WTO thus serves as a pre-commitment mechanism to lock in behavior. Domestic governments embrace pre-commitment constraints so that they can better counter domestic, rent-seeking interest groups.<sup>197</sup> Should a country violate its commitments, other countries can enforce them through legalized institutions. In this way, the WTO's binding dispute-settlement function creates legitimacy for its commitments.<sup>198</sup>

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194. Damro, *supra* note 181, at 173.

195. Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, *The Concept of Legalization*, 54 INT'L ORG. 401, 426-27 (2000).

196. Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CALIF. L. REV. 899 (2005).

197. Ernst-Ulrich Petersmann, *Trade Policy as a Constitutional Problem: On Domestic Policy Functions of International Rules*, 41 AUSSSENWIRTSCHAFT 405 (1996).

198. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

Lock-in with the WTO's international standards also has the effect of forcing countries to develop higher standards. These standards support a network of market-building infrastructures that support the rule of law. Legalization therefore makes compliance more likely. Even if a country refuses to comply with a decision by the WTO on one of its trade policies, the decision itself may undermine the legitimacy of that policy.<sup>199</sup>

This pattern lessens the effects of interest group capture bias on international trade regulation. Specifically as it relates to antitrust issues, the dynamic may be particularly true in developing countries with smaller economies, more highly concentrated industries, and elite socioeconomic players with strong ties to government. Under such circumstances, it is difficult for an antitrust agency to enforce an efficiency enhancing agenda that might harm powerful interest groups. In contrast, interest groups can mobilize more effectively than consumers as a whole.<sup>200</sup> Simultaneously, consumers may have difficulty internalizing the benefits of antitrust's impact on competition in the aggregate to their everyday situation.<sup>201</sup> Therefore, consumers may act on beliefs following the manipulation of the tyranny of the majority, even when these beliefs may not actually be in their best interest.<sup>202</sup> For example, consumers might support a policy such as price control, in the belief that it helps their welfare, though in fact it creates overall losses for them.

#### b. Nondiscrimination in the World Trade Organization

Legalization at the WTO functions through commitments to nondiscrimination.<sup>203</sup> Nondiscrimination provides equality of opportunity between foreign and domestic market participants in a given country. As a consequence of nondiscrimination, governments cannot put policies in place that would benefit domestic champions over foreign market entrants. As such, nondiscrimination makes it more difficult for countries to undertake nationalist market policy at the expense of global allocative efficiency.

Theoretical models explain that the fundamental problem that the WTO solves is insufficient market access.<sup>204</sup> Nondiscrimination reduces opportunities

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199. Robert Keohane, Andrew Moravcsik, & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457, 467 (2000).

200. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

201. ICN, *CONSUMER OUTREACH BY ICN MEMBERS—A REPORT ON OUTREACH UNDERTAKEN AND LESSONS LEARNED* (2005).

202. Bryan Caplan, *Rational Irrationality and the Microfoundations of Political Failure*, 107 PUB. CHOICE 311 (2001).

203. Alan O. Sykes, *International Trade*, in 3 ENCYCLOPEDIA OF LAW AND ECONOMICS (Boudewijn Bouckaert & Gerrit de Geest eds., 2000).

204. Kyle Bagwell, Petros C. Mavroidis & Robert Staiger, *It's a Question of Market Access*, 96 AM. J. INT'L L. 56, 60 (2002).

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to erect market access barriers.<sup>205</sup> This checks domestic interest groups' impulses. As one author points out, "[m]ost instances of discrimination against (or underrepresentation of) foreign nationals in national political processes are, at the same time, instances of capture of the national political process by a national interest group against the interests of a dormant national majority."<sup>206</sup> Foreign exporters tend to be underrepresented in domestic legislation.<sup>207</sup> Since their exclusion has aggregate effects on market competition and dynamic growth, WTO commitments assist in putting them on equal regulatory footing with domestic firms. Nondiscrimination allows foreign exporters to participate in domestic antitrust and overall regulation that affects their competitiveness.<sup>208</sup>

### c. Participation in the World Trade Organization

The WTO is an institutional choice of international adjudication of antitrust over the malfunction of the market, domestic legislature or agencies, and soft law international alternatives. Binding adjudication presumes that WTO adjudication may be less subject to interest group capture than either the market or the political process. The WTO could provide dispute settlement to enforce antitrust commitments.<sup>209</sup> WTO members use dispute settlement to retaliate against trading partners that harm a previously negotiated commitment.<sup>210</sup>

There are costs to WTO adjudicatory participation. Adjudication may have limits in its ability to process information. Such limits may discourage participation. Adjudicators have higher information costs because they are not experts in a given subject. This reduces their ability to be precise in their decision making. WTO adjudication may come out with inconsistent or poorly reasoned results depending on the ability of adjudicators to come up with solutions to complex problems. An institutional choice of adjudication may overwhelm the judicial decisionmakers and their resources.<sup>211</sup>

The nature of adjudication under the WTO determines who has meaningful representation. WTO adjudication has particular implications to the extent that antitrust uses dispute settlement. Litigation increases the costs of participation

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205. Oliver Budzinski & Mariana Bode, *Competing Ways towards an International Competition Policy Regime: An Economic Perspective on ICN vs. WTO*, in NEW DEVELOPMENTS IN ANTITRUST, *supra* note 1, at 17.

206. Miguel Poiars Maduro, *Europe and the Constitution: What If This Is as Good as It Gets?*, in RETHINKING EUROPEAN CONSTITUTIONALISM 24 (J.H.H. Weiler & Margareta Wind eds., 2000).

207. John O. McGinnis, *The Political Economy of International Antitrust Harmonization*, 45 WM. & MARY L. REV. 549 (2003).

208. Maduro, *supra* note 206, at 15; McGinnis, *supra* note 207.

209. Bernard Hoekman & Kamal Saggi, *International Cooperation on Domestic Policies: Lessons from the WTO Competition Policy Debate*, in ECONOMIC DEVELOPMENT AND MULTILATERAL TRADE COOPERATION 7 (Simon J. Evenett & Bernard Hoekman eds., forthcoming 2006).

210. KYLE BAGWELL & ROBERT W. STAIGER, *supra* note 2, at 98.

211. KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 2, at 239. The malfunctions of the WTO on antitrust issues become clearer in the analysis of the recent *Telmex* case, as discussed *infra*.



because of the complexity of rules and length of litigation.<sup>212</sup> Complex litigation creates higher litigation costs. This handicaps infrequent players in WTO adjudication because they do not use adjudicative rules as often and therefore face higher information costs.<sup>213</sup> In contrast, repeat players have lower information costs. They can adapt faster to changes in adjudication or changes more generally in a given institution.<sup>214</sup> These costs make participation more difficult for litigants with fewer financial means.<sup>215</sup>

The WTO and most preferential trade agreements (PTAs) limit adjudicatory access to states.<sup>216</sup> Countries participate in WTO adjudication by bringing potential claims. This does not mean that powerful MNCs lack a voice. They can act through their governments. This particularly benefits the United States and EU because of what one author terms “public-private partnerships.”<sup>217</sup> Public-private partnerships occur in a number of steps. In the U.S. setting, first a party (a deep-pocket company or trade group) seeks congressional backing to bring a complaint. Then, the party gives the Office of the United States Trade Representative (USTR) information supporting the claim. Next, the party helps select cases that the USTR has a high probability of winning. Thereafter, the private party spends significant financial resources to assist the USTR in the litigation.<sup>218</sup> Though the United States pioneered public-private partnerships, the EU has begun to catch up in its use of them.<sup>219</sup>

The larger a nation’s economy, the greater is its bargaining power at the WTO.<sup>220</sup> Traditionally this has meant countries of the developed world, particularly the United States and EU, have held the most bargaining power. The public-private partnerships that these countries bring to the WTO dispute system have increased the disparity of results in hard law adjudication between rich and poor countries.<sup>221</sup> This disparity is a function of information costs. Thus, public-private partnerships hinder meaningful participation by developing countries in adjudication. This is not to suggest that developing countries cannot undertake public-private partnerships. Rather, the relative

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212. KOMESAR, LAW’S LIMITS, *supra* note 2, at 37.

213. *Id.* at 38.

214. *Id.* at 162.

215. Marc Galanter, *Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 165 (1974).

216. Some PTAs allow for private parties to participate in dispute resolution in antitrust. *See, e.g.*, North American Free Trade Agreement, U.S.-Can.-Mex., pt. 5, ch. 15, Dec. 17, 1992, 32 I.L.M. 289 (1993).

217. Gregory C. Shaffer, *The Blurring of the Intergovernmental: Public-Private Partnerships Behind US and EC Trade Claims*, in TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY, *supra* note 187, at 97.

218. GREGORY C. SHAFFER, PUBLIC-PRIVATE PARTNERSHIPS IN W.T.O. LITIGATION ch. 3 (2003).

219. *Id.* at ch. 4.

220. Steinberg, *supra* note 45, at 347.

221. Marc L. Busch & Eric Reinhardt, *Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement*, 37 J. WORLD TRADE 719 (2003).

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costs of such partnerships remain higher for developing countries than for the United States and EU.

The United States and EU are direct parties or third-party participants in most WTO cases. Not surprisingly, the United States and EU understand the adjudicatory system better than most because they are repeat players. Information is costly.<sup>222</sup> Repeat play lowers the information costs of litigation. The United States and EU gain expertise through their participation in many cases. This expertise provides them with greater capacity to identify cases, manage them efficiently, and increase their chances of winning them. U.S. and EU involvement in most WTO disputes also provides them with bargaining leverage for political disputes not settled through the WTO. Because they have lower information costs, these parties can also inflict costs on adversaries more effectively.<sup>223</sup> Their expert knowledge allows the United States and EU to maximize their involvement in negotiation of disputes in the “shadow of the law.”<sup>224</sup> Such knowledge has important implications for trade law and its use in deciding antitrust issues. Since the United States and EU participate more often in cases, they can better transform the substance of WTO law than other participants.<sup>225</sup>

Developing countries have a lesser ability to participate in cases decided in the shadow of the law. This gap is due to a mismatch in legal capacity.<sup>226</sup> This is a function of the relatively small value of benefits to participation and the relatively high cost of access to participation.<sup>227</sup> An offending party offers its greatest concessions in the consultation stage rather than the panel decision stage. Developing-world litigants are unlikely to utilize this consultation period as effectively as the repeat players for pretrial bargaining.<sup>228</sup> This increases their participation costs in legal disputes.<sup>229</sup>

Even when a developing country wins in WTO adjudication, it may achieve less than a developed world victor would. The current WTO system gives developed world litigants more remedy choices than those available to developing countries. If the political price for compliance is too high, a

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222. Yoram Barzel, *Transaction Costs: Are They Just Costs?*, 141 J. INST. & THEOR. ECON. 17 (1985).

223. SHAFFER, *supra* note 218, at 459 & n. 34.

224. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 1 (1963); AVINASH K. DIXIT, *LAWLESSNESS AND ECONOMICS: ALTERNATIVE MODES OF GOVERNANCE* ch. 2 (2004).

225. SCHAFER, *supra* note 218, at 471-72.

226. Marc L. Busch & Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 FORDHAM INT'L L.J. 158 (2000).

227. Steve Charnovitz, *Transparency and Participation in the World Trade Organization*, 56 RUTGERS L. REV. 927, 949-50 (2004).

228. Busch & Reinhardt, *supra* note 221, at 720-23.

229. Marc L. Busch & Eric Reinhardt, *Transatlantic Trade Conflicts and GATT/WTO Dispute Settlement*, in *TRANSATLANTIC ECONOMIC DISPUTES: THE EU, THE US, AND THE WTO* 465 (Ernst-Ulrich Petersmann & Mark Pollack eds., 2003).

developed country may pay the penalty in terms of increased market access rather than change the behavior that distorts trade.<sup>230</sup> A developing country would be foolish to retaliate against a developed trading partner simply because the developing country has very little leverage for retaliation. The developing country may represent only a sliver of total trade for the developed country, while the developed country may account for a significant percentage of all trade for the developing country. Lack of leverage limits the ability of developing countries to enforce WTO rulings in their favor.<sup>231</sup>

Even with these limitations on effective participation, adjudication allows developing countries to achieve better outcomes than they would in bilateral negotiations.<sup>232</sup> Dispute settlement reduces the power asymmetry between a developing country and a developed one. A developing-world complainant may discipline U.S. or EU behavior because it can use the WTO commitment system. A developing country may have little leverage in direct bilateral negotiations. Under the WTO, power has become more centralized. This centralization allows for greater justification for the imposition of sanctions or the threat of the imposition of sanctions against noncompliant parties.<sup>233</sup> Parties are likelier to commit to an outcome, even where they do not like the result. This process forces compliance, in some cases even by powerful participants in the WTO such as the EU and United States.

#### d. Ability of the World Trade Organization to Solve Antitrust Problems

##### i. Market Access

The capacity of the WTO to undertake an antitrust-style analysis is a function of its ability to meld market access trade rules with antitrust notions of barriers to entry. In some situations, a WTO policy of nondiscrimination may solve antitrust problems.<sup>234</sup> However, there may be cases in which a market access issue is not a function of anticompetitive conduct—i.e., not an antitrust issue. The ability of the WTO to distinguish between such situations is the test

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230. Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 30 J. LEGAL STUD. 179, 191 (2002).

231. Brewster, *supra* note 175, at 257.

232. Christina L. Davis, *Do WTO Rules Create a Level Playing Field for Developing Countries? Lessons From Peru and Vietnam*, in NEGOTIATING TRADE: DEVELOPING COUNTRIES IN THE WTO AND NAFTA (John Odell ed., forthcoming 2006). WTO membership itself may help WTO countries even if it does not benefit countries in dispute settlement. By joining the WTO, countries reduce the cost of negotiation to receive benefits from all other member countries. Marc Busch, Rafal Raciborski & Eric Reinhardt, *Does the Rule of Law Matter? The WTO and US Antidumping Investigations* (Working Paper, August 2005).

233. Brewster, *supra* note 175, at 259; Jide Nzelibe, *The Role and Limits of Legal Regulation of Conflicts of Interest (Part I)*, 6 THEORETICAL INQ. L. 215 (2005).

234. BAGWELL & STAIGER, *supra* note 98, at ch. 9. The authors admit that not all WTO antitrust issues are market access issues. They note that merger policy creates externalities though they leave unresolved whether other issues may create externalities that require direct negotiation of antitrust.

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of the applicability of the WTO to market access antitrust issues.

Thus far, there have been few WTO dispute settlement adjudications that address market access implications of antitrust directly or indirectly.<sup>235</sup> This capacity to understand antitrust principles and apply them to a trade remedy goes to the core of the WTO's ability to solve market access issues that implicate antitrust. An examination of a recent such case provides a glimpse of the adjudicatory capacity of the WTO in this area. *Mexico—Measures Affecting Telecommunications Services* (hereinafter, *Telmex*) addressed the current WTO competition conceptualization.<sup>236</sup> The specific questions at issue in *Telmex* were whether Mexico had violated its commitments and obligations under the General Agreement on Trade in Services (GATS) Schedule of Commitments, GATS Annex on Telecommunications, and the Reference Paper on Telecommunications (RP) on practices in basic and value-added telecommunications services.<sup>237</sup> In *Telmex*, the WTO panel stated that antitrust issues are intractably tied to national treatment and market access. It declared:

Removing market access and national treatment barriers was not deemed sufficient to ensure the effective realization of market access commitments in basic telecommunications services. Accordingly many Members agreed to additional commitments to implement a pro-competitive regulatory framework designed to prevent continued monopoly behaviour, particularly by former monopoly operators, and abuse of dominance by these or any other major suppliers. Members wished to ensure that market access and national treatment commitments would not be undermined by anticompetitive behaviour by monopolies or dominant suppliers, which are particularly prevalent in the telecommunications sector.<sup>238</sup>

Under this reasoning, trade disciplines could be used in cases of anticompetitive conduct where there are violations of market access and national treatment commitments. This understanding of trade discipline applies to a critical area of antitrust—how best to address anticompetitive behavior by dominant firms. It is particularly relevant for regulated industries, where antitrust may have overlapping jurisdiction with sector regulators. In such situations, a dominant firm in a regulated industry may distort the competitive process through monopolization. Domestic antitrust solutions may be inadequate because of various antitrust immunities and limitations in domestic capabilities and laws.<sup>239</sup> Trade law may provide a second avenue of action against such behavior that antitrust may not adequately address or remedy.

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235. See, e.g., World Trade Organization, *supra* note 131; *Mexico—Measures Affecting Telecommunications Services*, WT/DS204/R (2004); *United States—Anti-Dumping Act of 1916*, WT/DS136/AB/R & WT/DS162/AB/R (2000); *Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain*, AB-2004-3 (2004).

236. *Mexico—Measures Affecting Telecommunications Services*, *supra* note 235.

237. Through the RP, the WTO addresses a number of key telecommunications regulatory issues, such as interconnection, universal service, and resource allocation.

238. *Mexico—Measures Affecting Telecommunications Services*, *supra* note 235, at para. 7.237.

239. Timothy J. Muris, *Looking Forward: The Federal Trade Commission and the Future Development of Competition Policy*, 2003 COLUM. BUS. L. REV. 359 (2003).

The ability to decide cases that implicate antitrust does not ensure that the WTO would decide them correctly or use economic analysis that a domestic antitrust adjudicator would apply. To be an adequate institutional response, and more effective than other institutional alternatives, WTO actions must have competency in adjudicating such cases. How the institutional choice of adjudication in antitrust-like trade disputes plays out illustrates the abilities and limitations of this institutional choice. The first question is whether WTO adjudication can understand antitrust through the trade lens. One former WTO Appellate Body member notes that a background in antitrust is essential for proper adjudication with respect to WTO RP obligations:

Without a common understanding of the goals and methods of competition law, it is difficult to see how WTO Members to begin with, and WTO dispute settlers later on, can interpret some of the specific commitments on the prevention of anticompetitive practices. . . . It will also be difficult to adjudicate disputes in WTO about the correct interpretation of these critical, but generally worded principles.<sup>240</sup>

This is not to suggest that a WTO RP challenge is analogous to antitrust law. The WTO uses trade remedies rather than antitrust remedies. Nevertheless, effective RP dispute settlement must take into account competition and antitrust law to inform its application of trade law in areas that implicate competition.

Because of the complexity of issues involved in market access questions, analysis requires a fact-specific inquiry. Monopolization cases are complex by nature. Any attempt to use trade law remedies to address market access restraints requires highly nuanced thinking. Where barriers to entry constrain market competition, especially when these barriers result from government restraints favoring a dominant firm, the presumption that the market allows entry and exit requires reconsideration. Where government restraints allow firms (including dominant firms) to erect entry barriers, one cannot then argue that international competition can deter the exercise of monopoly power. Adjudicators may lack the capacity to undertake rigorous analysis of such complex interplays. Indeed, Hovenkamp cautions:

When a particular form of behavior is too complex for reliable analysis within a reasonable time, then the only defensible antitrust rule is to let the market—rather than state intervention—control that behavior, at least for the time being. . . . But the basic rule should be nonintervention unless the tribunal has a high degree of confidence that it has identified anticompetitive conduct and can apply an effective remedy.<sup>241</sup>

If WTO adjudicators lack the ability to undertake such an inquiry and properly identify the anticompetitive conduct, they may do more harm than good, globally, by imposing as penalties for perceived market access problems

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240. *Trade and Competition Interlinkages: The Case of Telecom*, Fondazione Eni Enrico Mattei, Venice, 15 (Dec. 1998), available at <http://www.feem.it/NR/rdonlyres/FE756606-2F38-4279-8F9A-3BC1FB0F9DAB/303/6899.pdf>.

241. Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 272 (2001).

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trade remedies that may in fact have no sound economic rationale.

If RP based dispute resolution is a bridgehead between trade and antitrust law, current dispute settlement demonstrates that the gap in understanding of market access concerns between trade and antitrust at the WTO remains significant. The antitrust elements of the *Telmex* case present problematic reasoning.<sup>242</sup> In finding for the United States, the panel addressed the case with only formalistic and procedural reasoning; it did not provide a detailed decision that appropriately wrestled with the complex economics based factual record. Neven and Mavroidis provide an important critique of the decision's antitrust elements on these grounds.<sup>243</sup> In short, the decision lacked a sophisticated analysis to determine the relevant market. What analysis the panel did bring to bear on the relevant market question was deficient in two critical ways. First, the panel merely accepted that the market for termination services was the relevant market, even though there were other possible ways to define the relevant market.<sup>244</sup> Second, the panel pursued a theory of exploitative practice by the Mexican telecommunications industry, which is difficult to prove in an antitrust context, given possible procompetitive justifications. Additionally, the panel read into the RP a cartelization provision that did not exist.<sup>245</sup>

For greater impact in the antitrust world, *Telmex* would have needed an antitrust inquiry in addition to its trade law analysis. Overlaps in the two fields were likely present in the underlying facts of the *Telmex* case, and better adjudication could have applied these two disciplinary tools together. Generally speaking, if the WTO were to employ complex antitrust analysis it would better serve as an effective institution to address market access issues. However, the *Telmex* case suggests that the WTO is not yet an effective institutional choice for remedying market access problems. The gap between trade and antitrust remains too great in the WTO as it currently functions.

### ii. Central Merger Authority

One antitrust function that the WTO could theoretically take on is that of a central merger authority to reduce international coordination and substantive differences to merger review.<sup>246</sup> In this role it would operate as an international

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242. J. Gregory Sidak & Hal J. Singer, *Überregulation Without Economics: The World Trade Organization's Decision in the U.S.-Mexico Arbitration on Telecommunications Services*, 57 FED. COMM. L.J. 1 (2004); Petros C. Mavroidis & Damien Neven, *El Mess in TELMEX: A Comment on Mexico—Measures Affecting Telecommunications Services*, 5 WORLD TRADE REV. 271 (2006).

243. Mavroidis & Neven, *supra* note 242, at Part IV.

244. *Id.* at para. 365.

245. *Id.* at Part V; Philip Marsden, *Trade and Competition: WTO Decides First Competition Case—With Disappointing Results*, COMP. L. INSIGHT, May 2004, at 3.

246. To be sure, this proposal goes farther than even the WTO Trade and Competition Working Group would advocate. A more limited proposal by the Chair of the Working Group advocated that the WTO push for increased convergence among merger control systems. Moreover, the proposal recommended an economic rather than political rationale for improvements to international merger control. Ariel Ezrachi, *Merger Control and Cross Border Transactions: A Pragmatic View on*

regulator with the power of merger review across jurisdictions.<sup>247</sup> As more countries develop merger control, the number of countries involved and the overlap and conflict in their requirements ultimately may require an international solution. In an increasingly global world, a global merger control system might create efficiencies in the merger review process. Disparate policies are currently in place, in both procedural and substantive areas of merger control.<sup>248</sup> As more countries enact merger control regimes, coordination problems among agencies may increase.

The growing global reach and increasing concentration of ever more markets may justify a centralized regulator for merger control.<sup>249</sup> Such a system is not without precedent. The EU merger control system allows for supranational review of mergers that reach certain community-wide thresholds. A global antitrust merger system simply takes supranational merger control to its logical conclusion. After all, many industries are already global and populated with players ripe to merge with, acquire, or be acquired by each other.

Distortions in a centralized merger system depend on the distribution of winners and losers in countries subject to merger jurisdiction but under authority of a centralized agency.<sup>250</sup> The possibility of such distortion leads to an institutional dilemma. Under centralized merger control, the costs of domestic-level public choice problems could magnify at the international level. This may so increase the cost of participation in the merger control system that only well funded parties could afford to participate. These may be the very participants that have the most to gain from increasingly concentrated global markets. However, such concern may be overblown. Drawing upon the lessons of the EU merger system, some theoretical work suggests that the allocation of merger jurisdiction, whether to a national or supranational regulator has only a small effect on the outcome of a merger.<sup>251</sup>

The benefits of a centralized merger control system remain hypothetical. It seems unlikely that in the near term such a centralized system will materialize.<sup>252</sup> Countries generally may be unwilling to put global interests

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*Cooperation, Convergence and What's in Between*, in TRANSATLANTIC ANTITRUST RESEARCH HANDBOOK (Philip Marsden ed., forthcoming 2006).

247. Fiebig, *supra* note 1.

248. KY P. EWING, COMPETITION RULES FOR THE 21ST CENTURY: PRINCIPLES FROM AMERICA'S ANTITRUST EXPERIENCE 36-38 (2003).

249. Oliver Budzinski, *Towards an International Governance of Transborder Mergers?—Competition Networks and Institutions between Centralism and Decentralism*, 36 N.Y.U. J. INT'L L. & POL. 1, 4 (2003); Mitsuo Matsushita, *Reflections on Competition Policy/Law in the Framework of the WTO*, in INTERNATIONAL ANTITRUST LAW & POLICY, FORDHAM CORPORATE LAW INSTITUTE 34-38 (Barry Hawk ed., 1997). For a contrarian view, see Christopher Bliss, *Trade and Competition Control?*, in 1 FAIR TRADE AND HARMONISATION 316 (Jagdish Bhagwati & Robert Hudec eds., 1996).

250. Neven & Röller, *supra* note 1.

251. *Id.*

252. Douglas H. Ginsburg & Scott H. Angstreich, *Multilateral Merger Review: Lessons from Our*

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above national interests.<sup>253</sup> The current major participants in international merger regulation would likely question the feasibility of any central merger authority that could limit their own regulatory efforts. Institution of a central authority would require the largest players in merger control, the United States and European Union, to cede their direct control over mergers to a worldwide body in which they would have less ability to control results and may have less trust in the ability to limit errors in merger control. Even the EU has not eliminated national review of certain mergers.<sup>254</sup> Establishing a centralized merger control authority would require stakeholder nations to reach consensus on global substantive standards for merger review—standards that create fewer costs than benefits. Whether nations can achieve such consensus or standards is uncertain. One significant roadblock is that some substantive differences remain between U.S. and EU approaches to merger review.<sup>255</sup> Additionally, development of a global welfare standard may simply be beyond current capabilities.<sup>256</sup>

Countries' differences in approaches (and political objections to others' approaches) make the common ground necessary for a global, centralized merger authority elusive. Differences and objections aside, global welfare merger analysis seems to be outside the competency of the WTO. The WTO seems incapable as it stands to oversee global, merger regulation given the cost of change and the availability of other institutions that are better equipped to handle such a role. For the most part it is an adjudicative body that enforces binding commitments that parties have entered into in order to reduce trade barriers. The WTO staff lacks even everyday knowledge of antitrust issues, limiting the organization's capacity to serve as an antitrust regulator or central administrator. The WTO's role is to reduce public rather than private restraints of trade. Much of merger coordination and substantive merger antitrust problems involve private conduct rather than government-imposed barriers. Even when there are public or mixed public and private restraints to mergers, governments often circumvent antitrust agencies to impose restraints.<sup>257</sup>

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*Federalism*, 68 ANTITRUST L.J. 219, 225 (2000).

253. Robert W. Hahn & Anne Layne-Farrar, *Federalism in Antitrust*, 26 HARV. J.L. & PUB. POL'Y 877, 916 (2003).

254. Instead, it has moved to increased decentralization under Regulation 1/2003 except in cases that have a EU dimension to them.

255. William Kolasky, *GE-Honeywell—Narrowing But Not Closing the Gap*, 20 ANTITRUST 69 (2006); Eleanor M. Fox, *The European Court's Judgment in GE/Honeywell—Not a Poster Child for Comity or Convergence*, 20 ANTITRUST 77 (2006); Lorenzo Coppi & Mike Walker, *Substantial Convergence or Parallel Paths? Similarities and Differences in the Economic Analysis of Horizontal Mergers in U.S. and EU Competition Law*, 49 ANTITRUST BULL. 101 (2004).

256. Paul Crampton & Milos Barutciski, *Trade Distorting Private Restraints: A Practical Agenda for Future Action*, 6 SW. J.L. & TRADE AM. 3, 47 (1999).

257. Simon Evenett, *Trouble in Paradise: Will Technocrats Review Global Mergers Forever*, CESIFO FORUM, Spring 2006, at 27.



## iii. Norm-creator for Mergers and Cartels

One role that the WTO could play is facilitator of antitrust norms. Such a role returns to the vision of the 2003 WTO, when it ended the discussions of the Working Group on the interaction of trade and competition. The WTO discussions on “core principles” attempted to apply WTO principles of transparency and nondiscrimination to the development of antitrust norms.<sup>258</sup> A global norm-diffusion function for the WTO presupposes antitrust agencies’ interest in embracing it as yet another forum in which to discuss best practices. Given the limited time and financial resources of antitrust agencies, particularly those of the developing world, it is not clear that the WTO offers a forum uniquely suited to create antitrust norms for which agencies should spend their limited time and resources in meetings and negotiations. Use of the WTO to create antitrust norms seems inappropriate given the institutional weakness of the WTO in antitrust, especially in light of the relative strength of other international institutions such as the ICN (discussed *infra*). Other international institutions have already established success in disseminating antitrust norms, in some cases norms implicating private conduct such as mergers and cartels, and have tackled mixed private-government restraints in studies on sector regulation. The WTO addresses only government limitations on trade and antitrust. WTO agreements do not reach purely private behavior, even when there are international effects of this behavior. These limitations on WTO agreements limit its ability to create norms in antitrust for private anticompetitive behavior.

With respect to cartels, the WTO simply lacks the capacity to police purely private behavior. Many international cartels operate without any government restraints upon them. The WTO can only be effective in those cases in which the government is somehow facilitating a private cartel through regulation or purposeful nonenforcement of anticartel laws. The WTO’s possible remedies also limit its effectiveness in combating international cartels. The WTO remedy is simply an order “to cease and desist.” Lack of damages declaws much of WTO remedies’ deterrent value.<sup>259</sup> As the discussion on cartel remedies in Part III.A illustrates, even treble civil damages may not deter cartels. There is little reason to believe that a system without a multiplier effect would create an incentive for companies to cease in their cartel activities.<sup>260</sup>

The WTO could serve as a talking shop to create norms on cartels. Given the other institutional alternatives, a WTO solution may not lead to the optimal

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258. *Communication from the EC and Its Member States: A WTO Competition Agreement and Development* (2003), available at [http://trade.ec.europa.eu/doclib/docs/2003/april/tradoc\\_111261.pdf](http://trade.ec.europa.eu/doclib/docs/2003/april/tradoc_111261.pdf).

259. Petros C. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, 11 EUR. L.J. 763 (2000).

260. Connor, *supra* note 21.

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institutional outcome for fighting cartels.<sup>261</sup> As with WTO treatment of mergers, creation of yet another forum to discuss cartel enforcement and best practices entails costs but not benefits greater than the costs of negotiating such an agreement and using such a forum. Certain institutional alternatives, described later in this Part, appear more viable.

### *2. Preferential Trade Agreements*

#### a. The Role of Preferential Trade Agreements

The WTO is not the only binding set of international trade agreements with antitrust implications. Countries have been entering into increasing numbers of PTAs. Some of the older and more of the newer PTAs include antitrust chapters. As of January 2005, 170 PTAs have been notified to the WTO and are currently in force, and 65 are estimated to be operational though not yet notified.<sup>262</sup> Over 130 of the notified agreements have been entered since January 1995.

There are both offensive and defensive reasons for PTA liberalization. Liberalization may lead to increased multilateral liberalization across the global board. The dynamics of PTAs create bargaining leverage for PTA member countries in multilateral negotiations. Parties to a PTA have incentives to push for global agreements to concessions that they already have made bilaterally. In short, as Country A liberalizes its markets with respect to Country B, Country A has an added incentive to have Countries X and Z make similar commitments globally, since Country A has already liberalized its own market. PTAs also play to a country's defensive interests. If Country A has an agreement with Country B, Country C might feel at a disadvantage in its trade to Country A vis-à-vis Country B, because Country C lacks the preferential treatment in trade with Country A that Country B enjoys. Country C may therefore try to push for such commitments in its own PTA with Country A in order to gain the same trade advantages that Country B has with Country A.

#### b. Can Trade Agreements Make a Difference at the Regional or Bilateral Level?

A recent OECD paper provides the first examination of antitrust chapters across a number of recent PTAs. The OECD study provides a dataset of PTA commitments. The paper creates a taxonomy of antitrust provisions based on

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261. It is interesting that the OECD Trade and Competition Group document summarizing the salient issues in the trade and competition debate does not present a case for why anticartel efforts should find a home in a WTO competition policy as opposed to a combination of soft law and domestic institutions. See OECD, *TRADE AND COMPETITION: FROM DOHA TO CUNCUN* (2003).

262. See generally Jo-Ann Crawford & Robert Fiorentino, *The Changing Landscape of Regional Trade Agreements* (WTO Discussion Paper No. 8, 2005).

eight classifications. It classifies agreements across 24 different types of provisions.<sup>263</sup> This taxonomy reflects the complexity of agreements and their provisions.<sup>264</sup>

A breakdown of the antitrust trade provision taxonomy provides an assessment of most-used provisions. Two thirds or more of the agreements include provisions relating to (1) cooperation, including exchanges of evidence and/or information; (2) anticompetitive behavior, including anticompetitive agreements (such as cartel clauses), abuse of dominant positions, and state enterprises / state monopolies; (3) nondiscrimination; (4) transparency; and (5) consultation mechanisms. The inclusion of such provisions suggests that most agreements focus on both procedural and substantive improvements relating to trade and antitrust. Procedurally, this suggests a need to formalize increased agency-level cooperation. Anticartel clauses suggest that PTAs may combat cartels' international effects. Some of these provisions also implicate market access issues in the trade and antitrust interface.

Lack of anticartel provisions (inclusion in fewer than one third of other antitrust PTAs) suggests that such provisions are not priorities in the international trade and antitrust interface—and/or that the political cost for inclusion of these provisions is too high. Cooperation-based provisions include notification as well as negative and positive comity. Among anticompetitive behavior provisions, only merger provisions are rarely included. Other provisions, rare within PTA antitrust chapters, include provisions for due process or dispute settlement.

The rarity of either negative or positive comity provisions in PTAs suggests that the signatories at the time of signing lacked either the sufficient level of trust or common norms that would allow inclusion of such commitments. The lack of notification requirements for the other parties likewise suggests that trust and cooperation between agencies require organic growth rather than a mandate from above. PTA effectiveness for increased cooperation may be limited to overcoming problems of domestic law that would otherwise make cooperation impossible, such as limits to exchanges of information. A low number of provisions on information sharing weakens the ability of agencies to coordinate on merger or cartel enforcement. In most cases, PTAs limit remedies for violations to consultations or have no remedies whatsoever for violations under the PTA.

A lack of provisions regarding merger control signals that nations may not

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263. OECD, *Competition Provisions in Regional Trade Agreements Part I*, COM/DAF/TD 3 (2005). These categories also may lead to errors based on misclassification or of double counting. See Simon J. Evenett, *What Can We Really Learn from the Competition Provisions of RTAs*, in COMPETITION PROVISIONS IN REGIONAL TRADE AGREEMENTS: HOW TO ASSURE DEVELOPMENT GAINS 39-40 (Lucian Cernat, Philippe Brusick & Ana Maria Alvarez eds., 2005).

264. OECD, *Competition Provisions in Regional Trade Agreements Part I*, COM/DAF/TD 8 (2005).

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view the PTA as an appropriate institution to overcome the malfunctions of their antitrust agencies' merger policies, and that agencies already may be effective in their merger control. Lack of merger control-related provisions may indicate that the operational coordination needed for merger regime requires alternative institutions that are more responsive and flexible to these more episodic concerns. The substantive issues included in PTAs have an effect on merger control only to the extent that there are consultations or dispute settlement between the two countries' agencies. Issues of substantive law in PTAs, such as monopolization or cartels, do not apply binding dispute settlement. Instead, these provisions preserve domestic agency autonomy through consultations. Substantive commitments in trade agreements by agencies may serve to institutionalize objectives but make most of provisions in PTAs aspirational only.

That PTAs do not usually include dispute settlement begs the question of what role PTAs serve at all for antitrust compliance. Surprisingly, given that the United States has been hostile to the inclusion of binding antitrust provisions within the WTO, all U.S. PTAs contain binding dispute resolution for "Designated Monopolies" and "State Enterprises." Though they are not "pure" antitrust issues, these two areas provide trade remedies for violations of nondiscrimination by parties to the PTAs. Viewed positively, even the United States, hostile to binding WTO antitrust remedies, has committed itself to dispute settlement for some antitrust issues. From the normative standpoint, this type of PTA provision provides a model for other PTAs, and ultimately the WTO itself, for trade and antitrust issues such as market access. Since there has never been a completed dispute settlement based on these provisions, it remains unclear if panelists to such disputes will be able to apply trade remedies with an understanding of antitrust harm. It is possible that the judicial malfunction of WTO dispute settlement may replicate in PTA dispute settlement.

Regional PTAs have both political and economic components. Economically, they create a common market and harmonize domestic rules. Political issues play a role in economic integration in these regional and subregional PTAs.<sup>265</sup> Because of the political context, these PTAs go beyond merely trade-related issues. Though the EU is the best known regional PTA, it is not the only one. More recent attempts at political and economic integration, such as the Andean Community, Mercosur, and CARICOM, have been less successful in the antitrust arena.<sup>266</sup> This is due to a lack of political will to

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265. On the EU, see *THE ORIGINS AND DEVELOPMENT OF EUROPEAN INTEGRATION* (Peter Stirk & David Weigall eds., 1999); J.H.H. WEILER, *THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?"* (1998). On Mercosur see, for example, Monica Hirst, *Mercosur's Complex Political Agenda*, in *MERCOSUR: REGIONAL INTEGRATION, WORLD MARKETS* 35 (Riordan Roett ed., 1999).

266. D. Daniel Sokol, *Why is this Chapter Different From All the Others? An Examination of Why Countries Enter Into Non-enforceable Competition Policy Chapters in Free Trade Agreements Versus*

increase supranational antitrust and, in Mercosur and the Andean Community, limits in institutional design. CARICOM's capacity constraints have limited subregional political and economic integration.

The EU offers some guidance in establishing such PTAs. As part of EU Antitrust Modernization, Regulation 1/2003 effectively granted full enforcement powers over Articles 81 and 82 to the Member States, subject to some powers retained by the EC to assure uniformity of application, and allowed their agencies to share information with one another. The following hypothetical illustrates the process of regional coordination. Let us assume that the Italian and German antitrust authorities become aware of the anticompetitive effects on consumers in their countries due to conduct taking place in France. They would use the European Competition Network to contact the French antitrust agency, provide it with the information they have, and have the French take over investigation and enforcement. This type of interjurisdictional regional work occurs with increasing regularity within the EU.

Regionalization through PTAs may solve the problem of international antitrust for small economies that lack the resources to fund an antitrust agency. Under such an agreement, a single regional agency could remedy antitrust violations in a given country. PTAs may also be appropriate where effects of competition are region-wide. On its own, a nation's antitrust agency may not be able to act on conduct that is anticompetitive conduct at the regional level. PTAs may thus prove effective in the Caribbean and parts of Africa, where the size of a country and its economy may make creating an antitrust agency unfeasible.

#### c. Participation in Antitrust Regional Trade Agreements

Participation in antitrust PTAs tracks participation in the WTO to the extent that dispute resolution is possible in such PTAs. High-stakes domestic participants forge public-private partnerships with trade officials to identify and bring forth cases for dispute settlement. In those agreements, such as NAFTA, which allow private rights of action, private parties may bypass government actors to participate directly in adjudication. The nature of participation within PTAs shifts when recourse comes in the form of consultations between parties to the agreement. In these cases, domestic agencies, rather than adjudication, become the institutional driver of participation. Domestic stakeholders may petition agencies formally or informally to take certain policy positions. In those agreements with no dispute-resolution mechanisms, lack of recourse to any solution under the PTA limits participation.

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*Other Alternatives*, CHI.-KENT L. REV. (forthcoming 2008).

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### *B. Soft Law Antitrust Institutions*

International soft law networks allow domestic agencies to share information. This may facilitate cooperation and make compliance more likely. Participation in such networks is important because soft law convergence sets the agenda for regulatory thinking and prioritization. Soft law promotes convergence upon general benchmarked principles, which, because they mandate no single standard, a country may more easily apply to meet its specific needs. This allows agencies the flexibility to adapt best practices to the socioeconomic situation in their given country. Soft law preserves more sovereignty than hard law when addressing international antitrust problems. Soft law maximizes the possibility of implementation and reduces potential roadblocks to reform through flexible responses. Unlike hard law, soft law creates benchmarks for behavior rather than exact standards. When there are minimum standards, these operate as a default rule. Countries can experiment as to particular types of enforcement actions and methods.<sup>267</sup>

Though the tools that each of the soft law institutions use to create its work product are similar, as are the malfunctions of each of the soft law institutions, the comparative institutional analysis of soft law institutions illustrates why the ICN is the most effective soft law institution to address general issues within international antitrust. The ICN works better than other soft law and hard law international institutions, domestic institutions, and the market, because its institutional structure encourages meaningful participation across a number of levels.

#### *1. The Organization for Economic Co-operation and Development*

##### *a. Functions of the Organization for Economic Co-operation and Development*

The OECD CLPC is a transgovernmental network of antitrust enforcers. It employs several tools that facilitate informal convergence through the sharing of experiences across agencies: peer reviews, identification of best practices, and the creation of voluntary recommendations.<sup>268</sup> Discussions of these issues create opportunities for agencies to understand international antitrust in a comparative context.

Members of the OECD prepare discussion papers that set out their approaches to the issues under review. Meetings facilitate personal interaction across jurisdictions. This assists agency coordination on cross-border issues. Meetings also create opportunities for agency leadership to perform critical

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267. William E. Kovacic, *The Modern Evolution of US Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377 (2003).

268. Terry Winslow, *The OECD's Global Forum on Competition and Other Activities*, 16 FALL ANTITRUST 38 (2001).

self-assessment in a friendly setting. Among member antitrust agencies, OECD-led discussions promote meeting of the minds on antitrust matters and cross-pollination of approaches to particular issues. This process leads to the development of best practices, which become formalized as nonbinding OECD recommendations.

Discussions expose agencies to alternative modes of problem-solving. This deliberative process allows agencies to benchmark their experiences and develop common standards. Peer review is essential to this process. The OECD conducts peer reviews of participant countries' antitrust systems.<sup>269</sup> The peer review contains recommendations to improve the reviewed nation's antitrust regime.

The purpose of peer review is to examine a country's antitrust system, the better to improve policy making and adopt best practices. Insulation makes organizations less receptive to feedback. The OECD peer review challenges agency insulation by bringing forth criticism of an agency's policy and enforcement choices. OECD peer reviews of a country's antitrust agency performance provide an outside assessment of that agency. In a peer review, the OECD staff prepares a lengthy report that articulates the strengths and weaknesses of a particular competition agency.

The OECD presents its peer reviews in a forum before other OECD members. Agencies have the opportunity to comment on the approaches, strengths, and weaknesses of their sister agencies. This OECD process implicates the regulatory principal-agent problem. Agency interests may be different from those of their home countries.<sup>270</sup> Peer review may overcome some of the principal-agent accountability limitations in regulatory fields, such as antitrust.<sup>271</sup> Peer review creates a mechanism in which the agent (the antitrust agency) must justify its use of discretion given the experiences of its peer agencies. This makes an agent accountable not merely to its principal but also to other peers.<sup>272</sup>

Peer reviews serve two functions. First, they police countries' compliance with benchmarked norms. Because of the repeat interaction of these agency heads, agencies have an incentive not to be shamed in front of peer agencies for poor enforcement decisions and outcomes. Second, agencies use peer review as

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269. Fabrizio Pagani, *Peer Review: A Tool For Co-operation and Change*, OECD SG/LEG (2002), at 1.

270. See generally Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041 (2003).

271. Much recent applied work in the area comes in the study of "new governance." See, for example, the special issue of the *European Law Journal* (Vol. 8, 2002) devoted to new governance. For US perspectives, see Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

272. See, e.g., Charles F. Sabel & William H. Simon, *Epilogue: Accountability Without Sovereignty*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US* 395 (Joanne Scott & Grainne de Burca eds., 2006).

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a tool for domestic consumption. OECD peer reviews give agencies a mandate to push for domestic change. A reviewed agency can return to its legislature with an OECD mandate to revise the structure of domestic antitrust system.

### b. Dynamics of the Organization for Economic Co-operation and Development's Institutional Structure

There is some intergovernmental structure rather than pure agency-to-agency deliberation within the CLPC. OECD members are countries rather than agencies. This makes it more difficult to accomplish some antitrust objectives. Many government agencies must vet all recommendations before the CLPC sends them to the OECD Council. Such agencies can include trade ministries, finance ministries, and foreign ministries. Each may have objectives different from those of antitrust agencies.<sup>273</sup> Every member country has the power to veto, and these other agencies may push their government to veto discussion of certain topics contrary to their particular interests, even if the veto is counterproductive and contrary to OECD objectives.

The OECD Secretariat has a permanent staff that provides institutional memory and capacity for in-depth analysis. For meetings on antitrust, the secretariat staff prepares background papers of depth and quality. The OECD Secretariat's background papers contribute significantly to the OECD's capacity to serve as an arena for high-level, substantive antitrust discussions. Furthermore, since members of the CLPC are all at a similar level of economic development, agency capacity, and experience, the typical OECD meeting has more potential for a substantial conversation on antitrust issues than the typical meeting of the ICN or UNCTAD.

However, it is difficult for bureaucratic organizations with a permanent staff structure to manage change effectively. Over time, such organizations tend toward inertia and limited results.<sup>274</sup> The OECD is no exception to this general trend. In certain respects, by the mid-1990s, the OECD had lost its leadership role in setting the antitrust agenda in certain areas. The OECD launched the Joint Group only after the WTO created a group on the interaction of trade and antitrust. Similarly, the formation of the ICN pushed the OECD to respond and increase its outreach efforts to nonmember countries.

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273. For example, nonantitrust agencies such as trade agencies may push for cartels in some countries for political reasons. See JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 176 (2001) for the case of aluminum in the United States during the 1990s.

274. Charles Heckscher, *Defining the Post-Bureaucratic Type*, in *THE POST-BUREAUCRATIC ORGANIZATION: NEW PERSPECTIVES ON ORGANIZATIONAL CHANGE* 14 (Charles Heckscher & Anne Donellon eds., 1994); MICHAEL L. TUSHMAN & CHARLES A. O'REILLY III, *WINNING THROUGH INNOVATION: A PRACTICAL GUIDE TO LEADING ORGANIZATIONAL CHANGE AND RENEWAL* (2002); ERIC D. BEINHOCKER, *THE ORIGIN OF WEALTH: EVOLUTION, COMPLEXITY, AND THE RADICAL REMAKING OF ECONOMICS* (2006).



c. Participation in the Organization for Economic Co-operation and Development

The OECD is a smaller organization than the WTO or UNCTAD. Even though some non-OECD members are observers in the CLPC, the perception is that the OECD serves the interests of its own member countries.<sup>275</sup> The CLPC shuts out many of the world's antitrust agencies, including those of the developing world, from participation in its process of soft law harmonization through creation of best practices. This exclusivity may be a form of regulatory imperialism in which OECD countries impose their framework on developing countries.<sup>276</sup>

In recent years, the OECD has taken steps to increase its outreach to non-OECD members and increase its number of participants. The OECD runs a yearly Global Competition Forum, in which agencies from the developing and developed world discuss issues, create analytical convergence, and work to improve cooperation across agencies. Additionally, the OECD has set up regional antitrust centers in Eastern Europe (Hungary) and Asia (South Korea). These centers offer assistance in capacity building and policy advice for their respective regions. The OECD has not yet established such a center in Latin America, but it hosts an annual Latin American Competition Forum to encourage cooperation, coordination, mutual learning, and peer reviews for agencies in the region. The Latin American Competition Forum allows regional agencies to present case studies and get feedback on practices and techniques from agencies primarily at similar levels of expertise and development.

The OECD is not a pure transgovernmental organization. The OECD has a private sector participation component, and from time to time it invites academics and consumer groups to participate as discussants at OECD meetings. The Business & Industry Advisory Committee (BIAC) sends a representative of the business community to OECD meetings. This model of private sector participation has significant weaknesses. It assumes that the private sector speaks with a single voice for antitrust issues. BIAC must take lowest common denominator positions on behalf of various business groups. The costs of participation are lower for large firms vis-à-vis individual consumers. Other than the agencies themselves, nobody claims to speak for individual consumers at the CLPC.

Limited involvement by nonstate actors at the OECD means that the OECD lacks meaningful input by practitioners, NGOs, academics, and MNCs who are repeat players in antitrust debates domestically. These stakeholders could make

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275. Edward M. Graham, "Internationalizing" Competition Policy: An Assessment of the Two Main Alternatives, 48 ANTITRUST BULL. 947, 950 (2003).

276. A more benign view is that developing-world agencies model themselves on the United States and the EU antitrust agencies. JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 215-16 (2000).

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significant and substantial contributions with respect to enforcement priorities and analytic approaches. Lack of nonstate participation reduces overall participation in the OECD. Moreover, additional participatory and accountability problems face the OECD. Its submissions and reports are subject to confidentiality protocols. Some reports do not appear in the public record for some time. This lack of transparency limits stakeholders' awareness of OECD actions and limits their ability to shape the OECD agenda and limits norm diffusion outside of agencies to the larger domestic antitrust community.

### d. The Organization for Economic Co-operation and Development's Ability to Solve Problems

The OECD is weak relative to the ICN in its ability to serve as an implementing organization at the operational level. This limits the benefits of OECD participation. The OECD operates by consensus. Consensus depends on the slowest mover to certain issues. The OECD can affirm and progress incrementally toward certain points of view already acceptable to business and government. The OECD is not issue-driven. Instead, the OECD is deliberative. It promotes more in-depth analysis of issues. The CLPC's function is information-gathering and conceptualization. This allows the OECD to address some difficult political issues at the center of the antitrust.

As OECD members are those most active in cartel and merger enforcement, the OECD can help incrementally to set the agenda in these areas. The OECD has helped shape the discussion of how to conceptualize improvements in merger control since the mid-1990s. In its study of international mergers of 1994, the CLPC developed a qualitative, multiple case study approach to understand the international merger process.<sup>277</sup> The lengthy study included seven recommendations to improve harmonization and cooperation in merger control. Additionally, in 1999 the CLPC produced the Report on Notification of Transnational Mergers, which laid out practices and procedures to create a better functioning merger control system. This report provided the significant intellectual underpinning of the ICN's work to streamline its merger review process.<sup>278</sup>

More recently, the OECD adopted recommended merger practices that build upon the ICN's work in merger control from 2001 to 2004.<sup>279</sup> These OECD outputs on mergers, plus additional related work products that touch upon mergers, such as increased cooperation and peer reviews, demonstrate that the OECD plays an important role in the conceptualization of merger best practices. But, lack of broad implementation of these best practices suggests limitations to the OECD's ability to get countries to adopt them.

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277. OECD, *MERGER CASES IN THE REAL WORLD, A STUDY OF MERGER CONTROL CASES* (1994).

278. OECD, *Report on Notification of Transnational Mergers*, DAF/CLP(99)2/FINAL (1999).

279. OECD, *Recommendation of the Council on Merger Review*, C(2005)34, Mar. 23, 2005.

The OECD also has contributed to taking stock of existing anticartel practices and developing a shared conceptualization of cartels.<sup>280</sup> It helped to create a common understanding for enforcers of the problems posed by international hard-core cartels.<sup>281</sup> However, this took quite a bit of time, as the CLPC began its efforts in the 1960s, while the OECD recommendation on hard-core cartels did not emerge till 1998. In 2005 the OECD followed up this work with the creation of best practices for cooperation among agencies in cartel investigations. Like the 2005 recommended practices for mergers, parallel work on the same issue at the ICN has influenced best practices for fighting cartels.<sup>282</sup>

Increased cooperation has facilitated better formal and informal cooperation on cartel work among OECD members. As a result of increased cooperation, the OECD has assisted in strengthening ties between agencies on cartel matters. Bilateral ties improve trust between agencies. They make it easier for agencies to cooperate on cartel investigations that have an international dimension. The OECD also has helped set the agenda for more formal bilateral ties between agencies. After the OECD developed a model bilateral cooperation agreement, many of the subsequent bilateral agreements between OECD members followed this model.<sup>283</sup>

Through the work of its Joint Group, the OECD has been active in refining the conceptualization of market access. Nevertheless, despite yearly meetings of the Joint Group, case studies, and secretariat publications, the intellectual divide among OECD members on market access remains significant. EU Member States and the United States have not been able to reach an intellectual consensus on how to consider or address market access. Complicating matters, the Joint Group's mandate has expired, its work not renewed.<sup>284</sup> This limits the OECD's ability to further understanding of market access and create recommended practices on market access issues.

## *2. The United Nations Conference on Trade and Development*

### *a. The United Nations Conference on Trade and Development Explained*

In many ways, the UNCTAD is the mirror image of the OECD, except that it pushes a developing-world agenda rather than a developed-world agenda.

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280. OECD, *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels*, C(98)35/FINAL, Mar. 25, 1998; OECD, *Recommendation Concerning Effective Action Against Hard Core Cartels*, C(98)35/FINAL (2005).

281. OECD, *supra* note 25, at 8.

282. OECD, *BEST PRACTICES*, *supra* note 24.

283. OECD, *Recommendation of the Council Concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade*, C(95)130/FINAL (July 27, 1995).

284. BNA, *OECD Acknowledges Low Priority, Dumps Antitrust-Trade Working Group*, ANTITRUST & TRADE REG. REPORT, June 16, 2006, at 695.

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Thus, as a transgovernmental institution, the UNCTAD shares many of the OECD's outputs, strengths, and weaknesses (discussed in the previous Section). Additionally, the UNCTAD has more of an international trade focus. Much of the antitrust work within the UNCTAD reflects this overall trade focus. This makes the UNCTAD well versed in many of the international trade and antitrust interface issues, including market access.

Many of the early UNCTAD antitrust positions reflected developing-world preferences in an era of import substitution and state command and control. Within antitrust policy, early UNCTAD work culminated in the UNCTAD code of 1980, as discussed in Part II, *supra*. Even though neoliberalism transformed the thinking of many UNCTAD members during the 1980s and 1990s, the UNCTAD remains focused on developing-world antitrust in a way that pursues the sometimes disparate goals of fair trade, industrial policy, economic equality, and efficiency.

The UNCTAD organizes conferences to bring together agencies and identify issues to study, and it also publishes academic investigations into antitrust issues.<sup>285</sup> It has created a template for a model antitrust law that has been used in the creation antitrust regimes for a number of countries. Moreover, the UNCTAD has also examined work in international cooperation and cartels. The UNCTAD provides technical assistance to countries for the set up and implementation of antitrust laws. The UNCTAD's ability to undertake effective technical assistance is due in part to recipient agencies' perception of a more sympathetic ear at the UNCTAD than they would find at the developed world's technical assistance platforms.

### b. Participation in the United Nations Conference on Trade and Development

Developing countries set the UNCTAD agenda. This allows the UNCTAD to recognize the unique needs of developing-world agencies and countries. The UNCTAD pushes an understanding that countries with different levels of development have different internal dynamics. It holds that developing-world agencies and antitrust systems require special accommodations, given their social, political, and economic backgrounds and their capacity constraints. Though the UNCTAD strives to represent the interests of the developing world, it is an intergovernmental organization subject to the same questions of legitimacy and democracy deficit as the OECD because of its lack of direct stakeholder participation. Like the OECD, end consumers do not have a direct voice in UNCTAD deliberations. They must rely on agencies to represent their views.<sup>286</sup>

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285. Philippe Brusick, *UNCTAD's Role in Promoting Multilateral Co-operation on Competition Law and Policy*, 24 W. COMP. 23 (2001).

286. Antitrust agencies, flawed as they are, may be the most participatory in terms of how they represent consumer interests relative to the other institutions discussed in this article. Consumers rely on

## c. Dynamics of the United Nations Conference on Trade and Development

The UNCTAD's institutional malfunctions are more pronounced than those of the OECD or ICN in certain respects. The UNCTAD lacks the resources and the full political support of the United States and the European Union in antitrust matters. Any policy preference for norms in antitrust requires the tacit consent of both these great powers. As merger enforcement and cartels have an impact on developed world agencies, these agencies, and the organizations in which they participate (i.e., the OECD and ICN), want to take the lead in these areas. Moreover, the more powerful and influential stakeholders in mergers and cartels (private antitrust bars in the United States and EU and MNCs) feel more at home at the ICN and OECD than they do at the UNCTAD. This limits the UNCTAD's ability to shape the antitrust agenda in these areas.

Even as the UNCTAD may offer greater legitimacy in representing the perceived needs of developing-world countries, it is for this very reason that the UNCTAD is less effective as a participatory vehicle for international antitrust harmonization and implementation. The UNCTAD produces least common-denominator output of all of its members. This makes for a low cost to participation but little benefit, in the form of lowest common-denominator work product. Unlike the OECD, not all UNCTAD members have an antitrust regime. Nor are all UNCTAD members as similar in levels of economic development as OECD members. Indeed, all OECD members are also UNCTAD members, since the UNCTAD is a UN organization. This affects who participates and how much of a voice each participant has in UNCTAD discussions. For example, in the UNCTAD it is just as important to address the views of Macedonia, Vietnam, or Zimbabwe on an efficiencies defense in merger control as it is to consider German or U.S. opinions. Like other UN organs, the UNCTAD may have more of an overt political agenda. Some UNCTAD members would regard a Chicago School economic approach as anathema if it came to a politically incorrect conclusion. For example, UNCTAD work that did not support social justice concerns but only economic efficiency might be problematic for a number of UNCTAD members.

The UNCTAD provides a forum for developing countries to air their grievances with a sympathetic audience. The UNCTAD provides a broader vision of antitrust, including issues of development and social justice, which other institutions lack. The UNCTAD can build consensus of common views among its developing-world constituent agencies as to issues of development as they intersect with antitrust concerns. Its ability to provide technical assistance gives the UNCTAD capacity to shape the rules and norms of a number of developing-world antitrust systems.

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antitrust agencies to protect consumer interests. Deborah Platt Majoras, *Celebrating the FTC*, 72 ANTITRUST L.J. 755, 757 (2005).

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### d. Institutional Dilemma of the United Nations Conference on Trade and Development

As international convergence in methods and thought in antitrust becomes more of a reality, the UCTAD faces an institutional dilemma.<sup>287</sup> The UNCTAD's role is under attack from both the ICN and OECD. Unless the UNCTAD reinvents itself in a unique role, it may lose some of its relevance in policy debates. The other soft law institutions have taken the lead in antitrust harmonization, benchmarking, implementation, and policy. This is in part a function of power asymmetries in economics and politics. As more developing-world antitrust agencies attend OECD events, the OECD can engage members of the traditional UNCTAD constituency in OECD peer reviews, studies, and recommendations. In contrast, the UNCTAD, because of its history of antagonism to Chicago School antitrust, does not receive the same level of representation of developed agency leadership at its events. UNCTAD attempts at peer review are a recent phenomenon; it remains to be seen how effective they are compared to OECD peer reviews.

The ICN presents a particular challenge to the UNCTAD. Like the UNCTAD, the ICN includes both developing and developed world antitrust agencies. Developing-world antitrust agencies attend ICN meetings and are involved in working groups in part to show that they can participate side by side on equal footing with their sister agencies in the developed world. Developing-world agencies reflect their participation in the ICN in various ICN work products, as the next Section illustrates. With limited resources, developing-world agencies may rather spend their human and financial capital on ICN endeavors that enhance their reputation in the eyes of more developed antitrust agencies.

### 3. *The International Competition Network*

#### a. Overview of the International Competition Network

The ICN is a relatively new transnational organization in which nongovernmental advisors participate with antitrust agencies in soft law harmonization of antitrust. In its brief five years of existence, the ICN seems to have moved compliance further than the longer-standing OECD and UNCTAD. ICN annual meetings regularly receive delegates from over 70 countries with antitrust laws. Among the issues discussed at the ICN are guidelines for merger and cartel enforcement, capacity building, the relationship of regulated sector enforcement to antitrust, and competition advocacy. Market access (and indeed the trade and antitrust interface) has never been a part of the ICN agenda.

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287. To the extent that we witness convergence, it seems to follow a more economics-based, efficiency approach.

b. The International Competition Network as a Transnational Institution

There are both realist and constructivist elements to explain the ICN. From the realist perspective, the ICN facilitates agency coordination. As agencies around the world began to exercise merger control powers, the business community and U.S. and EU agencies pushed for increased coordination across agencies because of the increased transaction costs for mergers. To a lesser extent, these same forces have pushed for cartel coordination.<sup>288</sup> The ICN provides agency heads and their senior staff an opportunity to have face-to-face contact with each other. This process establishes personal relationships, which enhance coordination across agencies. Setting up basic norms allows for common understandings. In this sense, the ICN has constructivist elements. The purpose and output of the ICN is to transform behavior of various actors to common antitrust norms. As a transnational organization, the stakes are low. There is no rulemaking function to the ICN. The ICN lacks dispute settlement. ICN outputs are nonbinding.

The ICN's greatest contribution to international antitrust has been to create and implement norms across jurisdictions, as the discussion on the work of the ICN mergers and cartel groups explores.<sup>289</sup> The transnational structure of the ICN plays a role in its success. The ICN's institutional structure and topic choices also help to explain these successes. Transnationalism in the antitrust setting has many of the benefits of transgovernmentalism, without the ultimate country-level political check found in transgovernmental organizations. Unlike the OECD, ICN positions do not need vetting before other national nonantitrust agencies or government ministries. This has consequences for which parties and interests in the ICN shape debates and what sort of outputs are possible.

c. Participation in the International Competition Network

At the agency level, the ICN provides an opportunity for young agencies to participate in norm creation with more established agencies. Developing-world agencies head a number of the ICN groups, e.g., Competition Policy Implementation (Brazil); subgroups, e.g., Antitrust and the Judiciary (Brazil and Chile), Technical Assistance (Estonia), and Cartels Implementation (Brazil). At one point a developing-world agency (Mexico) headed the ICN itself. Nevertheless, the ICN retains structural obstacles to developing countries setting its agenda. Developing-world agencies have limitations on their ability to set a development agenda (other than for technical assistance, which touches few raw political nerves of developed agencies). Mitigating this concern is a number of developing countries' membership on the ICN steering group, which

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288. The business community wants increased certainty in enforcement and a reduction in disparate outcomes in investigations and prosecutions.

289. William E. Kovacic, *Extraterritoriality, Institutions, and Convergence in International Competition Policy*, 97 AM. SOC'Y INT'L L. PROC. 309, 311 (2003).

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sets the overall ICN agenda. This reduces the power asymmetries that favor the United States and EU, but retains enough of the power asymmetry that the United States and EU buy in to the ICN's agenda and work products.

For some developing countries there are financial costs to participation at ICN meetings. This limits the ability of these agencies to participate meaningfully. To address the need for participation by developing-world agencies, the ICN has set up a not-for-profit corporation to support ICN activities. To reduce its potential for capture, the corporation only accepts funds from member governments and agencies. The corporation supports delegations from financially challenged agencies to the annual ICN conferences.

Participation at the ICN includes more than agencies of different levels of experience and capacity. Because the ICN is a transnational organization, participation by nongovernmental actors plays an important role. The mechanisms of participation and types of participants in the ICN help to shape its functions and outputs. The inclusion of nongovernmental stakeholders adds an important dimension to these dynamics. Such stakeholders have specialized knowledge that allows them to provide insights into problem-solving for particular issues. Moreover, the inclusion of stakeholders addresses issues of participation. Stakeholders play the role of intermediary between agencies and their larger domestic political constituencies.<sup>290</sup> They also increase the transparency of both agencies and the ICN to the wider public.<sup>291</sup> To reduce participation costs, the ICN posts its outputs on the web for public dissemination. The nongovernmental stakeholders include both developed- and developing-world participants. This increases the points of contact for norm diffusion and creates additional buy in of ICN work product outside of government.

A transnational structure allows stakeholders to provide input into problem-solving and norm creation. ICN stakeholder participation allows nongovernmental actors an opportunity to participate in a way that heretofore has been unavailable to them in other international antitrust institutions. The ICN requires an invitation for nongovernmental advisers to participate. Though this presents a form of club membership, most agencies eagerly accept stakeholder participation. A number of developing-world nongovernmental agencies (NGAs) participate in the groups and attend the annual conferences. The perception by agencies and nongovernmental stakeholders is that NGA participation has improved the work product of the ICN.

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290. Patrizia Nanz & Jens Steffek, *Global Governance, Participation and the Public Sphere*, 39 GOV'T & OPPOSITION 314 (2004).

291. Patrizia Nanz & Jens Steffek, *Assessing the Democratic Quality of Deliberation in International Governance: Criteria and Research Strategies*, 40 ACTA POLITICA 368 (2005); Jan Aart Scholte, *Civil Society and Democratically Accountable Global Governance*, 39 GOV'T & OPPOSITION 211 (2004).



The strength of a transnational forum is that it overcomes some of the weakness of traditional antitrust agency decision making. Traditional domestic administrative law has not been able to create “a normative model that builds on best practices in an administrative world beset by inadequate budgets, legislative imperatives, and public resistance, as well as real scientific uncertainties.”<sup>292</sup> The ICN has begun to address some of these concerns internationally. The ICN opens the administrative model to input from a broad spectrum different stakeholders both domestically and internationally. It thereby receives the latest thinking across jurisdictions to assist agencies in selling antitrust enforcement in their domestic jurisdictions. This serves at once to police agencies even as it creates reputational effects to encourage compliance.

#### d. Dynamics of the International Competition Network

##### i. Virtual Operation

The second element to the ICN that makes it more effective vis-à-vis other institutional alternatives is that the ICN operates as a virtual organization. This gives it flexibility to grow and to address new issues as they emerge within antitrust policy circles. There is no permanent staff. All participants have full-time jobs in government, academia, NGOs, or the private sector. This creates a sense of ownership of ICN work product from government and non-government stakeholders because of their involvement in the work product. This virtual nature requires sophistication in coordination and decision making. A steering committee of agencies makes ICN decisions. Steering committee members and heads of working groups are all domestic antitrust officials.<sup>293</sup> The ICN has geographic balance as well as some representation by developing-world countries, increasing participation and accountability of agencies of various sizes and levels of economic development. The steering committee guides the ICN by helping set the agenda for discussion and establishing the working groups.<sup>294</sup>

##### ii. Action-oriented Agenda

The ICN does not seek to understand particular subjects for its own sake of study. Its purpose is to create consensus and adopt antitrust norms. The ICN does not require increased formalism in terms of specific harmonized

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292. Jerry L. Mashaw, *Law and Engineering: In Search of the Law-Science Problem*, 66 LAW & CONTEMP. PROBS. 135, 153 (2003).

293. Current members of the steering committee include Canada, the European Commission, France, Germany, Ireland, Israel, Italy, Japan, Mexico, Russia, South Africa, South Korea, Switzerland, and the United States.

294. ICN, *ICN Operational Framework*, adopted June 25, 2003 in Mérida, Mexico, available at [http://www.internationalcompetitionnetwork.org/operational\\_framework3.pdf](http://www.internationalcompetitionnetwork.org/operational_framework3.pdf).

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standards. In this sense the ICN has a different institutional capability than either the OECD or UNCTAD. These other organizations can study contentious issues for the very reason that they are not results-oriented organizations. Their in-depth analyses of controversial topics uncover the rationale behind the substantive differences among members. Over time, this potentially allows for a synthesis of ideas that can overcome concerns with shared norms.

Soft law regulatory cooperation works best where coordination is important but the substance is not.<sup>295</sup> Fighting anticompetitive mergers and cartels requires coordination, and coordination entails operational transaction costs. The ICN has been successful in its endeavors because its limited agenda thus far has focused on reducing the transaction costs of coordination through adoption of better practices. The ICN has purposely chosen to address only those areas of law where success is likely.

This agenda contrasts with the international antitrust transgovernmental organizations. Regardless of progress, their bureaucracies may support continuing function of transgovernmental organizations, which may continue to put out work product even if it has no immediate effect upon their members. Over the long term, this depth of knowledge can bring forth new initiatives and perhaps slowly develop consensus on various issues. In contrast, if the ICN is not able to apply its learning to policy prescriptions, it is no longer effective in the purpose for which it was created. This is an issue as networks suffer from the possibility of decay.<sup>296</sup> If the members' commitment to the ICN weakens (particularly the United States' and EU's commitment), the institution also weakens.<sup>297</sup> Because the cost of harmonization for substantive disagreements in antitrust may be high, taking on such issues within the ICN may reduce its momentum to identify problems and implement solutions that encourage domestic compliance.<sup>298</sup>

### e. Harmonization at the International Competition Network

The ICN attempts to capture the best practices of regulatory diversity and

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295. David Zaring, *Informal Procedure, Hard and Soft*, in *International Administration*, 5 CHI. J. INT'L L. 547 (2005).

296. Budzinski, *supra* note 249, at 50.

297. Mariana Bode & Oliver Budzinski, *Competing Ways Towards International Antitrust: The WTO versus the ICN*, in NEW DEVELOPMENTS IN ANTITRUST, *supra* note 1, at 21.

298. *Id.* In May 2006, the ICN set up a working group on unilateral conduct to cover issues of dominance/monopolization, co-headed by the United States and Germany. One senior DOJ official described the difference between EU and US approaches to dominance as "Europeans are gentlemen. Americans are cowboys." J. Bruce McDonald, *Section 2 and Article 82: Cowboys and Gentlemen*, College of Europe Global Competition Law Centre, *The Modernisation of Article 82*, Second Annual Conference, Brussels (June 16-17, 2005); see also Michal S. Gal, *Monopoly Pricing as an Antitrust Offense in the U.S. and the EC: Two Systems of Belief About Monopoly?*, 49 ANTITRUST BULL. 343 (2004). The lack of substantive consensus between the two main supporters in the ICN may frustrate the ability of ICN participants to achieve progress in this area. Lack of progress on unilateral conduct may lead to increased inertia on the part of the ICN.

the benefits of greater international cooperation. There is a three-step process toward antitrust convergence in this context. The first step involves decentralized experimentation at the national or regional levels. The second step is the identification of superior approaches. The final step involves a process of harmonization by the adoption of the superior approaches by individual jurisdictions.<sup>299</sup> Under this approach, greater cooperation is not the end result. Instead, coordination and cooperation are necessary steps increased harmonization based on best practices.

The adopted standards are the so-called best and recommended practices. These provisions are benchmarks rather than substantive criteria. The ICN claims that it does not seek to create mandatory harmonization. One ICN report states:

It is important to stress that the ICN does not seek any “top down” harmonisation of competition law and policies throughout the world. It not only lacks the competence to do so, but more fundamentally takes the view that any attempt at wholesale harmonisation would do injustice to the great diversity of the economic, institutional, legal and cultural settings prevalent in the home jurisdictions of its member agencies. This diversity is an important source of inspiration when comparing various solutions to competition issues developed in one or the other jurisdiction. If and when such a comparison helps to identify the most convincing approach, it is up to each individual agency to consider whether its home jurisdiction might benefit from following such benchmarks.<sup>300</sup>

Harmonization at the ICN allows for flexibility. Harmonization in this context suggests adoption of better practices within a band of possible options depending on the particular experience of and situations within a country. Harmonization does not imply uniformity.

On the one hand, since ICN practices are not binding, this preserves the domestic choices of countries to pursue policies that their agencies decide upon. However, on the other hand, there is a soft coercive element to ICN harmonization. As the ICN reaches goals and principles, the decision and the modalities for harmonization remain within the control of each individual country. Cooperation is a first step. For the ICN to be effective there must be some benchmarking and identification of best practices. This is a system that paradoxically fosters diversity in stock taking in order to limit that diversity. A decentralized system of cooperation without harmonization does not facilitate the adoption of superior norms and practices.<sup>301</sup>

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299. See Timothy J. Muris, *Competition Agencies in a Market-Based Global Economy* (Brussels, Belgium, July 23, 2002) (prepared remarks at the Annual Lecture of the European Foreign Affairs Review), available at <http://www.ftc.gov/speeches/muris/020723/brussels.htm>.

300. ICN, *A Statement of Mission & Achievements up Until May 2005* 2 (2005) (emphasis added).

301. William E. Kovacic, *Competition Policy Cooperation and the Pursuit of Better Practices*, in *THE FUTURE OF TRANSATLANTIC ECONOMIC RELATIONS: CONTINUITY AMID DISCORD* 66, 68 (David M. Andrews, Mark A. Pollock, Gregory C. Shaffer & Helen Wallace eds., 2005); Muris, *supra* note 301. In the European experience, harmonization worked through the creation of best practices in the EU context. The experiences of national agencies created the foundation for Community wide competition law. See generally DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE*:

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As more agencies adopt ICN principles, and in particular as the major jurisdictions do, a bandwagoning effect begins.<sup>302</sup> The ICN allows regulatory diversity at the first level. However, in the second level, it erodes some diversity by creating norms or standards. Agency preferences may change as the agency feels that it has no choice but to agree to the framework of a majority of agencies, particularly of agencies that wield significant power.<sup>303</sup> There are financial repercussions (technical assistance) and social repercussions (peer perception) that push agencies to bandwagon. Agencies thus make these norms their own even if benchmarking requires a change in their structure or behavior.<sup>304</sup> Such behavior is desirable when, as a result of changes in economic thinking, agencies adopt improved practices that work within their larger legal systems.<sup>305</sup>

### f. Operational Functions of the International Competition Network

There are three stages to the development of norms at the ICN. In the first stage, the steering group identifies an issue for study. At the second stage, a working group studies the issue. Through the course of the study, the working group determines those aspects of the issue that are suitable for harmonization and identifies ways to reach a more effective regulatory outcome. In the third stage, the working group presents its findings, and the ICN begins to implement the core practices they imply. At this final stage, an ICN working group focuses its output on the creation of templates, manuals, and other products that facilitate implementation.

The ICN consists of a number of working groups. Each working group covers an important issue in antitrust. The working groups have created better operational strategies for cooperation and coordination. In other cases, the working groups have created common ideas and best practices which have become the basis of implementation strategies for member countries. The steering group has established subgroups in each of these working groups to focus on more specific issues.

The subgroups of each working group prepare a number of different outputs. These include recommended practices, best practices, and manuals to help operationalize across jurisdictions the handling of cases and pursuit of enforcement. The subgroups produce reports, many of which include empirical

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PROTECTING PROMETHEUS (1998).

302. On bandwagoning, see generally ROBERT POWELL, *IN THE SHADOW OF POWER: STATES AND STRATEGIES IN INTERNATIONAL POLITICS* (1999); Charles K. Whitehead, *What's Your Sign?—International Norms, Signals, and Compliance*, 27 MICH. J. INT'L L. 695, 706 (2006).

303. LLOYD GRUBER, *RULING THE WORLD: POWER POLITICS AND THE RISE OF SUPRANATIONAL INSTITUTIONS* (2001).

304. In other circumstances, these changes require a change in domestic legislation. The ICN can serve as a policy lever to help enact this legislation.

305. William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43 (2000).

data not previously collected in the aggregate from antitrust agencies. These reports survey thinking on various issues and offer new insights on ways to harmonize practices and approaches. Outputs also include templates for thresholds, procedures across countries, databases of information, and toolkits.<sup>306</sup>

The ICN as an institution adopts practices at two levels. Of all its nonbinding work product, the ICN's recommended practices enjoy widest approval. These practices have the approval of the entire ICN. Best practices reflect the steering group's acceptance of subgroup work product but not formal approval by the entire ICN. To date, only ICN recommended practices include the work of the merger group.

#### i. Mergers

ICN efforts have reduced the costs associated with multiple filing systems. The ICN has increased operational convergence in merger control through the adoption of recommended and best practices. This has effects on both firms involved in mergers and on agencies' budgets and time. The merger group's work has also increased technical assistance on mergers. This includes training of agencies' staff in the latest techniques of merger investigation and implementation of guiding principles and best practices.

The merger group contains three subgroups: Notification and Procedures, Analytical Framework, and Investigative Techniques. The Notifications and Procedures subgroup has created merger templates based on each jurisdiction's standards for merger control. This easily available list provides increased certainty for businesses and their counsel, thereby reducing the risk and potential costs of a merger. One of the main outputs of the Notification and Procedures subgroup has been a common framework to begin to reduce the differences across jurisdictions in the procedures and processes of merger control. The ICN membership created a set of Eight Guiding Principles for Merger Notification and Review Procedures. These include: (i) sovereignty; (ii) transparency; (iii) nondiscrimination; (iv) procedural fairness; (v) efficient, timely, and effective review; (vi) coordination; (vii) convergence; and (viii) protection of confidential information.<sup>307</sup> Along with these principles, the Notification and Procedures subgroup identified recommended practices for merger control. The adoption of these practices by member agencies creates opportunities for more efficient merger control across jurisdictions. The greater efficiency should reduce the amount of time and uncertainty involved in global merger control. Indeed, it already has begun to do so.

The ICN has adopted practices that working group members acknowledged

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306. ICN, *supra* note 300, at 3.

307. ICN, *Guiding Principles for Merger Notification and Review Procedures* (2002).

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and identified as best practices in merger control. These recommended practices include: (1) sufficient nexus between the transaction's effects and the reviewing jurisdiction; (2) clear and objective notification thresholds; (3) flexibility in the timing of merger notification; (4) merger review periods; (5) requirements for initial notification; (6) conduct of merger investigations; (7) procedural fairness; (8) transparency; (9) confidentiality; (10) interagency coordination; (11) remedies; (12) competition agency powers; and (13) review of merger control provisions.<sup>308</sup> Best practices include a broad statement and an explanatory comment to articulate each of these general themes. This allows enough flexibility in approach to accommodate different legal backgrounds, traditions and socioeconomic structures.

The recommended merger practices have not met with the sort of nonresponse typical for many nonbinding recommendations from other soft law organizations. In fact, there has been considerable implementation of these practices. This is not to suggest that all countries have implemented ICN recommended practices. Rather, a substantial number have done so. More agencies plan to adopt them going forward as they change their domestic laws to accommodate these practices.

Thus far, 54 percent of ICN members have made or plan to make revisions to their merger regimes to comply with the recommended practices.<sup>309</sup> Private sector studies corroborate agencies' progress in conforming to the recommended practices. According to these studies, no jurisdiction was completely inconsistent with all three recommended practices. Nearly 90 percent of all jurisdictions were partially consistent with all three practices, though only six at that time were substantially consistent with all three recommended practices. In the aggregate, over one third of the jurisdictions were substantially consistent with at least one recommended practice.<sup>310</sup> Though in the aggregate compliance has been high, compliance seems to have been higher in countries with stronger antitrust systems.<sup>311</sup> Not surprisingly, those countries more open to international mergers are those most likely to implement changes to increase the certainty of merger control in these jurisdictions. Conformity also may be due to political economy reasons such as

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308. ICN, *Recommended Practices for Merger Notification and Review Procedures* (2005). The final two recommended practices were added in 2005.

309. Julie Soloway, *The Fourth Annual International Competition Network Conference: Continued Progress Toward Convergence*, INT'L ANTITRUST BULL., Fall/Summer 2005, at 14, 14-15.

310. A designation of partially consistent could include a variation of "full consistency with some, and complete or partial inconsistency with other, component elements of each Recommended Practice." J. William Rowley & A. Neil Campbell, *Implementation of the International Competition Network's Recommended Practices for Merger Notification Procedures: Final Report*, 5 BUS. L. INT'L 111, 111-12 (2004).

311. J. William Rowley & A. Neil Campbell, *Implementation of the ICN's Recommended Merger Practices: A Work-in-(Early)-Progress*, ANTITRUST SOURCE, July 2005, at 1-2.

resources and trade openness.<sup>312</sup> Widespread conformity to at least some aspects of the recommended practices is an important first step where there had been little previous implementation in this area among agencies.

Another subgroup, Merger Investigation and Analysis, focuses on analytic techniques and methods to improve the quality of merger investigations. This has included work on an analysis of merger guidelines. This subgroup's work product analyzes the substantive standards of merger guidelines in various competition systems. Merger group inquiry into specific investigative techniques and approaches allows the ICN to implement its recommended practices across jurisdictions. This in turn increases norm diffusion and adds to operational issues an implementation element that other international soft law for a lack.

Merger Investigation and Analysis covers market definition, unilateral effects, coordinated effects, entry barriers and expansion, and efficiencies.<sup>313</sup> A related project creates an analytical baseline standard for an Investigative Techniques Handbook.<sup>314</sup> The handbook offers a common framework for enforcers to use in undertaking merger investigation and analysis. It provides a way for agencies to increase the efficiency of their techniques and results. The framework also addresses issues of substantive convergence. The framework creates a foundation for substantive practices and provides a clearer sense of the types of behavior that match substantive standard benchmarks for merger analysis.

In many cases, ICN recommendations are quite similar to earlier OECD or BIAC recommendations.<sup>315</sup> Wide implementation of its merger recommendations begs the question of why the ICN has succeeded where other soft law institutions have failed. What seems to have distinguished the ICN's efforts from earlier OECD merger recommendations is that in developing the ICN's recommendations, the private sector worked intimately with the agencies in creating a framework that is functional from a business standpoint. The ICN model addresses business groups' interest in reducing transaction costs for business and improving legal certainty in the process and application of merger control. Furthermore, stakeholders in the merger group have increasingly

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312. Simon J. Evenett & Alexander Hijzen, *Conformity with International Recommendations on Merger Reviews: An Economic Perspective on 'Soft Law'* (Univ. of Nottingham, Research Paper No. 2006/04, 2006), available at <http://ssrn.com/abstract=893034>.

313. ICN, ANALYSIS OF MERGER GUIDELINES (2004).

314. ICN, INVESTIGATIVE TECHNIQUES HANDBOOK FOR MERGER REVIEW (2005).

315. ICN dynamics demonstrate that the competition created by multiple international antitrust organizations spurs innovation in other organizations as each institution responds to developments in the others. The OECD responded to the ICN's Recommended Practices by issuing its own Recommendation Concerning Merger Review. The OECD Recommendation includes many of the same types of practices as the ICN recommendations. This may be a case of mutually reinforcing recommendations. It also may result from the OECD's desire to continue to be seen as relevant in this area where the ICN has taken the lead in policy implementation and where previously the OECD monopolized policy initiatives.

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included developing agencies and NGAs. Developing-world stakeholder participation provides greater credibility to the ICN merger working group, as well as broad experience to draw upon and diverse voices in the creation of common approaches. Likewise, the virtual nature has increased the points of norm diffusion and created increased buy in as ICN participants take ownership of the group's work product.

### ii. Cartels

The cartel working group has increased harmonization of laws and approaches to combat cartels. The ICN has organized cartel workshops for agencies. In these workshops, agencies review techniques, compare enforcement strategies, and increase their capacity to undertake cartel work. These workshops provide agencies an opportunity to compare effective practices against international cartels. One important work product by the cartels group has been its analytical treatment in defining cartel enforcement. This work also includes analytical treatment of instructions and penalties for cartel enforcement.<sup>316</sup>

The cartel working group has authored a manual on anticartel enforcement techniques. The manual has helped agencies to identify better practices in investigation and enforcement techniques and to examine and improve existing practices. The manual and templates create benchmarks for techniques and practices. These outputs facilitate the ability of agencies to follow enforcement norms that reduce the costs of investigations while improving their results. Additionally, the cartel group has examined substantive issues in cartel enforcement that have practical effects. These issues include overcoming obstruction of investigations by defendants and the contexts in which private cartel enforcement can aid public enforcement. Similarly, cartel work has created changes in antitrust policy in a push for leniency. As a result of efforts in the ICN, a number of countries have moved to incorporate leniency programs. For example, in 2003, Australia, Brazil, and Japan each modified their antitrust systems to encourage leniency.<sup>317</sup> Other countries also have revised their antitrust laws based on ICN cartel group recommendations.

### iii. Market Access

The ICN has not yet included international trade and antitrust interface

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316. ICN WORKING GROUP ON CARTELS, *supra* note 56.

317. Leniency may be critical to uncovering and prosecuting cartels and to reducing the stability of other cartels. Leniency provides agencies with inside evidence of cartel activity. This reduces the cost of detecting cartels. When a leniency program is in place, this may also serve to destabilize other cartels because it increases the benefits of defection from the cartel for the first mover who applies for leniency. See ICN, DRAFTING AND IMPLEMENTING AN EFFECTIVE LENIENCY PROGRAM (2006); John M. Connor, *Global Antitrust Prosecutions of Modern International Cartels*, 4 J. INDUSTRY, COMPETITION, & TRADE 239 (2004).



issues in its agenda. This limits the role that the ICN could play in creating a common understanding of market access issues. It may be that because of the contentiousness of the market access issue, both among developed countries and between developing and developed countries, discussion of it would cause a slowdown in ICN outputs. Given that there is no permanent bureaucracy within the ICN, its lack of movement toward an understanding of market access and the creation and implementation of best practices for market access have the potential to derail the organization. Without results in market access, ICN members might stop committing resources to study this issue. This might have spillover effects on other ICN work. At the level of agency participation, the ICN faces the problem that the United States and EU will put fewer efforts into the ICN if this or another issue creates an impasse. Without EU and U.S. support, the ICN will lose momentum and relevance. The United States seems unwilling to address market access unless it is on U.S. terms.<sup>318</sup>

Market access is an area in which business support may be mixed. This contrasts with mergers, where the business community has provided significant input. To a lesser extent, business has a stake in ICN work on cartels. MNCs facing market access issues have an interest in ensuring that the ICN does not reach consensus at the lowest common denominator and that consensus does not stymie procompetitive behavior. Business may be relevant to engage in market access debate if this is the potential outcome. Academic support on market access is also mixed due to different approaches that academics take to antitrust, as exemplified in the debate on whether efficiency should be the only goal of antitrust.

### *C. The Market as an Institution*

The market is itself an institution that regulates conduct. Any comparative institutional analysis that excludes the market would be incomplete. More formal institutions may not be necessary when the market effectively disciplines behavior better than other institutions. However, markets may malfunction in a number of ways. Antitrust is a regulatory response to such failures. Specifically, antitrust responds to a market failure in which the exercise of monopoly power by one or more actors creates a misallocation of resources.<sup>319</sup> If markets functioned efficiently without exploitation, there would be no need for antitrust.

If left entirely to producers, prices would reflect a price higher than the competitive price. When producers can limit the entry of competitors on their own or collude with competitors to set prices higher than a competitive rate of

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318. As the previous historical discussion reveals, both the United States and EU need to be in agreement before any issue has the chance for effective implementation.

319. Alan J. Meese, *Market Failure and Non-Standard Contracting: How The Ghost of Perfect Competition Still Haunts Antitrust*, 1 J. COMPETITION. L. & ECON. 21, 23 (2005).

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return where price exceeds marginal cost, this exposes a gap in the market's ability as an institution to yield optimal results. It is because of this exploitation that countries create some level of market regulation through antitrust laws and institutions. Markets also may malfunction where firms can use increased globalization to participate in anticompetitive activities around the world through exercise of monopoly power. As the previous discussion on the problems of international antitrust shows, a weakness of the market is that it may not easily self-correct against anticompetitive spillover or market access malfunctions.

An argument can be made that a reduction in trade barriers could allow markets to self-correct for the problems of international antitrust.<sup>320</sup> As countries have uncovered more cartels operating internationally, this thinking has begun to change. A contestable market through trade openness may have limits in its ability to self-regulate against cartels. Even jurisdictions with the greatest trade openness (for example, Hong Kong and Singapore) have had to put antitrust laws in place to combat hard-core cartels.<sup>321</sup> As the previous discussion on cartels illustrated, the evidence of international cartels shows that countries without anticartel laws suffer larger overcharges than countries with antitrust regimes.

With respect to mergers, the market may not be as effective as other more formal legal institutions at correcting mergers with international anticompetitive implications. If firms could merge at will across borders, they would strive to gain monopoly power in order to raise prices and reap richer profits. It should come as no shock that firms will pay more for a privatized company when they can buy a monopoly position.<sup>322</sup> Furthermore, without merger review, a country loses the means to participate in mergers that may have significant implications on its domestic economy. Mergers in particularly concentrated markets, in which there may be incredibly high market shares, have greater potential to affect competition in that market. Imagine the competitive effects, for example, of merger between two global cellular telecommunications companies with holdings in highly concentrated markets across a region.

In this hypothetical, one nation in the region lacks merger control, which prevents it from considering the competitive effects on its consumers in the cellular telecommunications market. Because of the importance of telecommunications to a country's infrastructure and development, such effects could have profound implications on the country's global competitiveness.

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320. Bruce M. Owen, *Competition Policy in Latin America* 8 (Stanford Law Sch. Olin Program in Law and Economics, Working Paper No. 268, 2003), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=456441](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=456441).

321. See Singapore Competition Act of 2004; Justine Lau, *Hong Kong Body Backs Anti-trust Shake-up*, FIN. TIMES, July 4, 2006, at 7.

322. OECD, *supra* note 124, at 8.

Without merger review, there is no ex-ante opportunity to remedy possible anticompetitive conduct. Though the market could self-correct upon entry of another firm (in pursuit of profits above the competitive level), the previous discussion on barriers to entry and the *Telmex* decision suggests that market access barriers may limit the ability of the market to self-correct appropriately.

## VI. CONCLUSION

### *A. The Effectiveness of Institutions*

This Article demonstrates that there are flaws in each of the existing institutions, domestic and international, which address the issues of international antitrust. No one institution solves each of the malfunctions that affect international antitrust completely. However, soft law international organizations may be the least problematic institutional alternative for addressing international antitrust concerns generally. In particular, the ICN is more effective than any other soft law institution. Such institutions have lower participation costs than do their hard law alternatives. Moreover, they are more effective in their ability to overcome the problems of international antitrust than are purely domestic institutions.

The design of international organizations affects institutional outcomes.<sup>323</sup> Once parties choose a regime, it becomes more difficult to change it as the regime becomes path-dependent. Indeed, international organizations foster increased path dependency.<sup>324</sup> Therefore, it is important to undertake a cost-benefit analysis to make sure that an international regime is worthwhile. Otherwise, the long-term cost of an institution may be significant and exceed that of other institutional choices.

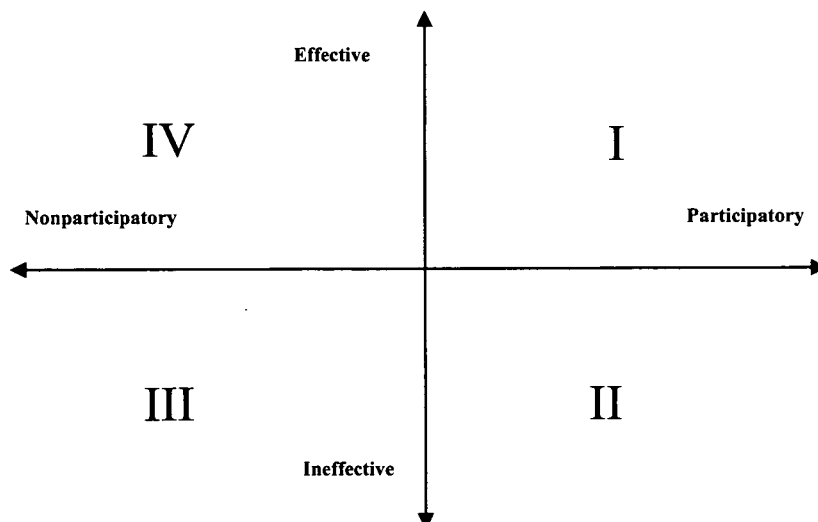
The goal of comparative institutional analysis is to create a system that is effective, where the benefits outweigh the costs. Not all systems have effective participation by actors. The diagram below provides the ranges of participation and effectiveness of institutions.

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323. Koremenos, Lipson & Snidal, *supra* note 161.

324. Kenneth Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONFLICT RESOL. 3 (1998).

## Monopolists Without Borders



The optimal institutions are those in quadrant I. These institutions have a high level of meaningful participation by actors domestically and internationally. The next best institutional type is in quadrant IV. Such institutions are effective in their outcomes, a function of the benefits of participation. However, they have problems with participation, a function of the costs of participation. Institutions that have high costs and low benefits but high levels of participation fall within quadrant II. The institutions that have all of the worst possible attributes are in quadrant III—ineffective institutions with low levels of participation.

International antitrust issues are complex. The appropriate institutions to address them must account for the global nature of the problem. Once global institutions play a role, this reduces the level of participation by domestic actors. By their nature, global institutions are less accountable than their domestic counterparts, and they entail increased costs of participation. Put differently, there are questions of participation and legitimacy to international antitrust institutions. No international institution has strong democratic legitimacy. Instead, by their nature, supranational institutions suffer in this regard.<sup>325</sup> International organizations are farther from voter preferences than domestic alternatives and the market. This increases the costs of participation in these organizations to those with significant financial resources. Even on the domestic level, institutions become less participatory as the complexity of issues they deal with increases. None of the current international antitrust

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325. Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2020-22 (2004).

institutions fit within quadrant I. Each of the international institutions discussed in this Article fit somewhere in quadrant IV. None is fully effective.

Domestic institutions, such as the legislature, courts, and administrative agencies, have greater participation but alone are less effective for international antitrust issues. They exist within quadrant II. As the soft law international institutions become more effective, they empower purely domestic institutions. The implementation of soft law norms from international organizations occurs at the domestic level. Domestic and international antitrust institutions move together and operate dynamically.<sup>326</sup> International institutions become more effective as they improve the capacity of domestic agencies and vice versa.

*B. Final Thoughts on Institutional Responses to the Problems of International Antitrust*

Market access remains a significant distortion that the market seems unable to self-correct. Thus far, domestic and international solutions, whether based on soft or hard law institutions, have been ineffective in remedying market access problems. When the transaction costs are high and the potential payoff is unclear, countries may not even attempt to negotiate an agreement. This makes hard law more likely to be ineffective in such situations. This may be the lesson of the market access negotiations in the antitrust and trade interface at the WTO. Moreover, in the market access area, soft law through the OECD or UNCTAD has proven ineffective in creating norms thus far to promote better compliance mechanisms, because the costs of substantive intellectual convergence remain high.

As a preliminary step, addressing market access concerns from an antitrust perspective requires increased analytical convergence on the antitrust side as to the appropriate conceptualization of market access problems. The second step would be to bridge antitrust and trade conceptualizations on market access. This would call for a reconsideration of whether trade remedies for market access problems that affect both antitrust and international trade can ever be reconciled. Given that the WTO has dropped competition policy from its current round of negotiations, to start up this discussion again within the WTO would be premature. Moreover, current WTO adjudication lacks the in-depth competition analysis that antitrust practitioners undertake in their domestic adjudications.<sup>327</sup>

In the long term, PTAs may be a way to bridge the gap in thinking on market access at the WTO. Some antitrust chapters with binding dispute

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326. When countries take domestic responses, it is unclear how much of such responses is a function of a purely domestic approach to international antitrust.

327. There is need for further work on how best to reconfigure the WTO to achieve procompetitive goals that pass muster under both trade and antitrust regimes.

resolution provide trade remedies for antitrust violations. They may provide the tools and structures to ensure that adjudications address both trade and antitrust concerns successfully. Future PTAs may include specific standards of review or mandate that antitrust experts serve as panelists for violations under antitrust provisions. To the extent that such experiments provide an example of the effectiveness of this approach, they may help build international consensus to include antitrust dispute settlement as part of a future round of WTO negotiations. This may lead to binding rules for market access concerns in antitrust. This process may even have long-term effects of putting economics back into the practice of international economic law, including in the area of antidumping.<sup>328</sup> Since no cases have yet concluded with decisions utilizing antitrust chapters in any PTA, this remains a theoretical discussion.

The ICN has not yet attempted to tackle market access concerns. It may have built up the capacity to engage its various governmental and nongovernmental stakeholders in addressing procedural market access concerns such as more effective coordination and consultation. However, the ICN has not significantly tested its ability to resolve serious disagreements in different views of antitrust laws. Reliance on the ICN to address market access issues would thus entail institutional risk. Taking on these concerns could weaken the effectiveness of the ICN overall. However, even with its inherent risks, the ICN seems the least unattractive alternative, certainly better than inaction, at least for procedural issues. That is, the benefit of action, given the scope of the market access problem, suggests that the benefits outweigh the potential costs, even if the ICN does nothing more than improve procedural concerns in the antitrust and trade interface.

Soft law international organizations have played an effective role in addressing a number of mergers and cartel issues. Soft law antitrust institutions show that it is possible for agencies to reach a basic operational consensus, establish best practices, and implement these practices to improve domestic institutional capacity for managing mergers and cartels.<sup>329</sup> Participation by stakeholders seems to play a critical role in the ICN's effectiveness in creating compliance among them. Of all the international institutions discussed in this Article, the process of bottom-up harmonization and domestic implementation exists primarily within the ICN. The ICN does not displace traditional international institutions as much as it exploits their institutional weaknesses to

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328. Antidumping has been a difficult issue for antitrust because antidumping has a more relaxed threshold for competitive harm. Alan O. Sykes, *Antidumping and Antitrust: What Problems Does Each Address?*, in BROOKINGS TRADE FORUM 1 (Robert Z. Lawrence ed., 1998). Some scholars have suggested anti-dumping injury to be based on antitrust principles. See, e.g., Diane Wood, *'Unfair' Trade Injury: A Competition-Based Approach*, 41 STAN. L. REV. 1153 (1996).

329. This supports general theories within the international relations literature which suggest that compliance will be more likely where there is consensus to norms. Edith Brown Weiss, *Concluding Remarks*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 542 (Dinah Shelton ed., 2000).

address issues of implementation. The ICN represents the best international institution to push forward an agenda of consensus, better practices, and implementation on mergers and cartels. It is therefore best suited to push implementation of international antitrust more generally.

The OECD's strength is in its quasi-academic work and high-level meetings among top enforcers. The OECD's best output relative to other institutions is academic in terms of in-depth discussions of issues. It should focus on in-depth investigation of antitrust issues, through various reports and discussions, to build analytical consensus. Its use of peer reviews facilitates domestic change toward improving the quality of domestic antitrust systems and institutions. This is a gradual process of change but one in which the input of time and resources may be worth the output of consensus on how to increase allocative efficiency. Technical assistance that the OECD, its member countries, and the UNCTAD provide will improve the capacity of younger, less experienced agencies to implement best practices. The UNCTAD's future role should address its quasi-political strength. The UNCTAD can continue to draw attention to the needs of developing countries and agencies. Without the UNCTAD, the participation of many of the least developed nations in antitrust would likely be insignificant.

The ICN institutional choice permits a cost-benefit allowance that includes a results-based legitimacy as a function of the participatory model.<sup>330</sup> Results-based legitimacy that allows for increased participation can create a more socially desirable outcome for antitrust issues. To the extent that the ICN can create improved efficiency and reduce costs, it can overcome its lack of democratic legitimacy by providing good results. The choice of the ICN suggests that international agency-to-agency cooperation with nongovernmental stakeholder involvement, a virtual structure, and participation of stakeholders in both the developed and developing world present fewer and less severe malfunctions than purely domestic adjudicatory responses, the political process, the market, international hard law adjudication, or transgovernmental cooperation in antitrust. The ICN can facilitate achievement of important goals in international antitrust. In other words, reaching these goals is a question of institutional choice. The proper choice of institutions to address goals provides a rich set of policy prescriptions for international antitrust concerns and potentially other areas of international regulatory law.<sup>331</sup>

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330. Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1517 (2006).

331. For example, in securities law the response in transgovernmental. Marc I. Steinberg & Lee E. Michaels, *Disclosure in Global Securities Offerings: Analysis of Jurisdictional Approaches, Commonality and Reciprocity*, 20 MICH. J. INT'L L. 207 (1999).