

ESSAY

ANTITRUST AND INTERNATIONAL REGULATORY FEDERALISM

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In this Essay, Andrew Guzman proposes internationalization of antitrust law to supplant current methods of antitrust regulation across national borders. Specifically, instead of relying on local regulation, bilateral agreements between states, or a choice-of-law rule for antitrust enforcement, countries should adopt universal substantive standards. Moreover, Guzman recommends the World Trade Organization (WTO), which already employs a dispute resolution mechanism, as the governing forum for international antitrust issues. There, states can negotiate transfer payments in one international transaction to achieve agreement in another. Upon evaluating Professor Eleanor Fox's proposal of a stand-alone World Competition Forum that would specialize exclusively in international antitrust negotiations, Guzman concludes that the WTO is the preferred forum. Its dispute resolution system would facilitate substantive cooperation among countries by allowing for concessions exchanged in antitrust as well as in other areas of international relations.

INTRODUCTION

Although the growth of international business activity is rightly heralded as one of the great payoffs from the current era of peace and international integration, it brings new challenges and problems for national regulatory systems. In many regulatory areas, the substantive law governing conduct is domestic while the activity itself is international. As a result, every state must accept that many activities within or affecting its jurisdiction will be regulated by foreign law—either exclusively or concurrently with local regulation. The alternative is the development of a substantive international regulatory system, which presents its own problems of delay, surrender of sovereignty, and international bureaucracy.

This Essay advances the claim that the regulation of international antitrust should be left neither to overlapping regulation nor to a choice-of-law rule intended to select a single governing jurisdiction. Instead, international business activity requires the adoption of sub-

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stantive international standards to govern antitrust. Furthermore, the place to establish such standards is the World Trade Organization (WTO), where a dispute resolution system already is in place and, more importantly, where states can offer concessions in one area to achieve agreement in another.¹

Several of the questions addressed in this Essay were recently discussed in this law review by Professor Eleanor Fox, the leading academic commentator on international antitrust issues.² Although I share many of her views on the subject, we disagree on the appropriate solution. She advocates the establishment of a stand-alone World Competition Forum for the negotiation of international antitrust,³ whereas I support the inclusion of negotiations within the WTO. This seemingly procedural difference in views is, in fact, critically important because it impacts the likelihood of the successful establishment of substantive cooperation in international antitrust.

In this Essay, I investigate whether we can rely on regulatory competition to deliver desirable cooperation, and I conclude that we cannot. I then explain why real substantive cooperation is required and show that it can only be achieved if some form of transfer payments—most likely concessions in other areas of international relations—can be arranged. Finally, I acknowledge and address some of the criticisms of the WTO, concluding that it remains the best forum for international antitrust negotiations.

I

THE CURRENT STATE OF COOPERATION

The continuing growth of international business activity has not been lost on domestic antitrust authorities. International transactions present a challenge to domestic enforcement agencies because their traditional tools of enforcement typically apply only within their own national boundaries. Without some form of cooperation among en-

¹ The question of how to move forward with the regulation of international antitrust is timely—there are serious calls for the inclusion of competition policy issues on the agenda for the next round of World Trade Organization (WTO) negotiations. The key proponents of inclusion are the European Union and Canada. See *The EU Approach to the WTO Millennium Round: Communication from the Commission to the Council and the European Parliament*, COM(1999)331 final at 11-12. The key opponent is the United States. See Joel I. Klein, *Anticipating the Millennium: International Antitrust Enforcement at the End of the Twentieth Century*, in *Annual Proceedings of the Fordham Corporate Law Institute: International Antitrust Law and Policy* 1, 8-10 (Barry E. Hawk ed., 1998) (arguing that “the United States takes a cautious approach” to the creation of WTO working group on competition policy).

² See Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 *N.Y.U. L. Rev.* 1781 (2000).

³ *Id.* at 1801, 1805-06 (proposing World Competition Forum).

forcement agencies, it is often difficult to build a case against a well-organized international firm or group of firms, even if the firm or firms are engaged in clear violations of domestic law. Important documents might be kept offshore; meetings among participants in, for example, a scheme to fix prices might be held outside the country, and the parties themselves might reside in several jurisdictions, making it difficult to bring them all before a single court.

Faced with the problem of international activity and domestic enforcement powers, antitrust authorities have cooperated in order to prevent the erosion of their ability to enforce domestic laws. This cooperation has taken a number of forms, the most important of which are described in this Section. Furthermore, procedural cooperation continues to develop, and new cooperative agreements are being reached.⁴

One of the most common and effective forms of cooperation in international antitrust takes the form of bilateral agreements among states.⁵ These bilateral agreements provide for the sharing of information between enforcement authorities where the actions of one country's regulators may affect the other country's interests.⁶ They

⁴ See *id.* at 1785-88 (discussing "state of play" of international antitrust).

⁵ For example, the United States has entered into such agreements with Mexico, Brazil, Japan, Australia, Israel, Canada, the European Communities, and Germany. 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; 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; 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; Agreement Between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance, Apr. 27, 1999, U.S.-Austl., reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,502A; 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; 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 [hereinafter Cooperation Agreement With Canada]; 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; Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, U.S.-F.R.G., reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,501.

⁶ For a more detailed discussion of how these agreements operate in practice, see Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. Rev. 343, 362-70 (1997), which discusses bilateral agreements. See generally John J. Parisi, *En-*

also provide for consultation between the affected states to resolve mutual or unilateral concerns and state that, where possible, the parties are to cooperate in enforcement matters.⁷ The high-water mark of cooperation in these agreements is a call for each party to take into account the impact of anticompetitive conduct on the other when considering an enforcement action.⁸ This laudatory objective, however, is not present in all bilateral agreements and provides neither particulars regarding how parties should take foreign interests into account nor a sanction for a failure to do so.

Although these bilateral agreements play an important role in the enforcement of antitrust laws, it is important to note that they do not go beyond the sharing of information. None of the agreements represent a compromise of domestic control over enforcement or any other loss of sovereignty.⁹ For example, domestic rules regarding confidentiality trump these cooperation agreements.¹⁰ In addition, states are explicitly allowed to take their own interests into account in determining whether they wish to cooperate.¹¹ There is no coordination of substantive laws, no establishment of minimum standards, and no accounting for the impact of one state's substantive laws on other states.¹²

forcement Cooperation Among Antitrust Authorities, 12 *Int'l Q.* 691 (2000) (discussing enforcement of cooperation agreements between international jurisdictions).

⁷ See, e.g., Cooperation Agreement With Canada, *supra* note 5, art. III (enforcement cooperation provisions).

⁸ See *id.* art. VI.1 (“[E]ach Party shall, having regard to the purpose of this Agreement as set out in Article I, give careful consideration to the other Party’s important interests throughout all phases of its enforcement activities . . .”).

⁹ There are two significant exceptions. Canada and the United States have entered into a treaty that provides for the use of compulsory powers to gather evidence in criminal antitrust cases and allows for the compulsory exchange of information. Treaty Between the Government of the United States of America and the Government of Canada on Mutual Legal Assistance in Criminal Matters, Mar. 18, 1995, U.S.-Can., 24 *I.L.M.* 1092. The United States also has entered into an agreement with Australia under the International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. § 6201 (1994), which represents a somewhat higher level of cooperation. See Daniel K. Tarullo, Norms and Institutions in Global Competition Policy, 94 *Am. J. Int'l L.* 478, 496 n.67 (2000) (critiquing effectiveness of proposed arrangements for changing state behavior to remedy international competition problems).

¹⁰ See, e.g., Cooperation Agreement With Canada, *supra* note 5, art. X.1 (“Notwithstanding any other provision of this Agreement, neither Party is required to communicate information to the other Party if such communication is prohibited by the laws of the Party possessing the information or would be incompatible with that Party’s important interests.”).

¹¹ See *id.* art. III.3 (stating that “[e]ach Party’s competition authorities will, to the extent compatible with that Party’s laws, enforcement policies and other important interests,” undertake certain specified cooperative action).

¹² See *id.*

The procedural cooperation that we currently see is broadly consistent with what one would expect from self-interested states and administrative agencies seeking to preserve their own influence.¹³ It should provide little or no comfort to those who believe that the regulation of cross-border activity requires a more coordinated international response. To see why this is so, consider the situation of domestic antitrust enforcement officials as international activity grows in importance. As more and more transactions gain an international focus, the task of ensuring compliance with domestic antitrust laws becomes more challenging: Much of the information needed to investigate and build a case might be outside the reach of enforcement officials; individuals who are suspected of violating the law or are familiar with the case at hand may be beyond the subpoena power of local officials; and so on. Nearly all of these challenges stem from the limited jurisdictional reach of domestic agencies rather than from the limits of substantive law. If domestic agencies are provided with access to information and individuals located abroad, they can enforce domestic laws more effectively.

By sharing information, enforcement agencies cooperate in such a way as to allow both themselves and their sister agencies to continue their work. Notice, however, that under this view there is no reason to think that domestic agencies are concerned about the international regulatory system. The procedural cooperation that is in place does not evidence a move toward a more international conception of antitrust. It simply represents the adaptation of domestic enforcement agencies to new international challenges.¹⁴ These agreements, important though they are, address only the question of how to enforce domestic laws.¹⁵ They say nothing about whether states have adopted laws that are appropriate for a global economy.

¹³ See Parisi, *supra* note 6, at 691 (discussing antitrust cooperation among international authorities).

¹⁴ See Enrico Colombatto & Jonathan R. Macey, *A Public Choice Model of International Economic Cooperation and the Decline of the Nation State*, 18 *Cardozo L. Rev.* 925, 935 (1996) (explaining that domestic agencies may engage in international cooperation to protect their own autonomy).

¹⁵ I do not mean to suggest that the enforcement question is a minor one. Indeed, enforcement may be an even greater challenge for international antitrust than the adoption of appropriate substantive laws. As discussed below, however, the most difficult problem will be ensuring the enforcement of antitrust laws by states that adopted such laws in order to obtain some other benefit. Existing forms of cooperation address a different problem—enforcing the laws preferred by the domestic state even when transactions are international.

II REGULATORY COMPETITION

If one accepts that existing cooperation falls short of what is needed to achieve true international antitrust regulation, one might ask if regulatory competition is able to generate a desirable outcome instead.¹⁶ In her recent Essay, Professor Fox addresses this question, concluding that there is a race to the bottom as well as a race to the top in competition law.¹⁷

As a semantic matter, the notion that there can be both a race to the bottom and a race to the top is inconsistent with the conventional use of those terms in corporate and securities law. In this Section, I seek to clarify the relevance of regulatory competition in the competition law context and discuss how policymakers should respond. On the one hand, the analysis reveals that we cannot rely on regulatory competition to generate desirable competition policies. On the other hand, we are not witnessing a race to the bottom, either. States do not have significant incentives to modify their competition laws in order to attract business. Rather, they have an incentive to establish those competition laws that are best for their own residents.¹⁸ The problem for international antitrust is that policies aimed at maximizing the welfare of local residents will not be, in general, the best policies from a global perspective.

The debate over regulatory competition has been well established in the corporate law literature in the United States for many years,¹⁹ and in recent years, it has become a central issue in the international securities literature.²⁰ The basic outline of this debate is straightfor-

¹⁶ I have argued elsewhere that regulatory competition has precisely this effect in the area of international securities regulation. See Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. Cal. L. Rev. 903 (1998).

¹⁷ Fox, *supra* note 2, at 1789-93, 1797-98.

¹⁸ Alternatively, one may believe that states establish policies that maximize the benefits enjoyed by policymakers. Regardless, it remains true that policies are aimed at achieving objectives other than maximizing global welfare.

¹⁹ See Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 Harv. L. Rev. 1435 (1992) (arguing for new approach to question of state competition for incorporation charters which combines elements of both sides of debate: those advocating "race for the bottom" thesis and those advocating "race for the top"); Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 Nw. U. L. Rev. 913, 919-20 (1982) (explaining important implications of "race to the bottom" thesis for firm managers); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. Legal Stud. 251, 258 (1977) (criticizing "race for the bottom" thesis).

²⁰ See generally Choi & Guzman, *supra* note 16 (advocating for regulatory regime that gives investors more control over what law governs their transactions); Merritt B. Fox,

ward. Scholars who favor providing firms with a liberal choice of regimes argue that such a system will generate beneficial competition among jurisdictions seeking to attract firms. In both the corporate and securities areas, the notion is that firms should be allowed to make a choice of legal regime independently of the locational choices they make with respect to their businesses.²¹ On the other side of the debate, it is argued that granting such choice will harm shareholders and, in the case of securities, investors.²² The strongest argument against choice in the corporate debate turns on the existence of an agency problem between shareholders and managers. Because it is the firm's managers who actually select the applicable law under a choice regime, there is concern that jurisdictions will create regimes that appeal to these managers rather than to shareholders.²³

Nobody has suggested that antitrust be governed by a choice regime that is similar to that proposed for corporate and securities law. Unlike corporate and securities law, there is no market to discipline the choices made by firms in an antitrust context. Firms simply would choose the least restrictive market without regard for the impact of their choice on consumers. Thus, a pure form of regulatory competition is out of the question for antitrust. Jurisdiction must be determined based on the location of firm activity, the location of the effects generated by that activity, or both.

Even if jurisdiction is premised on the location of activity or effects, however, there remains a question of whether countries use their antitrust laws to "compete" for firms. Notice that the focus here is on attracting firms by making local regulations more hospitable. Even if such competition were to take place, it certainly would be less rigorous than competition for corporate charters or for jurisdiction over securities, because conduct and effects tests force firms to restructure their operations in some way when selecting a particular legal jurisdiction, whereas pure choice regimes allow firms to select a jurisdiction without changing their business practices.

Securities Disclosure in a Globalizing Market: Who Should Regulate Whom, 95 Mich. L. Rev. 2498 (1997) (arguing that single international regulatory regime would not maximize economic welfare).

²¹ See Choi & Guzman, *supra* note 16, at 916-39.

²² See *id.*

²³ The debates about regulatory competition continue, and this is obviously not the place to resolve them. For the most recent exchange in corporate law, see generally Lucian A. Bebchuk & Allen Ferrell, *A New Approach to Takeover Law and Regulatory Competition*, 87 Va. L. Rev. 111 (2001), and Stephen J. Choi & Andrew T. Guzman, *Choice and Federal Intervention in Corporate Law*, 87 Va. L. Rev. (forthcoming September 2001).

In any event, concern about jurisdictions tailoring their laws in order to attract businesses is unnecessary in antitrust.²⁴ This is so primarily because regulatory competition has little impact on state decisions in the absence of rules ensuring exclusive jurisdiction. Such rules are absent in the area of competition law. Regardless of the location of a firm and its activities, many jurisdictions—most notably the United States and the European Union—apply their own laws to actions that have a local effect. Thus, a firm whose activities have an effect in the United States cannot escape American jurisdiction by moving its operations to another country. Any competition among states in this example, therefore, is bounded by the American rules.²⁵

There remain firms that do not seek to sell to any jurisdiction that applies its laws extraterritorially. These firms might, in principle, be attracted to jurisdictions that have relatively permissive antitrust rules.²⁶ Therefore, if a firm's activities affect states that have territorial antitrust rules, there may be competition to attract the investment of those firms.

Even if such firms exist, however, they are unlikely to present a significant problem from the perspective of antitrust. The firms in question must be engaged in international trade,²⁷ must not sell their goods into the United States or the European Union, and must be engaged in some form of anticompetitive activity. If the firm produces a tradable good or service and does not sell into the United States or the European Union, however, it is all but certain that one or more other firms provide the same good or service to the United States and European Union. The presence of additional firms implies that there is competition in the industry, making it much less likely that anticompetitive conduct can take place. The point is that extraterritoriality all but eliminates any pressure resulting from regulatory competition. This means that neither a race to the top nor a race to the bottom is likely.

Professor Fox expresses concern about a different form of competition among states. She points out that many—indeed most—coun-

²⁴ There is reason to be concerned that local rules will be designed to externalize the costs generated by firm activity. This issue is addressed in Part III.

²⁵ In this example, states could compete with one another if their laws were tougher than those of the United States. Because the firm will be subject to the U.S. rules, however, the competition does not generate an incentive to weaken one's rules beyond those of the United States.

²⁶ At the margin, these firms also may be deterred from trading with jurisdictions that have tough laws and that impose those laws extraterritorially.

²⁷ If they are not engaged in international trade, they can be regulated by domestic law, and the country will internalize all of the costs and benefits of the activity.

tries seek objectives other than efficiency in their antitrust laws.²⁸ In Canada, for example, the stated goal of antitrust policy is not only to promote efficiency, but also to protect small- and medium-sized businesses.²⁹ In the European Community, antitrust goals include the prevention of private restraints that would impede integration, market efficiency, and fair access to markets.³⁰ Professor Fox expresses concern that countries adopting objectives other than the enhancement of efficiency may handicap their businesses and, as a result, face pressure to eliminate any factors that hamper efficiency.³¹

What Professor Fox has in mind, however, does not represent a harmful form of competition, and there is no danger that it will force states to adopt an efficiency-based competition policy if that is not their preference. To see why there is no reason for concern, consider a simple example. Imagine a country that chooses to adopt a competition law that not only addresses efficiency issues but also includes abuse-of-dominance rules like those of the European Union.³² Assume the country has determined that such abuse-of-dominance laws are desirable.³³ To the extent abuse-of-dominance laws impose costs on local firms, it is true that those firms are disadvantaged by such

²⁸ See Fox, *supra* note 2, at 1789-1800 (discussing rationales other than U.S.-style efficiency for foreign nations' antitrust regulations); Joseph P. Griffin, *EC/U.S. Antitrust Cooperation Agreement: Impact on Transnational Business*, 24 *Law & Pol'y Int'l Bus.* 1051, 1051 (1993) (discussing E.C.-U.S. Antitrust Cooperation agreement and its impact on transnational trade between Europe and United States); Nina Hachigian, *Essential Mutual Assistance in International Antitrust Enforcement*, 29 *Int'l Law.* 117, 123-24 (1995) (noting that stated and unstated goals of competition policy vary among countries); Diane P. Wood, *The Impossible Dream: Real International Antitrust*, 1992 *U. Chi. Legal F.* 277, 304-05 (1992).

²⁹ See Competition Act, R.S.C., ch. C-34, § 1.1 (1985) (Can.) ("The purpose of this Act is to maintain and encourage competition in Canada in order to . . . ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy . . .").

³⁰ See Lennart Ritter et al., *EEC Competition Law—A Practitioner's Guide* 2-13 (1991); Eleanor M. Fox, *The End of Antitrust Isolationism: The Vision of One World*, 1992 *U. Chi. Legal F.* 221, 223 (1992); Wood, *supra* note 28, at 304.

³¹ Fox, *supra* note 2, at 1791-92 (contrasting E.U. model with U.S. efficiency model and postulating that "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").

³² See *id.* at 1791 (discussing abuse-of-dominance law of European Union); Per Jebesen & Robert Stevens, *Assumptions, Goals, and Dominant Undertakings: The Regulation of Competition Under Article 86 of the European Union*, 64 *Antitrust L.J.* 443, 487-91 (1996) (discussing differences between U.S. and E.U. jurisprudence of abuse of dominant position).

³³ Because it makes no difference to our analysis how this decision is reached, we can accommodate both public interest and public choice assumptions. There are debates about whether it is possible for antitrust objectives other than efficiency to be welfare enhancing. This Essay takes no position on the question and simply assumes that it is possible for the purposes of this example.

laws. That these laws are desirable from a national perspective, however, implies that the laws also provide benefits to the country and/or its policymakers that offset the loss of competitiveness. If it is felt that the abuse-of-dominance laws deter firms from investing in the country, policymakers can avoid this problem without sacrificing the perceived benefits of the laws by shifting the related costs to, for example, taxpayers. That is, the state can offset the costs borne by local firms by reducing the tax rate paid by these firms. Since we have assumed that the abuse-of-dominance laws are preferred by local policymakers, it must be that the states are better off with those laws in place and with their costs shifted to taxpayers than they are without those laws. A country that wants to adopt abuse-of-dominance laws, therefore, can do so without reducing the competitiveness of its firms.³⁴

III

THE NEED FOR TRUE INTERNATIONAL ANTITRUST

Up to this point, this Essay has shown that neither existing cooperation nor regulatory competition gives hope to those who favor substantive international antitrust. This conclusion, however, does not necessarily suggest that international cooperation beyond information sharing is necessary. This Section explains why there is a strong case for the internationalization of antitrust. The need for substantive cooperation is based on the harmful incentives that international activity generates for the domestic production of antitrust law.

We begin by making an assumption about the behavior of national governments.³⁵ Fortunately, a complete model of government

³⁴ Obviously, there are alternative ways in which the costs of abuse-of-dominance laws could be shifted away from firms. The point is simply that by insulating local firms from the costs, the state is able to maintain the laws without harming its ability to attract firms.

³⁵ Such assumptions are, as a general matter, problematic because we do not have a good understanding of exactly what motivates domestic policymakers. Most models of international law (and, indeed, most models of law at any level) proceed with the assumption that governments pursue some vision of the public interest. See, e.g., Brainerd Currie, *Selected Essays on the Conflict of Laws 190-91* (1963) (advocating rational pursuit of national interest in conflict-of-laws jurisprudence); Choi & Guzman, *supra* note 16, at 941-45 (citing investor and market protection as key goal of securities regulation); Fox, *supra* note 20, at 2503 (“[T]his goal of maximizing economic welfare drives the analysis” of recommended apportionment of securities’ regulatory authority); Kenneth J. Vandeveld, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 *Mich. J. Int’l L.* 621, 625-26 (1993) (discussing purposes of U.S. bilateral investment treaty program).

Other models, however, adopt a public choice perspective on government action and assume that governments pursue the interests of policymakers and that such interests may well differ from the public interest. See, e.g., Warren F. Schwartz & Alan O. Sykes, *Toward a Positive Theory of the Most Favored Nation Obligation and Its Exceptions in the WTO/GATT System*, 16 *Int’l Rev. L. & Econ.* 27, 28 (1996) (arguing that public choice

decisionmaking is not necessary for the analysis below. In particular, it is not necessary to determine whether decisionmakers pursue their own interests or those of their citizens. It is only necessary to assume that governments and regulators favor their own constituents over foreigners,³⁶ a reasonable assumption that is present in virtually any model of country behavior.

A government that promotes local interests (whether those of the public or the policymakers) seeks to capture the maximum possible benefits for locals while externalizing as many costs as possible onto foreigners. This desire to favor locals explains, for example, the widespread use of antitrust exemptions for export cartels, which typically exempt domestic firms from local competition laws when firm production is entirely exported. Any harm from anticompetitive activities conducted by a firm is felt by foreigners rather than by locals. The domestic firm, meanwhile, profits from those same activities.³⁷

The more important problem with using national laws to regulate international conduct is that international trade can cause distortions in the substantive policies adopted by governments.³⁸ Imagine, for example, that the firms in imperfectly competitive industries in a country export almost all of their production.³⁹ Under this assumption, the vast majority of harm from any anticompetitive conduct is felt abroad while the benefit of this conduct is enjoyed by local firms. A domestic government seeking to advance local interests, therefore, has an incentive to permit local firms to engage in anticompetitive conduct.⁴⁰

provides “[t]he most promising avenue for positive theory” of trade regulation). But see Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 *Colum. L. Rev.* 1, 34-56 (1998) (critiquing public choice theory). For a collection of papers discussing public choice issues in the antitrust context, see generally *The Causes and Consequences of Antitrust* (Fred S. McChesney & William F. Shughart II eds., 1995).

³⁶ See Alan O. Sykes, *Externalities in Open Economy Antitrust and Their Implications for International Competition Policy*, 23 *Harv. J.L. & Pub. Pol’y* 89, 92-93 (1999) (defending this assumption).

³⁷ The United States exemption from the antitrust laws for export cartels is contained in the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (1994), the Webb-Pomerene Act, 15 U.S.C. §§ 61-66 (1994), and the Export Trading Company Act of 1982, 15 U.S.C. §§ 4001-4021 (1994). For a more detailed discussion of this exemption in the United States, see *United States v. Concentrated Phosphate Export Ass’n*, 393 U.S. 199, 206-08 (1968), which discusses the purpose of Webb-Pomerene Act. See generally John F. McDermid, *The Antitrust Commission and the Webb-Pomerene Act: A Critical Assessment*, 37 *Wash. & Lee L. Rev.* 105 (1980).

³⁸ A more detailed treatment of the theory behind this discussion can be found in Andrew T. Guzman, *Is International Antitrust Possible?*, 73 *N.Y.U. L. Rev.* 1501, 1510-24 (1998).

³⁹ Only imperfectly competitive industries are of concern here because firms in competitive industries are not problematic from an antitrust perspective.

⁴⁰ If one adopts a public interest model of government, the local government seeks to permit the conduct of firms because the profits enjoyed by these firms outweigh any local

The simple adoption of an export cartel exemption, however, may not serve the goals of the government, because such exemptions normally require that all of a firm's production be exported if it is to qualify as an export cartel. For firms that export most, but not all, of their production, an export cartel exemption is not helpful. An alternative strategy for the government, therefore, would be to adjust its substantive competition policy to take trade flows into account. In our example, the government could adopt permissive antitrust laws that permit a wide range of activities that would be considered anticompetitive under its laws if there were no exports. By doing so, the government would allow local firms to engage in anticompetitive activities, yet retain minimal competition laws to constrain the behavior of firms that engage in extreme conduct that imposes such large costs that even the local costs (which are only a small share of global costs) exceed local benefits.⁴¹

This discussion sheds some light on the question of why some countries choose not to adopt any antitrust laws. One view is that states may refrain from adopting such laws because enforcement consumes resources, and this cost may outweigh any benefits.⁴² In addition to the direct and political costs of enforcement, there is the danger that once lawmakers open the door to an antitrust law they may adopt an overly protectionist and regulatory form. It is argued that a state is especially likely to eschew antitrust law if it is small and open, because such countries can rely on foreign competition to protect their markets.⁴³

The above analysis suggests an additional reason that some countries—especially small, open economies—may choose not to adopt any antitrust laws. Small, open economies typically export a large share of their production and may not be able to regulate extraterritorially. Because most of the harm from their own firms' anticompetitive actions is felt by foreign consumers and because they are unable to apply their own laws to regulate their imports, these countries have little to gain from adopting antitrust laws.

loss by consumers. If one adopts a public choice model, the result is the same. Under one public choice model, for example, the government prefers to permit the conduct because local business interests benefit and will lobby aggressively, while local consumer interests face limited harms and, therefore, will not engage in significant lobbying with respect to the issue.

⁴¹ Another way to favor locals is to provide sectoral exemptions for those sectors that are primarily engaged in export. See Fox, *supra* note 2, at 1795-96.

⁴² See *id.* at 1794-95.

⁴³ It might be added that such countries often will be able to rely on foreign antitrust law to protect their markets because the firms that sell to them are likely to sell to other countries.

Up to this point, the discussion has advanced the claim that exports by firms operating in an imperfectly competitive market generate an incentive for the country to weaken its antitrust laws. A similar claim can be made about imports. Assuming that a country is able to regulate activity that takes place abroad, the importation of goods sold in imperfectly competitive markets generates an incentive to tighten antitrust rules.⁴⁴ This is so because the country takes into account the full amount of the harm suffered by its own residents as a result of anticompetitive activity but does not take into account the benefits enjoyed by foreign firms. Imagine, for example, a country in which there is no production of goods that sell in imperfectly competitive markets—all consumption of these goods is imported. Since local officials do not take into account the benefits to foreigners, they will prevent activity that imposes any costs on local consumers—even if the benefits enjoyed by the foreign firms are greater than these costs. If some production takes place locally, there remains an incentive to engage in unduly strict lawmaking as long as the country is a net importer of the good. A net importer has a disproportionate share of consumption and, therefore, weighs the interests of consumers more heavily than those of producers relative to what it would do in the absence of trade.

Combining the above discussions of imports and exports demonstrates how international trade affects a country's substantive antitrust policies.⁴⁵ In particular, we can predict how a country's policy will change relative to its closed-economy policy.⁴⁶ A country that is a net importer of goods sold in imperfectly competitive markets will adopt a policy that is stricter than its closed economy policy, while a country that is a net exporter of such goods will adopt a policy that is weaker than its closed economy policy. Only a country whose imports and exports in imperfectly competitive markets happen to be balanced will adopt the same policy in an open economy as it would in a closed economy.

⁴⁴ Here, and throughout the Essay, the incentive to tighten or weaken laws is relative to what would be the case in the absence of trade.

⁴⁵ For simplicity, it is assumed that all gains and losses are distributed proportionally around the world. Thus, for example, if a country has 40% of the world's firms, those firms are assumed to enjoy 40% of global profits; and if a country has 20% of the world's consumers, those consumers are assumed to bear 20% of any global loss to consumers. This assumption is not necessary but makes the presentation clearer.

⁴⁶ The closed economy policy is defined as the policy that the government would adopt in the absence of international trade—implying that the country would internalize the full costs and benefits of any policy. How lawmakers weigh these costs and benefits depends on one's model of government decisionmaking.

Once one recognizes the impact that trade has on antitrust policy, the need for an international antitrust regime becomes clear. Unless trade in imperfectly competitive markets remains balanced, net importers and net exporters in these markets will have inconsistent objectives. Net exporters will seek weak laws and will succeed in obtaining them as long as there is no extraterritorial application of the law.⁴⁷ On the other hand, net importers will want stricter laws and will succeed if they are able to apply their laws extraterritorially.

Notice that both net importers and net exporters have an incentive to adopt laws that differ from their closed-economy policies. If one assumes that domestic governments seek to maximize the welfare of their residents (the public interest model), then the closed-economy model represents the optimal policy, and the distortion discussed above causes national policies to move away from the optimum. If one assumes that governments pursue some other set of objectives (the public choice model), the closed-economy policy itself will not be welfare maximizing. Trade, therefore, may cause national policies to move toward or away from the optimal policy, depending on the balance of trade and whether one expects the closed-economy policy to be stricter or weaker than the optimum.

Assuming, for the moment, that countries agree on the objectives of antitrust policy, international negotiations have the potential to achieve those objectives. Although domestic policymakers seek to favor their own residents, the fact that each jurisdiction agrees on the policies that maximize global well-being means that countries will be able, in principle, to negotiate that outcome.⁴⁸ Thus, if one assumes that transaction costs are zero and that all countries agree on the goals of competition policy, one would expect international negotiations to generate a single set of substantive international legal rules that would overcome the distortionary effects of trade on domestic antitrust.

Now consider what happens if we relax the assumption of consensus regarding the appropriate role of competition policy. If disagreement about the optimal policy is the result of differences in information—meaning that one country is correct while the others are mistaken—it is possible that agreement will be reached through communication and debate as one view comes to be accepted at the expense of the others. If, on the other hand, differing views are the result of different preferences or cultural contexts, then the exchange

⁴⁷ If there is no extraterritorial application of the law, all countries resemble net exporters in terms of their policy preference because their laws can only affect local firms.

⁴⁸ This is a straightforward application of the Coase Theorem—where there are no transaction costs, and all parties agree on the optimal rule, the parties will establish that rule through negotiation.

of information will not overcome these differences. If the gains from international cooperation are less than the subjective losses that must be endured by one or more countries in order to achieve that cooperation, then there is no way to achieve a consensus in which all countries are better off. No agreement is possible in this context because cooperation would represent a global loss.

However, an assumption of zero transaction costs ensures that agreement will be achieved as long as the benefits from cooperation exceed the costs. Through the construction of suitable transfer payments, those countries that gain will compensate those that lose. If, for example, European countries believe that abuse-of-dominance rules are important and that the loss of these rules imposes a cost on their societies, they will nevertheless be prepared to accept an agreement that does not include abuse-of-dominance rules as long as they receive transfers that exceed their perceived loss.

Thus, it is the presence of transaction costs, not divergent goals, that stands in the way of a negotiated international policy. Because net importers and exporters have divergent interests, it is unrealistic to expect that a substantive agreement will be reached unless concessions are offered by one group to the other. Transfer payments are also required to address the fact that there is no consensus on the proper goals for antitrust. Countries that compromise the goals they believe to be appropriate will have to be compensated in some way. If agreement is to be achieved, therefore, it is imperative that the negotiations take place in a forum in which such concessions can be made. In particular, a stand-alone competition policy committee represents an undesirable way to structure negotiations because negotiators will not have the authority to offer concessions in other areas.⁴⁹

IV

A ROLE FOR THE WTO

Part III of this Essay demonstrated that because countries have divergent views regarding the goals of competition policy, and because trade flows lead to divergent national interests, the negotiation of a substantive international antitrust agreement is difficult. In our global economy, however, there may be no way to provide for the sound regulation of competition without such an agreement. Without an

⁴⁹ See Andrew T. Guzman, *International Antitrust and the WTO: The Lesson from Intellectual Property 18* (U.C. Berkeley Law and Econ. Working Paper No. 2000-20, 2000) (arguing that Trade Related Aspects of Intellectual Property (TRIPs) agreement was possible because negotiations took place in WTO where transfer payments are possible), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=248317 (on file with the *New York University Law Review*).

agreement, countries will continue to pursue their local interests without regard for what is best from a global perspective. The central problem is well posed by Professor Fox: "How should we, how can we, reorder economic regulation so that it works for us as citizens of the world?"⁵⁰ The answer is to have nations negotiate an agreement that serves the interests of each of them and simultaneously improves the international regulatory situation. The question then becomes how to structure negotiations in order to achieve the desired international cooperation.

This Part argues that the place to pursue cooperation and agreement is the WTO. This is a controversial claim. Some commentators believe that the negotiation of competition law should be kept separate from WTO business.⁵¹ In the next Section, I address some of the concerns about WTO involvement.

The primary advantage of the WTO is its potential to overcome the divergent national incentives created by international trade and local regulatory objectives. Unlike many other fora, the WTO provides a setting in which a wide range of topics can be discussed and which, therefore, allows for concessions in one area in exchange for agreement in another.⁵² Thus, for example, the Trade Related Aspects of Intellectual Property (TRIPs) agreement was only achieved once intellectual property was brought within the WTO framework during the Uruguay Round of trade talks.⁵³ Developing countries—who had little to gain from stricter intellectual property rules—agreed to the TRIPs proposal in exchange for trade concessions from developed countries.⁵⁴ The ability to negotiate across issue areas is funda-

⁵⁰ Fox, *supra* note 2, at 1807.

⁵¹ See Eleanor M. Fox, *Competition Law and the Millennium Round*, 2 *J. Int'l Econ. L.* 665, 677 n.37 (1999); Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 *Am. J. Int'l L.* 478, 478 (2000).

⁵² See, e.g., Marco C.E.J. Bronckers, *Better Rules for a New Millennium: A Warning Against Undemocratic Developments in the WTO*, 2 *J. Int'l Econ. L.* 547, 548 (1999) ("Deadlocks that have blocked progress in international organizations . . . are resolved in the WTO because here governments can make package deals.").

⁵³ Guzman, *supra* note 49, at 16-23.

⁵⁴ See Frederick M. Abbott, *Commentary: The International Intellectual Property Order Enters the 21st Century*, 29 *Vand. J. Transnat'l L.* 471, 472 (1996) ("The developing countries ultimately accepted the TRIPs Agreement as part of a bargained-for-exchange, not because they concluded that the Agreement as a stand-alone matter was necessarily in their best interests."); Frederick M. Abbott, *The WTO TRIPs Agreement and Global Economic Development*, 72 *Chi.-Kent L. Rev.* 385, 387-89 (1996) (discussing developing countries' interests in TRIPs negotiations); Bronckers, *supra* note 52, at 548-49 (explaining how trade concessions enabled TRIPs agreement); Guzman, *supra* note 49, at 22 ("[D]eveloping countries wanted and received trade concessions on agricultural subsidies, market access for their own agricultural goods, and protection against unilateral sanctions by developed countries, especially the United States.").

mental to the achievement of agreement in international antitrust. In the parlance of economists, this represents a lowering of transaction costs, which, in turn, increases the likelihood that the optimal result will be achieved.⁵⁵ Without a lowering of transaction costs, a multilateral agreement on substantive international antitrust is probably impossible.

The WTO has additional advantages that make it a desirable forum for the negotiation of a competition policy agreement. Most obvious among these advantages is the presence of a dispute settlement system. Dispute resolution is of great importance because if a deal is reached, some of the parties to the agreement will have consented to a system of international antitrust only because they were offered other benefits. In the absence of procedures to compel such compliance, these countries have little incentive to honor their commitments. Without an effective system for holding states to their commitments, we must rely on reputational constraints and the potential for sanctions by other states—an unreliable and often unpredictable alternative. In this environment, commitments may not be considered credible and, therefore, it may be impossible to strike a deal.

Dispute settlement within the WTO is certainly imperfect, but it is the best available mechanism for ensuring compliance with a competition agreement. In addition to the above benefits, of course, the WTO is an advantageous forum because it features universal membership, has relatively transparent procedures, and has experience managing the negotiation and implementation of international agreements.

V

CONCERNS ABOUT THE WTO

Although it is beyond the scope of this Essay to undertake a complete discussion and analysis of the arguments made in support of either the status quo or a stand-alone competition policy forum, this Section provides a brief review of those arguments and explains why they are not persuasive. The United States has adopted the position that international competition policy should continue to be negotiated through bilateral and regional agreements rather than through the WTO.⁵⁶ Although it is true that there is a certain level of cooperation

⁵⁵ See *supra* note 49 and accompanying text.

⁵⁶ See Int'l Competition Policy Advisory Comm. to the Attorney Gen. and Assistant Attorney Gen. for Antitrust, Final Report 201-79 (2000) [hereinafter ICPAC Report], available at <http://www.usdoj.gov/atr/icpac/finalreport.htm>. But see Joel I. Klein, *Time for a Global Competition Initiative?*, Speech at the EC Merger Control 10th Anniversary Conference (Sept. 14, 2000) (welcoming multilateral forum to deal with certain aspects of

among antitrust authorities today, what currently exists does not rise above procedural cooperation intended to assist local authorities in the prosecution of their own domestic laws. It does not represent a serious move toward cooperation in terms of substantive rules.⁵⁷

Professor Fox is, relative to other American commentators, a proponent of international efforts at cooperation. Even she, however, has expressed some concerns about incorporating negotiations within the WTO. Professor Fox argues that with the exception of private market access restraints,⁵⁸ international antitrust issues should be addressed in an independent forum apart from the WTO.⁵⁹ Professor Fox focuses on the question of whether or not competition law issues are appropriately considered "trade" issues, implying that the WTO should be used exclusively for trade issues.⁶⁰ She proposes leaving those antitrust issues that are sufficiently trade related within the WTO while keeping other antitrust issues separate.⁶¹

Specifically, she believes that competition laws designed to open markets play the same basic role as liberal trade laws and should be placed within the WTO. For market access issues, the substantive content of her proposal includes a choice-of-law rule under which the law of the excluding nation (i.e., the importer) applies to a competition law case. This choice-of-law remedy, of course, overlooks the strategic questions raised earlier in this Essay.⁶² A system under which the excluding nation's law applies is a system of extraterritoriality. Where countries apply their laws extraterritorially, net importers have an incentive to overregulate because their consumers receive all of the benefits of the regulation while the costs are borne (at least in

international competition policy), available at <http://www.usdoj.gov/atr/public/speeches/6486.pdf>.

⁵⁷ See supra Part I.

⁵⁸ Professor Fox identifies three types of market access restraints. They are "(1) abuse of dominance: exclusions by monopoly or dominant firms, (2) cartels with boycotts, and (3) vertical restraints such as exclusive dealing by the few leading firms in high barrier, concentrated markets wherein entry by outsiders is difficult." Fox, supra note 51, at 671.

⁵⁹ See id. at 674-78 (arguing that whereas market access restraints should be handled by WTO, free-standing World Competition Forum should be created to resolve purer competition issues).

⁶⁰ Id. at 675 ("[Competition] issues are at the heart of *competition* law, not trade law, and they deserve to be placed on 'competition' ground.").

⁶¹ In fairness to Professor Fox, she has been engaged in a debate with U.S. officials and commentators who often favor a less aggressive international response to the challenge of competition policy. For this reason, it may be that she has sought primarily to address the concerns of this group rather than the more internationalist concerns expressed in this paper. See Eleanor M. Fox, Separate Statement of Advisory Committee Member, ICPAC Report, supra note 56, Annex 1-A.

⁶² See supra Part III.

part) by foreign producers. These overly strict rules would be the de facto international antitrust regime.

More important than her proposal regarding market access, however, is her argument that competition policy rules that do not address market access should be left outside the WTO framework. She believes that an agreement on international antitrust should be pursued,⁶³ but she proposes that this be done through a stand-alone World Competition Forum.⁶⁴ Because the organization would deal exclusively with competition policy, however, it would have no practical way to orchestrate transfer payments, leaving transaction costs high and making agreement unlikely.

Professor Fox offers three objections to placing international antitrust talks within the WTO.⁶⁵ None is compelling. First, negotiations within the WTO would have to include both trade and competition representatives, which, she fears, may impede progress on competition issues.⁶⁶ Contrary to Professor Fox's concern, the presence of both sets of negotiators is part of the advantage of keeping the talks within the WTO. With both sets of negotiators present, it is easier to negotiate trade-offs in one area in order to get benefits in others.

Second, because WTO agreements typically include dispute resolution, Professor Fox expresses concern that countries that are opposed to dispute resolution may be unwilling to participate.⁶⁷ While it is true that some countries—most notably the United States—may prefer to avoid an agreement that includes dispute resolution, it is also true that an agreement is of limited use if it cannot be enforced in some fashion. International competition policy is difficult in part because it requires countries to make commitments that, while globally desirable, are harmful to their own welfare. Such commitments are much more credible in the presence of a dispute resolution procedure. The resistance to dispute resolution should be overcome through negotiations. If substantive and credible international antitrust law is desirable from a global perspective, those who stand to benefit from it

⁶³ Fox, *supra* note 2, at 1801 (“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.”).

⁶⁴ See Fox, *supra* note 51, at 675. At least some movement has been made toward the establishment of such a forum. The ICPAC Report recommends that the United States consider the creation of a new venue for consultation on international antitrust issues, which it terms the “Global Competition Initiative.” ICPAC Report, *supra* note 56, at 281-85.

⁶⁵ Fox, *supra* note 51, at 677 n.37.

⁶⁶ See *id.*

⁶⁷ See *id.*

can offer transfers to those who stand to lose, such that everybody is better off with an agreement.

Finally, Professor Fox expresses concern that if the WTO opens up to competition policy, labor, and environmental issues, it could become overwhelmed and ineffective.⁶⁸ Although competition policy issues should be incorporated with care, there is no evidence that the WTO is losing its ability to deal with its traditional trade concerns or its more recent obligations toward intellectual property. Thus, there is no indication that the WTO cannot handle competition policy as well.⁶⁹

Professor Daniel Tarullo has also spoken in opposition to the inclusion of antitrust within the WTO.⁷⁰ He argues that such a policy would be ill-advised because the WTO operates in an adversarial manner, which makes it poorly suited to “the cooperation among states that will be necessary to address some types of problems concerning international competition policy.”⁷¹ The essence of his argument appears to be that the WTO is fundamentally a trade organization and that the resulting norms of the organization cannot properly accommodate competition policy.⁷²

Although concerns about the institutional willingness of the WTO to take competition policy as seriously as it takes trade policy may have some merit, they point to a need for change within the WTO rather than a reason to avoid using that organization for competition policy. The WTO has been dominated by officials with interests in trade because, until the Uruguay Round, the General Agreement on Tariffs and Trade (GATT) was devoted almost exclusively to trade issues. If it is true that the culture of trade is fundamentally different from regulatory issues such as competition policy, it is no surprise that a trade organization should feature that culture. Bringing competition policy within the WTO, therefore, would require institutional changes, including the presence of people with expertise and interest in that area. There is no question that an institutional change of this sort

⁶⁸ See *id.*

⁶⁹ The wisdom of incorporating issues such as environmental and labor issues is beyond the scope of this Essay. These issues should be considered on their own merit, independently of the international antitrust issue.

⁷⁰ See Tarullo, *supra* note 51, at 489-94 (discussing limits of WTO and its inadequacy in dealing with regulatory issues).

⁷¹ *Id.* at 479.

⁷² See *id.* (“Housing a competition arrangement in the WTO would inevitably favor the trade norms where the two conflict. Accordingly, forcing the square peg of competition policy into the round hole of trade policy will change the shape of the peg.”).

presents challenges, but on the other hand, there is little reason to think that it cannot be done.⁷³

In addition, claims that the WTO cannot successfully incorporate regulatory issues are contradicted by the fact that it has already done so with the TRIPs agreement. As discussed above, national incentives in intellectual property are quite similar to those in antitrust. The success of TRIPs, therefore, suggests that there is hope for an antitrust agreement as well.

A decision to include antitrust issues in a future round of WTO negotiations leaves open the question of what should be included in an international agreement. This important question is beyond the scope of this short Essay, but it is worth noting a few points. First, a national treatment and nondiscrimination principle would be an important first step toward ensuring sound competition policies. Although a national treatment requirement would not address the strategic choice of domestic law by trading nations, it would prevent the most explicit attempts to favor locals over foreigners such as exemptions for export cartels. Second, private rights of action should be encouraged. Competition policy often suffers from political involvement and interference, and the existence of a private right of action would, like the national treatment principle, promote the equal treatment of all affected parties.⁷⁴ Additional obligations would obviously have to be added to an antitrust agreement, including rules to ensure transparency and minimum substantive standards. These are left for another day.

CONCLUSION

The ambitious goal of achieving an international antitrust regime presents several substantial obstacles. These include, but are not limited to, the following three challenges. First, negotiators must overcome the lack of agreement regarding the optimal content of antitrust policy in a closed economy. Some countries view antitrust policy as a tool to pursue economic efficiency and little else, while others also seek to protect small and medium-sized businesses, and still others believe that it also should be used to protect employment. Second,

⁷³ A complete discussion of how the WTO should adapt to its expanding role in areas such as intellectual property, competition policy, environmental issues, and labor issues is beyond the scope of this Essay but merits careful consideration.

⁷⁴ In other writings, I have argued for both national treatment and private rights of action in a more generalized context that would also apply to antitrust. See Andrew Guzman, *Choice of Law: New Foundations 50-60* (U.C. Berkeley Law & Economics Research Paper No. 2000-17, 2000), available at <http://papers.ssrn.com/sol3/results.cfm?cfid=229721&cftoken=96520238> (on file with the *New York University Law Review*).

achieving compliance with an agreement will be challenging because the enforcement practices of countries are difficult to monitor and because it is even more difficult to compel a country to change them. Finally, consensus on the substantive content of an agreement is difficult to achieve because systematic trade imbalances in imperfectly competitive markets can affect the substantive laws adopted by a country, moving it away from the rules it believes to be optimal for a closed economy, and at times, moving it away from what other countries are willing to accept.

Despite these challenges, international antitrust should be pursued because appropriate regulation can only come through an international agreement. Because agreement will require transfers from those that benefit from deals to those that lose, it is crucial that the forum in which negotiations occur be one in which such transfers can take place at low cost. The most likely candidate is the WTO, which holds the best hope for a substantive international competition policy agreement.