

ESSAY

ANTITRUST AND REGULATORY FEDERALISM: RACES UP, DOWN, AND SIDEWAYS

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In this Essay, Professor Eleanor Fox analyzes regulatory competition and regulatory federalism with respect to competition law. In considering whether some degree of higher-than-national-level regulation is wise, Fox observes possible races to the bottom and the top, as well as the race to be the model for the world. She then analyzes regulatory disregard: the tendency of national systems and their actors to disregard their neighbors and to disregard the problem of excessively overlapping regulatory systems. Professor Fox concludes that there is a modest and marginal race to the bottom; that there is also a race to the top; that there is little competition as such among competition regimes to attract investment, but there is competition between the United States and the European Union to export competition law models to the rest of the world; and that, in view of nationalistic races and regulatory disregard, there is a case for the internationalization of certain specific procedures and principles.

INTRODUCTION

Antitrust law is national. Markets—many of them—are global. Arguments have been made for internationalizing antitrust law or raising surveillance of anticompetitive restraints to a level higher than that of the nation.¹ Analysis of these arguments is complicated by the fact that there are many versions of antitrust law and its goals, both descriptive and normative, and there are many possibilities for internationalization or cooperation on antitrust rules and their enforcement.

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¹ See, e.g., *Towards WTO Competition Rules* (Roger Züch ed., 1999) (compiling proposals by various officials and scholars); Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 Am. J. Int'l L. 478 (2000) (considering problems, proposals, and limits of institutions).

In this Essay, I explore the federalism of antitrust in view of global markets. What is the desirable level of antitrust regulation? First, to set the stage, I ask: What is antitrust law, what are its goals, and why are we observing the increasing adoption of antitrust laws by nations? I then describe the state of play of internationalization of antitrust. Third, I ask: Is there regulatory competition among the antitrust regimes of nations? That is, do nations use antitrust regimes to compete for investment and the location of business, and, if so, is there a race toward the bottom (degrading law to attract investment and business) or the top (improving law)? Fourth, I describe the competition of the United States and the European Union, each to export its model to the rest of the world. Fifth, I examine the phenomenon of, and world problems that arise from, regulatory disregard of people and systems beyond a nation's borders. Finally, I present a case for targeted internationalization.

I

WHAT IS ANTITRUST LAW AND WHY IS ITS PURVIEW EXPANDING?

It is necessary to ask the definitional question for two reasons. First, we need a foundation for the ensuing discussion, and second, the popular American conception—that antitrust law is a tool to produce efficiency through markets—is not necessarily a faithful description. In fact, antitrust (or competition law) is whatever legislators and judges of particular jurisdictions say it is. It ranges from a body of law that controls business practices in order to protect or empower the underdog, to laws that check and disperse business power and assure a better distribution of opportunity and wealth to the nonestablished. Antitrust includes law that preserves the competitive process and its governance of markets and law that advances efficiency through markets anchored (for example) by an aggregate wealth or a consumer welfare paradigm. In this Essay I call law that advances efficiency through markets “efficiency law.” I call law to advance goals such as preserving a society of small business, protecting small firms from exploitation and exclusion by dominant firms, providing fair access to markets, and setting fair rules of the game “fairness law.”²

² Some fairness goals are in tension with efficiency. For example, nations might choose a law against low-pricing campaigns by dominant firms that are likely to squeeze higher-cost small firms out of the market; others might choose a law hospitable to lower pricing unless it is below the dominant firm’s costs and will result in monopoly prices. The first choice may be seen as fair to small competitors. The second may be seen as both good for consumers and efficient.

Even within a particular national system, the goals of competition law may evolve and transmogrify, often depending on the state of industrialization of the economy, the strength of the political democracy, the power of the judiciary and of bureaucrats, and the exposure of domestic firms to global competition.

There is a large area of agreement among nations regarding the illegality of certain types of restraints, because these prohibitions fit demands for both fairness and efficiency. This is particularly evident in the law against competitors' price fixing, market division, and bid rigging (cartels), and against naked monopolistic exclusions designed to block market entry or growth. But even in the realm of near-consensus rules, there are exceptions. For example, less-developed countries may exempt from antitrust proscriptions cartels in strategic goods in which they have a comparative advantage, especially raw materials and commodities. Moreover, there is often disagreement even within a single jurisdiction about what is a naked monopolistic exclusion, as is evident from the *Microsoft* case.³ Outside of the area of cartels the margin of divergence among national laws increases. For example, many countries, following a European model, regulate unfair or oppressive uses of market power, while the United States focuses more narrowly on the tendency of restraints to lower the output of goods and services.

For many years, United States antitrust law (which itself has been the subject of political economy swings) was the only significantly enforced competition law in the world. Today some eighty countries have competition laws. More than half of these laws were adopted in the last decade. Approximately twenty additional countries are currently drafting competition laws.⁴

The adoption of competition laws is now fashionable throughout the world. The adopting countries have mixed motives. Some Central European countries that hope to become members of the European Union have adopted competition laws, and indeed European-style competition laws, because they must do so under "Europe Agreements" in order to be admitted to the waiting room for membership in

³ See *United States v. Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998); *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999) (findings of fact), 87 F. Supp. 2d 30 (D.D.C.) (conclusions of law), 97 F. Supp. 2d 59 (D.D.C. 2000) (final judgment), appeal denied and case remanded, No. 00-139, 2000 WL 1052937 (U.S. Sept. 26, 2000).

⁴ See International Competition Policy Advisory Comm., U.S. Dep't of Justice, Final Report 33 (2000), available at <<http://www.usdoj.gov/atr/icpac/icpac.htm>> [hereinafter ICPAC Report]; see also Mark R.A. Palim, *The Worldwide Growth of Competition Law: An Empirical Analysis*, 43 Antitrust Bull. 105, 109 (1998) (listing 70 countries with competition laws as of end of 1996).

the European Union.⁵ Indonesia adopted a competition law in 1999 because the International Monetary Fund required it to do so as part of the economic reforms on which rescue funds were conditioned.⁶ Many countries moving from statism or command-and-control economies to markets want rules in place to check the greed expected to attend free markets.⁷ Some are convinced that adopting Western-style competition laws will tend to attract needed Western investment by making the environment familiar to Westerners, instilling a sense of greater trust and certainty. Many nations are convinced (often by U.S. or E.U. advocates) that competition law is good for them; that it will, in a Michael Porter sense,⁸ make their businesses more robust and better able to compete while attracting investment and jobs, thus increasing economic opportunity and serving their people as entrepreneurs, consumers, and workers. Most of the new statutes contain a healthy dose of protection against "unfair" competition, "unfair" contracts, or "unfair" behavior of suppliers.⁹

I write this Essay in view of the diversity of choices that nations make.¹⁰

⁵ See Thinam Jakob, EEA and Eastern European Agreements with the European Community, in 1993 Annual Proceedings of the Fordham Corporate Law Institute: International Antitrust Law and Policy 403, 426-34 (Barry Hawk ed.) (reviewing trade agreements of European Community that include competition provisions).

⁶ See Eleanor M. Fox, Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia, 41 Harv. Int'l L.J. 579, 588 & n.49, 589 (2000).

⁷ See Eleanor M. Fox, The Central European Nations and the EU Waiting Room: Why Must the Central European Nations Adopt the Competition Law of the European Union?, 23 Brook. J. Int'l L. 351, 351 (1997); Manisha M. Sheth, Note, Formulating Antitrust Policy in Emerging Economies, 86 Geo. L.J. 451, 454 (1997) (discussing advantages of clearly defined, specifically tailored, and aggressively enforced antitrust policy in developing countries).

⁸ See Michael E. Porter, The Competitive Advantage of Nations 617-82 (1990) (arguing that prosperity for companies and countries depends on local competitive environment, and that existence of global competition does not eliminate importance of domestic competition; rather, strong domestic competition tends to make firms competitive in global markets); Michael E. Porter, Michael Porter on Competition, 64 Antitrust Bull. 841 (1999) (same).

⁹ For a distinction between fairness and efficiency, see *supra* note 2 and accompanying text; see also John Fingleton, Eleanor Fox, Damien Neven & Paul Seabright, Competition Policy and the Transformation of Central Europe 63, 73-76, 114-15, 176 (1996) (describing fairness aspects of competition laws of Central European countries and noting how fairness principles can undermine attempts to establish efficient markets). The fairness-efficiency tension is crucial to this Essay, for attempts by one nation or community to impose fairness rules on another may be seen as pressure towards the bottom, while reciprocal impulses towards law guided by efficiency is seen as virtuous pressure towards the top. See *infra* Part III.

¹⁰ See generally Wolfgang Pape, Socio-Cultural Differences and International Competition Law, 5 Eur. L.J. 438 (1999) (arguing that, as result of cultural differences, competition laws of various nations have different meanings).

II

THE STATE OF PLAY OF INTERNATIONALIZATION IN ANTITRUST

Since the modern era, market conduct has had transnational dimensions. In the 1940s, trading nations seriously considered the adoption of world rules to govern restrictive business practices. They drafted and nearly adopted the Havana Charter. Thereafter, nations formulated voluntary codes and principles in the context of the United Nations Conference on Trade and Development and the Organization for Economic Cooperation and Development.¹¹

Until the end of the 1980s, diverse attitudes towards competition itself created animosities, especially towards extraterritorial enforcement by the United States when U.S. enforcement collided with other nations' decisions about how to organize their economies. The failure and fall of communism at the end of the 1980s and the start of the 1990s signaled disaffection with dirigiste economic control and a greater appreciation of markets. As nation after nation began to adopt or expand market systems, they also began to adopt competition laws to govern market conduct, most often in the image of the European Community, which protects both competitors and consumers from abuses. Also, nations began to form a new consensus on the legitimacy of a nation's jurisdiction over actors and acts abroad that cause domestic harm. Numerous nations now recognize the applicability of their competition laws to conduct abroad that causes effects within their territories.¹²

Meanwhile, the General Agreement on Tariffs and Trade (now the World Trade Organization (WTO)) became more progressive in requiring lower tariffs and open markets, thus facilitating global competition and a more integrated world. Globalization, in turn, brought with it needs and incentives for cooperation among antitrust agencies. Various nations' consumers are targeted by offshore cartels. To enforce their antitrust laws, the competition agencies need evidence

¹¹ See ICPAC Report, *supra* note 4, at 36, 255-59. For basic documents, see *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, U.N. Conference on Restrictive Business Practices, U.N. Doc. TD/RBP/CONF/10 (1980), reprinted in 19 I.L.M. 813 (1980); *United Nations Conference on Trade and Employment, Final Act*, arts. 46-54 (1948) (Havana Charter of proposed International Trade Organization), reprinted in Clair Wilcox, *A Charter for World Trade* 227 (1949); *Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade*, Organization for Economic Cooperation and Development (OECD), OECD Doc. C(95)130/FINAL (1995), available at <<http://www.oecd.org//daf/clp/recommendations/rec&com.htm>>.

¹² See Restatement (Third) of the Foreign Relations Law of the United States § 415 reporters' note 9 (1987).

from the home state of the cartel members. Moreover, nations whose exporters are blocked from markets abroad may wish to induce sister agencies to enforce their own laws. These interests and incentives produced a new generation of cooperation agreements, which now exist between the European Union and the United States,¹³ the European Union and Canada,¹⁴ and the United States and, respectively, Australia,¹⁵ Brazil,¹⁶ Canada,¹⁷ Israel,¹⁸ Japan,¹⁹ and Mexico.²⁰

Officials of the European Union have put forth a vision and a work program.²¹ Their proposals go qualitatively further than effects-based enforcement and bilateral cooperation agreements. Since the mid-1990s, they have analyzed the need for global minimum competition rules or core principles. The European Union proposed, and the nations of the WTO accepted, the creation of a Working Group on the Interaction Between Trade and Competition Policy. The Working Group now has completed several years of discussions and identification of issues and needs,²² and its work is continuing.²³

¹³ Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, U.S.-E.U., reprinted in 4 *Trade Reg. Rep.* (CCH) ¶ 13,504.

¹⁴ Framework Agreement for Commercial and Economic Cooperation Between the European Communities and Canada, July 6, 1976, E.U.-Can., 1976 O.J. (L 260) 2.

¹⁵ Agreement Between the Government of the United States and the Government of Australia Relating to Cooperation on Antitrust Matters, Apr. 27, 1999, U.S.-Austl., reprinted in 4 *Trade Reg. Rep.* (CCH) ¶ 13,502.

¹⁶ Agreement Between the Government of the United States of America and the Government of the Federative Republic of Brazil Regarding Cooperation Between Their Competition Authorities in the Enforcement of Their Competition Laws, Oct. 26, 1999, U.S.-Braz., reprinted in 4 *Trade Reg. Rep.* (CCH) ¶ 13,508.

¹⁷ Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, Aug. 3, 1995, U.S.-Can., reprinted in 4 *Trade Reg. Rep.* (CCH) ¶ 13,503.

¹⁸ Agreement Between the Government of the United States of America and the Government of the State of Israel Regarding the Application of Their Competition Laws, Mar. 15, 1999, U.S.-Isr., reprinted in 4 *Trade Reg. Rep.* (CCH) ¶ 13,506.

¹⁹ Agreement Between the Government of the United States and the Government of Japan Concerning Cooperation on Anticompetitive Activities, Oct. 7, 1999, U.S.-Japan, reprinted in 4 *Trade Reg. Rep.* (CCH) ¶ 13,507.

²⁰ Agreement Between the Government of the United States of America and the Government of the United Mexican States Regarding the Application of Their Competition Laws, July 11, 2000, U.S.-Mex., reprinted in 4 *Trade Reg. Rep.* (CCH) ¶ 13,509.

²¹ See, e.g., The EU Approach to the WTO Millennium Round: Communication from the Commission to the Council and the European Parliament, COM(99)331 final.

²² See Report (1999) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WTO Doc. WT/WGTCP/3 (Oct. 11, 1999); Report (1998) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WTO Doc. WT/WGTCP/2 (Dec. 8, 1998).

²³ For background on these events, see Tarullo, *supra* note 1.

In the background, convergence of law and practice has occurred and is occurring. Numerous meetings and workshops among competition officials, scholars, and practitioners, and technical assistance especially by the United States, the European Union, and Germany to nations that are newly adopting competition laws, have provided cross-fertilization and produced increasingly higher levels of common understanding.²⁴

Meanwhile, in the context of the WTO, the trading nations have adopted various agreements that include reference to, or rules of, competition law. For example, the General Agreement on Trade in Services (GATS)²⁵ and its Telecommunications Annex²⁶ forbid discriminatory abuse of dominance and require reasonable access to telephone networks. An accompanying reference paper further suggests that members commit to maintain adequate measures to prevent anticompetitive practices by major suppliers, including cross-subsidization, use of information obtained from competitors in order to compete against them, and the withholding from competitors of technical or commercial information about essential facilities.²⁷

Officials of the European Union and Canada are advocating a next step for the WTO Working Group on the Interaction Between Trade and Competition Policy: that competition issues should be readied for a future WTO agenda.²⁸ The United States opposes the

²⁴ Major annual workshops or conferences in Florence at the European University Institute and in New York at the Fordham University School of Law are among those that contribute to the cross-fertilization. See *Annual Proceedings of the Fordham Corporate Law Institute: International Antitrust Law and Policy* (Barry E. Hawk ed.) (published annually since 1973); *European Competition Law Annual 1997: The Objectives of Competition Policy* (Claus Dieter Ehlermann & Laraine L. Laudati eds., 1997); *Robert Schuman Centre Annual on European Competition Law 1996* (Claus Dieter Ehlermann & Laraine L. Laudati eds., 1997).

²⁵ General Agreement on Trade in Services art. IX(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments—Results of the Uruguay Round 283, 292, 33 I.L.M. 1167, 1175 (1994) [hereinafter GATS].

²⁶ GATS Annex on Telecommunications, Legal Instruments—Results of the Uruguay Round 313, 33 I.L.M. 1192 (1994).

²⁷ Reference Paper, 36 I.L.M. 367 (1997). The Reference Paper was prepared by the World Trade Organization (WTO) Secretariat, but it is not an official WTO document. See Laura B. Sherman, *Introductory Note*, 36 I.L.M. 354, 357 n.21 (1997). For a description of the implications of the WTO telecommunications agreement, see OECD, *Trade and Competition Policies for Tomorrow* 79-89 (1999).

²⁸ See, e.g., Mario Monti, *The Main Challenges for a New Decade of EC Merger Control*, Speech at the E.C. Merger Control Tenth Anniversary Conference (Sept. 15, 2000), available at <http://www.europa.eu.int/comm/competition/speeches/index_2000.html>; Karel van Miert, *International Cooperation in the Field of Competition: A View from the EC*, in 1998 Annual Proceedings of the Fordham Corporate Law Institute: *International Antitrust Law and Policy* 13, 13-25 (Barry Hawk ed.) [hereinafter 1998 Annual Proceedings]; Karel van Miert, *The WTO and Competition Policy: The Need to Consider Negotiations*, Address Before Ambassadors to the WTO (Apr. 21, 1998) [hereinafter van Miert,

effort.²⁹ The wisdom or not of such a next step may be illuminated by analysis of race-to-the-bottom, regulatory competition, and regulatory federalism analysis.

III

ARE ANTITRUST LAWS OF NATIONS TOOLS OF VIRTUOUS OR HARMFUL COMPETITION?

A. Regulatory Competition

One reason suggested for internationalizing economic law stems from the hypothesis that if left alone, nations will design or use their laws to attract trade, investment, or the establishment of business, and that to seduce business investment away from their neighbors, nations will degrade their laws.³⁰ International rules could restrain this perverse competition. The concept of races—toward bottom or top—assumes that there is regulatory competition: It assumes that nations are competing against one another in the formulation or application of their laws to be more attractive to business or individuals than are their neighbors.³¹

Competition law, however, does not provide a particularly useful template for regulatory competition. Contrast, for example, corporations law. One and only one state of the United States will grant a firm's corporate charter, and the law of the state of incorporation regulates the internal affairs of the company. States, therefore, vie to be

WTO and Competition Policy]; Konrad von Finckenstein, Remarks at "Global Warming? International Reaction to the ICPAC Report" Panel, American Bar Association, Section of Antitrust Law (July 11, 2000), available at <<http://strategis.ic.gc.ca/SSG/cf01805e.html>>.

²⁹ See Joel I. Klein, Anticipating the Millennium: International Antitrust Enforcement at the End of the Twentieth Century, in 1998 Annual Proceedings, *supra* note 28, at 9, 9-10 [hereinafter Klein, Anticipating the Millennium]. However, Klein has endorsed a Global Competition Initiative, as proposed in the ICPAC Report, *supra* note 4, at 281-85, to deal on a multilateral level with the panoply of world competition issues. See Joel I. Klein, Time for a Global Competition Initiative?, Speech at the E.C. Merger Control Tenth Anniversary Conference (Sept. 14, 2000), available at <www.usdoj.gov/atr/public/speeches/6486.htm>.

³⁰ See Daniel A. Farber, Environmental Federalism in a Global Economy, 83 Va. L. Rev. 1283, 1301-06 (1997) (explaining why multilateral regime might be justified); Richard B. Stewart, Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy, 86 Yale L.J. 1196, 1210-16 (1977) (exploring how federal authority to compel state implementation of federal environmental programs is grounded in moral claims).

³¹ For an excellent collection of papers on the problem, both conceptually and as applied to particular areas, see the June 2000 issue of the *Journal of International Economic Law*, with its introductory essay, Daniel C. Esty, Regulatory Competition in Focus, 3 J. Int'l Econ. L. 215 (2000).

the corporate home.³² Competition law has no parallel. A host state's competition law is not the exclusive applicable competition law.³³ A nation's competition laws normally govern not only the conduct of firms within that jurisdiction, but also the conduct of firms located outside of the jurisdiction that harm competition within the jurisdiction. Moreover, firms choose to enter many different markets in order to serve the people there (e.g., Coca-Cola or McDonald's may establish themselves in Russia), understanding that they will be subject to that nation's entire body of law. Competition law that is helpful or harmful (however it is seen by the firm) could be a marginal incentive or disincentive to establishment in the jurisdiction; but if a firm desires to enter a market to serve the consumers there, and would probably enter apart from competition law considerations, a competition law or the lack of it is not likely to be a deterrent unless it has significant negative qualities for the firm that override the market's attractiveness.

Thus, unlike the phenomenon of corporate charters, states or nations are not in direct competition with one another to have the most desirable competition law from the viewpoint of a firm that is a target of opportunity of that nation or state.

B. Efficiency-Based Antitrust and the Race to the Bottom

It is worth exploring, nonetheless, whether there is a scope for a race among nations that might tend to degrade national competition laws. The framing of the problem depends upon what is "good" antitrust law. Currently in the United States, "good" antitrust law is thought by a significant body of experts to proscribe only conduct or transactions that lessen both rivalry and efficiency. If these effects are absent (according to many authorities and cases), the law has no basis

³² See, e.g., Lucian Arye Bebchuk & Allen Ferrell, *Federalism and Corporate Law: The Race to Protect Managers from Takeovers*, 99 Colum. L. Rev. 1168, 1169-70 (1999) (reviewing scholars' acceptance of existence of state competition for corporate charters); William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 Yale L.J. 663, 664-65 (1974) (chronicling efforts by Delaware to make its law more attractive to corporations); David Charny, *Competition Among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the "Race to the Bottom" in the European Communities*, 32 Harv. Int'l L.J. 423, 430-34 (1991).

³³ See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (holding that national law applies to offshore collaborators that intend to affect and do affect regulating nation's market); *Cases 89 et al./85, A. Åhlström Osakeyhtiö v. Commission*, 1988 E.C.R. 5193, 5242-45 ¶¶ 11-28 (upholding application of E.C. treaty to foreign wood pulp cartel); see also Eleanor M. Fox, *National Law, Global Markets, and Hartford: Eyes Wide Shut*, 68 Antitrust L.J. 73, 79-80 (2000) (discussing extraterritorial application of competition law).

for intervention.³⁴ To the extent that a nation's antitrust law is based on such an efficiency principle,³⁵ there is small purview for a convincing race-to-the-bottom argument in antitrust (apart from exemptions and state actions that are treated below). Antitrust law thus defined and confined would tend to attract, not repel, business. Stated differently, when the best law—best as seen by firms and investors—is law that reduces costs and does not impose costs, competition among nations to attract businesses and investment will not degrade the law.³⁶

This point may be illuminated by contrasting antitrust with environmental law, which is often cited as the paradigm for the race-to-the-bottom phenomenon.³⁷ Environmental regulation normally imposes costs on businesses, even efficient businesses, and usually does so at the point of production. Firms may shift their production sites in response to local costs.³⁸ Firms that must pay high costs of environmental regulation are at a disadvantage in their competition with firms that operate production facilities in jurisdictions with less costly requirements.³⁹ Therefore, nations might feel the competitive pres-

³⁴ See *California Dental Ass'n v. FTC*, 526 U.S. 756, 775 n.12, 776-78 (1999) (stating that antitrust should not intervene in absence of empirical evidence of output-limiting effects); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (stating that antitrust is not about fairness, and that fact “[t]hat below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured”).

³⁵ While contemporary U.S. antitrust law is guided by efficiency defined in terms of consumer welfare, United States antitrust law was not enacted as “efficiency law,” and legacies of the antipower, prodiversity era remain. See Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. Rev. 936, 936 (1987) (noting historical “preference for pluralism, freedom of trade, access to markets, and freedom of choice”).

³⁶ For convenience and clarity, this statement discounts the costs of administration and enforcement. In calling U.S. antitrust law “efficiency law” on the grounds that it proscribes only impediments to efficiently functioning markets, this perspective also puts to one side the premerger notification and merger regulatory system. It discounts costs of error especially in regard to protectionist applications and in regard to procedures, including costs of class actions and treble damages in cases of error. Therefore, even those who happily identify U.S. substantive antitrust law as efficiency-driven would want to relax the assumption that U.S. antitrust law is efficient.

³⁷ See Richard Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. Rev. 1210, 1214-15 (1992) (challenging race-to-the-bottom justification for placing responsibility for environmental regulation at federal level).

³⁸ See Farber, *supra* note 30, at 1301; Revesz, *supra* note 37, at 1214-15.

³⁹ See Case 92/79, *Commission v. Italian Republic*, 1980 E.C.R. 1115, 1122 ¶ 8 (holding that European Community had power to adopt directive to protect environment). The European Community had jurisdiction to adopt sulphur content legislation, in part, because national provisions at a high level of protection would impose burdens on the businesses within its borders, “and if there is no harmonization of national provisions on the matter, competition may be appreciably distorted.” *Id.*; see also White Paper: Preparation of the Associated Countries of the Central and Eastern Europe for Integration into the

sure to lower environmental standards and thereby make themselves a more attractive home to business.

In contrast with environmental law, efficiency-style competition law⁴⁰ does not handicap business; at least it is self-consciously intended not to be handicapping. Efficient, responsive firms do not have to pull punches or pay a tax. A business environment with an efficiency-based competition law should be attractive and inviting, at least to those business people who are betting that they will succeed on the merits.

But let us flip the paradigm for, as indicated, in the world anti-trust community there is no agreement on what is the top ("good" law) and what is the bottom. This Essay thus far has assumed that law designed to promote efficiency, that gives firms freedom to do that which will lower their own costs, is at the antitrust top. There is another conception. Take as an example the abuse-of-dominance law of the European Union⁴¹ and of the many countries of the world (most countries with antitrust law) that adopt the E.U. model. In these jurisdictions, dominant firms abuse their dominance if they unfairly exclude or exploit smaller firms. This Essay assumes that countries that choose the E.U. model do so because for them it is the top.⁴² From

Internal Market of the Union, COM(95)163 final pt. 2.13, available at <<http://cadmos.carlbro.be/Library/WhitePaper/WhitePaper.html>> [hereinafter White Paper on Enlargement] (stating that common standards are necessary to prevent migrations to states with lower standards and lower costs).

⁴⁰ On the other hand, competition law designed to protect competitors may impose costs on efficient businesses. See *infra* notes 41-42 and accompanying text. Such law may be called "competitor-regarding law."

⁴¹ See Eleanor M. Fox, *Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness*, 61 *Notre Dame L. Rev.* 981, 983 (1986) (comparing U.S. and E.U. law and suggesting an efficiency defense to abuses based on unfairness); Per Jebsen & Robert Stevens, *Assumptions, Goals and Dominant Undertakings: The Regulation of Competition Under Article 86 of the European Union*, 64 *Antitrust L.J.* 443, 487-512 (1996) (comparing U.S. and E.U. law and expressing concern that E.U. law handicaps efficient competition).

⁴² Competition laws virtually always contain three sets of prohibitions: (1) They prohibit certain single-firm conduct, i.e., the monopolization offense in the United States or the abuse-of-dominance offense in the European Union; (2) they prohibit anticompetitive agreements, including cartels and other collaborations of competitors (horizontal restraints), and anticompetitive agreements between suppliers and their customers, who are often resellers (vertical restraints); and (3) they prohibit or control anticompetitive mergers. The abuse-of-dominance or monopolization law is a good example of law that either can be limited narrowly to offenses that hurt consumers, or can be expanded broadly to protect competitors from conduct that hurts them. The challenge in the latter case is not to condemn conduct that constitutes competition itself. It is not conceivable that the member nations of the European Community chose Article 86 (now Article 82), which prohibits abuse of dominance, rather than the less regulatory U.S. counterpart (Section 2 of the Sherman Act, 15 U.S.C. § 2 (1994)) in order to attract U.S. businesses to the European Community or to keep European businesses from migrating to the United States. The U.S.

this perspective, U.S.-style antitrust law *could* trigger a race to the bottom, that is, pressure on the European Union and others to degrade their law so as not to disadvantage their own businesses in world competition.

Here is a scenario, through the eyes of a hypothetical European who embraces European-style competition law:

E.U. abuse of dominance law is good for society. It maintains the right economic, fairness, and governance values, which are good for Europe and good for the world. But given the globalization of markets, Europe cannot maintain this system unless the United States adopts it too. Otherwise European businesses will pay higher costs than do American firms, American firms will outcompete European firms, and investment will gravitate to American shores. Europe might be forced to downgrade its law to the American standard—soulless, short-term aggregate efficiency based on assumptions of well-functioning markets. To the extent that Europe stands its ground, the competition it faces from lower-cost American firms is unfair competition.

Perhaps this perspective is neither hypothetical nor entirely altruistic. The European Union has a policy to require hopeful E.U. members to adopt (to “approximate”), more or less, into their *national* legal systems, the major bodies of law of the European Community, prominently including competition law.⁴³ The policy is designed to create common conditions of competition at high standards⁴⁴ and equalize (i.e., raise outsiders’) costs. Thus, the European Commission explains:

Another reason for legislating at the Community level has been the need to create and maintain equal conditions for economic operators. Competition could be distorted if undertakings in one part of the Community had to bear much heavier costs than in another and there would be a risk of economic activity migrating to locations where costs were lower. . . . The implementation of high common standards of protection is among the Union’s objectives and at the same time helps to ensure this “level playing field.”⁴⁵

law explicitly puts efficiency above fairness. See, e.g., *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). *Brooke Group*’s demanding requirements for proof of price predation have been rejected expressly by the European Court of Justice. See Case C-333/94 P, *Tetra Pak Int’l S.A. v. Commission*, 1996 E.C.R. I-5951.

⁴³ See Fingleton, Fox, Neven & Seabright, *supra* note 9, at 54-56.

⁴⁴ “High” standards for antitrust is a subjective and relative concept. A “high” standard of protection against abuse of dominance in the European Union might be seen as a low standard in the United States (through the prism of efficiency).

⁴⁵ White Paper on Enlargement, *supra* note 39, ¶ 2.13. Officials of the European Union have suggested that internationalization of competition policy ultimately should include adoption of common substantive principles of law for international transactions, and they commonly envision those principles as E.C. principles. See van Miert, WTO and Competition Policy, *supra* note 28.

Given U.S. efficiency-based law, the European Union may regard itself as caught in a race to the bottom. Perhaps responding to the pressure on its businesses, E.U. law is converging with U.S. law in various important respects.⁴⁶

C. Efficiency-Based Antitrust Law That Is Not U.S. Style

In the above version of “high standard” antitrust, this Essay assumed that deviation from a U.S. efficiency model is explained by nonefficiency goals, e.g., fairness in protecting smaller firms from abusive domination. But the United States does not have a monopoly on defining “efficiency.”⁴⁷ Deviation from the U.S. model might be attributable to nations’ different requirements or strategies for creating and maintaining efficient markets. For example, as Polish, Hungarian, Indonesian, and South African officials have said, their countries need to “grow” competition. They need to create hospitable environments for building systems of competition on the merits. They especially need hospitable environments for the entry and growth of small and medium-sized firms. In these nations, capital may be hard to get, capital markets may not function well, and the risk of an entrepreneur’s failure or setback (e.g., by cronyism, renationalization, or new grants of special privilege) in connection with new or renewed entry is likely to be higher than it is in mature, stable market economies. Thus, the U.S. rules on laissez-faire price predation or market foreclosure may not be the efficient rules for non-U.S. countries.⁴⁸

In this context we may find a stronger claim that the U.S. model induces a race to the bottom. If the forces of globalization put pressure on countries to adopt austere U.S.-style antitrust law (a plaintiff

⁴⁶ The law on vertical restraints is the most prominent example. See Joseph F. Winterscheid & Margaret A. Ward, *Two Part Harmony: New Rules for Vertical Agreements Under European Union Competition Policy*, *Antitrust*, Summer 2000, at 52, 52 (stating that major E.U. reforms in treatment of vertical restraints bring E.U. rules closer to those of United States). Changes in U.S. antitrust law beginning in the mid to late 1970s were likewise a response to efficient foreign competition. See Fox & Sullivan, *supra* note 35, at 944-45; see also Eleanor M. Fox, Chairman Miller, *The Federal Trade Commission, Economics, and Rashomon*, *Law & Contemp. Prob.*, Autumn 1987, at 33 (describing politics of change to less interventionist antitrust regime). While it is politically correct today to call the U.S. law of the 1960s wrongheaded and to call the changes of the 1980s and 1990s a move towards reason and enlightenment, the fact is that the law of the 1960s was supported by a vision and values. Antitrust law based on these values simply was no longer sustainable in the face of globalization and the pressures towards short-term efficiency. U.S. Supreme Court Justices Douglas, Black, and Warren, who championed the autonomy, power dispersion, and economic democracy values of U.S. antitrust law, well may have seen globalization as an ineluctable pressure towards the bottom.

⁴⁷ See Fox & Sullivan, *supra* note 35, at 971-74 (noting different views of efficiency even within United States).

⁴⁸ See Fingleton, Fox, Neven & Seabright, *supra* note 9, at 20-61, 174-75.

virtually never wins a U.S. price predation case because low prices *are* competition and crushed competitors are not in themselves a concern), this pressure may force non-U.S. countries to accept the U.S. model in order to enhance their established firms' competitiveness and thus may undermine the ability of a developing or reindustrializing nation to create an efficient economy—especially an efficient economy that includes its citizens among the players.⁴⁹

D. No Antitrust Law as a Possibly Efficient Choice

Some countries choose no antitrust law. Why?

One hypothesis is: to attract business and investment. Business might want freedom to do what antitrust usually prohibits (freedom to cartelize, monopolize, raise rivals' costs, merge to market power, and in some circumstances to price discriminate, tie, refuse to deal) and firms might value this freedom more than they value protection against rivals' predations.

A second hypothesis is: Antitrust law and its enforcement is expensive; it takes resources. For practical and political reasons it may be difficult to enforce the law effectively, and it may be especially difficult to enforce the law where the gains are greatest, such as where restrictive state action or state investment is involved. Antitrust proponents that have in mind efficient antitrust may fear that their nation's legislators, when called upon to adopt an antitrust law, will adopt an overregulatory and protectionist law. Moreover, the marginal gains to economic welfare from antitrust may be small, and may be negative if antitrust becomes protectionist or a source or trigger for the grant of special privileges.⁵⁰ The small marginal gains possibility would be more likely if the economy were small and open, in which case domestic traded-goods markets will be protected by inbound foreign competition. As for particularly harmful domestic anticompetitive conduct that spills over to world markets, the nation may be able to rely on prosecution by mature antitrust jurisdictions such as the United States for enforcement.

The first hypothesis—freedom from antitrust will attract business—is relatively unlikely to be the case. If the attracted business

⁴⁹ See Fox, *supra* note 6, at 593 (suggesting that nations may need to bring their own people into economic mainstream in order to fulfill their potential for business efficiency and competitiveness).

⁵⁰ See William H. Page, *Antitrust Review of Mergers in Transition Economies: A Comment, with Some Lessons from Brazil*, 66 U. Cin. L. Rev. 1113, 1113-15 (1998) (emphasizing "susceptibility of antitrust to perverse enforcement"); A.E. Rodriguez & Mark D. Williams, *Recent Decisions by the Venezuelan and Peruvian Agencies: Lessons for the Export of Antitrust*, 43 Antitrust Bull. 147, 152 n.8 (1998) (noting incentives to reward investors with monopoly privileges).

sells abroad instead of or as well as in the host nation, its anticompetitive practices will be subject to scrutiny in consumer jurisdictions with antitrust laws.⁵¹ There is no escape from antitrust. If, on the other hand, a firm invests in Country A because it wants to serve Country A's consumers, the attraction is Country A. Although an excessively burdensome law of Country A could be a factor that marginally dissuades investment, by definition, freedom from antitrust would not have been the attraction.

The second hypothesis—an antitrust regime will cost more than it is worth—possibly could hold true for small, open economies such as Hong Kong or Singapore.⁵² If it does, pressure on the nation to adopt a competition law could be a pressure toward the bottom.⁵³

E. Antitrust Law, or Lack of It, for Nationalistic Ends

There are, to be sure, quite troublesome deviations from good antitrust law, whether "good" is defined in terms of efficient outcomes or in terms of protecting the competition process. For example, nations may offer anticompetitive attractions to particular firms to induce them to locate or invest in the nation.⁵⁴ One form of inducement is *law* that lets firms restrain trade anticompetitively. Another is selective nonenforcement of law, letting particular firms restrain trade anticompetitively in return for their coveted establishment or investment. In these cases there is no ambiguity between top and bottom, and there is a case for checking an internation game⁵⁵ that results in degraded law.

For example, nations' antitrust laws commonly do not cover, or else exempt, export cartels. Yet such cartels hurt foreigners, and outbound cartels also commonly distort competition in the world and therefore hurt even the home country (though less, and less immedi-

⁵¹ See *supra* note 33 and accompanying text.

⁵² Such economies, however, must be cautious in reaching this conclusion. Offshore competition will not protect the economy from restraints involving services (e.g., energy), untraded goods, and goods with high transportation costs. See Pun-Lee Lam, Dominance in Hong Kong's Gas Industry, 16 Rev. Indus. Org. 303, 305-07 (2000) (analyzing alternative models to safeguard competition in Hong Kong gas industry).

⁵³ The negative pressure, however, would have to be discounted to the extent that the no-antitrust advantage depends on a free ride on other nations' enforcement. Moreover, analysis should take account of the fact that competition law itself almost always exerts useful pressures towards openness, transparency, and meritocracy.

⁵⁴ See Rodriguez & Williams, *supra* note 50, at 152 n.8.

⁵⁵ The selective nonenforcement "game" would occur, however, only if other nations responded by competing for the investment of the privileged firm by offering corresponding privileges. This is relatively unlikely to happen or to be significant.

ately, than they hurt foreigners).⁵⁶ Enforcement at the source of the wrong is usually most efficient, for the targeted victims are often left with no practical remedy. Export cartel exemptions are common even in nations such as the United States, where cartel conduct is considered so egregious when it hurts Americans that cartels go to jail.

Nations give excuses for blinking or shrugging at export cartels. One explanation—a modest view of the state's authority to regulate acts that radiate beyond national borders—is plausible and, where authentic, is not attributable to bad world citizenship. The limits-of-sovereignty explanation for not proscribing export cartels is especially believable if it does not coexist with a generous extraterritorial stretch of national law when the attenuated application advantages the nation's citizens over foreigners.

A U.S. limits-of-sovereignty motivation seems doubtful. The U.S. example seems, rather, to fit the mutual-degradation hypothesis. The United States provided an exemption from the Sherman Act for export associations notified to the Federal Trade Commission by the Webb-Pomerene Act of 1918.⁵⁷ Congress invoked as a major reason for the legislation the fact that trading partners offered export exemptions and that therefore U.S. antitrust law was handicapping American business in comparison with business located abroad.⁵⁸

The hypothesis that nations may try to attract or retain business establishments by giving U.S.-located businesses freedom to harm foreigners (as far as the United States is concerned) is not wholly implau-

⁵⁶ See Eleanor M. Fox & Janusz A. Ordover, *The Harmonization of Competition and Trade Law—The Case for Modest Linkages of Law and Limits to Parochial State Action*, *World Competition*, Dec. 1995, at 5, 8-9, 15-20 (describing downward spiral and proposing world welfare standard with derogations for nonparochial sovereignty claims); Frédéric Jenny, *Globalization, Competition and Trade Policy: Issues and Challenges*, in *Towards WTO Competition Rules*, *supra* note 1, at 3, 22-23 (showing how developing countries are prime victims of anticompetitive practices).

⁵⁷ Act of Apr. 10, 1918, ch. 50, § 2, 40 Stat. 516, 517 (codified as amended at 15 U.S.C. § 62 (1994)).

⁵⁸ In *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199 (1968), the Supreme Court reviewed the legislative history of the Webb-Pomerene Act, and quoted Representative Carlin as saying, “I am frank to say that personally I have no sympathy with what a foreigner pays for our products,” *id.* at 207 (quoting To Promote Export Trade, and for Other Purposes: Hearings on H.R. 16707 Before the House Comm. on the Judiciary, 64th Cong. 7 (1917) (statement of Rep. Carlin)), as well as Senator Pomerene’s statement that “[w]e have not reached that high plane of business morals which will permit us to extend the same privileges to the peoples of the earth outside of the United States that we extend to those within the United States,” *id.* at 207-08 (alteration in original) (quoting 55 Cong. Rec. 2787 (1917) (statement of Sen. Pomerene)). The noncoverage was reinforced and broadened by the Foreign Trade Antitrust Improvements Act of 1982, Pub. L. 97-290, tit. IV, 96 Stat. 1233, 1246-47 (codified as amended at 15 U.S.C. §§ 6a, 45(a)(3) (1994)).

sible. It is certainly not difficult to induce national legislatures to confer such largess; foreigners do not vote.

This Essay already has discussed export cartels, the immediate and greatest harmful effect of which is external. The Essay now considers freedom from antitrust altogether, presupposing (in contrast to Part III.D above) wholly negative motivations: A nation may decide to run a cartel haven as a strategy for attracting businesses to locate and remain in the nation.

If the country is democratic and consumer-conscious, this strategy may be difficult to implement for local markets, because citizens will bear the costs of the private restraints. Further, few markets today are wholly local, and as noted above in Part III.D, in a world that now largely recognizes effects-based jurisdiction, the walls of the citadel have been breached. The promised haven will be illusory and the cartelists will not be protected from antitrust enforcement. Therefore, haven building is an unlikely explanation for a nation's choice not to adopt an antitrust law.

Finally, nations may grant special privileges, either by not enforcing their law against nationals that anticompetitively exclude foreigners, or by giving special rights—such as sole import licenses or government procurement business—to nationals. These privileges may be a means to keep domestic businesses at home and are not likely to be a means to *compete* for the investment or establishment of foreign businesses. These are discriminatory, nationalistic, cronyist practices. Practices of this sort obstruct the world trading system. They are in part controlled by the WTO, albeit weakly. They may be candidates for stronger control in the world trading system.

F. Race to the Top

Thus far we have considered the possible competition of nations for business and investment. We might observe a second form of competition. Fittingly for competition law, nations compete for buyers of the products and services offered by firms located within the nation. The competition for buyers means that nations, in their regulatory choices, have the incentive to seek ways and construct environments likely to make "their" businesses responsive to buyers. This competition may be seen as a race to the top.⁵⁹

⁵⁹ "Top," however, is normative. As used here, it implies that aggregate efficiency is the best course. It ignores other concerns, e.g., diversity, distribution of economic opportunity, protection from economic abuse. Those who fought the war against the Chicago School takeover of antitrust would not agree that aggregate efficiency is the top. See, e.g., Walter Adams & James W. Brock, *Antitrust and Efficiency: A Comment*, 62 N.Y.U. L. Rev. 1116, 1121-24 (1987) (arguing that major problem of antitrust is problem of size);

We can observe this phenomenon in both the United States and the European Union. In the 1960s, U.S. antitrust law was synergistic with civil rights law; it protected the underdog. It protected the freedom of independent traders to sell where and to whom they chose, and protected their right not to be fenced out of any significant market by the use of leverage. It valued market governance by impersonal forces, rather than by dominant firms.⁶⁰

This humanistic form of antitrust did not survive an economic recession, growing international competition, and inroads by foreign competitors into U.S. markets. The Reagan revolution of the early 1980s reversed the antitrust paradigm; since then the common wisdom has been: Competition is an economic modality for the purpose of producing efficient markets, and antitrust law is a tool to aid the process in the event of market failure.⁶¹

The second example is a European example. European competition law is based on an eclectic set of objectives: to integrate the common market, to protect firms from abusive domination, to provide openness and access, to level the playing field, to foster efficiency and competitiveness, and to serve citizens as consumers. Perhaps seeing the nonefficiency goals and the regulatory nature of its system as handicapping, the European Union has embarked upon projects of reform. Thus, the European Union has relaxed notification requirements for vertical (e.g., distribution) agreements, has provided a safe harbor for a large number of vertical agreements that do not threaten harm to efficiency, and has launched a major project for procedural reform that drastically will reduce governmental surveillance of private agreements.⁶²

Gordon B. Spivack, *The Chicago School Approach to Single Firm Exercises of Monopoly Power*, in *Antitrust Policy in Transition: The Convergence of Law and Economics* 83, 83-86, 95-101 (Eleanor M. Fox & James T. Halverson eds., 1984) (noting that Congress clearly intended antitrust laws to prohibit use of leverage and thus to ensure less powerful firms access to markets on basis of merit rather than power, and that fact that leveraging is often not inefficient and even may be efficient is not acceptable reason for jurists to change law to reflect their view of public interest).

⁶⁰ See Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 Cornell L. Rev. 1140, 1151-52 (1981).

⁶¹ See Fox & Sullivan, *supra* note 35, at 957-59.

⁶² For the liberalization of E.U. law regarding vertical agreements, see Winterscheid & Ward, *supra* note 46, at 53-54. For procedural liberalization that would eliminate the system of notification and approval of agreements and would give to E.U. member states the power to exempt agreements, see White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, COM(99)101 final.

G. Competition to Be the Model for the World

There is a third form of competition. This is a particular competition between the United States and the European Union to expand the geographic scope of their law. The European Union and the United States use one common mode and two divergent modes in competing for this hegemony.

The common vehicle is advocacy in the course of advice and technical assistance for implementing competition laws. There are many "buyers" in this market. Some 100 countries in the WTO do not have competition laws, and many forces and sources—the International Monetary Fund, the World Bank, the European Union, and the United States—are priming these countries to want them. This is virtuous competition to the extent that the country "buying" competition law is free to choose its competition law (or to choose no competition law) on the merits and is sufficiently well informed to make a rational choice. But these conditions may not be met.

The United States follows the route of extraterritoriality, while the European Union follows the route of Europe Agreements and free trade agreements. As we have seen, hopeful future members of the European Union *must* adopt E.C.-like competition law into their national law.⁶³ In addition, Europe Agreement partners must, and other free trade partners normally must, agree to apply E.C. principles to competition problems in the free trade area.⁶⁴

This competition may be a race either to the bottom or to the top if one characterizes the law of one of the contestants as inferior and the other as superior. In any event, the European Union is winning the competition. More nations are finding the E.U. model, in contrast to the U.S. model, congenial to their economies and polities.⁶⁵

This competition between the systems is competition in the course of exporting law, not importing law. The dominant exporter will have the stronger position in the world when, and if, multinational businesses find it no longer tenable *not* to have one overarching set of rules of the game. At a more advanced stage of globalization and world integration, the question will be, then, whether the United States will maintain its veto over world competition law, or whether it will give up principle for greater gain.

* * *

⁶³ See Jakob, *supra* note 5, at 403, 426-34.

⁶⁴ See *id.* at 405-06, 411-12, 429-34.

⁶⁵ See William E. Kovacic, *Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies*, 66 U. Cin. L. Rev. 1075, 1086-89 (1998).

In sum, there may be races to the bottom in connection with competition law and its coverage. A dominant aspect of these races involves nationalistic strategies that result in negative externalities exceeding national costs.⁶⁶ Also, as to substantive norms or the rules that embody them, nations that wish to protect firms from unfair abuses may find U.S. efficiency law a negative pressure tending to squeeze social concerns out of the law.⁶⁷ Similarly, developing countries may find U.S. law a negative pressure countering ground-up efforts to become economically inclusive, efficient societies.⁶⁸ Negative effects of races to the bottom may be counteracted by races to the top such as the competition for buyers in world markets.

IV

REGULATORY DISREGARD OF PEOPLE AND SYSTEMS BEYOND NATIONAL BORDERS

Analysts who ask the questions posed above normally do so on the basis of the following assumptions: Regulation (if any) at the lowest political level is best because it tends to preserve autonomy, accountability, and efficiency. Competition among states for people or businesses, by fostering regulatory systems that people prefer, normally will improve the quality of regulation. Only if competition for people or business induces states to degrade their standards will higher-level regulation possibly be appropriate; more inquiry then would be needed to determine if the benefits in suppressing perverse competition are greater than its costs.

But the categories above—races to bottom or top and regulatory competition—are not complete.⁶⁹ They ignore a critical phenomenon that may undermine the pursuit of the most effective regulation. This additional phenomenon is not a result of national systems competing beneficially or perversely against one another, but a result of nations' acting as if they stood alone when they do not. It is a result of nations' acting in disregard of a larger affected community. By one narrow view, the challenge we face is: How might nations improve their coor-

⁶⁶ See supra Part III.E.

⁶⁷ See supra text accompanying notes 43-45.

⁶⁸ See supra Part III.C.

⁶⁹ Moreover, the postulated alternatives are incomplete. The literature commonly poses the choice as regulatory competition or (to avoid a race to the bottom) harmonized standards. See Esty, *supra* note 31, at 215 (introduction to collection of papers on regulatory competition). The choices are in fact much richer. There are numerous opportunities for linking national systems and dissipating systems conflict, some of which are suggested in *infra* Part V. The simplistic postulated choice—regulatory competition or a world code—is frequently used as a straw man to discredit, and not to deal with, nuanced internationalism. See, e.g., Klein, *Anticipating the Millennium*, *supra* note 29, at 9-10.

dination on a horizontal basis? In the author's view, however, lack of sufficient horizontal government-to-government cooperation is not the major problem. Government officials acting for their governments, and sometimes also to solidify personal position, reputation, or power, are not sufficiently incentivized to treat larger-than-national problems as holistic problems of the wider community. A Boeing/McDonnell Douglas merger remains a Boeing (competitiveness) problem for the United States and an Airbus (competitiveness) problem for the European Union. Moreover, in this globalized world of very free movement for mobile factors—capital, business, skilled workers—national officials are less and less true agents for "their" polity.⁷⁰

There is a need for an international economic order in which at least some players are charged with responsibility to enhance the welfare of the entire community. Comprehensive global solutions are normally overbroad, inflexible, and unnecessary. They instill the fear of loss of sovereignty. In its most convincing form, the sovereignty concern implies "the widespread sense that international integration interferes with the ability of government to deliver the benefits the citizenry want."⁷¹ The sovereignty and bloated distant bureaucracy concerns can be allayed by targeted answers to particular problems. These problems are most in need of solutions, and need feasible solutions that do not touch the raw nerves of national independence.

Competition problems that are bigger than nations and may answer to this description include mergers in truly transnational markets; duplicative, pile-on premerger control; beggar-thy-neighbor nationalistic strategies; and systems clashes. This Essay considers all of these categories below. Problem solving in these categories requires a conception of the world that rises above political borders.

⁷⁰ See Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 Mich. L. Rev. 167, 169 (1999) (arguing that traditional international relations paradigm based exclusively on interstate relations is now inadequate, and that domestic interest groups cooperate with similarly situated foreign interest groups to exploit less organized and more vulnerable groups).

⁷¹ Lawrence H. Summers, Distinguished Lecture on Economics in Government: Reflections on Managing Global Integration, *J. Econ. Persp.*, Spring 1999, at 3, 7, 9-10, 17 (arguing that world economic integration is critical for economic welfare and peace, but is daunting challenge in view of needs for governance and concerns for loss of sovereignty; and stating that reconciling integration, governance, and sovereignty is "economic integration trilemma").

V

A CASE FOR SELECTIVE INTERNATIONALIZATION OF
COMPETITION LAW*A. Problems*

Race-to-the-bottom discourse could produce an agenda to control export cartels, discrimination against nonnationals, and antidumping laws, all of which evidence mutually degrading behavior by nations. But race-to-the-bottom analysis has a built-in perception limitation. By focusing on horizontal competition among nations, the discourse steers the mind away from the global picture. A global picture is necessary to give further insight into problems that can be solved, and opportunities that can be seized, to enhance world welfare.⁷²

The global picture implies a borderless conception of the world. A borderless conception implies the treatment of a market problem without national boundaries, or alternatively, a treatment of each problem as if all harms and benefits fall within the geographic bounds of the same polity. A borderless conception would have benefits in solving the following problems, some of which are overlapping, and some of which reflect the race-to-the-bottom phenomenon.

1. The Vision Problem

Antitrust confined to national law obscures the full dimensions of world problems. Thus, when the European Community sought to impose on IBM Europe the duty to disclose to competitors the interface changes of new products, it did not have the incentive to take account of the effects of predisclosure on IBM (international) or on inventiveness in general,⁷³ and IBM did not have the power to protect itself from this blinder vision. When Mannesmann and Italimpiante, the last two producers of seamless steel pipes appropriate for oil drilling in less-developed countries, planned to merge, neither they nor their home nations (Germany and Italy) had the incentive to protect China and the rest of the buyer market, and the buyer markets did not have

⁷² See Fox & Ordover, *supra* note 56, at 14-17; see also Thomas Christiansen, European Integration Between Political Science and International Relations Theory: The End of Sovereignty 26-33 (European Univ. Inst. Working Paper RSC No. 94/4, 1994) (analyzing European Union as new post-Hobbesian order made up neither of coequal sovereign states nor sovereign Union but offering porous sovereignty with different and varying degrees of authority depending on task and interests of community and states).

⁷³ See Eleanor M. Fox, Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness, 61 *Notre Dame L. Rev.* 981, 1011-17 (1986) (describing European proceedings against IBM after U.S. government withdrew case against IBM in belief that such action would chill innovation).

the practical ability to protect themselves from the monopolization.⁷⁴ Proper analysis requires a vision from the top.

2. *The Proliferation Problem*

Some eighty nations now have competition laws.⁷⁵ Approximately fifty require premerger notification and the lapse of a waiting period during which time the authorities analyze the merger.⁷⁶ The number of countries with premerger control is growing. Firms whose business or conduct crosses borders often must comply with numerous national laws at once. The laws are not identical, and even identical words in statutes are often interpreted and applied differently. In some instances the problem of proliferation and overlap (against the background of accepted principles of extraterritoriality) is so extreme as to need immediate solution. This is so in the area of premerger control, where one small country (in terms of a merger's impact) can delay an entire transaction that has passed through the clearance process in some twenty or thirty other jurisdictions.⁷⁷

3. *The Nationalism (Externality) Problem*

Nations tend to make competition-law decisions based on what is good for the nation at the expense of the world. Europe supported Airbus in opposing Boeing's acquisition of McDonnell Douglas, and America supported Boeing in completing the acquisition.⁷⁸ Japan's MITI has supported the Japanese glass industry against claims of a market-blocking cartel and Fuji Film against claims of monopolistic exclusion of Kodak, while American agencies or officials have supported the U.S. glass industry and Kodak in connection with their claims of unlawful exclusion.⁷⁹

⁷⁴ See Case No. 3622 (C2227), Fiatimpresit-Mannesmann Demag-Techint/Italimpiante, Bollettino della Autorita Garante della Concorrenza e del Mercado, Mar. 4, 1996, §§ 15-16, 70-71, 130 (Italian Antitrust Auth. 1996) (English translation on file with the *New York University Law Review*).

⁷⁵ See ICPAC Report, *supra* note 4, at 33.

⁷⁶ See *id.* at 37, 89 n.4.

⁷⁷ See *id.* at 37, 41, 90-94. For the costs of the proliferation of merger control, see Douglas H. Ginsburg & Scott H. Angstreich, *Multinational Merger Review: Lessons from Our Federalism*, 68 *Antitrust L.J.* 219, 219-22 (2000).

⁷⁸ See ICPAC Report, *supra* note 4, at 55-56; see also Eleanor M. Fox, *Antitrust Regulation Across National Borders: The United States of Boeing Versus the European Union of Airbus*, *Brookings Rev.*, Winter 1998, at 30 (explaining how antitrust case got derailed into near trade war).

⁷⁹ See Report of the Panel, *Japan—Measures Affecting Consumer Photographic Film and Paper*, WTO Doc. WT/DS44/R, (Mar. 31, 1998), available at <<http://www.wto.org>>; ICPAC Report, *supra* note 4, at 211-14.

Possibly for nationalistic reasons, nations refuse to prohibit their nationals from doing abroad acts that are prohibited, even criminally, at home. This is so even where the nation into which the sales are made also condemns the conduct but finds enforcement beyond its practical power and resources.

Moreover, nations selectively may fail to enforce their laws when the would-be defendants are nationals and the victims are foreign. Such anticompetitive practices create a market access problem, encapsulated in the Japanese glass and film (perceived) incidents.⁸⁰

State trade-restraining measures, including state-authorized standards, exemptions, and derogations,⁸¹ may stem from nationalistic impulses, and may be patently excessive in view of legitimate goals. Some such measures are caught by the prohibitions of the WTO, but many, including blessings in the form of a state-action defense, act of state, or sovereign compulsion, are not.⁸² There is no international understanding of what is or is not appropriate government intervention to limit trade. Examples of situations that would have profited from common understandings, or at least transparency and clarity about the limits of government action with negative external effects, include the uranium cartels and boycotts of the 1970s⁸³ and the Russian aluminum market-flooding problem of the early 1990s.⁸⁴

Easily-triggered antidumping laws likewise present a problem of state restraints on trade and competition. Not only do antidumping laws directly restrain trade and competition, but threats of invoking these laws are a major facilitator of world cartels.⁸⁵ The antidumping problem appears, appropriately, on many agendas for reform. In concept it fits neatly into the list of competition-related state restraints of trade.⁸⁶

⁸⁰ See ICPAC Report, *supra* note 4, at 211-14.

⁸¹ An example is the European standard for electronic paging equipment, which was set in view of the needs and interests of European industry. See Eleanor M. Fox, *The Problem of State Action That Blesses Private Action That Harms "The Foreigners,"* in *Towards WTO Competition Rules*, *supra* note 1, at 325, 327-31.

⁸² See *Trugman-Nash, Inc. v. New Zealand Dairy Bd.*, 954 F. Supp. 733 (S.D.N.Y. 1997) (dismissing U.S. importer's claims against New Zealand Dairy Board based in part on finding that Board had mandated lessening of export competition); Fox, *supra* note 81, at 326.

⁸³ See *United Nuclear Corp. v. General Atomic Co.*, 629 P.2d 231 (N.M. 1980).

⁸⁴ See *Hammons v. Alcan Aluminum Corp.*, 1997-1 Trade Cas. (CCH) ¶ 71,714 (C.D. Cal. 1996), aff'd mem., 132 F.3d 39 (9th Cir. 1997), cert. denied, 525 U.S. 948 (1998).

⁸⁵ See Richard J. Pierce, Jr., *Antidumping Law as a Means of Facilitating Cartelization*, 67 Antitrust L.J. 725, 742-43 (2000) (proposing that antidumping laws be replaced with antitrust predation law or, at least, that antitrust authorities should conduct thorough investigation of conduct of every firm that files antidumping complaint).

⁸⁶ See Mitsuo Matsushita, *Reflections on Competition Policy/Law in the Framework of the WTO*, in 1998 Annual Proceedings, *supra* note 28, at 31, 47-51; see also Fox & Ordover, *supra* note 56, at 31-32.

4. *The Problem of Systems Clash*

One nation may allow, and sometimes wish to facilitate, what another nation prohibits. Systems clash may lead to hostilities, possibly culminating in a trade war (as nearly occurred in the matter of Boeing/McDonnell Douglas) or in nationalistic measures (blocking and claw-back statutes, as in the British Protection of Trading Interests Act of 1980).⁸⁷ Jurisdictional free-for-alls are increasingly accepted.⁸⁸ There are no overarching rules or protocols to channel behavior so as to alleviate such conflicts, and no rules for choice of law, jurisdictional priority, or proportionality. Therefore, the most restrictive jurisdiction always wins.

B. Opportunities

The case for internationalization does not depend merely on a specific catalog of problems. The case may be based, more affirmatively, on opportunities.

Educational opportunities are waiting to be realized. The competition laws of nations are divergent. To some extent this is so merely as a result of lack of information and understanding. Nations' laws tend to achieve greater convergence through cross-fertilization. Also, numerous countries recently have adopted or are contemplating the adoption of competition laws.⁸⁹ These include several less-developed countries.⁹⁰ They need technical assistance and could profit from benchmarking and competition peer reviews. Formalization of educational and assistance projects could help solidify the infrastructure of competition law. A firmer world infrastructure with a body of common understanding could lead not only to the anchoring of markets (and often, thereby, of democratic institutions),⁹¹ but also to the strengthening of common cause, e.g., against both world cartels and local corruption and privilege.

Second, some WTO agreements now prohibit certain private or other commercial restraints.⁹² More such agreements are likely to fol-

⁸⁷ See Eleanor M. Fox, Extraterritoriality, Antitrust, and the New Restatements: Is Reasonableness the Answer? 19 N.Y.U. J. Int'l L. & Pol. 565, 583-84 (1987) (noting international acceptance of jurisdiction based on intended effects in regulatory nation).

⁸⁸ See Eleanor M. Fox, Extraterritoriality and the Merger Law: Can All Nations Rule the World?, Antitrust Rep., Dec. 1999, at 2, 2-7.

⁸⁹ See ICPAC Report, *supra* note 4, at 33.

⁹⁰ See Carlos M. Correa, Competition Law and Development Policies, in *Towards WTO Competition Rules*, *supra* note 1, at 361, 366.

⁹¹ See Dani Rodrik, The New Global Economy and Developing Countries: Making Openness Work 90-95 (1999) (arguing that democratization is complement to economic reform and stability).

⁹² See Matsushita, *supra* note 86, at 31, 34-35.

low. The General Agreement on Trade in Services and its Telecommunications Annex are examples.⁹³ These agreements contain competition law vocabulary, such as “anticompetitive practices” and “abuse [of] monopoly position,” without definition of these terms.⁹⁴ There is a particular need for the WTO nations either to adopt a choice-of-law principle in relevant WTO agreements or to develop common understandings of the competition concepts upon which market actors (e.g., telecommunications companies) can rely in conducting their affairs and upon which dispute settlement panels may draw.

Many measures would be useful in facilitating the enterprise of better⁹⁵ and more nearly seamless competition policy for the world. GATT/WTO rules and concepts of transparency, proportionality, national treatment, mutual respect, due process, and a prophylactic principle in favor of openness, are among the most obvious. As markets become more integrated, the benefits of such disciplines will become more apparent, and their adoption more natural.

CONCLUSION

I have suggested elsewhere how principles and opportunities might be translated into helpful links in a world system. I have proposed, for example, a modest extension of WTO obligations to place on member states the responsibility to prevent market closure by artificial private as well as public restraints.⁹⁶ I also have proposed a common clearinghouse for multinational merger filings,⁹⁷ mutual recognition of merger filings,⁹⁸ and rules for choice of law in merger, monopoly, and market access cases, combined with a duty of national regulators to count all costs in the event of jurisdictional clashes.⁹⁹

⁹³ See, e.g., GATS art. VIII (regulating monopolies and exclusive service suppliers); GATS Annex on Telecommunications art. 5 (requiring WTO Members to provide access to public telecommunications networks).

⁹⁴ See GATS art. VIII(2) (requiring WTO Members to ensure that legal monopoly not “abuse its monopoly position” when supplying service outside its monopoly rights); Reference Paper, *supra* note 27, at 367 (describing various “anti-competitive practices” and defining “essential facilities” in telecommunications context).

⁹⁵ By “better” I mean either enhancing world welfare or moving national systems into a more nearly frictionless relationship with one another, for political as well as economic ends.

⁹⁶ See ICPAC Report, *supra* note 4, annex 1-A (separate statement of committee member Eleanor M. Fox); Eleanor M. Fox, Competition Law and the Millennium Round, 2 J. Int'l Econ. L. 665, 665-66, 671-78 (1999) [hereinafter Fox, Millennium Round]; Eleanor M. Fox, Toward World Antitrust and Market Access, 91 Am. J. Int'l L. 1, 1-2, 13-17 (1997).

⁹⁷ See ICPAC Report, *supra* note 4, annex 1-A (separate statement of committee member Eleanor M. Fox).

⁹⁸ See *id.*

⁹⁹ See *id.*; Fox, Millennium Round, *supra* note 96, at 671-78.

These proposals appeal more to good sense than to practical politics. Despite rather clear net benefits of certain targeted higher-level solutions, there is an asymmetric demand of nations for higher-level solutions,¹⁰⁰ and national officials are still our bargaining agents for world regimes. The United States, in view of the country's extraordinary tools for self-help, has the least to gain and the most to lose from multilateral solutions.¹⁰¹ The developing countries have the most to gain but the least power to get what they want. However academic this Essay is at this time, we at least can observe that with regard to competition law, the race-to-the-top or bottom perspective is a side track. The big question is regulatory federalism in the shadow of regulatory disregard and in the context of globalization: How should we, how can we, reorder economic regulation so that it works for us as citizens of the world?

¹⁰⁰ See Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. Rev. 1501, 1504 (1998) (arguing that net importers will tend to impose too much antitrust enforcement and net exporters will tend to underregulate); Jenny, *supra* note 56, at 22-23 (noting greater vulnerability of less developed countries to international cartels).

¹⁰¹ The United States would lose a modicum of hegemony. Internally, U.S. antitrust officials would lose power to U.S. trade officials.