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THE POLITICAL ECONOMY OF INTERNATIONAL ANTITRUST HARMONIZATION

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International harmonization of competition laws is in the air. A large number of academics have called for harmonization of the substantive content of antitrust laws.<sup>1</sup> They have noted the potentially large costs of divergent national antitrust law applied globally. These costs include the transaction costs for companies of complying with multiple regimes and the costs of being governed by the most restrictive antitrust regime, even if that regime is suboptimal. Perhaps more importantly, the recent Doha meeting of the World Trade Organization has called for the next round of World Trade talks to take steps toward harmonization, including harmonization of certain core substantive standards.<sup>2</sup> Thus, the intellectual impetus for harmonization now may enjoy a plausible forum for its realization.

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<sup>1</sup> See, e.g., Sharon E. Foster, *While America Slept: The Harmonization of Competition Law Based on the European Model*, 15 EMORY INT'L REV. 467 (2001); Eleanor M. Fox, *Towards World Antitrust and Market Access*, 91 AM. INT'L L. 1 (1997). Early works in this canon include. Eleanor Fox, *The End of Antitrust Isolationism: the Vision of One World*, 1992 UNIV. CHI. L. F. 221; F. M. SCHERER, *COMPETITION POLICIES FOR AN INTEGRATED WORLD ECONOMY*, 1994 .

<sup>2</sup> Paragraph 25 of the Doha Declaration addresses harmonization issues, and calls for considering the inclusion within the WTO of “core principles, including transparency, non-

In my view, substantive harmonization, even if limited to core competition standards, would be a major mistake. It is undoubtedly true that multiple regimes impose some of the costs that commentators have described. But substantive harmonization by which I mean a single international regime binding on all nation states in at least some areas of antitrust also has potential costs. An international lawmaking regime creates high agency costs because it is less subject to democratic control. It also imposes costs by discouraging beneficial change, as the regime once in place will be difficult to change. Thus, an international regime might well lead to a worse world competition policy overall. Its long-run costs are particularly problematic in world that is not static. As information costs, transportation costs, and trade restrictions decline, it may well be that the appropriate scope of the optimal antitrust regime will narrow as market processes become better correctives to market imperfections than government intervention. The lock-in costs of an international regime thus are particularly high in a world in which the pace of change is ever faster.

What advocates of substantive antitrust harmonization need to do and have not so far done to my satisfaction is to identify the defects of our decentralized regime and show why the process for substantive harmonization will cure those defects, while not introducing more. Defects can be assessed only against some optimizing standard. Thus, if the advocate's standard is economic efficiency, he or she should show not only why multiple regimes will have inefficiencies but how the international regime will produce more efficient competition law overall. If the advocate's standard encompasses other objectives, he or she must show why the international regime will meet those objectives better.

Second, it may also be questioned why should one should want diverse nations to agree on a single optimizing standard rather than permit different standards to stimulate a continuing debate on the appropriate objectives of competition law. The most persuasive premise for harmonization would thus be one that takes a modest optimizing standard that could command very substantial consensus and shows why harmonization would reach that standard without introducing more social costs. A good example of a modest optimizing standard would be that

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discrimination and procedural fairness, and provisions [prohibiting] hard core cartels: modalities for voluntary cooperation: and support of for progressive reinforcement of competition institutions in developing countries through capacity building." See World Trade Organization, Ministerial Session- Doha, 9-14 November 2001-Ministerial Declaration–Adopted on 14 November 2001, WTO Doc No WT/MIN(O1)/DEC/1 (Nov. 20, 2001) (hereinafter Doha Declaration).

antitrust law should be applied without regard to the nationality of the producers and consumers involved.

As it happens, the WTO generally applies antidiscrimination rules that focus on preventing foreign bias in regulations that affect importers rather than engaging in substantive harmonization of those regulations. The antidiscrimination model has advantages over substantive harmonization, because formulating and applying antidiscrimination rules have fewer agency costs than formulating and applying substantive rules. Moreover, the antidiscrimination model permits continued innovation and change in substantive rules, thus facilitating continued debate about what is the optimal content of regulation. Thus, if domestic competition regimes harbor foreign bias, my recommendation on combating bias would be to add an antidiscrimination antitrust code modeled on other antidiscrimination codes in the WTO regime. The code, for instance, would prevent a nation from refusing to apply antitrust laws that protected market entrants of its own nationality to market entrants of foreign nationality. Such a code would advance values integral to the WTO as well as to competition law, because it would preclude a nation from substituting a nontariff barrier—in the form of a discriminatory antitrust regime—for reduced tariff barriers. Thus, a more modest and practical objective—the elimination of foreign bias—would make an international competition agenda more amenable to being adopted in their most practical forum—the WTO.

Part I of this essay will first critique the arguments for substantive harmonization of antitrust laws. It will argue that these arguments are unpersuasive because they fail to show that the costs of our decentralized system of competition law are more than the agency costs and associated pathologies of highly centralized rulemaking and enforcement. In particular, they fail to recognize that a decentralized system has a certain dynamism over the long run, because the conflicts between different systems may become a focus of public attention and lead to better laws. In contrast, an international harmonized regime faces a greater danger of stasis.

Part II of the essay will address Professor Andrew Guzman's new argument that international harmonization is necessary because domestic antitrust regimes neglect foreign consumer and producer interests. First, the paper will use the U.S. antitrust regime as an example to suggest that some institutional structures such as an independent judiciary tend in some circumstances to constrain this bias. In other cases, this bias, even if unrestrained, may compensate for public choice flaws in domestic antitrust system and actually move more toward a more efficient competition policy.

Part III of the paper will provide antidiscrimination model of international competition law. The basic intuitions behind this model are two. First, foreign bias in competition laws is likely to become a greater problem as the WTO gets rid of other trade restrictions, because interest groups will substitute discriminatory competition laws as other protectionist barriers decline. Thus, a neglected rationale for some policing of domestic antitrust law is that antidiscrimination requirements are necessary to protect efficacy of the WTO's tariff reductions and elimination of other trade restrictions. Second, the solution to foreign bias should go no farther than eliminating the bias rather than serve as excuse to engage in substantive harmonization of antitrust laws.

This kind of international antidiscrimination regime will have several advantages over substantive harmonization. First, it will preserve substantive diversity and therefore experimentation, preventing lock-in problems. Second, it will avoid many public choice problems that make it likely that substantive harmonization will be suboptimal. Third, an antidiscrimination model comports with the rest of WTO jurisprudence and, if located there, will benefit from its already established institutional structure, including a sophisticated jurisprudence for ferreting out discriminatory laws. Unlike substantive rules, an antidiscrimination model will also not require substantial transformation of WTO institutions— change that would be counterproductive to the rest of the WTO regime.

One general lesson offered here is that institutional and public choice considerations must be taken into account in deciding the optimal extent, if any, of substantive international harmonization of any set of regulations, including competition laws. Even if one does not agree with the particular public choice model of antitrust on which this essay is premised, it is still necessary to test international harmonization under a model of how governmental actors behave in order to determine whether it will be beneficial.

### *I. Critique of the Traditional Argument for Substantive Antitrust Harmonization*

A variety of arguments have been made for international harmonization of substantive competition law. Two of the oldest are the simplest. The first is simply that in a world of multinational corporations, multiple antitrust regimes raise transaction costs.<sup>3</sup> The second is that in a world with extraterritorial application of antitrust laws, the most restrictive antitrust laws will always govern business behavior even if those antitrust laws prove suboptimal.<sup>4</sup>

These traditional arguments do not seem very strong by themselves, because they do not attempt to show how substantial are the costs of diverse antitrust law and then compare them with the costs of harmonization. The transaction costs of complying with different laws can be substantial in terms of the costs of professional services and like but they would be seem to be dwarfed by the question of whether the international rule will prove substantively better. Moreover, some of the transaction costs of compliance with multiple laws can be reduced by nonsubstantive harmonization--harmonization of the forms of requests for information. Steps for such procedural harmonization are already being taken bilaterally and multilaterally.<sup>5</sup>

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<sup>3</sup> See Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U.L. REV. 343, 400 (1997) (noting burdens on business of multiple antitrust reviews).

<sup>4</sup> See INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE'S FINAL REPORT 52 (2000) (report to Janet Reno, Attorney General and Joel Klein, Assistant Attorney General for Antitrust) (noting that the most restrictive nation prevails in merger review).

<sup>5</sup> See Daniel Steiner, *The International Convergence of Competition Law*, 24 MAN. L.J. 577, 580 (1997).

The debate over substantive harmonization thus should center on whether the decisions under a harmonized law system are likely to be better than the sum of the legal applications of diverse systems. This comparison requires an evaluation of both the benefits and costs of an international harmonized regime and the benefits and costs of diversified national regimes. Let me first test an economic efficiency standard and in particular the consumer welfare model of the Chicago school as the standard of comparison.

A. The Political Economy of Domestic Antitrust. We can best understand whether an international standard would tend to depart from a consumer welfare model of antitrust if we understand why national standards, at least within developed nations, tend to depart from this model in the first place. In developed nations several factors tend to make their competition law depart from the consumer welfare ideal. Obviously, space does not permit me to give a full picture the public choice pathologies of antitrust.

The first distorting factor is the interest of government antitrust officials have in a more than optimally interventionist antitrust policy. Two kind of bias are at work here.<sup>6</sup> The first is that a more interventionist policy allows them to gain more rents. In return for enforcing the antitrust law against a company, officials can gain rents from competitors.<sup>7</sup> It is true that in refusing to exercise official discretion to enforce laws against a company they can obtain rents from that company, but to make that threat of enforcement credible they have to intervene at times. Second, the bureaucrats charged with intervention have an interest in the larger budgets and staff that a more interventionist policies brings. Such larger budgets and staff both bring more prestige.<sup>8</sup> It also brings more postbureaucratic employment opportunities as an interventionist policies require more consultants and lawyers to handle the dangers of such policies on behalf of corporations. Broadly speaking, the first kind of bias (campaign contributions and other favors from excessive intervention) will tend to affect elected executive officials and the second kind of bias (prestige and employment opportunities from the intervention) will tend to affect the permanent bureaucracy.<sup>9</sup>

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<sup>6</sup> I would note that even besides the influence of rent-seeking the mismatch between the short time horizons of politics and the long run time horizons of markets may lead to excessive antitrust intervention. See Donald I. Baker, *Government Enforcement of Section 2*, 61 NOTRE DAME. L. REV. 898 (1986).

<sup>7</sup> See Fred S. McChesney, *Economics Versus Politics in Antitrust*, 23 HARV. J. L. PUB. POL'Y 133, 134 (giving examples of political influence on antitrust enforcement).

<sup>8</sup> Cf. *id* at 140. (antitrust enforcement bring favorable publicity to antitrust agencies).

<sup>9</sup> It is true that in the United States private actors can also enforce much of antitrust law through private causes of action. Nevertheless, private enforcement is unlikely to correct for public choice bias in favor of excessive antitrust intervention. First, executive regulators tend to shape the law with their decisions on antitrust both because judges are more likely to defer to their judgments and because much private litigation simply piggybacks on their decisions. Secondly, the structure of private litigation has its own structural difficulties. Since private

Nor is the judiciary or legislature likely to limit the pathologies of antitrust enforcement. Antitrust offers legislators similar rent-seeking opportunities: they can extract rents by setting up a system that permits excessive intervention because they can use legislative hearings and the budget process to influence the cases executive regulators bring.<sup>10</sup>

Moreover, even if legislators were themselves motivated entirely by the public interest, antitrust statutes cannot be written like a code, because no code can capture all anticompetitive business practices.<sup>11</sup> Thus, executive regulators inevitably enjoy substantial discretion to shape the interpretation of antitrust statutes to pursue their own interests.

The judiciary's ability to restrain regulators can also be limited.<sup>12</sup> First, regulators can act in a way that makes judicial review of their actions ineffective. For instance, particularly in Europe regulators can act to block a merger and by the time effective judicial review can reverse that decision business considerations may well force termination of the merger.<sup>13</sup> Second, even in cases where judicial review is effective the judiciary has often deferred to the regulators, because there are costs to the judiciary in standing up aggressively to the democratically elected branches. Finally, the tendency toward self-aggrandizement that drives bureaucrats is also not unknown in the judiciary. For instance, the prospect of transforming and supervising an entire industry as Harold Greene did with the phone industry, cannot be discounted as a possible

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litigation can be filed by competitors as well consumers, much private litigation will attempt to advance theories that protect competitors rather than competition and so be excessively interventionist.

<sup>10</sup> See Michael P. Kenny & William H. Jordan, *United States v. Microsoft: Into the Antitrust Regulatory Vacuum Missteps the Department of Justice*, 47 EMORY L.J. 1351, 1376 (1998) (detailing how Orrin Hatch, who was the home state Senator of many of Microsoft's competitors tried to influence Department of Justice to bring Microsoft case).

<sup>11</sup> It is for this reason that United States antitrust law employs a common law rather than code approach. See Christopher M. Barbuto, *Toward a Convergence of Antitrust and Trade Law: An International Trade Analogue to Robinson-Patman*, 62 FORD. L. REV. 2047, 2055 (1994).

<sup>12</sup> See Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 OR. L. REV. 1383, 139-1395 (1998) (suggesting that antitrust regulators often set rules with a minimum of judicial involvement).

<sup>13</sup> See Eric S. Hochstadt, *The Brown Shoe of European Competition Law*, 24 CARDOZO L. REV. 287, 302 (2002) (suggesting that European regulators have substantial discretion because of lengthy time for judicial review of their decisions).

distorting motive.<sup>14</sup> Thus even if institutionally constrained, the basic human tendency toward self-aggrandizement contributes to overenforcement.

Nor can the public in the form of voters be expected to exercise much control over the form of competition law. Because of rational ignorance, the public confronts large agency costs in monitoring the behavior of legislation and executive action in any area.<sup>15</sup> Competition law tends to be quite technical which tends to exacerbate the difficulties of democratic control over bureaucratic elites.<sup>16</sup>

Finally, a heuristic bias contributes to overenforcement. One must always remember that the central question in antitrust is whether government intervention will correct anticompetitive practices better than the market itself.<sup>17</sup> Only then is government intervention justified. This is largely a short-run/ long run question because in the long run the market erodes wealth decreasing cartels and monopolies. But humans have a heuristic bias that causes them to discount these long run facts. Because the future is uncertain, people use a “representativeness” heuristic by which they assume that future patterns of events will resemble the past patterns with which they are familiar.<sup>18</sup> Political actors, both legislative and executive, will thus tend to

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<sup>14</sup> Harold Greene was even called the czar of telecommunications during the pendency of his antitrust oversight. See Leslie Cauley, *Telecom Czar Frets Over New Industry Rules*, WALL ST. J., Feb. 12 1996 at B1, B6.

<sup>15</sup> Rational ignorance describes the systematic tendency for of citizens to pay little attention to political information. The phenomenon occurs because acquiring information is both costly and unproductive. It is costly because to acquire such information, individuals must invest time that they could be using in other more productive enterprises. It is unproductive because, although the principal instrumental use of such information is to guide voting, the vote of any one individual to influence the outcome of an election. See DENNIS C. MUELLER, PUBLIC CHOICE II 205-206 (1989).

<sup>16</sup> For a discussion of why cognitive ignorance exists on complex matters and how cognitive ignorance increases agency costs, see John O. McGinnis, *The Partial Republican*, 35 WM. & MY. L. REV. 1751, 1792 ) (1994).

<sup>17</sup> See Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

<sup>18</sup> The representativeness heuristic tends to make people overconfidently extrapolate about predicted characteristics of a class from a small sample size of which they happen to be aware. See Amos Tversky & Daniel Kahneman, *Belief in the Law of Small Numbers* in DANIEL KAHNEMAN, PAUL SLOVIC, AMOS TVERSKY, JUDGMENT UNCERTAINTY: HEURISTIC AND BIASES 23 (1982). If the sample consists of events rather than objects, the heuristic should tend to make people extrapolate in a similarly irrational manner from events of which they are aware to uncertain future events. Thus, individuals will tend to think that future events will resemble past events more than probability warrants. See Kenneth Arrow, *Risk Perception in Psychology and Economics*, 20 ECON. INQUIRY 1, 5 (1982). For an important present day application, see

underestimate the likelihood of the destabilizing change that the market brings to cartels and monopolies.

B. The Political Economy of International Antitrust. In light of the reasons that national antitrust laws tend to be suboptimal, we are in a better position to assess whether internationally harmonized antitrust will prove better. In my view, the international regime has distinctive costs in the form of higher agency costs and deprives us of distinctive benefits of the diversified regime in the form of potentially useful innovations in competition law.

i. Higher Monitoring Costs. One reason for doubt is that agency costs are likely to be higher at an international level and thus bureaucrats will have more ability to fashion more interventionary rules. First, average citizens will find the international process even more opaque than the domestic process and thus have more difficulty monitoring those charged with carrying out antitrust policy.<sup>19</sup> Geneva is more distant than Washington. Second, more rents are available on a global scale. If business groups can gain international intervention in their favor, they can disable a whole world's worth of competitors.<sup>20</sup> Finally, international antitrust regulators, like other regulators outside the control of government, become a distinct class with a distinctive interest-- that of growing the international antitrust apparatus-- that is not likely to mirror the interests of their government leaders, let alone the interests of the average citizens in the world.<sup>21</sup>

Because of these costs, the formulation and application of international standards may be more excessively interventionist than those of any major nation.

ii. Higher Enforcement Costs. Moreover, we must also consider the costs of enforcing an international harmonized regime. The kind of enforcement costs differ depending on whether an international agency enforces international competition law directly or nations themselves enforce the international standards. We will consider each set of costs in turn. If a substantive international regime is to be enforced directly by international bureaucrats it will be a regime without precedent. Its novelty alone may entail substantial costs. First, any new regime has start

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ROBERT SHILLER, *IRRATIONAL EXUBERANCE* (2000) (using work on representativeness heuristic to suggest that people will think stock market patterns today will be those of tomorrow).

<sup>19</sup> See Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT'L. BUS. 681, 699-702 (1996-1997) (explaining that citizens face higher costs monitoring international rules than domestic rules).

<sup>20</sup> Cf. Frank Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1337-38 (1994).

<sup>21</sup> For discussion of the rise of a network of international regulators to enforce such matters, see Anne Marie Slaughter, *The Real New World Order*, FOREIGN AFF. Sept.-Oct. 1997 at 183, 189. I believe that Professor Slaughter underestimates the public choice costs of such networks, because they will be interested in their own mission and status and will thus not take account of the public interest.

up costs and is more likely to make errors because of lack of appropriate traditions, rules and institutions. International decisionmakers will create high agency costs, for the reasons discussed above. Finally, because such an international corp of decisionmakers will depend ultimately on the coalition of support of leaders from nations states around the world they will need to take the national identity of actors into account in making their decisions, thus distorting whatever competition principles are agreed upon. Even if they did take substantial account of national government interests, it remains an open question whether international regulators would have the political legitimacy to make their decisions stick when a nation state vehemently disagreed.

But perhaps most costly of all, such a regime would necessitate changes in the constitutional structures of nation states. For instance, in the United States the Appointments Clause and the requirement of Article III judiciary represent a serious constitutional bar to giving international decisionmakers authority to render decisions that would directly affect United States decisions.<sup>22</sup> The costs of changing such constitutional provisions are not only those of going through the constitutional amendment process. They also include destabilizing constitutional norms that serve to ameliorate public choice problems of government by assuring an accountable executive and an independent judiciary. Even if these are worth relaxing for the cause of antitrust harmonization, relaxing them may create costs in other areas where their loss would be not worth the cost. It is no answer to say that we can make a case by case decision as to whether or not the costs are worth paying, because our decision to constitutionalize accountability requirements such as that embodied in the Appointments Clause and the Article III judiciary represents a judgment that day to day political judgments on these matters will systematically come out incorrectly.

Another mechanism would be to set international standards but to allow nations themselves to enforce these standards. In other words, the rules would be centralized but enforcement would be decentralized. Such a structure, however, allows over time for nations to diverge dramatically in their application of the standards. Even within a single nation, the judiciary has interpreted essentially the same antitrust law with spectacularly different results in different eras. The results could surely be as disparate in different nations as the international standards will be influenced by the preexisting substratum law of competition.<sup>23</sup>

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<sup>22</sup> See Jim Chen, *Appointments with Disaster: The Unconstitutionality of Binational Arbitral Review Under the United States-Canada Free Trade Agreement*, 49 WASH. & LEE. L. REV. 1455 (1992) (discussing the reasons that direct enforcement of the United States Canada free trade agreement by international arbitrators violates Article II's Appointment Clause because the international arbitrators are not appointed by the President).

<sup>23</sup> See Spencer Waller Weber, *Neo-Realism and International Harmonization of the Law: Lessons from Antitrust*, 42 U. KAN. L. REV. 557, 559 (1994) (harmonized rules enforced nationally rather than internationally will tend to diverge because of different conceptions and values in different nations).

iii. The Potential Loss of Innovation and Progress Through Substantive Harmonization. We must also evaluate whether the international regime would lose any benefits distinctive to the diversified regime. It might be argued that antitrust law can hardly get worse under an international system because under a decentralized system in a globalized world the most restrictive system will also govern. But even apart from the problem discussed above that agency costs may make international standards more excessively interventionist than those of any major nation, this claim would not be quite right. Even in a globalized world, some nations will not have jurisdiction to apply their antitrust law. For instance, a merger may occur that has implications for the United States and Asia but which does not affect Europe. Assuming that Europe is the most restrictive antitrust regime, it will not pass on the legality of a merger where only the United States and Asian nations have jurisdiction. Thus we would have to compare the sum of the antitrust applications in the decentralized system to that of the harmonized system.

Second, and most importantly we should investigate the distinctive benefits of a diversified regime in a world that is not static. In the 1980s United States regime was transformed to embrace a much more optimal economic regime with a better focus on consumer welfare.<sup>24</sup> One question is whether there will be some process by which excessively restrictive regimes will undergo similar transformations. In my view, the different rules operating within a diversified regime may move to a more optimal level by virtue of their very diversity, because diversity creates opportunity for legal innovation and change.

Commentators have rightly noted that competition law will not be optimized by jurisdictional competition. Because of its extraterritorial reach, a nation can apply its competition law to firms that do not choose to locate there and firms thus cannot exit to put pressure on the antitrust law to become more optimal.<sup>25</sup> Conversely, if firms could choose their antitrust law without regard to location they would choose the least restrictive regime which may well turn out to be suboptimal.<sup>26</sup>

Nevertheless, one of the advantages of any decentralized regime even in the absence of the formal conditions for jurisdictional competition, is the innovation and the debate that it engenders.<sup>27</sup> Certainly the EU's merger laws have been heavily criticized when it has prohibited mergers, such as the GE-Honeywell merger, that the United States has allowed.<sup>28</sup> Moreover, this

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<sup>24</sup> See ROBERT H. BORK, *THE ANTITRUST PARADOX* 427 (rev. ed.) (suggesting that by the 1980s American courts were adopting economic efficiency as the touchstone of antitrust).

<sup>25</sup> See Andrew T. Guzman, *Antitrust and International Regulatory Federalism*, 76 N.Y.U. L. REV. 1142, 1149 (2001).

<sup>26</sup> *Id.* at 1148.

<sup>27</sup> See John Duffy, *Harmony and Diversity in Global Patent Law*, 17 BERKELEY TECH. L.J. 685, 690 (2002).

<sup>28</sup> See Eric S. Hochstadt, *The Brown Shoe of European Competition Law*, 24 CARDOZO L. REV. 287, 296 (2002) (collecting criticism).

criticism appears to have good effects, prompting changes in the EU regime.<sup>29</sup> Conflicts can bring beneficial change because the tensions between different official decisions focus the attention of the press and other elites outside government circles on the wisdom of government antitrust intervention. Such focal points of criticism would be lost with harmonization.<sup>30</sup>

A thought experiment is helpful in illustrating the way in which a decentralized regime may be more open to beneficial innovation than in a centralized regime. Assume that antitrust law today was that of the Warren Court era—a very sorry state from the consumer welfare perspective. Under those circumstances, it would be very likely even without the additional agency costs of formulating international rules that the harmonized regime of that era would have been suboptimal from the consumer welfare perspective. And assume further that as in 1980s a *laissez-faire* revolution sweeps the United States but does not reach Europe. It would be harder to change the international regime than the United States regime alone because that regime would have been much more impervious to being destabilized by a revolution limited in geographic scope. And if the United States regime were not transformed, it could not have provide an implicit critique of other national regimes. Despite the public choice tendencies in the developed world for excessive antitrust law intervention, revolutions in social thought and changing political institutions sometimes can upset these policies. These revolutions are much more likely to succeed bit by bit in decentralized regime as they take hold in one nation and spread by example to others. Innovations emanating from the United States, in particular, have been frankly responsible for many beneficial transformations in competition law as well as many other areas of law and culture. In my view, it would be a mistake to set up international structures that inhibit the dynamism of the United States from continuing to exert maximum influence by example.<sup>31</sup>

The need for continually innovative perspectives on antitrust law is especially important because the comparative advantage of government intervention depends on how swiftly the

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<sup>29</sup> *See, e.g.* Remarks of Mario Monti, Commissioner for Competition Policy, Conference on Reform of European Merger Control, British Chamber of Commerce, Brussels, Belgium (April 4, 2002) (acknowledging criticisms of European merger review process in setting forth reform proposals).

<sup>30</sup> It may be argued that European law can be criticized even in the absence of conflict. Of course, it is true that academics and others can critique antitrust law at any point, but the question is whether anyone will listen. Political theorists since Machiavelli have noted that conflicts between officials on fundamental points can engage the public's attention and for a republican government to focus on first principles. *See* NICCOLO MACHIAVELLI, *THE DISCOURSES* (1531), REPRINTED IN 2 *THE HISTORICAL, POLITICAL AND DIPLOMATIC WRITINGS OF NICCOLO MACHIAVELLI* 98-102 (1988).

<sup>31</sup> *Cf.* GEOFFREY BLAINE, *A SHORT HISTORY OF THE WORLD* (2003) (suggesting that the United States is an empire by virtue of the power of its ideas rather than its military conquests).

market will correct for supercompetitive prices in the absence of that intervention.<sup>32</sup> That market process in turn depends on transportation, information costs, and trade restrictions, as a world in which supplies can be easily redirected from one country to another is one in which the market can work faster corrections on supercompetitive prices. The point here is that the appropriate set of rules authorizing government antitrust intervention may differ depending on the effectiveness of general market discipline. Intervention by any bureaucratic rules, no matter how sensible in the abstract, has potential costs, because the government makes mistakes in rule application. Thus, the optimal shape of antitrust rules, like market prices themselves, is always changing. We will therefore benefit from continuing experimentation to gauge the best contours of competition law.

In contrast, an international regime faces a higher degree of stasis in its rules, because the transaction costs of getting agreement from almost all nations in the world to change the rules is higher than that of getting change from a single nation.<sup>33</sup> If, on the other hand, one were to delegate substantial discretion to international bureaucrats, their power would exacerbate the problem of agency costs.

Of course, this analysis assumes that economic efficiency should be the goal of antitrust law. But other objectives would be subject to a similar public choice inquiry.<sup>34</sup> The question would be why national antitrust laws fall short of their identified objectives and why these same difficulties would not prevent international harmonized antitrust from better realizing these objectives. Thus, whatever the appropriate objectives of antitrust, their optimal realization depends on considerations of political economy.

Now it may be thought that there may be some compensating advantages for international antitrust norms. I have suggested that in the developed world there is tendency for antitrust law to be excessively interventionist. In the developing world, there often is little antitrust law<sup>35</sup> and there may thus be underenforcement of competition norms. One contributing factor may be that they lack the government infrastructure to effectively enforce competition law. Moreover, in the developing world government officials or their families are often partners in major industries and

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<sup>32</sup> See Easterbrook, *supra* note x, (suggesting that the scope of antitrust should be limited to instances in which it has a comparative advantage over market correcting forces).

<sup>33</sup> See William J. Alceves, *Institutionalist Theory and International Legal Scholarship*, 12 AM. INT. L. & POL. 227, 244 (1997) (detailing transaction costs of international agreements).

<sup>34</sup> Even those who understand the political economy of antitrust differently from the view advocated here still have to identify the assumptions underlying their predictions of the behavior of government actors and show why international harmonization would be better under these assumptions.

<sup>35</sup> See Julian Epstein, *The Other Side of Harmony: Can Trade and Competition Law Work Together in the International Marketplace*, 17 AM. U. INT'L REV. 343, 360 (2002) (discussing lack of antitrust law in developing nations).

thus, in contrast to the officials in the developing world, they can collect rents directly by sharing in the monopoly profits from collusion and other anticompetitive practices in which their companies engage.

Perhaps it might be thought that an agreement forged between the developed and developing world may reach a happy medium, but I am skeptical. As discussed above, antitrust law must be written with broad concepts and those charged with enforcing them will be largely Western bureaucrats who are motivated by the prospect of the greater prestige and rents that excessive intervention brings. Without a world government or global demos, the actions of these international enforcers will be hard to monitor.

## II. *The Failure of Domestic Antitrust to take Foreign Interests into Account*

A. Introduction. A new interesting argument for substantive harmonization is that nations will systematically fail to take account of the interests of foreign producers and foreign consumers.<sup>36</sup> Thus, application of antitrust law under national systems will be suboptimal, because it will not even attempt to maximize consumer and producer welfare generally.

Such arguments represent the best and most comprehensive attempt to show that a structure of international competition law will represent an improvement over the present decentralized regime. They are better than traditional arguments for four reasons. First, the objective sought—that antitrust laws should be applied without respect to nationality—is a modest one that may well command consensus. Second, the claim that domestic antitrust laws neglect foreign interests has the ring of truth. Third, as globalism makes trade more important it is at least superficially plausible that this neglect has large costs because corporate actions potentially regulated by antitrust affect more and more foreign producers and foreign consumers. Finally, the problem of foreign bias has a clear nexus with substantive harmonization. If the world had a single antitrust law enforced by an international organization, parochial bias might be substantially reduced if not eliminated, just as the federal enforcement of antitrust laws in the United States has reduced concern about state bias.<sup>37</sup>

Professor Andrew Guzman, the leading proponent of this argument for substantive harmonization, employs a relatively simple model to show that countries will take account only of their own citizens' interests. Nations simply neglect the interests of foreign companies and foreign consumers in their calculations of welfare maximizing competition policies. For instance, a country with only exporters of a good and no consumers of that product will turn a blind eye to anticompetitive practices that detract from consumer welfare. Conversely, nations with only consumers and no producers will not take the increased foreign producer profits from

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<sup>36</sup> See Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. Rev. 1501(1998).

<sup>37</sup> It has not eliminated this concern, as shown by the suggestion that Senators who came from the states of Microsoft's competitors influenced the initiation of the Microsoft litigation.

transactions such as mergers into account in assessing whether these transactions should be permitted.<sup>38</sup>

This tendency to neglect foreign interests can theoretically result in two kinds of divergences from the competition law that a nation would have chosen in the absence of trade from other nations. First, it may simply result in either de jure or de facto exceptions to the antitrust laws. For instance, a nation that generally prosecutes cartels could simply exempt domestic cartels that affect only foreign consumers from the ambit of its laws. A nation could also decide to prevent vertical integration of foreign manufacturers that want to sell in its markets while permitting vertical integration of its domestic companies. We will call these divergences “exception divergences.”

Second, if such outright exceptions were not possible, a nation might change its antitrust law from what it would optimally deploy in closed economy—i.e. where only domestic consumers and producers were at issue.<sup>39</sup> If a nation consumed less than it produced and did not distinguish antitrust laws by sectors, it would tend to have weaker antitrust laws than it would in closed a economy, because antitrust laws protect consumers while depriving producer of monopoly profits.<sup>40</sup> This tendency would be particularly pronounced if the nation exported imperfectly competitive products, such as pharmaceuticals and other intellectually property rich products, because monopoly profits from exports would redound to the benefit of the nation.<sup>41</sup> Conversely, if a nation consumed more than it produced then it might tend to have stronger laws than it would in a closed economy.<sup>42</sup> This tendency would be particularly pronounced if the nation exported perfectly competitive products because antitrust laws would not affect those anyway.<sup>43</sup> I will call this kind of divergence “distortion divergence” and address these two kind of divergences separately.

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<sup>38</sup> *Antitrust Possible* at 1520. Professor Guzman’s general result is: Assuming that nations apply their antitrust laws extraterritorially, the general result is that “a country whose firms are responsible for x % of global production will take into account x% of the change in global producer surplus generated by a particular activity and that a country whose consumers account for y% of global consumption will take account y % of the total change in global surplus generated by the activity.” *Id.*

<sup>39</sup> See Andrew T. Guzman, *International Antitrust and the WTO: The Lesson from Intellectual Property*, 43 *Va. J. Int’l xx* (forthcoming 2003)/

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

Professor Guzman then suggests that substantive international antitrust provides a potential solution to this problem, because international rules and enforcement would have no reason to discriminate on a parochial basis. Thus, at least potentially antitrust enforcement would move to a more optimal level.

The attractiveness of this solution depends on how problematic parochial bias is for antitrust and whether there are features of international harmonization that actually make it likely that international harmonization will move away from the optimal level of antitrust enforcement. First, I believe that bias may be less of a problem than Professor Guzman's formal model suggests it will be in all circumstances. Second, and more fundamentally, bias might compensate for other public choice problems of antitrust, paradoxically leading to more optimal competition laws. Third, even assuming that local enforcement is suboptimal, harmonizing substantive international antitrust rules may sacrifice so much in experimentation and potential for beneficial transformation that the costs may outweigh the benefits.

B. Institutions and Localism. Professor Guzman is certainly correct in his claim that antitrust will sometimes be deployed systematically to consider only local interests and will be biased against foreign interests in some circumstances. Exception divergences will result. Congress, for instance, has exempted export cartels from the reach of antitrust laws and may be influenced by predominance of exporter interests in exempting certain sectors from antitrust altogether.<sup>44</sup> Parochial bias strongly influences Congress and other democratic legislatures around the world.

That foreign bias can affect antitrust laws should come as no surprise to public choice analysis. Legislators do not gain by promoting the interests of foreigners, because foreigners do not vote and foreigners are often prohibited from providing material aid to politicians in other ways such as through campaign contributions.<sup>45</sup> For similar reasons, constitutions that attempt to discipline legislators by rules encouraging neutrality among their own regions are likely to be indifferent, even antagonistic, to foreign interests.

But many antitrust laws are neutral on their face, particularly as between foreign and domestic producers.<sup>46</sup> When the laws themselves are neutral it is not so clear that foreign

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<sup>44</sup> See, e.g. Web Pomerene Act, Pub. L. No. 65 -126, 40 Stat. 516 (1918) (codified at 15 U.S.C. §§ 16-66 (1994)).

<sup>45</sup> See, e.g., 2 U.S.C. 441 (e) (1994).

<sup>46</sup> It is interesting to speculate why Congress does not make such parochial distinctions between foreign and domestic companies in merger laws. If Congress did shape our laws to be so blatantly discriminatory, they would invite retaliation against United States companies. United States companies might thus lobby against such discrimination. In contrast, American consumers are a diffuse group and are not in a position to prevent discrimination against foreign consumers even if it were to encourage discrimination against United States consumers in foreign competition laws. United States law does seem to discriminate against foreign consumer interests. See *infra* notes xx and accompanying text.

interests will be neglected, because the legal institutions charged with carrying them out may not be as subject to parochial bias as legislators. Let me illustrate this latter point with some examples in United States antitrust enforcement. First, assume that U.S. has only consumers of a product. Will our antitrust system fail to take account of producer surplus of the foreign companies in deciding whether to challenge a merger? First, classifying the nationality of multinational corporations is often difficult. They have shareholders and employees around the world and thus government decision makers would often take some substantial account of their interests. Second, advanced industrial democracies like the United States have developed formal rules and a legal culture that requires decision makers to consider only those criteria that the law makes relevant. Thus, the judiciary and to some extent the bureaucracy will be constrained to take foreign interests into account so long as the law does not formally eliminate them from consideration.

In fact, the International Operations Guidelines issued by the Department of Justice make clear that unless the law otherwise requires, the “the agencies do not discriminate in enforcement of the antitrust laws on the basis of the nationality of the parties.”<sup>47</sup> Now of course, it is always possible that decision makers will slight these interests, but it not entirely clear what the mechanism that will guide them to do this. They have craft interests that militate against such blatant favoritism.

Moreover, if the antitrust division disapproves a merger, the company has recourse to a judge who is even less likely to be swayed by such local bias. To be sure, sometimes because of timing issues, regulators can stop mergers before judges can review their decisions, but nevertheless judicial review offers some protection in many cases. Thus, there are a variety of institutional screens that in the United States context make bias less likely in cases assessing the anticompetitive conduct of foreign companies.

Now assume that the U.S. has only producers of a product and no consumers. Will antitrust fail to intervene to protect foreign consumer interests? Here there may be more reason to worry. A recent act has suggested that the interest of foreign consumers need not be taken into account in most circumstances in initiating antitrust actions.<sup>48</sup> The Justice Department International Antitrust Operations Guidelines confirm this stance.<sup>49</sup> Even in the absence of such a direction, in initiating a prosecution bureaucrats must take account of budgetary constraints and in the context of case selection bias may be more likely to creep in because it is less obvious. Moreover, since there is no judicial review of failure to take an action, the judiciary will not be a bulwark against bias.

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<sup>47</sup> See Guidelines for International Operations, U.S. Department of Justice Antitrust Enforcement (April 1995) at p. 3, [www.usdoj.gov/atr/public/guidelines/internat.htm](http://www.usdoj.gov/atr/public/guidelines/internat.htm)

<sup>48</sup> See The Foreign Trade Antitrust Improvements Act, 15 U.S.C. 6(a) 1994.

<sup>49</sup> See Guidelines for International Operations, *supra* note x, at 9-15 (requiring an effect on United States commerce or United States producers to assert U.S. antitrust jurisdiction).

The general lesson of this review is the importance of making our models institutionally rich. Only then can we assess the degree of damage a diverse antitrust regime will inflict through the tendency toward bias against foreign interests.

C. Public Choice Considerations Countervailing to Foreign Bias. If one believes that public officials do not necessarily enact and enforce competition laws in the public interest, bias against foreign interests will not necessarily make antitrust laws depart from an economically optimal regime.<sup>50</sup> Indeed, such foreign bias may counteract the public choice driven biases against wealth maximizing laws and thus move competition law toward a more optimal state.

For instance, let us assume that, contrary to their claim that they treat producers of all nationalities equally, prosecutors in the United States give greater weight to producer interests (when they are primarily domestic) and less weight to consumer interests (when they are foreign) than is justified by the letter of the law. In many instances, this reweighting may move us toward optimal antitrust enforcement because it will make prosecutors less likely to go after monopolies and other commercial practices in the marginal case where the public choice factors described above may lead to overenforcement.

One might suggest that the bias against foreign interests would have the opposite effects when the United States has almost all the consumers and few of the producers of a product. For instance, in deciding whether to allow a merger initiated by a foreign corporation, administrators' tendency to disallow the merger because of bias toward overenforcement may be exacerbated by a bias against foreign producer interests. But I have already suggested that because of institutional constraints, like an independent judiciary, foreign bias may have less effect in this context.

In any event, without a careful investigation of public choice and institutional factors one cannot really measure the extent to which exception divergence moves us away from the optimal enforcement of neutral antitrust laws.

D. Distortion Divergence of Neutral Laws Because of Foreign Bias. Besides leading to specific exemptions from antitrust, there is a theory discussed above that foreign bias may lead to distortion divergence from what their unbiased laws would have been under a closed economy. While distortion divergence is a possibility based on an economic model, it is supported by less empirical evidence than exception divergence. In fact there are some reasons to doubt that it is more than a theoretical possibility. First, a nation's balance between production and consumption changes as does the kind of goods it exports. It seems unlikely that a nation changes its antitrust law to follow changing patterns of consumption and production: the transactions costs are too high. Second, antitrust law does not appear to track closely the predictions of the model. Developed nations that export imperfectly competitive goods tend to have more interventionist

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<sup>50</sup> As Professor Guzman acknowledges. See Guzman, *Antitrust Possible* at 1531.

laws than the developing nations, although the theory suggests that the tendency would be the other way.<sup>51</sup>

In any event, even if such tendencies exist, it not clear whether they will make antitrust law better or worse. It depends on what are other forces that shape antitrust law. If, as I have suggested, there is tendency for developed nations to deploy excessively interventionist competition laws and developing nations to deploy too lenient competition laws, trade is likely to make the laws better than the would be under a closed economy. For instance, because of their export of imperfectly competitive goods, the developed nations will adopt laws that are less suboptimally stringent than they otherwise would.

Thus, even before we look at the costs of the international harmonization, it is not at all clear that the costs of parochialism are as high as might be initially assumed. And the size of these costs are crucial because they must be weighed against the cost of substantive harmonization which I have suggested may be quite high. First, the high agency costs may lead to less optimal enforcement than at the local level. Second, the loss of experimentation and conflict may decrease the opportunities for beneficial transformation of competition laws.

### III: *A More Modest Approach: The Antidiscrimination Model*

A. Introduction. Assuming that foreign bias is a substantial problem and that it moves us away from optimal antitrust enforcement, avenues to address the issue other than complete substantive antitrust harmonization should be considered. It is generally wise to offer a solution that goes no further than the problem warrants and here the identified problem is bias against foreign interests. Thus, another way of trying to cabin foreign bias in the formulation and application of competition rules would not involve substantive harmonization, but simply an attempt to eliminate foreign bias from influencing the content of the domestic antitrust laws.

This approach would have several advantages over substantive harmonization. It would preserve diversity of antitrust approaches. Conflict on the substance of antitrust law could still occur, generating publicity and cutting through agency costs. Better norms thus could thus still evolve from the debate that diversity may engender.

An antidiscrimination antitrust regime could also be put into an existing system of the WTO with precedent for enforcing nondiscrimination principles. Invigorating the WTO's prohibition against discriminatory competition rules that inhibit market access of exporters might remove non-tariff barriers to trade as well as improve the content of competition law. In the absence of a prohibition, nations are likely to substitute discriminatory market access as a nontariff barrier as WTO agreements progressively reduce tariff barriers. This likely substitution by special interests, while never discussed in the debates over antitrust harmonization, is in my view the best reason for an antidiscrimination antitrust regime, because it provides a concrete reason to believe the impulse to foreign bias will become stronger as the WTO clears away other

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<sup>51</sup> See *supra* note x (discussing the reasons that many developing nations have weak antitrust laws).

trade restrictions. Other effects of foreign bias in antitrust, like the failure to take foreign consumer interests into account, does not undermine the WTO's tariff reductions, but the WTO with its experience at ferreting out discrimination in nations' regimes may still be a useful forum to issue reports on such discriminatory practices.

An antitrust nondiscrimination regime would require nations not to discriminate in application of their competition laws and treat foreign producer and consumer interests equivalently to their domestic producer and consumer interests. This regime can have thinner or thicker nondiscrimination requirements depending on whether it sought to ferret out discrimination in application of the laws as well as in their formulation. How thick the requirements should depend on the institutional context bearing on discrimination against foreign interests: as discussed above, for instance, legislatures are more likely to discriminate in the formulation of rules than an independent judiciary is discriminate in the application of rules.

Thus a nondiscrimination regime might begin by simply forbidding discriminatory laws like foreign cartel exemptions or exemptions for particular industries that seem tied to the predominantly export oriented industries. If administrative discrimination is likely to move the regime from optimal enforcement, rules for nondiscrimination in such areas of enforcement could be added to the regime. Such a thickening of the antidiscrimination principle might be accompanied by providing a safe harbor for countries with institutional regimes (such as one that includes an independent judiciary) that are unlikely to discriminate against foreign interests. Thus, these rules would not require nations to adjudicate in any particular way, but one would take account of their institutional process in determining the scrutiny needed for bias. This would decrease the need for international oversight while giving nations incentives to build the institutions to protect against foreign bias. Pressure for procedural as opposed to substantive harmonization can increase transparency of rules and decrease bias without imposing uniform substantive requirements on diverse nations.

Another advantage of this system would be that neither its formulation nor enforcement would be subject to the peculiarly high agency costs and other public choice problems involved in choosing substantive rules. The formulation of the rules would be fairly straightforward because they would not involve policy discretion in choosing the substantive content of antitrust rules just implementation of the nondiscrimination principle.

I caution that I am here sketching a regulatory ideal of an antidiscrimination antitrust regime. Many of the best features of such an ideal, such as excising antidumping law applied to foreign producers when they are inconsistent with the antitrust laws applied to domestic producers, are unlikely to be realized in the short term because of political obstacles in the Doha round. But it is useful to understand our baselines before the political compromises begin.

B. The Shape of a WTO Antidiscrimination Regime in Competition Law It has been argued that the best place for the antitrust harmonization to take place is the WTO, principally because antitrust harmonization can become a subject of bargaining and those nations that would be made worse off by antitrust harmonization can trade it for other items (i.e. lower tariffs, stricter enforcement of an antidumping regime) that they would prefer but other countries would not.<sup>52</sup> This seems a plausible argument. But it is much strengthened if the content of antitrust harmonization consists of antidiscrimination rules. For antidiscrimination model, the WTO offers precedent for the content of the model's rules because the WTO with few exceptions requires its members not to discriminate against other members in their regulatory regimes rather than imposes substantive restrictions on the content of regulation. For a limited antidiscrimination regime, the WTO thus affords a better institutional match than UNCTAD or the Organization for International Cooperation or Development, other forums that have been suggested for an development of an international competition structure.<sup>53</sup> Moreover, an antidiscrimination international antitrust regime will not threaten to transform the WTO into a regime with very high agency costs, because it will not set a precedent for substantive regulatory rulemaking.

To understand the way an antidiscrimination antitrust regime can fit into the WTO regime, it is useful to explain the basic political economy of the WTO regime. The WTO creates a structure moving toward freer world trade by creating a reciprocal relation between tariff reductions domestically and those in other countries and thereby changing the constellation of political interests at play in debates over tariff reductions.<sup>54</sup>

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<sup>52</sup> See, e.g., Guzman, Antitrust and Regulatory Federalism, *supra* note x, at 1157.

<sup>53</sup> See Consumer Policy and Multilateral Competition Frameworks Discussion Paper.

<sup>54</sup> See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 157-74 (2d. ed. 2002) (discussing the reciprocal nature of the Most Favored Nation obligation of the WTO.)

The benefits that exporter groups gain from low tariffs abroad cause them to enter the political struggle against the protectionist interest groups at home, thus virtually representing the public's interest in wealth enhancing free trade.<sup>55</sup> Thus, the WTO blunts the ability of protectionist interest groups to obstruct lower tariffs that would benefit majority of citizens in their countries.<sup>56</sup> Under this view, the WTO is a regime that facilitates democratic choice within individual states even as it increases wealth by decreasing tariff barriers.

But the reduction of tariffs does not make interest groups disappear, but merely causes them to adopt a more subtle strategy of protectionism. They have a tendency to substitute nontariff barriers for the reduced tariffs so they can continue to earn rents.<sup>57</sup> An important kind of nontariff barrier is discriminatory regulation. Discriminatory health and safety regulation is well-known and much of the current WTO dispute settlement regime is aimed at providing avenues for government to challenge such discriminatory regulation as part of the dispute settlement system.<sup>58</sup>

Quite apart from any interest in harmonization for the sake of the efficiency of the antitrust law, the WTO regime should prohibit discriminatory antitrust laws that interfere with market access. Otherwise protectionist interest groups will have a tendency to substitute such discriminatory rules and frustrate the effect of tariff reductions. This development can detract from the entire WTO regime because exporter groups will not have ex ante incentives to fight for lower tariffs in their home country if they recognize that their reciprocal gains abroad can be reduced by such a strategy.<sup>59</sup> Examples of discriminatory antitrust regulations that detract from market access would include discriminatory restrictions on importing companies that prevent these companies from integrating vertically with domestic companies, if such mergers would facilitate

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<sup>55</sup> See John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 545 (2000) (noting that producers who enjoy a comparative advantage gain new markets when foreign countries reduce tariffs, which creates incentive for such producers to lobby for lower tariffs in their own countries.)

<sup>56</sup> *Id.* at 546.

<sup>57</sup> For a general discussion of the manner in which concentrated interest groups will attempt to substitute one kind of rent-seeking for another kind that is blocked by the political system, see John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MY. L. REV. 365, 428-429 (1999).

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See McGinnis & Movsesian, *supra* note x, at 566-572 (explaining the antidiscrimination model of the WTO).

<sup>59</sup> See John O. McGinnis, *Minimizing Wealth Reducing Conflicts Through International Law With an Illustration from the Subsidies Regime*, xx N. W. J. INT'L L. & BUS. xx (forthcoming 2002).

competition against domestic companies. Other discriminatory practices might include refusing to apply for the benefit of foreign companies rules against boycotts or a domestic requirement of providing competitors “an essential facility,” even when domestic companies receive the advantage of such rules.

It may be that Article III of the GATT that embodies GATT’s national treatment requirement could be interpreted to provide such protections in some instances. But it is clear from the case law that it would not reach all discriminatory antitrust legislation that could interfere with market access.<sup>60</sup> The Doha round thus could usefully provide a separate agreement devoted to antitrust law to make national treatment principles more comprehensive and concrete in the area of competition law, as previous rounds of the GATT have provided separate agreements that make national treatment principles more comprehensive and concrete in in such contexts as the regulation of organisms and their products<sup>61</sup> and in technical regulation of products.<sup>62</sup>

In particular, Article III: 4 requires only that a member nation from providing less favorable treatment to foreign “like products,” providing only limited protections to foreign exports.<sup>63</sup> Given the “like products” element of the requirement, it is conceivable that a nation could apply its competition law differently depending on the product at issue, so long as it applied the competition law equally to the same product. For instance, if the new low cost provider of a product were a foreign import a nation might well permit boycotts and other anticompetitive processes to frustrate all new entrants, both domestic and foreign, on the grounds that the actual incidence of the anticompetitive process would fall mostly on the foreign imports. A WTO panel actually gave this limited but defensible reading to Article III:4 when it held that Japan had not discriminated against American photographic film producers because its competition law

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<sup>60</sup> I discuss some of this case law below.

<sup>61</sup> Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994. WTO Agreement, Annex IA, Legal Instruments – Results of the Uruguay Round vol. 27 (1994), [http://www.wto.org/english/docs\\_e/legal\\_e/15-sps.pdf](http://www.wto.org/english/docs_e/legal_e/15-sps.pdf) [hereinafter SPS Agreement].

<sup>62</sup> Agreement on Technical Barriers to Trade, Apr. 15, 1994. WTO Agreement, Annex IA. Legal Instruments – Results of the Uruguay Round vol. 27 (1994), [http://www.wto.org/english/docs\\_e/legal\\_e/17-tbt.pdf](http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf) [hereinafter TBT Agreement]

<sup>63</sup> Article III: 4 of GATT provides: The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product

treated Japanese film producers in the same way.<sup>64</sup> Left unexplored in the opinion was whether Japan was applying its competition law in the photographic film industry as it does in other industries. The problem of divergent sectoral application of antitrust laws driven by foreign bias is likely to become a bigger problem as the General Agreement on Trade in Services reduces other kinds of barriers in an increasing number of service sectors.

There is precedent in the WTO for a broader requirement of legal consistency. For instance the Sanitary and Phytosanitary Standards Agreement—the GATT agreement that regulates food regulation—requires members to avoid “arbitrary or unjustifiable distinctions in the in the level [of protection it considers] to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.” The contemplated WTO competition agreement could deploy a similar consistency requirement, requiring nations not to arbitrarily vary their competition law depending on the products and services at issue. As discussed below, such a requirement should be even easier to apply than the SPS consistency requirement.<sup>65</sup>

Of course, even this requirement will not assure market access if a nation, like Japan refuses punish anticompetitive behavior even when directed against its own citizens. But in that case the nation must resist the application of antitrust regime that would benefit not only their consumers generally but domestic producers entering the full range of their product markets. Thus, an invigorated consistency rule should make it harder for a nation to engage in covert discrimination in market access.

The contemplated Competition Code emerging from the Doha round should also clarify that government actions to be assessed under its standard must be broadly construed. It must cover all government action, including government policy formulation and implementation.<sup>66</sup> Specifically, it must include government inaction because inaction

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<sup>64</sup> See Japan—Measures Affecting Consumer Photographic Film and Paper, Report of the Panel, WT/DS44/R at §§10.378-10.382 (March 31, 1998).

<sup>65</sup> One effect of such an antidiscrimination regime would to encourage nations to adopt antitrust rules of general applicability rather than special rules for different sectors because the latter could be subject to attack under an general antidiscrimination regime. I count this modest move toward substantive harmonization an advantage because it encourages laws of general applicability, countering public choice problems. Law of general applicability are less likely to be product of special interests than laws which can shaped to apply to one constellation of interests. See Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation and the Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 VAND. L. REV. 1355, 1410 (1993) (noting that laws of general applicability have fewer public choice pathologies).

<sup>66</sup> The scope of government action to scrutinized was a also a contested issue in the Photographic Films case. *Id.* at §§ 10.375-10.376.

under competition laws can be discriminatory and deny market access, as when a government attacks only anticompetitive practices that affect domestic companies.

It is important to note one potential conflict between an antidiscrimination antitrust model and the WTO regime.<sup>67</sup> Currently, the WTO regime permits antidumping laws under certain conditions.<sup>68</sup> Antidumping laws generally permit tariffs to be raised on foreign imports if they are sold at a price lower than the price in their home country or lower than the cost of production.<sup>69</sup> In contrast, domestic antitrust often (as in the United States for instance) permits suits against domestic companies only if their cost is lower than their cost of production and even then only under very defined circumstances. More generally, a nation's antidumping regime is at war with the consumer welfare model of its antitrust regime, because antidumping remedies are intended to protect competitors rather than competition.<sup>70</sup> Thus any regime that has consumer welfare as its goal in antitrust but deploys antidumping laws is potentially subject to attack under a serious antidiscrimination antitrust regime that seeks to guarantee market access. For political reasons, it may well not be possible to subject antidumping laws to the discipline of an antitrust antidiscrimination model. Indeed the difference between our antitrust regime and the antidumping regime offers a practical measure of the entrenched power of interest groups and xenophobia to inhibit wealth creating free trade. Nevertheless, there would be no difficulty from the perspective of ideal free trade if an antitrust antidiscrimination regime eventually undermines GATT's permission for antidumping laws.

It should be noted that not all discriminatory laws relate to market access. For instance, a country could fail to take account of foreign consumer welfare in the calculus of its antitrust laws and thus could permit export cartels while it prohibited cartels that would impose costs on its domestic consumers. Such a policy would not interfere with the market access of foreign importers. As such, while it may be an unfortunate policy it does not detract from the basic dynamic of the WTO regime by reducing the incentives of exporters to battle for lower tariffs in their home country. For that reason, as I will explain in more detail later, antidiscrimination norms in antitrust that do not facilitate market access should not be enforced by the WTO dispute resolution system.

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<sup>67</sup> See Wesley A. Cann Jr, *Internationalizing Views Toward Recoupment and Market Power: Attacking the Antidumping Dichotomy through WTO-consistent Global Welfare Theory*, 17 PA. J. INT'L ECON. L. 69 (1996) (describing tension between antitrust and antidumping law).

<sup>68</sup> See GATT Article VI (permitting GATT members to raise tariffs in response to dumping by importing nations).

<sup>69</sup> See, e.g., 19 U.S.C. 1673.

<sup>70</sup> For discussion of the tension, see Richard Boltuck & Seth Kaplan, *Conflicting Entitlements: Can Antidumping And Antitrust Regulation be Reconciled*, 61 U.CIN. L. REV. 903 (1993).

Nevertheless, such antidiscrimination norms can still benefit, however enforced, from the methodology that the WTO has used to ferret out discriminatory regulations.

### C. The Constraints of Antidiscrimination Rules and the Minimization of Agency Costs

The public choice problems described in section III will affect antidiscrimination rules far less than substantive rules because antidiscrimination rules remove most policy discretion from international decisionmakers. The WTO, for instance, already enforces antidiscrimination principles with respect to other regulations with a variety of procedure oriented rules that eschew the kind of policy decisions that can be distorted by public choice factors, including bureaucratic interests. The WTO's antidiscrimination jurisprudence considers whether a nation's rules are transparent, consistently applied with respect to foreign and domestic producers, and avoid regulatory processes that are unnecessary to advance the regulations' objective.<sup>71</sup>

For instance, the transparency requirement does not require substantive judgments and yet helps assure that both foreign and domestic producers face similar compliance costs for antitrust regulations. Foreign firms may have greater difficulty complying with generally applicable regulations because domestic producers may better understand the opaque requirements of their own bureaucracy. Transparency helps level the regulatory playing field by ensuring that regulations are publicized and the steps for compliance are clear.<sup>72</sup>

Even transparent regulations, however, can have an unequal incidence on foreign and domestic producers or foreign and domestic consumers if they are unequally applied.<sup>73</sup> Thus, the antidiscrimination regime would need to make sure the regulations are applied consistently. For example, if a nation enforced its law against cartels only when the cartels were of foreign producers, that would violate a nondiscrimination rule. Evaluating consistency would not require a review of the substance of a nation's competition regulations just a comparison of its treatment of foreigner producers or consumers and its treatment of domestic producers or consumers.

This comparison should in fact be easier than similar comparisons undertaken by the WTO in evaluating health and safety regulations because a consistency evaluation in that context requires identifying the health and safety objectives that myriad of health and regulations serve. For instance, in order to decide that an Australian regulation

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<sup>71</sup> For fuller discussion of this jurisprudence, see McGinnis and Movsesian, *supra*, note x, at pp. 572-581.

<sup>72</sup> See Edward A. Laing, *Equal Access/Non-Discrimination in International Economic Law*, 14 WISC. INT'L. L. 246, 296 (1996) (understanding the transparency requirement as a means of preventing discrimination against foreign products).

<sup>73</sup> See McGinnis & Movsesian, *supra* note x, at 575.

prohibiting the importation of salmon was discriminatory, the WTO compared this regulation with weaker regulations relating to domestic herring which it concluded posed higher risks.<sup>74</sup> In the competition context, in contrast, nations tend to have somewhat more unified rules focusing on improving competition. The questions would not concern the difficult question of which regulation affecting domestic producers provide an appropriate comparison to the allegedly inconsistent regulation affecting foreign producers but the simpler question whether the nation's competition law was applied consistently across the range of product markets. The WTO Competition Code could also adopt a stance of substantial deference to enforcement decisions if those decisions were reviewed domestically by a judiciary genuinely independent of the executive and structured in such a way that it substantially eliminates the possibility of foreign bias.

One final danger would be that nations might add requirements, procedural or substantive, that do not advance their legitimate antitrust objectives simply because those regulations imposed greater costs on foreign producers. Once again the antidiscrimination regime could use precedent in the WTO to apply a least restrictive alternative requirement to eliminate provisions extraneous to competition objectives. The review would not be deeply substantive and subject to public choice pathologies, because it would not need to identify the competition objectives that the law served, only to make sure that the regulations served those objectives and not the cause of discrimination.<sup>75</sup>

D. Enforcement of WTO Antidiscrimination Competition Law Decisions. If antitrust harmonization took place within the WTO, another advantage of a nondiscrimination regime would be that it would also not require construction of a new and untested institution, since tribunals are already familiar with applying a nondiscrimination jurisprudence. Like the rest of WTO regime, such a Competition Code would also allow, except for discrimination issues, final responsibility for antitrust decisions to rest with officials of the country concerned, thus ameliorating fears that substantive decisions taken internationally create a democratic deficit.

The dispute resolution system within the WTO also minimizes the enforcement problems discussed earlier. It requires international review of domestic decisions, avoiding the parochial interpretation of its principles that will over time lead to divergence.<sup>76</sup> Yet WTO rulings are only binding as a matter of international law. They have no direct effect, leaving the final decision to implement the ruling to member states.

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<sup>74</sup>WTO Appellate Body Report on Australia,—Measure Affecting Importation of Salmon, WT/DS18/AB/R §§ 154-158, [http://www.wto.org/english/tratop\\_e/dispu\\_ds/18abr.doc](http://www.wto.org/english/tratop_e/dispu_ds/18abr.doc).

<sup>75</sup> See Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV.1, 25 (1999) (noting the least restrictive means test allows governments to pursue their chosen objectives).

<sup>76</sup> For problems of national interpretation of international principles, see *supra* notes xx and accompanying text.

It thus permits domestic systems of constitutional accountability to work and avoids the substantial costs of direct implementation of international rulings.<sup>77</sup>

Even without direct effect, the WTO nevertheless deploys a fairly effective method of gaining compliance with its rulings. If a nation does not comply with a ruling of the WTO, the offended nation can generally seek to withdraw concessions from the offending nation in value equal to the harm that the violation of WTO rules is causing.<sup>78</sup> For instance, if a nation were found to have violated the Competition Code by failing to afford a foreign market entrant the protection that it gave to domestic market entrants, the offended foreign nation would be authorized to raise its tariffs on a product of the offending nation in the amount of the value of the violation. The theory is that such sanctions will energize the exporters adversely affected by the sanctions to lobby their governments to comply with the WTO ruling.<sup>79</sup>

Given the institutional precedent of the WTO, dispute resolution under the WTO (or at least withdrawal of concessions authorized by dispute resolution) should be available only for violations of the WTO Competition provisions that impair market access. Thus, for instance, decisions by nations specially to immunize export cartels from antitrust scrutiny would not be subject to dispute resolution. The reason is that extending dispute resolution to competition law that does not affect market access of exporters would impose costs on exporters with no corresponding benefits. As discussed above, the WTO structure relies on exporters to lobby for lower tariffs in their own countries in return for concessions abroad.<sup>80</sup> The prospect of future sanctions will reduce ex ante the value of these concession and cause exporters to lobby less for the lowering of tariffs in their own countries. This cost is worth paying if, as I argued above, enforcing a prohibition on discriminatory regulation is necessary to prevent nations from substituting discriminatory regulations, including discriminatory antitrust regulations that affect market access, for tariff barriers. But if the discriminatory antitrust regulations do not affect market access (as when a nation permits export cartels at the expense of foreign consumers) the use of WTO sanctions to enforce a prohibition against such regulations will impose costs on a class of companies that does not receive benefits from the enforcement. As a result, expanding the withdrawal of concessions beyond market access

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<sup>77</sup> For problems involved in loss of constitutional accountability, see *supra* notes xx and accompanying text.

<sup>78</sup> SCM 4.10; 7.8. Article 22 of The Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex to 2 to the WTO agreement provides that the WTO can authorize an offended member to either receive compensation or retaliate by withdrawing concessions. The retaliation must be “equivalent” to the loss the offended member has sustained. DSU 22.4.

<sup>79</sup> See Mark L Movsesian, *Enforcement of WTO Ruling: An Interest Group Analysis*, 22 N.W. J INT’L BUS. (forthcoming 2002).

<sup>80</sup> See *supra* notes xx and accompanying text.

issues would tend to reduce the expected value of the WTO regime to exporters and thus diminish their activism in support of the rounds of reciprocal tariff reductions that are at its heart.

Even if the WTO should not provide full dispute resolution for violations of antidiscrimination norms that are not related to market access there can be other vehicles for the WTO to monitor compliance with such norms. A competition committee could issue periodic reports and such reports could create pressure for nations to change their practices.<sup>81</sup> Because of the WTO's experience in applying antidiscrimination rules, as discussed above, it may be a better forum for such reports than other organizations.

E. Objections. I address two possible objections to limiting international antitrust within the WTO to a nondiscrimination regime rather than adding the requirement, as the Doha agenda appears to contemplate, that all WTO members also be held to certain "core competition principles."<sup>82</sup> The first is that nondiscrimination principles are not sufficient to force nations to treat foreign interests equally. Some countries, for instance, may choose to have no antitrust law because they want to help their producers at the expense of foreign consumers. Moreover, it may not be rational for a small country to have an antitrust law, because it will not have the clout to apply its competition law extraterritorially to protect its own consumers.<sup>83</sup>

An international agreement could take care of the second point by requiring other nations to permit the extraterritorial application of another nation's laws, at least on the same antitrust theories deployed by the nation whose producers are the target of the antitrust enforcement. Thus, a nation would no longer have an international process obstacle to the enforcement of antitrust laws.

But the international regime should not require nations to choose some particular form of antitrust law. Small, undeveloped, nations may rationally choose a low level of antitrust enforcement for reasons wholly related to their domestic situation rather than to any foreign bias. First, given vigorous international trade, small, developing nations may best conclude that monopoly prices of both domestic and foreign products can be best constrained by foreign competition rather than domestic antitrust intervention. The smaller the size of a nation's market, the easier it is for a foreign company to redirect part of its supply to discipline any supercompetitive prices in that nation.<sup>84</sup> Thus, a small

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<sup>81</sup> The WTO has created more informal structures, such as the Trade Review Mechanism, which encourages nations to improve their laws from a trade perspective.

<sup>82</sup> See *supra* notes xx and accompanying text description of Doha agenda.

<sup>83</sup> See Guzman, Antitrust and Regulatory Federalism, *supra* note, at 1153.

<sup>84</sup> See A.E. Rodriguez & Mark D. Williams, *The Effectiveness of Proposed Antitrust Programs for Developing Countries*, 19 N.C.J. INT'L L. & COM. REG. 209, 218 (1994) (Competition from imports "is a countervailing force against whatever power

nation may rely on free trade rather than competition laws to promote consumer welfare. Second, if as I have argued, the central question in antitrust is the comparative advantage of corrective market processes and government intervention,<sup>85</sup> such nations may rationally take account of their relatively weak institutional competence in assessing the likelihood that government intervention will lead to better results than market processes.

Finally, there are nonfrivolous arguments that in a variety of situations no antitrust enforcement will be superior to the antitrust enforcement of a particular government.<sup>86</sup> It is an advantage of a diversified system that some countries can test this regime that others may study its fruits. It is no answer to say that cartels are always bad, because distinguishing a horizontal agreement that constitutes a anticompetitive cartel and from one that may have market benefits is a matter of debate even under United States antitrust law. Thus, the antidiscrimination model of antitrust harmonization should oppose substantive harmonization even if it limited to “core principles” or some other formulation that would impose a standard scope for some kinds of antitrust and inhibit innovative rules, including the absence of government intervention, in the area of horizontal agreements.<sup>87</sup>

Second, some may suggest that each WTO member should be required to enforce core antitrust principles on the analogy that TRIPS requires WTO members to enforce core intellectual property principles. But there are both theoretical and practical reasons that substantive intellectual property principles are enforced through the WTO that do not apply for substantive antitrust rules. First, certain nations have no incentives to provide any intellectual property laws at all. For instance, consider a small developing nation with few, if any, inventors. That nation has no incentives to give patent protection, because it would rationally conclude that it is better to free ride on the inventions of others.<sup>88</sup> Indeed, even if a small developing nation had some inventors, it would have no incentives to provide patent protection because creators in their nations would reap sufficient rewards through getting patent protection abroad.<sup>89</sup>

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domestic firms may have to raise prices above the competitive and socially efficient level).

<sup>85</sup> See *supra* notes xx and accompanying text.

<sup>86</sup> See Lino A. Graglia, *Is Antitrust Obsolete*, 23 HARV. J.L. & PUB. POL. 11, 21 (1999) (arguing that in many instances antitrust law does more harm than good).

<sup>87</sup> See *supra* notes xx and accompanying text (discussing Doha agenda that contemplates enforcement of core antitrust principles).

<sup>88</sup> See Duffy, *supra* note x, at 698-699 (explaining the international externalities of intellectual property systems that justify TRIPS).

<sup>89</sup> *Id.* at 701.

The case concerning antitrust is different: all nations have consumers and thus nations have incentives to have antitrust laws. These incentives may not be perfect and may be affected by the mix of imported and exported goods, but that is true of all regulations. Nevertheless the WTO does not and should not require nations to have a floor of health, safety, labor or other regulations because of the public choice defects involved in international regulatory regimes.<sup>90</sup> The WTO requires only that these laws be nondiscriminatory and this is the proper analogy for a competition regime. Here we have shown how these antidiscrimination principles may be deepened in the context of competition law.

Moreover there were intensely pragmatic reasons for the inclusion of TRIPs into the WTO that go the heart of the dynamic that fuels the WTO's reciprocal tariff reductions. The developing world most wanted tariff reductions in textiles and agriculture where it often holds a comparative advantage. But it could only succeed in obtaining these reductions with the help of the most powerful exporters in the developed nations. These exporters, such as film producers and pharmaceutical companies, had exports that made use of intellectual property. They would not have been enthusiastic, however, about the prospect of increasing their exports to the developing world through reciprocal tariff reductions, if the developing world continued to expropriate what was in their view their intellectual property. Accordingly, the grand bargain at the heart of the Uruguay Round required nations, particularly developing nations, to adopt minimum standards for intellectual property in return for the agreement of developed nations to lower tariffs on textiles and agriculture.<sup>91</sup> Key export sectors are not demanding substantive harmonization as a price for making fundamental tariff reductions in the coming rounds of WTO talks.

### Conclusion

Substantive antitrust harmonization is inadvisable because it has high agency costs and will reduce experimentation and innovation in antitrust that over long run is likely beneficial. In contrast, an antidiscrimination antitrust model has fewer agency costs, particularly if it conducted in the WTO, because the antidiscrimination precedent of the WTO will provide a stable guide to the development of antidiscrimination rules. The antidiscrimination regime will allow also allow continued beneficial experimentation and innovation in competition law. Moreover, insofar this regime helps police nations' denial of market access to importers, it will advance the goals of the WTO by inhibiting nation from substituting discriminatory competition regulations to negate the value of tariff and other concessions that make trade freer.

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<sup>90</sup> See McGinnis & Movsesian, *supra* note xx, at 552-553.

<sup>91</sup> See, e.g., JAYASHREE WATAL, INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES 9-47 (2001) (discussing this bargain).

While antidiscrimination harmonization regime within the WTO would be directed at only government conduct, it would also often inhibit private practices that are used to deny market access to foreign companies. For instance, if domestic companies in a country tried to boycott any distributor who sold the goods of the foreign firm, their government would be required to take action against the boycott if it took action against boycotts against domestic firms. Thus, foreign firms would get the advantage of whatever competition laws protected domestic firms against anticompetitive private practices.

Thus, for instance, a strong commitment to consistency in competition laws might ultimately change the result in the Kodak case. There the United States claimed that the small stores law which permitted the Japanese stores an effective veto over the opening up of department stores inhibited distributional opportunities for Kodak. A nondiscrimination model could make such government inaction. For instance, if department stores were allowed to open in response to the distributional needs of domestic Japanese competitors in other areas, then the refusal to open department stores in response to American needs for distribution should be attributed to the government and condemned under a nondiscrimination market access regime.

If the government actually promoted the boycott, as the United States has alleged in some instances, the case for discrimination would be even easier to prove. The WTO rules should be written to make clear that government encouragement of private firms in such actions should be treated as a state denial of market access.

Class of enforcers

Kodak

cartel-core: what is interesting

cross-licensing

relation of laws to current antitrust laws

Extraterritorily

How much enforcement may depend on trade. Trade better than antitrust enforcement

talk about advantages of getting rid of restrictions.

Stephen objection.

Enforcement– market access.

Jurisdiction competition–buy products

diversity–innovation versus conflict

no interest of inventor even in third world country in lobbying for intellectual property