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COMPETITIVE COMPETITION LAW? AN ESSAY AGAINST INTERNATIONAL COOPERATION

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Abstract

This paper draws on strategic trade theory to explore the conditions under which different national competition law systems can compete. I assume that each state seeks to maximize a weighted sum of producer and consumer welfare within its territory, the weighting in turn reflecting public choice considerations. I further assume the tolerance or promotion of inefficient forms of inter-firm cooperation and monopolization discourages investment in the protected economic sector and makes it less likely that firms in that sector will innovate.

Working within these assumptions, the question becomes whether states have sufficient incentives to discourage inefficient inter-firm cooperation and monopolization in cases where foreign consumers bear the lion's share of the costs of monopoly rents. In a static model, individual states should prefer such arrangements, resulting in a collective action problem due to global losses of welfare. If, however, protected economic sectors bear a sanction in the form of higher costs of capital and lower rates of innovation, the collective action problem may dissipate. The critical question thus becomes the strength of the assumption that private or state-sponsored protection reduces incentives for investment and innovation.

Strategic trade theory also addresses the institutional conditions for governments to engage in successful protection. I argue that the tolerance of organizational combinations that reduce global welfare but produce local benefits is simply one aspect of such protection. The core common problem involves governmental capacity to distinguish industrial structures that advance efficiency from those that reflect rent-seeking. In trade law, one asks whether governments should protect local industries to promote positive externalities. In competition law, the symmetrical question is whether governments should sanction foreign industries to deter negative externalities.

I conclude by considering governmental capacity to pick industrial winners and losers. The empirical case for governmental success at distinguishing efficiency-enhancing from rent-seeking industrial structures is mixed at best. Moreover, the instances where the distinction seems easiest to make—cartelization of primary products—more often involve greater governmental involvement in the promotion of inefficient industrial structures than in their dismantling. The implication of this evidence is that it is plausible to assume that protection resulting from competition policy, like protection produced by governmental intervention, does deter investment and innovation and thus contains its own punishment.

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COMPETITIVE COMPETITION LAW? AN ESSAY AGAINST INTERNATIONAL COOPERATION

Multiple antitrust claims against a single firm seems a bad idea. Conflicts between the United States and the European Union over the permissibility of numerous mergers as well as overlapping prosecutions of Microsoft highlight the problem.[2] Absent a single standard of permissible cooperation and consolidation among producers, firms may find themselves facing sanctions in one jurisdiction for doing what another jurisdiction accepts or even requires.

A conventional static analysis predicts that different states will impose inconsistent standards, because the sum of local producer and consumer interests varies across states and governmental regulation should reflect these interests. In such a world, firms face an unattractive choice: They either must conform to the most restrictive level of competition regulation imposed by any state with which they have any ties, or they must forego ties with states that impose too restrictive regulation. Either outcome should produce global welfare losses. Firms either lose the opportunity to pursue organizational strategies that enhance welfare, or competition suffers in the face of the withdrawal of firms from markets tied to hostile regulation.

What might states do about this problem? Three possibilities suggest themselves. First, states might adhere to a common standard of competition law. Second, states might accept a body of rules for allocating regulatory jurisdiction that ensures that one, and only one, state imposes its competition standards on any given transaction. Third, states might not seek to cooperate internationally, and instead let the problem solve itself through a dynamic process that static models fail to capture.

Most commentators have argued for solutions one or two. The effort to incorporate competition law into the Doha Round negotiations of the World Trade Organization (WTO) reflects, if weakly, the impulse to harmonize competition law across states.[3] The debate over the

[2] Recent scholarship attests to renewed interest in the issue. For a representative sample, see Eleanor M. Fox, International Antitrust—A Multi-tiered Challenge: The Doha Dome, 43 Va. J. Int’l L. ___ (2003); Eleanor M. Fox, Antitrust and Regulatory Federalism: Races Up, Down, and Sideways, 75 N.Y.U. L. Rev. 1781 (2000); Ignacio Garcia Bercero & Stefan D. Amarasinha, Moving the Trade and Competition Debate Forward, 4 J. Int’l Econ. L. 481 (2001); Andrew T. Guzman, International Antitrust and the WTO: The Lesson from Intellectual Property, 43 Va. J. Int’l __ (2003); Andrew T. Guzman, Is International Antitrust Possible? 73 N.Y.U. L. Rev. 1501 (1998); Antonio F. Perez, International Antitrust at the Crossroads: The End of Antitrust History or the Clash of Competition Policy Civilizations? 33 Law & Pol’y Int'l Bus. 527 (2002); Ed Swaine, Against Principled Antitrust, 43 Va. J. Int’l l. ___ (2003); Alan O. Sykes, Externalities in Open Economy Antitrust and Their Implications for International Competition Policy, 23 Harv. J.L. & Pub. Pol’y 89 (1999); Daniel K. Tarullo, Norms and Institutions in Global Competition Policy, 94 Am. J. Int’l L. 478 (2000); Michael J. Trebilcock, Competition Policy and Trade Policy, 31 J. World Trade 71 (1997); Spencer Webber Waller, An International Common Law of Antitrust, 34 New England L. Rev. 163 (1999); Russell J. Weintraub, Competing Competition Laws: Do We Need a Global Standard? 34 New Eng. L. Rev. 27 (1999); Diane P. Wood, International Harmonization of Antitrust: The Tortoise or the Hare? 3 Chi. J. Int’l L. 391 (2002); Symposium: Can We Regulate Competition Internationally? A Case Study of the Attempted GE/Honeywell Merger. 23 U. Pa. J. Int'l Econ. L. 457-635 (2002).

[3] World Trade Organization, Ministerial Conference—Fourth Session—Doha, 9-14 November 2001—Ministerial

extraterritorial scope of antitrust regulation, which put the United States at odds with most other advanced industrial democracies from the mid-1940s until the mid-1980s, in essence was an argument about the second approach, and the recent negotiations over a Hague Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments has resurfaced the concept. I argue, in contrast, that states might do better by not trying to impose an international framework on competition law. Judge Wood, a leading authority on international antitrust, recently wrote that "Harmonization is something to which only a curmudgeon would take exception."[4] I rise to that challenge.[5]

The argument against international cooperation has both negative and affirmative elements. On the negative side, we have good reasons to doubt whether international imposition of either substantive rules of competition law or binding assignments of regulatory jurisdiction will result in welfare-enhancing outcomes. These reasons rest on a positive explanation as to why nations have different rules and why their regulatory jurisdictions overlap. The common thread is a prediction that government failure at the national level will replicate itself at the international level, and an observation that international regimes are more difficult to unwind than is domestic regulation.

On the affirmative side, we may expect that forces underlying international economic relations among the world's most prosperous and powerful states can punish those nations that use competition policy to produce substantial losses in global welfare, and reward those that employ competition policy to enhance global welfare. In an information-based economy with substantial international mobility of financial and human capital and significant levels of international trade in goods and services, states that impose a competition law that protects domestic producers from welfare-enhancing competition will tend to experience lower levels of investment and innovation. Countries that use competition law to punish more efficient foreign producers will suffer losses in consumer welfare without obtaining any offsetting competitive gains, once innovation losses are taken into account. Countries that use competition law to punish foreign producers engaged in inefficient forms of industrial organization, on the other hand, should experience some economic benefits.

I do not argue that economic forces unconstrained by international cooperation will lead inevitably to an optimal distribution of competition policies among states. Countries that underinvest in competition law may free ride on those countries that make optimal investments. Moreover, we have plenty of evidence that shortfalls in local political accountability, whether due to underdeveloped democratic processes or conventional public choice factors, will prevent political actors from fully internalizing the costs of their suboptimal choices. But one cannot claim with confidence that the costs resulting from the absence of international cooperation will

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Declaration—Adopted on 14 November 2001, ¶ 25, WTO Doc. No. WT/MIN(01)/DEC/1 (Nov. 20, 2001).

[4] Diane P. Wood, note supra, at 391.

[5] Cf. Paul B. Stephan, The Skeptic Speaks: I am Not a Blind, Pig-Stupid Opponent of Unification, Proceedings of the 96th ASIL Annual Meeting 336 (2002); Paul B. Stephan, The Futility of Unification and Harmonization in International Commercial Law, 39 Va. J. Int'l L. 743 (1999).

exceed those that a regime produced by state-to-state bargaining will have.

This paper proceeds in four parts. First, I provide a positive account how, under conditions of international trade, countries face various short-term incentives to choose competition policies, depending on the different mixes of domestic producers and consumers contained in each country's economies. In making this argument, I demonstrate how competition policy and law is inseparable from trade policy and law, and that what any country regards as its competition law may appear to other states as trade protection. At the same time, competition law present greater risks of welfare losses than does conventional, tariff-based protection, due to the less transparent nature of competition law's trade effects. Second, I review proposals to develop international regimes either to harmonize substantive competition law or to allocate regulatory jurisdiction. I identify reasons why such regimes are likely to be unsatisfactory. The same considerations that lead countries to use competition law as a form of protection will apply in the context of international relations. Moreover, an international regime will present additional problems of administration, application, and adaptation. Third, I discuss the long-term incentives to avoid protection that nations face under conditions of capital mobility. I review the extensive empirical literature on trade and development and argue that a similar positive correlation should exist between optimal choices of competition policy and economic growth. In the conclusion I explore the limits of my argument and suggest areas for future inquiry.

I. THE PROTEAN NATURE OF COMPETITION POLICY

Part of the problem of international competition law lies in the cultural limitations of those who propagate the subject. The United States has implemented competition policy through federal legislation for more than a century, and antitrust economics in the United States is a well researched and highly developed subject. It seems easy enough to assume that the rest of the world understands what we mean when we talk about competition, and not too hard to believe that any disagreements about optimal competition policy stems from an incomplete understanding of the state of the debate in the United States. A moment's reflection, however, will suggest why the problem is much more difficult and elusive. From an international perspective, we do not have a common vocabulary or sense of subject, much less a common commitment to substantive ends.[6]

A. What Is Competition Policy?

To show that competition policy means many different things to many different actors, one first must determine what it comprises. Under the aegis of competition policy, governments regulate producer choices, including decisions to cooperate with other producers. Regulation of prices, of marketing practices and of the array of products offered all comes under competition policy. Notwithstanding the label, states do not necessarily invoke competition policy either to enhance competition or to maximize global welfare, much less consumer welfare. Competition

[6] See Wolfgang Pape, Socio-Cultural Differences and International Competition Law, 5 Eur. L.J. 438 (1999).

policy, in practice as much as in theory, involves decisions about competition, but does not imply a preference for competitive markets. Support for a national champion, suppression of large-scale and efficient producers that threaten politically influential small producers, and setting quotas on output all represent competition policies.[7]

This seemingly obvious point is critical. A naive student of competition law might believe that competition policy involves government intervention against anticompetitive behavior by private actors. But competition cannot be an end to itself. Some kinds of collusion can be unambiguously desirable, such as (some) provision of standardized goods or long-term supply contracts. As Oliver Williamson famously observed decades ago, markets and organizational hierarchies often offer themselves as alternatives, and there are no *a priori* reasons always to prefer one over the other.[8] One cannot have a competition policy, then, without some concept of desirable cooperation. It follows that a state concerned about the level of competition in a given market might either forbid or mandate particular forms of cooperation. Competition policy necessarily merges with industrial policy.

In a world where international trade occurs, competition and trade policy also become the same subject. Trade policy at its heart involves choices over the level of competition between domestic and foreign producers a state will permit or encourage. This point seems obvious as a matter of logic, but it becomes paramount in industries that have increasing returns to scale. Absent a closed economy, competition and trade policy are the two sides of the same coin.

Why does a conviction that competition policy constitutes an autonomous discipline with its own technical expertise persist? Competition law appeared in the United States in response to private decisions to consolidate production. Its principal manifestation was the Sherman Act, which attacked cooperative actions "in restraint of trade" and abuses of monopoly power.[9] We should see this congruence between competition law and public restrictions on private cooperation and consolidation as a historical accident, however, and not as the core of what constitutes competition policy.

Even with this historical background, U.S. competition law never has manifested an implacable hostility to all forms of industrial consolidation. It accepts, for example, cooperation among producers organized or mandated by the several states,[10] as well as collusive political

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[7] See Daniel J. Gifford & Robert T. Kudrle, Alternative National Merger Standards and the Prospects for International Cooperation, in The Political Economy of International Trade Law—Essays in Honor of Robert E. Hudec 208 (Daniel L.M. Kennedy & James D. Southwick eds. 2002); Michael Trebilcock & Robert Howse, Trade Liberalization and Regulatory Diversity: Reconciling Competitive Markets with Competition Politics, 6 Eur. J.L. & Econ. 5 (1998). National champions proliferate, among others, in the airlines and telecommunications industries. The protection of German and Japanese shopkeepers from supermarket competition has been explained as part of a political bargain. "Rationalization" of product markets through government-enforced production quotas is characteristic of agriculture in Europe and the United States, the diamond industry, OPEC, and the ill-fated "New International Economic Order" of the 1970s.

[8] See Oliver E. Williamson, Markets and Hierarchies: Analysis and Antitrust Implications: A Study in the Economics of Internal Organization (1975).

[9] Act of July 2, 1890, c. 647, § 1, 26 Stat. 209, codified as amended at 15 U.S.C. §§ 1-4 (1994).

[10] Parker v. Brown, 317 U.S. 341 (1942); City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365 (1991).

action to bring about such state mandates.[11] The United States traditionally has encouraged collusion among exporters,[12] and more recently has supported similar cooperation among producers in supposedly strategic economic sectors such as semiconductor design and production.[13] When one turns to Europe or Japan, the illustrations of competition policy coexisting with coordinated producer behavior become abundant.

Another definitional point must be noted. Selective enforcement of competition policy enables rules nominally intended to increase competition to produce the opposite outcome. An obvious and pervasive example is antidumping law, which imposes a greatly expanded conception of predatory pricing only on foreign producers.[14] More generally, imagine Good A, the production of which has substantial economies of scale. Further imagine that this good competes with Good B, a product for which it is a substitute, and that the producers of Good B can influence decisions by the authority that regulates the market where Goods A and B compete. If this authority has the discretion to mandate levels of competition that preclude the achievement of economies of scale, an enforcement action brought against the producers of Good A will protect the Good B producers from salutary competition. Again, my claim is that nothing in the concept of "competition policy" precludes regulatory choices that decrease the overall level of competition in a market, much less requiring the level of competition that maximizes welfare.

I advance a broad definition of competition policy not only because it makes sense, but because it underscores the difficulties of achieving an international consensus about its content. Even if states could agree that efficiency—optimization of welfare—is the only legitimate objective of competition policy, agreement as to whether a particular regime advances or detracts from efficiency would remain elusive. Specifying the optimal mix of competition and cooperation in a particular economic sector is inevitably controversial.[15] Technological change and other kinds of innovation, as well as shifting consumer preferences, limit the lessons one can learn from analyzing a sector's history. Once legitimate differences over the optimal level of competition arise, it becomes difficult to the point of impossible to determine whether a regulator is pursuing efficiency-driven competition policy or not. And once one relaxes the constraint on objectives, by allowing regulators to prefer something other than efficiency, the possibility of monitoring regimes for compliance with their professed objectives becomes even more remote.[16]

B. Competition Policy and Local Interests

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[11] Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); Mine Workers v. Pennington, 381 U.S. 657 (1965); Professional Real Estate Investors v. Columbia Pictures Indus., 508 U.S. 49 (1993).

[12] Webb-Pomerene Act of 1918, 15 U.S.C. §§ 61-65 (1994); Export Trading Company Act of 1982, 15 U.S.C. §§ 4001-21(1994); Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (1994).

[13] National Cooperative Research Act of 1984, Pub. L. No. 98-462, 98 Stat. 1815 (1984), 15 U.S.C. §§ 4301-06.

[14] See 19 U.S.C. §§ 1673-73i (1994); Council Regulation (EC) No. 384/96, O.J. L 56/1 (1996).

[15] See Frank H. Easterbrook, Does Antitrust Have a Comparative Advantage? 23 Harv. J. L. & Pub. Pol'y 5, __ (1999) ("And here's the big point: by and large, we can't know when competition has 'failed.'")

[16] See also Ed Swaine, note , at ___.

Once one accepts that competition policy can cover a multitude of sins, it becomes possible to speculate about what end a given state might choose to pursue. In a world without friction where government sought to maximize general welfare, presumably competition policy would seek to identify and compel the optimal mix of competition and cooperation in any given economic sector. Friction aside, two factors can complicate this analysis—international trade, which implies the possibility of externalizing both the costs and benefits of a particular competition policy, and public choice considerations, namely the ability of groups with lower organizational costs to obtain rents from government at the expense of groups with higher organizational costs.

1. International Trade

As a conceptual matter, three considerations can influence a state's incentives to externalize the effects of its competition regulation. First, producers in the sector in question may be over- or under-represented in that state as compared to the global distribution of that sector's producers. For example, a few national economies are dominated by oil and natural gas production, while many important economies produce virtually none of that good (the European Union and Japan). Second, consumers of the good in question similarly may be over- or under-represented in the state. Third, the global market for the good may be more or less competitive. This last factor will affect the distribution between producers and consumers of potential gains from industrial consolidation.

Consider first a good, the production of which has increasing returns to scale up to the market clearing price. In this economic sector the most efficient producer is a monopolist. Further assume that consumption of this good is more or less evenly distributed globally, if not per capita then per GDP. Ignoring strategic issues and the possibility of coordination, a state should prefer to function as the home of this industry. The state can capture some portion of the producer's monopoly rents, while its consumers will suffer no more than if any other state hosted the monopolist. Under these conditions, a rational competition policy would entail protecting the local producer and inflicting costs on the producers of all other states. Monopoly leads to no welfare losses and the host state can externalize a large portion of the losses in consumer surplus to outsiders. Some have argued that operating system software for microcomputers, semiconductors, and large-body civilian aircraft are goods the production of which has these characteristics.[17]

Strategic trade theory, as developed by Krugman and others in the late 1970s, addresses exactly these circumstances.[18] It maintains that in many sectors production has increasing

[17] Laura D'Andrea Tyson, Who's Bashing Whom? Trade Conflict in High Technology Industries (1991).

[18] See Strategic Trade Policy and the New International Economics (Paul R. Krugman ed. 1986); Elhanan Helpman & Paul R. Krugman, Market Structure and Foreign Trade—Increasing Returns, Imperfect Competition, and the International Economy (1985); Avinash K. Dixit & Victor Norman, Theory of International Trade (1980); Kelvin Lancaster, Intra-industry Trade Under Perfect Monopolistic Competition, 10 J. Int'l Econ. 151 (1980); Paul R. Krugman, Increasing Returns, Monopolistic Competition, and International Trade, 9 J. Int'l Econ. 469 (1979).

returns to scale, monopoly industrial organization thereby becomes a norm rather than a deviation, and as a result the premises of liberal trade theory about competitive markets do not hold. As a positive matter, it predicts that greater levels of international trade attributable to lowered costs of transportation and communication and reduced legal barriers will lead to greater levels of industrial concentration. It argues that the conventional story of comparative advantage offers a seriously incomplete account of how international trade works, and argues that the distribution of monopolist producers, rather than the distribution of producer endowments, explains more about trade patterns. As a normative matter, strategic trade theory specifies the circumstances where states should prefer protection (broadly conceived to included subsidies to the local producers as well as import barriers) to free trade. This justification for protection goes strongly against the grain of liberal trade theory, which denies the value of protection.[19]

Strategic trade theory does not directly address the position of states that have no hope of hosting a global monopolist. One can infer, however, that a state that has no chance of winning this race would derive no gains from attacking the monopolist. The monopolist producer presumably would regard the attack as a cost of doing business and transfer those costs to that state's consumers, either directly by raising prices or indirectly by withdrawing from the market from which the attack would emanate.

Next consider a good the production of which has some increasing returns to scale, but only up to a point consistent with several multiple producers. Further assume that imperfect competition would exist in a consolidated market, allowing the producers to capture most of the benefits from the increased scale of production. Finally, assume that there exists at least one country with many consumers and few producers. This large-market country, if it sought to maximize the welfare of only its residents, would try to block industry consolidation under these circumstances, as its consumers would bear only the costs, and none of the benefits, of reduced competition. If the cost to a producer of not competing in this large market country were to exceed the return it would derive from increased scale, it would accede to the constraint on efficient consolidation.[20]

Put simply, under specified conditions that seem realistic if not abundant, some countries will have both an incentive to restrict producers from undertaking welfare-enhancing consolidation and cooperation, and the capacity to implement its policy. These states will choose a competition policy that, in terms of global efficiency, requires too much competition and not enough hierarchy.

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[19] For discussion of the tensions between strategic trade theory and liberal theory and a reconciliation based on political economy arguments, see Paul R. Krugman, Is Free Trade Passé? 1 J. Econ. Persp. 131, 143 (1987) ("It is possible, then, both to believe that comparative advantage is an incomplete model of trade and to believe that free trade is nevertheless the right policy.")

[20] See Andrew T. Guzman, International Antitrust and the WTO, note supra, at ___; Andrew T. Guzman, Choice of Law: New Foundations, 90 Geo. L.J. 883, 906-09 (2002); Andrew T. Guzman, Is International Antitrust Possible? note supra, at 1512-15.

The mirror argument also applies. Some states may host producers that have diminishing returns to scale and export most of their production. Examples would include industries that depend disproportionately on factor endowments, such as extraction or farming. These states might benefit if their producers participated in a successful cartel: monopoly rents would stay at home and the lion's share of the lost consumer surplus would fall on consumers in the export markets. Under these conditions, states would embrace a competition policy that not only tolerates, but mandates cartelization. In other words, these states would seek to effect a competition policy that, in terms of global efficiency, requires too much hierarchy and not enough competition.[21]

Finally, we need to return to a point made in the previous subsection. States can engage in selective enforcement of competition policy.[22] Given the difficulty of fixing optimal levels of competition, we should expect much competition law to take the form of elastic standards rather than of precise and constraining rules. The possibility of strategic deployment of competition law seems manifest where governments have a monopoly over enforcement, the situation that exists almost everywhere except for the United States. Even in the United States, governmental enforcement decisions have a powerful effect on private suits, as evidenced by the preference of private plaintiffs to follow in the wake of Justice Department litigation.[23] As a result, it becomes possible for the enforcement authority in effect to follow two enforcement policies. It can oppose collusion that benefits the foreign competitors of local producers while ignoring or even coordinating collusion that benefits local producers.

In other words, selectively enforced competition law can have the same effect as does trade protection. Because selective enforcement is harder to detect and monitor than a direct trade barrier, however, it may generate greater costs. Uncertainty about when competition law will apply may deter risk-averse transactors and require wasteful investments in precautions (such as legal services and lobbying). The ambiguous and elusive nature of protection realized through selective enforcement also may make it more difficult to mobilize coalitions to oppose it. Trade barriers, which conventionally take the form of high tariffs or quotas, are quantitatively precise, easier to detect and to oppose, and lower the costs of organizing opposition.

2. Political Economy

The previous subsection premised its arguments on an unrealistic assumption, namely that political decisionmakers seek to optimize the welfare of the polity that they represent and govern. We have plenty of evidence, however, that in many situations government will pursue outcomes that reflect the preferences of homogenous and compact interest groups at the expense

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21 See Andrew T. Guzman, International Antitrust and the WTO, note supra, at ___; Andrew T. Guzman, Is International Antitrust Possible? note supra, at 1512-18.

22 Andrew T. Guzman, International Antitrust and the WTO, note supra, at ___.

23 See also Mark R. Joelson, An International Antitrust Primer: A Guide to the Operation of United States, European Union and Other Key Competition Laws in the Global Economy 168-76 (2d ed. 2001) (arguing that administrative control over the content of U.S. antitrust control has grown significantly in the last quarter century).

of the general welfare. It seems uncontroversial that lower organizational costs enable some groups to elicit rents from government. And one of the best studied and documented examples of successful rent-seeking is that of domestic producers seeking protection against foreign competition at the expense of domestic consumers.[24] Producers have focused identities and technological expertise; consumers suffer from an array of identities (worker, family member, sports fan) and lack specialized knowledge. It is rational for producers to invest more than consumers do in obtaining desired outcomes from government, and rational for politicians to give a return on this investment.

The political economy story provides another set of explanations for variance among national competition policies. The ability of particular groups to minimize the costs of organization and political action must vary across countries, due to differences in the way politics is carried out and financed as much as because of differences in group characteristics. We should not expect similar groups to come out winners in different countries, much less win to the same extent.

The political economy story becomes even richer once one takes into account the empirical prediction that producer groups tend to have lower organizational costs relative to consumer groups, and thus generally achieve outcomes that favor them to the detriment of society as a whole. If political economy predicts more protection than one otherwise would expect, then one should look for states to expand the available tools of protection, including competition law. We should see not only differences among states in the content of their competition law—horizontal variation—but differences within states in the application of their competition law as a function of the subject's status as insider or outsider—vertical variation.

C. The Evidence

The evidence of horizontal variation among major economic powers is striking. The United States, the European Community and Japan use different institutions to pursue competition policy, articulate different substantive objectives, and reach different outcomes. Proof of vertical variation is more difficult to come by, as none of these countries admits to discriminating against foreign producers. Anecdotal evidence of such discrimination, however, abounds.

The disparity in institutional structure among the three principal economic powers is evident. The United States disperses enforcement power among two government agencies (the Antitrust Division of the Justice Department and the Federal Trade Commission) and private attorneys general, who benefit from various financial (treble damages) and procedural (class actions, broad

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[24] The original insight is credited to Pareto. Vilfredo Pareto, Manual of Political Economy 379 (Ann S. Schwier & Alfred N. Page eds. & Ann S. Schwier trans. 1971) (1927). For later work, see Dennis C. Mueller, Public Choice II 238-42 (1989); Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups ___ (1971); Anne O. Krueger, Political Economy, International Trade, and Economic Integration, 82 Amer. Econ. Rev. 109 (1992); Wendy Tacaks, Pressures for Protectionism: An Empirical Analysis, 19 Econ. Inquiry 687 (1981). See also Douglas A. Irwin & Randall S. Kroszner, Interests, Institutions, and Ideology in Securing Policy Change: The Republican Conversion to Trade Liberalization after Smoot-Hawley, 42 J.L. & Econ. 643 (1999) (tracing shift away from protection to increase in influence of exporters, not consumers).

pretrial discovery, jury trials) incentives. A residual and not well defined power of States to apply their own regulatory regimes further complicates the picture. In the European Community, by contrast, the Competition Directorate of the European Commission has a virtual monopoly over enforcement powers. The fifteen Member States have some residual power to regulate competition, but all rely on a single national authority with virtually no private enforcement.[25] Japan has a unified regulatory authority (the Fair Trade Commission), no subnational entities with regulatory powers, and high barriers to private litigation.[26] Some degree of collaboration between the government and industry cartels exists, although scholars debate the extent and scale of the government's contribution to these cartels.[27]

The substantive goals of U.S. antitrust law reflect the shifting preferences of administrations as well as changes in the courts' understanding. Over the last thirty years U.S. regulators have taken a more relaxed attitude toward forms of collusion and industrial concentration that seem driven by efficiency considerations. Consumer welfare remains the touchstone of competition policy, as opposed to opposition to the accumulation of power and influence in the hands of private firms. The courts also have moved in this direction, embracing efficiency as the principal criterion and embracing anticompetitive practices that plausibly may increase consumer welfare.[28] Finally, for sixty years the courts have permitted state-level experimentation with alternative approaches to the competition/collusion tradeoff. In a reversal of the normal preemption rule that underlies U.S. federalism, state-administered collusion displaces federal regulation.[29]

In form, the substantive goals of EC competition law seems virtually identical to that of the United States. Articles 81 and 82 of the current revision of the Treaty of Rome closely track Sections One and Two of the Sherman Act: Article 81 prohibits "concerted practices" that "may affect trade between Member States" and "have as their object or effect the prevention, restriction or distortion of competition," while Article 82 outlaws "any abuse" of "a dominant position." Given the cultural, economic, political and sociological differences between the two entities, however, it should surprise no one that these capacious words have achieved a

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25 See Notice on Cooperation between national Courts and the Commission in applying Articles 85 and 86 of the EC Treaty, 1993 OJ (C39) 6.

26 See John O. Haley, Antitrust in Germany and Japan—The First Fifty Years, 1947-1998, at 71-90 (2001); J. Mark Ramseyer & Minoru Nakazato, Japanese Law—An Economic Approach 6-9 (1999); J. Mark Ramseyer, Lawyers, foreign Lawyers, and Lawyer-Substitutes: The Market for Regulation in Japan, 27 Harv. J. Int'l L. 499 (1986).

27 The traditional story of Japanese economic success between 1945 and 1990 stressed the role of the Ministry of International Trade and Industry in directing and even compelling cooperation among producers. Ronald Dore, Flexible Rigidities: Industrial Policy and Structural Adjustment in the Japanese Economy, 1970-1980 (1986); Chalmers Johnson, MITI and the Japanese Miracle: The Growth of Industrial Policy, 1925-1975 (1982); Ezra Vogel, Japan as Number One: Lessons for America (1979). Recent work argues convincingly that this story fails to fit the evidence, and instead reflects excessive reliance by foreign scholars on the accounts of Japanese social scientists, whose accounts in turn were shaped by their Marxist or socialist ideologies. MITI failed to establish cartels that Japanese industry did not want, and could not immunize cooperative firms from prosecution by the Fair Trade Commission. Yoshiro Miwa & J. Mark Ramseyer, Capitalist Politicians, Socialist Bureaucrats? Legends of Government Planning from Japan (Draft Oct. 2002).

28 Daniel J. Gifford & Robert T. Kudrle, note supra, at 220-23.

29 See note supra and accompanying text.

significantly different meaning in the EC. At the risk of oversimplification, EC competition law evinces greater skepticism, relative to recent U.S. practice, about the benefits of producer consolidation and cooperation. One aspect of this skepticism, not so much articulated as displayed, is concern about private concentrations of power threatening governmental authority.[30] In particular, EC competition law clearly opposes the substitution of lower-level (that is, national) supervision for Community-administered competition policy. Unlike the United States, the lower-level entities cannot authorize anticompetitive practices.[31]

Japan has the Antimonopoly Law, a substantive competition law that in form follows closely that of the United States. But its Fair Trade Commission, although not quite the lapdog that some commentators portray, has not had the opportunity to develop as rich and informative a practice as has its U.S. and EC counterparts. It has brought criminal prosecutions against core anticompetitive behaviors, that is price fixing and output restrictions undertaken by groups of producers. It has not attacked other practices that result in significant costs to Japanese consumers, and it has no influence on government policies in some industries that protect numerous small producers from efficient competition by consolidated firms.[32]

Documenting the use of competition law as a means of protecting domestic producers presents a considerable challenge. No government acknowledges that it uses it competition law for this purpose, and the practice almost certainly violates the multilateral trade agreements administered by the WTO. Yet it seems plausible that governments do invoke competition law for purposes of restricting international trade. We have good reason to believe that domestic producers would reward politicians and bureaucrats that protected them in this manner, that some politicians might see strategic trade theory as a means of justifying such action independently of what local producers wished, and that the difficulty of proving such a motivation, perhaps coupled with the desire of other major economic powers to avoid an unwelcome precedent, might lower the costs of violating WTO rules.

Although I cannot point to systematic proof of the deployment of competition law for protectionist purposes, I can describe incidents where protection supplies the most plausible explanation for what happened. My examples are representative, and by no means exhaustive. They seem sufficient to at least place the burden of proof on those who might contend that no such protectionism occurs.

As a preliminary matter, one should note that a precursor to selective enforcement of competition policy for protectionist purposes is law in the form of broad, nonspecific standards that maximize enforcement discretion, as opposed to precise rules that tie the enforcer's hands. Of course, there exist many other plausible explanations for the choice of form: The enforcement bureaucracy may seek to maximize its discretion for reasons unrelated to protection, and even a welfare-maximizing lawmaker might regard bonding costs as unacceptably high relative to other

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30 Eleanor M. Fox, Antitrust and Regulatory Federalism, note supra, at 1791-93.

31 Treaty of Rome arts. 83(2)(e), 86(1), 87(1); Costa v. ENEL, [1964] E.C.R. 1141.

32 See John O. Haley, note supra, at 154-57, 162-68 (2001).

means of supervising the enforcement process. Nonetheless, it is relevant, although by no means decisive, that the substantive competition law of the United States, the EC and Japan all conform to the broad, nonspecific model.

Examples from all three jurisdictions illustrate that the discretion afforded the enforcers has allowed actions that seem inexplicable except as a way of advancing the interests of local producers. I begin with the United States. Several recent suits brought by both the government and private litigants reek of protectionism. During the run up to the 1992 presidential election, the Bush Administration, pressed by candidate Clinton's charges that it did not adequately protect U.S. producers from foreign competitors, announced that it would abandon the Reagan Justice Department's position that, except in limited instances, U.S. antitrust law would not address foreign anticompetitive practices that had no significant impact on U.S. consumer welfare.[33] The Clinton Administration carried through on its campaign posture, bringing and settling a suit against a British firm that allegedly imposed licensing restrictions on the use of its patented technologies to restrict the production of flat glass manufacturing outside the United States.[34] The following year it obtained an indictment against a Japanese paper company for participating in a conspiracy to fix the price of thermal fax paper.[35] Both actions rested on dubious economic theories but succeeded in signaling a willingness to punish foreign producers to the advantage of their U.S. competitors.[36]

The private suit that most clearly resonates with conventional trade protection is the epic battle between U.S. television set manufacturers and the Japanese consumer electronic industry. The trial court, the Third Circuit, and four Justices of the Supreme Court embraced the theory that producer collusion in the home market of the Japanese producers, coupled with successful price competition in the U.S. market, sufficed to make out a violation of the Sherman Act.[37] This theory merges antitrust law with antidumping law, inasmuch as the latter gives relief to U.S. producers seeking protection from foreign competitors without requiring any proof of predation or other harm to U.S. consumers. In effect the U.S. industry sought compensation for its failure to compete with the Japanese producers. A few years after a narrow majority of the Supreme Court rejected the suit, the parallel with trade law was made explicit. The U.S. government successfully collected antidumping duties based on the same evidence that the U.S industry has assembled in its antitrust claim.[38]

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[33] U.S. Dep't of Justice, Antitrust Enforcement Policy (1992), reprinted in 62 Antitrust & Trade Reg. Rep. (BNA) No. 1560, at 483-84.

[34] United States v. Pilkington plc, 1994-2 Trade Cas. (CCH) ¶ 70,841 (D. Ariz. 1994); United States v. Pilkington plc and Pilkington Holdings, Inc. Civil No. CIV 94-345 TUC WDB (D. Ariz.)—Response of the United States to Public Comments Concerning Proposed Final Judgment, 59 Fed. Reg. 52,823 (1994).

[35] United States v. Nippon Paper Industries Co., 109 F.3rd 1 (1997), cert. denied, 522 U.S. 1044 (1998).

[36] By contrast, the courts have shown no willingness to punish domestic producers that collaborate with the U.S. government in inducing foreign producers to join in a cartel. See Consumers Union of United States, Inc. v. Kissinger, 506 F.2nd 136 (D.C. Cir. 1974) (treating dispute as moot), cert. denied, 421 U.S. 1004 (1975).

[37] Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

[38] Zenith Electronics Corp. v. United States, 755 F. Supp. 397 (C.I.T. 1990). Discuss Byrd amendment

Finally, one should note that the WTO structure in principle constrains the use of competition law by the United States and others for protectionist purposes, but that the record to date suggests otherwise. A core principle of the General Agreement on Tariffs and Trade (GATT), the source of much of the substantive law that the WTO administers, entails "national treatment," or nondiscrimination against foreign producers.[39] One might think that a state that treats foreign producers differently for competition law purposes violates that principle and thereby invites WTO sanctions. The U.S. itself has invoked this principle against Japan, although it failed to prove its case.[40] More generally, the WTO has found itself unable to sort out trade and competition policy. To date, its only case concerning U.S. competition law dealt with the Antidumping Act of 1916, a statute that, as interpreted by the U.S. courts, simply recapitulates the substantive requirements of a predatory pricing violation under the Sherman Act. No criminal or civil suit under the 1916 Act has ever succeeded. But, because in form that Act regulates dumping in a matter not authorized by the WTO agreements, the WTO has condemned it. The WTO has not found it possible to deal with costly but hard-to-prove *de facto* discrimination, and instead has taken up a purely hypothetical case of *de jure* discrimination.[41]

Turning to the EC, one notes first the Commission's notorious refusals to approve mergers of U.S. firms that compete with important European producers, first among them the Boeing-McDonnell Douglas transaction.[42] The suspicion that the Commission sought to give a leg up to Airbus, Boeing's great rival, has been impossible to suppress. But merger regulation hardly represents the only Commission activity that smacks of protectionism. Other examples involve prosecutions for abuse of dominant position. This concept, although superficially similar to Section Two of the Sherman Act's prohibition of abuse of monopoly power, in practice has a broader reach that seems disproportionately to take in successful competition by non-EC firms. A classic case is its prosecution of United Brands, the American banana producer.[43] Not only did the Commission embrace an improbable theory of abuse, but it acted against a background of Community trade regulation that systematically protected bananas produced in former European colonies from competition from United Brands.[44] Consumer welfare, in particular that of banana-loving Germans, mattered not at all here.

In the case of Japan, one does not find prosecutions of foreign firms so much as tolerance of private collusion to keep out foreign competition. In this respect Japanese competition policy

[39] General Agreement on Tariffs and Trade, art. III, T.I.A.S. No. 1700.

[40] World Trade Organization, Report of the Panel, Japan—Measures Affecting Consumer Photographic Film and Paper, WTO Doc. No. WT/DS44/R (Mar. 31, 1998). For discussion, see Paul B. Stephan, Courts, Tribunals, and Legal Unification—The Agency Problem, 3 Chi. J. Int'l L. 333, 348-49 (2002;) Paul B. Stephan, Sheriff or Prisoner? The United States and the World Trade Organization, 1 Chi. J. Int'l L. 49, 56-61 (2000); Daniel K. Tarullo, note supra, at 484.

[41] World Trade Organization, Report of the Appellate Body, United States—Antidumping Act of 1916, Report of the Appellate Body, WTO Doc. Nos. WT/DS316/AB/R, WT/DS162/AB/R (Aug. 28, 2000). For discussion, see Paul B. Stephan, Courts, Tribunals, and Legal Unification—The Agency Problem, note supra, at 349.

[42] See Daniel J. Gifford & E. Thomas Sullivan, Can International Antitrust Be Saved for the Post-Boeing Merger World? A Proposal to Minimize International Conflict and to Rescue Antitrust from Misuse, 45 Antitrust Bull. 55 (2000).

[43] United Brands Co. v. Commission (Case 27/76), [1978] E.C.R. 207.

[44] World Trade Organization, Report of the Appellate Body, European Communities—Regime for the Importation, Sale, and Distribution of Bananas, WTO Docs. No. WT/DS27/R/USA (May 22, 1997), WT/DS27/AB/R (Sep. 9, 1997).

represents the stance of much of world outside of North American and Europe. Weak or nonexistent regulation of anticompetitive practices reflects the preferences of local producers, who seek monopoly rents both through domestic collusion and obstruction of import competition. Whether the government activity encourages and guides these policies or only accepts them remains a matter of debate. As note above, the United States argued for the first characterization before the WTO but failed to persuade a panel of arbiters.[45]

Finally, one should note a particular instance of substantive convergence among all major industrial economies with competition laws. Virtually every country expressly exempts export cartels from its law. This practice manifests a welfare calculation that gives no weight to foreign consumers, and suggests some indifference to local consumers that probably bear some costs from foreign export cartels. Looking at the exemption of export cartels as a global norm, rather than as local aberrations from good competition policy, reinforces the impression that competition law, among its many functions, serves as a source of trade protection.

At the risk of repeating myself, I do not maintain that these examples prove that competition law inherently or primarily operates as a tool for protection. I argue only that it is susceptible to such pressures, and that one can document instances where the susceptibility has manifested itself. The evidence undermines the conception of competition policy as something separate from, and motivated by different values than, trade policy. Our understanding of why states restrict international trade, it suggests, also may illuminate our expectations about why and when governments, and to a lesser degree private litigants, invoke competition law.

D. The Transparency Problem

As the preceding subsection indicates, the harnessing of competition law for protectionist ends seems plausible, but clear proof remains elusive. This indeterminancy highlights one of the principal problems of international antitrust. Absence a fixed set of precise rules, competition law at best will be uncertain, and at worst capricious. Wherever regulators have the capacity to act arbitrarily, we fear that they will exercise their powers to the advantage of specific groups and to the cost of outsiders. Yet squeezing this capacity out of competition law seems unlikely.

Competition law has not yet come to grips with many fundamental problems. No consensus exists on the distinction between successful consolidation and abuse of monopoly power,[46] on when vertical supply and purchase commitments encourage productive firm-specific investments and when they unnecessarily restrict consumer choice,[47] or when core misconduct such as cartelization or predatory pricing constitutes a genuine threat to consumer welfare and when the strategy contains the seeds of its own frustration, thus making regulatory intervention

[45] World Trade Organization, Report of the Panel, Japan—Measures Affecting Consumer Photographic Film and Paper, WTO Doc. No. WT/DS44/R (Mar. 31, 1998).

[46] Daniel J. Gifford & Robert T. Kudrle, note supra, at 230-34.

[47] Compare Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), with Centrafarm v. Sterling Drug, Inc. (Case 15/74), [1974] E.C.R. 1147.

unnecessary.[48] A wide array of policies are plausible; few if any are uncontroversial. Given this indeterminancy about the content of competition policy, one should not expect unambiguous commitments to clear rules. But without clarity, supervision of both the content of the rules and their application is extremely difficult, if not impossible.

The history of the WTO illustrates this point. The traditional postwar story of liberalization of the international economy focuses on tariff reduction. This form of protection neither disguises itself nor hides its effects. Tariffs single out goods traded internationally for special excises stated in precise quantitative terms, and quantification of their effects presents no great challenge. Tariff reduction agreements thus are both easy to negotiate and, once reached, easy to monitor for compliance. We should not be surprised that our greatest successes in moving toward free trade involve undoing the most transparent forms of protection. Conversely, when regulation takes the form of case-by-case application of general standards shaped by complex policy goals, both those affected by the regulation and those who impose it cannot easily commit to a mutually beneficial agreement.[49]

The experience of the last two decades illustrates the converse point. The shift in the international trade regime's focus to nontariff trade barriers, including health and safety rules and environmental regulation, has embroiled the WTO in great controversy. The agreements addressing these problems largely involve ambiguous commitments that raise profound interpretative problems. The efforts of the WTO organs to apply this standards to concrete cases has triggered intransigence on the part of the states accused of violation, sharp criticism of the dispute resolution process within the community of trade experts, and passionate attacks from populist forces.[50]

Competition policy embodies exactly the kinds of imprecise normative judgments that, as the WTO example illustrates, invites controversy and defection rather than consensus and commitment. Any proposal to impose international discipline on the subject, then, must offer some account of how it can overcome the kinds of problems that, so far, the WTO has found intractable.

II. VISIONS OF INTERNATIONAL ANTITRUST

The previous section establishes that states engaged in significant international trade have incentives to adopt competition laws that do not maximize global welfare. States whose

[48] Compare John R. Lott, Jr, Are Predatory Commitments Credible? Who Should the Courts Believe? (1999), with Peter H. Huang, Still Preying on Strategic Reputation Models of Predation, 3 Green Bag 2d. 437 (2000).

[49] John L. McGinnis &Mark L. Movsesian, The World Trade Constitution, 114 Harv. L. Rev. 511, 566-72 (2000).

[50] Robert L. Howse & Elisabeth Tuerk, The WTO Impact on Internal Regulations—A Case Study of the Canada-EC Asbestos Dispute, in The EU and the WTO: Legal and Constitutional Issues 283 (Gráinne de Búrca & Joanne Scott eds. 2001); Alan O. Sykes, Domestic Regulation, Sovereignty, and Scientific Evidence Requirements: A Pessimistic View, 3 Chi. J. Int'l L. 353 (2002) (technical barriers to trade and WTO dispute resolution process); Daniel K. Tarullo, note *supra*, at 494 & n.57 (citing disputes over Cuba sanctions, meat hormones, preferences for former colonies, and dolphin protection).

producers mostly export, or whose consumers do not have significant market power with respect to foreign producers, have little reason to have any competition laws at all, other than as cosmetic gestures to appease foreign critics. Japan may be a case in point. States that have significant market power but do not provide a home to producers may insist on levels of competition that may benefit consumers but lower efficiency. All states may avoid bright-line competition rules in favor of nonspecific standards that permit selective prosecution of foreign producers to advance protectionist ends.

Each of these outcomes maximizes local welfare to the cost of global efficiency. Multiple application of these laws—superimposing the laws of multiple jurisdictions with different standards on a single firm—would function simply as a tax on firms operating internationally. And a tax on globalization strikes many people, myself included, as perverse and harmful.

What is to be done? Experts have suggested various strategies for harmonizing and unifying global competition law. One would locate negotiations over the content of an international agreement to harmonize competition law in the WTO and give that organization the authority to enforce such an agreement. The current WTO negotiations (the Doha Round) have embraced competition law as a topic, although no concrete proposal yet has emerged. Alternatively, the major economic powers might agree to allocate regulatory jurisdiction in a way than minimizes conflicts among regulators. A series of bilateral agreements to which the United States is a party represent modest steps in this direction, and scholars have suggested other architectures for jurisdictional allocation. I first describe what these proposals might look like and then discuss their drawbacks.

A. International Coordination of the Substance of Competition Law

In both the United States and Europe, the history of competition regulation has been one of gradual ascension of the state hierarchy, from the states to the federal government in the United States and from nations to the EC in Europe. Should this progression continue, so that an international body would take on the responsibility of regulating the competitive practices of international businesses? Proposals to do so exist in both soft and hard versions.

1. Proposals for International Administration of Competition Law

Many, perhaps the majority of specialists writing on international antitrust have supported at a minimum soft harmonization of competition laws among states. For example, the Organization for Economic Cooperation and Development (OECD), a group that disproportionately comprises the world's richer nations, has promulgated guidelines for competition policy to which its members should adhere.[51] These establish a minimum level of regulation that each state should impose and also suggest a baseline to which they should gravitate. In 2000 the U.S. Justice

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[51] The documents take the form of Council Recommendations, which the OECD publishes, along with documents on related issues, at http://www.oecd.org/EN/documents/0,,EN-documents-768-nodirectorate-no-6-no-768,00.html (last visited Jan. 3, 2003).

Department's International Antitrust Advisory Committee called for greater standardization of merger review, technical assistance to encourage the creation of competition policy and enforcement agencies in countries that have none, and gradual assimilation of international practice leading toward standardization of competition policy rules.[52] This report led to the creation of the International Competition Network (ICN), an international organization of government regulators that sponsors conferences to promote harmonization.[53]

Others would go further. Both Eleanor Fox and Andrew Guzman have called for the forging of an agreement on competition policy modeled on the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[54] They would have the WTO serve both as the forum for negotiating the substance of such an agreement and the agency that resolves disputes over its meanings and enforces its obligations. Guzman argues that because harmonization would require some states to forego regulatory choices that, at least in the short run, would maximize their national interest, negotiations must take place in an environment that maximizes the opportunity for winners to compensate losers with concessions in unrelated areas.[55] The WTO seems ideal for this purpose both because of its scale (144 countries as of the end of 2002) and scope (its regulatory subjects comprise trade in goods and services, intellectual property, agricultural health and safety, and certain forms of investment regulation, among others).

Guzman also has argued for changes in the organizational structure of the WTO to accommodate its expanded jurisdiction. He calls for the division of the organization into departments, each with responsibility for substantive areas such as trade, competition, environment, labor, and intellectual property. Depicting these policy areas as rivalrous, he would have each department act as an advocate for its particular subject and rely on WTO internal dispute resolution processes to reach compromises.[56]

The bold new world that Guzman hopes to usher in would entail a single body of competition law applicable to firms operating internationally. States would enforce this law, but a department of the WTO would supervise their actions to ensure that they neither neglected their obligations nor exceeded the international regulatory limits. To the extent conceptions of optimal competition law conflicted with those for, say, intellectual property, labor standards, or food safety, the WTO would strike the proper balance and then require WTO members to

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[52] International Competition Policy Advisory Commission, U.S. Department of Justice Final Report (2000), http://www.usdoj.gov/atr/icpac/finalreport.htm (last visited Jan. 3, 2003).

[53] The ICN website is http://www.internationalcompetitionnetwork.org/index.html (last visited Jan. 3, 2003). See also Eleanor M. Fox, International Antitrust—A Multi-tiered Challenge: The Doha Dome, note supra, at ___.

[54] Eleanor Fox, International Antitrust—A Multi-tiered Challenge: The Doha Dome, note supra, at ___; Andrew T. Guzman, International Antitrust and the WTO: The Lesson from Intellectual Property, note supra, at ___. See also Einer Elhauge, Preference-Eliciting Statutory Default Rules, 102 Colum. L. Rev. 2162, 2243-45 (2002); Joel P. Trachtman, Economic Analysis of Prescriptive Jurisdiction, 42 Va. J. Int'l L. 1, 72-74 (2001); Hannah L. Buxbaum, Conflict of Economic Laws: From Sovereignty to Substance, 42 Va. J. Int'l L. 931, 962-66 (2002).

[55] Andrew T. Guzman, International Antitrust and the WTO: The Lesson from Intellectual Property, note supra, at ___.

[56] Andrew T. Guzman, Global Governance and the WTO (working paper, Aug. 15, 2002).

observe it.[57]

Fox has a less ambitious (or perhaps more idealistic) vision, although hers shares essential elements with Guzman's. She would give the ICN a greater role in formulating an international consensus on antitrust policy, although she ultimately would rely on the WTO for administration and enforcement of that consensus. She believes that states ultimately will develop a unified sense of what constitutes an "antitrust harm" and will recognize a universal right to address such harms.[58] She does not invoke, but her argument suggests, the rhetoric of international human rights law, which presupposes a cosmopolitan international commitment to the eradication of certain universally condemned practices.

2. Critique

In previous work I have questioned the value of proposals such as Guzman' and Fox's.[59] Summarizing my objections here, I note weaknesses in the concept of international cosmopolitanism, complications in administering international agreements to implement non-transparent principles, the agency problems associated with international dispute resolution, the potential drawbacks of executive branch representation of national interests in international negotiations, the difficulty of unwinding international regulatory structures, and the discomfiting track record of international agencies delegated far less challenging tasks than those that Guzman and Fox would give the WTO. Taken together, these arguments invited one to reconsider other alternatives to the problems posed by national antitrust regimes in an international economy.

a. Cosmopolitanism. Fox invokes the spirit of cosmopolitanism to undergird an optimistic account of why many states ultimately may reach a consensus on the content of competition policy. The concept of international cosmopolitanism has become fashionable lately in certain academic circles, although I do not know if Fox intends to invoke all that its advocates assert. International cosmopolitanism takes Rawlsian arguments for justice to the international level, asserting that thoughtful people would commit to a level of equality for all humans and therefore would embrace massive transnational wealth transfers.[60] If one accepts the premise that variations among national competition policies reflects differences in local welfare, then any convergence toward a global standard would entail making some groups in some countries better off, others worse off, and probably would diminish the welfare of at least come countries overall (say, OPEC members). Recognition of a universal right to be free from competitive injury thus

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[57] Id.

[58] Eleanor Fox, International Antitrust—A Multi-tiered Challenge: The Doha Dome, note supra, at ___.

[59] See Paul B. Stephan, Accountability and International Lawmaking: Rules, Rents and Legitimacy, 17 Nw. J. Int'l L. & Bus. 681 (1996-97); Paul B. Stephan, The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order, 70 U. Colo. L. Rev. 1555 (1999); Paul B. Stephan, Sheriff or Prisoner? note supra; Paul B. Stephan, International Governance and American Democracy, 1 Chi. J. Int'l L. 237 (2000); Paul B. Stephan, Institutions and Élites: Property, Contract, the State, and Rights in Information in the Global Economy, 10 Cardozo J. Int'l & Comp. L. 801 (2002); Paul B. Stephan, Courts, Tribunals and Legal Unification—The Agency Problem, note supra.

[60] See Iris Marion Young, Inclusion and Democracy (2000); Martha C. Nussbaum, Toward a Viable Cosmopolitanism (Mar. 1, 2000 draft); Tomas W. Pogge, An Egalitarian Law of Peoples, 23 Phil. & Pub. Affairs 195 (1994).

implies a commitment by states to international wealth redistribution.

While arguments for equality and the redistribution needed to attain it have a certain appeal, the ambitious claim of international cosmopolitanism has serious difficulties.[61] First, the idea that solidarity transcends distance—that people can identify with and care equally about persons at a great cultural as well as physical remove—seems fanciful as a positive matter and problematic as a normative one. One does not have to surrender any part of a core commitment to respect and care for all humans to recognize both that people flourish among their familiars, and that a great variation in culture and environment reflects the normal variety of humans and their corresponding social needs. Rawls recognized this problem when he limited his call for international justice to nations sharing similar values and political systems.[62]

Second, implicit in the argument for cosmopolitanism is an equation of a right of access to financial resources with a right to be free from physical brutality. But the case for universalism is much easier with respect to physical integrity than as regards financial status. Communities vary wildly in how they express and value financial status. Wealth is a social, and therefore local, artifact to a far greater extent than is physical inviolability.[63]

Third, wealth transfers require exactions from the source of wealth, as a voluntary surrender of resources never seems to suffice. Thus, the threat of force (if only in the form of economic sanctions) is a necessarily complement to a redistributive project. This in turn means that the risk of international conflict is deeply embedded in international redistribution. In the case of competition policy, enforcement of a common norm would entail some entity authorized to impose sanctions on shirkers and malfeasors. But one cannot contemplate the use of force without admitting the possibility of its abuse.

b. Agency costs of international entities. Designing an international body to administer and enforce an agreement on substantive competition policy presents serious issues of agency design and incentives. The transparency issues that make it so difficult to tell whether particular national actions amount to discrimination against foreign producers also complicate the construction of an enforceable standard for the agency. A narrow and precise mandate—perhaps a definition and prohibition of "core cartels"—would force at least some states to give up something they consider an advantage (consider again OPEC) without tackling other, possible worse anticompetitive practices. Alternatively, a broad mandate would shift to the international agency the discretionary authority to sanction (in both senses of the word) any of a full range of industrial policies. Individual states could not easily constrain this authority through monitoring because of the difficulty of reaching consensus as to whether an agency has departed from an

[61] I am indebted to Jack L. Goldsmith, Liberal Democracy and Cosmopolitan Duty: Notes Toward a Realistic Cosmopolitanism (Jan. 5, 2003 draft).

[62] John Rawls, The Law of Peoples (1999).

[63] I do not mean to deny the Foucaldian point that physical invasion has aspects of social construction. My point is a relative one, that perceptions of wealth depend more on social structure than do perceptions of pain.

indeterminate mandate.[64]

c. Dispute resolution. Limiting an international agency to the task of settling disputes over the meaning and application of an international agreement does not avoid the agency problems.[65] The U.S. example illustrates how the application of indeterminate standards shifts discretionary authority and the capacity to shape policy to the dispute resolution body. In theory, an international tribunal might follow in the footsteps of the U.S. judiciary and become the source of international competition law. In reality, this outcome is implausible.

U.S. federal judges have life tenure and a great fund of social capital. They come to the bench after achieving distinction in any of a number of legal fields, and they wind up on the Supreme Court after facing intense public scrutiny and surviving a daunting political gauntlet. They benefit from a tradition of judicial lawmaking that for the most part has gained acceptance and even admiration from the general public.

None of these statements can be made about the members of the WTO dispute settlement bodies or, for that matter, any adjudicator in the international system. For example, the members of the WTO appellate body, the closest analog to a common law appellate court, serve for six years, with nomination and replacement at the pleasure of specific countries or blocs, rather than of the WTO membership as a whole. Given this short leash, the possibility for articulating and imposing a competition policy that any significant state finds undesirable seems unlikely except over the very short run.[66]

d. Executive branches as national agents. In both international bargaining and monitoring of international agencies, states act through their executives, not their parliaments. For states operating under some version of the Westminister system where the leading parliamentary party forms the executive, this point may not have much significance. But even in such countries, actors within the executive may have interests that diverge from that of the legislature, including possibly a preference for larger budgets, projects that show off the executive to good effect, and work that increases the actors' future returns from their post-political careers. And in many states, the executive operates under the control of a different political party from the legislature. This may be true even if the executive answers directly to parliament, where no single party controls the legislature.

I previously have argued that these factors may express themselves in a tendency of governments to commit to harmonization and unification projects that produce little hard law but

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[64] See Paul B. Stephan, note supra, at 347.

[65] But see John O. McGinnis & Mark L. Movsesian, note supra, at 572-89 (arguing for welfare benefits of WTO dispute resolution). I consider the McGinnis-Movsesian argument strongest where the WTO addresses disputes over clear and therefore transparent principles. As the clarity of the principle dissipates, so does the likelihood of efficacious dispute resolution. See notes - supra and accompanying text.

[66] Paul B. Stephan, note supra, at 336-38.

provide officials with high-profile venues to display themselves.[67] One might even argue that the ICN constitutes a case in point. These efforts may seem harmless enough, but they have the potential to destabilize the legal environment in which firms operate. They may distract individual states from desirable changes in their competition laws, induce cosmetic changes to appeal to the international audience, and send confusing signals to bureaucrats and judges responsible for interpreting and applying national law.

e. Inflexibility in the face of changed circumstances. Law-based international institutions are hard to create and even harder to reform. The principle of unanimity that applies to treaty systems means that amendments, like the initial institution, require unanimous consent. As circumstances change, it often becomes desirable to alter the mandate and tools of the regime, but holdouts are likely. For this reason, international regimes tend to administer broad standards and norms rather than precise rules, and they tend to collapse or become irrelevant rather than reform themselves. Important counterexamples exist, but compared to both private firms and states, international organizations manifest inferior adaptive capability.[68]

f. International bureaucracies. Guzman appreciates that asking an international agency to make challenging policy judgments based on competing, and to some extent contradictory, commitments will not be easy. His response to this challenge is Weberian. He would rely on bureaucratic rationality embodied in distinct, policy-defined departments to formulate good policy and negotiate the competing interests.[69] In effect, he would replace national governments representing the material interests of their producers and consumers with technocratic élites guided by substantive expertise.

The ambition of this proposal is so remarkable that one wonders where to begin a critique.[70] The classic concern about bureaucratic rationality is that it masks a powerful urge for aggrandizement. In the international arena, we have few if any examples of agencies that have avoided the temptation. Budgets grow, capacities for effective intervention decline, and faith in international policymaking falters, only to rise up again in new areas. Geneva seems a graveyard for past idealism, not a hotbed of innovative solutions to the world's problems.

I mention Geneva advisedly. Guzman hopes to see the WTO, which operates out of Geneva, reorganized to take on a wide array of social and economic problems, including competition policy. As an agency concerned exclusively with liberalization of trade in goods, and mostly with tariff reduction, this organization acquired a reputation for low-cost, high-return coordination of national interests to the greater good. But since the 1994 Uruguay Round Agreements, which converted the old secretariat administering the GATT into the WTO, that entity has combined expanded responsibilities with an increasing frequency of embarrassments.

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67 Paul B. Stephan, Accountability and International Lawmaking, note supra, at 695-97.

68 Cf. Albert O. Hirschman, Exit, Voice and Loyalty (1970).

69 Andrew T. Guzman, Global Governance and the WTO, note supra.

70 For a critique that anticipates Guzman's proposal and, to my view, advances devastating objections, see John O. McGinnis & Mark L. Movsesian, note supra, at 552-66.

As it has taken over dispute resolution responsibility in areas such as food safety and intellectual property protection, it has increasingly found itself responding to disputes with decisions that the parties find unacceptable, and with which commentators find fault.[71] Going still further down this path seems ill advised.

B. International Coordination of Regulatory Jurisdiction

Recognizing the many obstacles to substantive harmonization of competition law, some governments and commentators have considered coordination of jurisdiction as an alternative way of addressing the overlapping jurisdiction problem.[72] The ideal is universal acceptance of jurisdictional criteria that would submit transactions to one, and only one, regulatory authority. The search for jurisdictional stability underlay the forty-year struggle between the United States and its trading partners over the "effects" test for antitrust jurisdiction as well as justifying the various agreements between the Justice Department and other states on antitrust enforcement.

1. Allocations of Regulatory Jurisdiction

In a simpler world of mechanical and formalistic jurisdictional tests, overlapping regulatory authority did not pose a problem. Only the sovereign on whose territory a transaction occurred would impose its rules.[73] But with the rise of multijurisdictional transactions, territoriality came under pressure. U.S. courts initially relaxed the traditional test by requiring that only some part of the transaction in question occur in U.S. territory.[74] By the end of World War II, the lower courts cast aside even that constraint, instead applying U.S. antitrust law to any action that had direct and intended effects in the United States.[75] Europe and the Commonwealth countries resisted this approach, but by the end of the 1980s the EC had incorporated the effects test into its own competition law.[76]

Almost as soon as the effects test emerged as the U.S. standard for international antitrust, some courts and commentators proposed to limit it. It is unclear whether the critics saw the potential costs of multiple regulation or simply disliked the foreign criticism that the test generated. For whatever reason, their efforts dominated most discussion of international antitrust during the 1970s and 1980s. The leading treatise on international antitrust proposed that courts use a "rule of reason," base on multiple criteria, to limit U.S. jurisdiction in cases that satisfied the effects test. The Ninth Circuit embraced this standard, and the Third Restatement of the Foreign Relations Law of the United States proclaimed it the general rule.[77] The campaign to limit antitrust jurisdiction suffered a setback in 1993, when, in *Hartford Fire Insurance Co. v.*

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71 See authorities cited in note supra.

72 For a thorough review of the literature, see Joel P. Trachtman, note supra.

73 American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) (dictum).

74 United States v. Sisal Sales Corp., 274 U.S. 268 (1927).

75 United States v. Aluminum Co. of America, 148 F.2nd 416 (2nd Cir. 1945).

76 In re Wood Pulp Cartel (Case 89/85), [1988] E.C.R. 5193.

77 Timberlane Lumber Co. v. Bank of America, 549 F.2nd 597 (9th Cir. 1976); Restatement (Third) of the Foreign Relations Law of the United States § 403 (1987).

California,[78] a narrow majority of the Supreme Court both endorsed the effects test and rejected the rule-of-reason limitation. But poor argumentation in that majority's opinion has enabled litigants to keep alive the prospect of the rule of reason's reemergence.[79]

As this account illustrates, disputes over jurisdictional scope typically take place in the judicial arena. Legislators typically fail to address the issue of extraterritorial regulation, and courts conventionally craft choice-of-law rules to fill in statutory lacunae. In the case of antitrust, however, some intergovernmental agreements also seek to distribute regulatory jurisdiction. The U.S. Justice Department has negotiated compacts with Australia, Canada, the EC, Japan and Mexico, among others.[80]

Superficially, these agreements appear to address the problems of overlapping regulation. A review of their terms, however, reveals that they do not even create soft law. Rather, the bilateral agreements express only a desire to consult and cooperate, and do not limit the discretion of regulatory authorities in any jurisdiction. None of these instruments has terms that a U.S. court could enforce, and the EC agreement entails judicial enforcement only in the sense that it provides the EC Commission with an additional grounds for making demands of national regulators.[81] Each purports to embrace the rule of reason as the basic concept for allocating regulatory jurisdiction, but all use a long list of unweighted criteria that have the effect of removing almost all exercises of regulator review from attack. Moreover, the agreements do not seek to coordinate merger approval, the area that has caused the greatest recent tension. If anything, the bilateral agreements illustrate the conflicting interests that jurisdictions have in imposing their competition law on international transactions, and the difficulties of surrendering regulatory discretion in spite of the potential costs caused by overlapping constraints on private transactors.

Finally, one should note the Hague Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters.[82] This multilateral instrument, if adopted, might limit the power of a signatory state to exercise some regulatory jurisdiction over extraterritorial transactions, and would make civil judgments produced by proceedings that conform to the convention subject to execution by all parties to the Convention. But no one who follows these negotiations seriously believes that the United States will sign the Convention or that Congress would accede to it. Rather, even this modest attempt to reach an international consensus on the allocation of regulatory jurisdiction seems an entirely academic exercise.

To summarize, the courts have supplied three different strategies for allocating regulatory

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[78] 509 U.S. 764 (1993).

[79] United States v. Nippon Paper Industries Co., 109 F.3rd 1 (1997), cert. denied, 522 U.S. 1044 (1998).

[80] For texts of the agreements, see http://www.usdoj.gov/atr/public/international/int_arrangements.htm (last visited Jan. 3, 2003).

[81] See France v. Commission (Case C-327/91), [1994] E.C.R. I-3641 (discussing enforceability of agreement as Community law).

[82] Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Oct. 1999), at http://www.hcch.net/e/conventions/draft36e.html last visit Jan. 3, 2003).

jurisdiction. The territorial approach would severely limit the scope of competition law in cases where production took place offshore. The effects test maximizes a state's regulatory power. The rule of reason muddles these two approaches. In theory states might agree to concrete and specific allocations of authority, but nothing achieved to date meets this description. To the contrary, the agreements we have suggest the difficulty of imposing significant constraints on national regulatory power.

2. Critique

The use of rules that allocate regulatory jurisdiction as a substitute for unification of substantive law is most closely associated with U.S. corporate law. During the last decade Roberta Romano has produced an influential reappraisal of this subject.[83] Her work has developed a conceptual apparatus that translates into other substantive areas and, in due course, has led to a rich and lively scholarly debate about regulatory competition generally.[84]

As Romano observes, the challenge is choosing jurisdictional criteria that will not promote a flight by transactions to a jurisdiction that permits significant externalization of the transactions' costs. The traditional critique of the U.S. choice-of-law rule for corporate law (place of incorporation) asserts that managers incorporate in jurisdictions that maximize their opportunities to enrich themselves at the expense of investors. The "race to the bottom" metaphor arose in this context.[85]

Romano's contribution involved a demonstration that managers often will have to internalize the costs associated with rules that enabled them to exploit investors, and thus should have a preference for rules that maximize firm value. She found in corporate law a virtuous race to the top, where her predecessors had seen only a regrettable regulatory collapse. Stephen Choi and Andrew Guzman extended her argument to the international arena, advocating a regime that would allow the issuers of securities to choose which jurisdiction would regulate their transactions.[86]

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[83] Roberta Romano, The Genius of American Corporate Law (1993); Roberta Romano, Empowering Investors: A Market Approach to Securities Regulation, 107 Yale L.J. 2359 (1998); Roberta Romano, The Advantages of Competitive Federalism for Securities Regulation (2002).

[84] See also Regulatory Competition and Economic Integration—Comparative Perspectives (Daniel C. Esty and Damien Geradin, eds 2001); International Regulatory Competition and Coordination: Perspectives on Economic Regulation in Europe and the United States (William W. Bratton, Joseph A. McCahery, Sol Picciotto & Colin Scott eds. 1996); William W. Bratton & Joseph A. McCahery, The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World, 86 Geo. L.J. 201 (1997); Joel P. Trachtman, International Regulatory Competition, Externalization, and Jurisdiction, 34 Harv. Int'l L.J. 47 (1993). Earlier influential work includes Warren E. Oates & Wallace M. Schwab, Economic Competition Among Jurisdictions: Efficiency Enhancing or Distortion Inducing, 35 J. Pub. Econ. 333 (1988); Frank H. Easterbrook, Antitrust and the Economics of Federalism, 26 J. L. & Econ. 23 (1983); Saul Levmore, Interstate Exploitation and Judicial Intervention, 69 Va. L. Rev. 563 (1983); Charles Tiebout, A Pure Theory of Local Expenditures, 64 J. Pol. Econ. 416, 422 (1956).

[85] Berle & Means

[86] Stephen J. Choi & Andrew T. Guzman, Portable Reciprocity: Rethinking the International Reach of Securities Regulation, 71 S. Cal. L. Rev. 903 (1998); Andrew T. Guzman, Capital Market Regulation in Developing Countries: A Proposal, 39 Va. J. Int'l L. 607 (1999). See also Roberta Romano, The Need for Competition in International Securities Regulation, 2 Theoretical Inquiries L. 387 (2001); Paul B. Stephan, Regulatory Cooperation and Competition—The

A consensus does not exist regarding the validity of Romano's empirical claims about U.S. corporate law, much less Choi and Guzman's extension. The debate focuses mostly on the supply rather than the demand side, involving arguments over the willingness of states to compete for corporate charters.[87] Most scholars, however, agree with the analytics underlying Romano's claim: The degree to which transactors should have the freedom to choose which rules will govern their transaction depends primarily on externalities. To the extent that the ratio of externalized costs to benefits matches that of those internalized, the transactors, at least if they meet minimum standards of competence, should have the freedom to choose their regulatory environment. Under these conditions, a race to the top can occur.

Using Romano's framework, the argument that competition regulation is susceptible to a race to the bottom, and therefore should not be subject to transactor choice, is straightforward. At its heart competition law involves producer conduct, either unilateral or in concert, that may have harmful effects on consumers. Allowing producers to choose which regime will regulate the harm they impose on consumers would make sense only if consumers could boycott producers that choose consumer-unfriendly regimes. But competition law, at least in theory, focuses on exactly the kinds of producer actions that reduce consumer choice. In most instances, producer choices about competition law should have no significance.[88]

Straightforward analysis also demonstrates that none of the three rules used by the courts for allocating state regulatory jurisdiction will produce optimal outcomes. First, a universal commitment to territoriality would prevent a state from regulating offshore producers intending inefficiently to limit competition in the state's market. Barring all such desirable regulation can be justified only if one can demonstrate that on balance extraterritorial regulation would decrease welfare. Some instances of extraterritorial regulation probably are inefficient. States can use competition law as a form of protection for local producers or as a means of attacking changes in foreign producers' organizational structure that greatly reduces production costs at the price of some reduced consumer welfare. But some states might limit competition rules to cases that both maximize efficiency and increase consumer welfare. Moreover, in industries where production is moveable, and firms thus can induce states to compete for their activities, producers probably would exploit a territoriality regime to increase opportunities for monopoly rents.

Search for Virtue, note supra, at 193-96; Frederick Tung, Passports, Private Choice, and Private Interests: Regulatory Competition and Cooperation in Corporate, Securities and Bankruptcy Law, 3 Chi. J. Int'l L. 369 (2002).

[87] See Lucien Bebchuck & Assaf Hamdani, Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters, 112 Yale L.J. ___ (2002); Marcel Kahan & Ehud Kamar, The Myth of State Competition in Corporate Law, 55 Stan. L. Rev. 679 (2002).

[88] Some subjects, such as contracts implementing vertical cooperation, may present sufficiently debatable competition issues to justify deference to the transactors. See Mitsubishi v. Soler. These contracts typically involve merchants who have some competitive choices prior to their entry into the agreement and involve project-specific investments that on balance may increase welfare. Goetz & Scott. Under these circumstances, the parties are more likely to internalize the costs of whatever competition regime they choose, and without the freedom to choose they may pass up valuable transactions.

Symmetrical arguments expose the flaws in the effects test. That approach multiplies the number of states with jurisdiction over transactions and thus increases the likelihood that private organizational decisions will confront governmental resistance. As with the territorial rule, whether governmental intervention will increase welfare constitutes an empirical consideration. There is no categorical reason to believe that the benefits from desirable competition rules permitted by the effects test necessarily will be greater that the costs generated by inefficient regulation.[89]

The most one can claim for the effects test is that is maximizes sovereignty by allowing states to choose the scope of their regulation free of international constraints. But maximization of sovereign choice is not necessarily a good thing. Arguments for expanding individual choice do not translate to the level of the state.[90]

The one approach that seems unambiguously flawed is the rule of reason. William Dodge misstates the case when he characterizes this approach as producing the same outcome as the territorial method.[91] Rather, the rule of reason only increases the likelihood that one state, presumably the place of production, will impose its competition rules. But unlike either the territoriality rule or the effects test, the rule of reason contains a high degree of instability and unpredictability. It allows courts to balance unweighted factors on an ex post basis, making reliable guesses about regulatory jurisdiction difficult if not impossible. It creates legal risk without necessarily eliminating the costs of either under-regulation or over-regulation.

If the judicially crafted formulas for allocating jurisdiction produce suboptimal outcomes, should governments enter into agreements to allocate regulatory jurisdiction? The extant agreements suggest that we already have reached the limits of state-to-state bargains. No state seems will to submit to serious and enforceable constraints on its regulatory jurisdiction. Two reasons for this reluctance suggest themselves. First, states will not surrender jurisdiction to regulate without some clear and reliable expectation of what substantive rules other states will apply. Second, and following from the first, states recognize that the jurisdiction issue simply recasts the question of preferences for substantive competition rules.

[89] William Dodge argues that courts should express a bias in favor of over-regulation on the ground that special interests find it easier to block regulation they disfavor than to have enacted legislation that they favor. William S. Dodge, An Economic Defense of Concurrent Antitrust Jurisdiction, 28 Tex. Int'l L.J. ___, ___ (2002). The argument confuses prudential concerns with welfare claims. Courts might defer to legislative choices about jurisdiction on the ground that they do not have the capacity to second-guess legislative choices. But it does not follow that because special interests have a comparative advantage in blocking adverse legislation, that only public-regarding regulation will pass through this filter. It is just as plausible that we see less legislation than we might because of the comparative advantage of compact groups, but that the legislation we do see still reflects private rather than public interests.

[90] I previously have criticized commentators that invoke the concept of sovereignty as justification for particular positions on regulatory jurisdiction. On close analysis, these invocations invariably turn out to be stalking horses for other substantive claims that require distinct argumentation. Paul B. Stephan, The Political Economy of Choice of Law, note supra, at 957-59.

[91] William S. Dodge, note supra, at ___: "The territorial and balancing approaches belong in the exclusive-jurisdiction category."

This last point also suggests why a global bargain to allocate competition policy jurisdiction may be undesirable as well as unattainable. On reflection, the jurisdictional question presents exactly the same issues and problems as does substantive harmonization. There is no neutral template for allocation that transcends the interests engaged by competition law, and no reason to believe that those interests would not affect the structure of any international bargain. In particular, giving an international agency responsibility for supervising how states exercise their jurisdiction would give rise to exactly the same agency problems discussed in the previous section.

C. The Future of International Supervision of Antitrust

The EC, the United States, and most scholars have treated international antitrust as a problem that international institutions can solve. The details of the solutions differ, but they have in common a conviction that an international forum will serve as a means for transcending local interests of states in favor of global welfare. I maintain that this faith in international cooperation is misplaced. Analogies to trade agreements do not work, because the assumptions, interests and legal tools at stake in competition policy are far less transparent, and therefore far less susceptible to oversight and satisfactory dispute settlement, than those presented by direct trade barriers. We have every reason to believe that international supervision either will be inconsequential, along the lines of existing agreements on international antitrust, or pernicious.

This critique opens the way to reconsidering what may happen if states do not face international constraints on how they conduct their competition policy. Given certain plausible assumptions about the world economy, in particular those sectors that draw to a greater extent on skill and innovation, an anarchic international environment may contain substantial impediments to a global race to the bottom in competition law. I explore this possibility in the next section.

III. ANARCHY, INTERNATIONAL ANTITRUST, INNOVATION AND INVESTMENT

In the first part of this paper, I described a static model that predicts what competition law a state will enact and enforce. This model rests on two assumptions, that states seek to maximize a weighted sum of local consumer and producer interests, and that the choice of competition policy has no secondary effects on consumer or producer welfare. The model regards states as choosing among a fixed set of outcomes that proceed directly from particular competition policies. Choices in one time period do not affect the set of choices available in the next.

A dynamic model, by contrast, assumes that choices made in the first time period alter the possibilities available in the next. I focus on a model of innovation that emphasizes increasing marginal returns and explore the relationship of this model to competition. One inference drawn from this model is that inefficient competition policy can lead to long-term losses in a globally competitive economy.

The question remains whether the static or the dynamic model offers a better fit for particular

sectors of the world economy. In industries such as agriculture and natural resource extraction, the distribution of natural endowments may dominate welfare calculations and innovation may play a less important role. In such sectors, we would expect to find inefficient industrial structures that generate, or at least seek, monopoly rents, along with significant levels of trade protection. In other, knowledge-based sectors, by contrast, the cost of protection, either through government regulation or private collusion, may be high.

A. Knowledge and Industrial Structure

A considerable body of work by economists has explored the impact of knowledge-based investments on economic growth. In these models, knowledge has low reproduction costs. Returns on knowledge thus depend critically on the size of the market in which knowledge-influenced goods can be sold.[92] Increases in the scope of the market, such as the creation of the U.S. common market in the nineteenth century and of Europe's in the second half of the twentieth, expand the opportunities for exploiting knowledge and thus rewards investments in knowledge more greatly. Trade liberalization and other strategies for broadening market structure also raise incentives to invest in knowledge.[93]

Recent empirical work tends to support this hypothesis. Studies by Jeffrey Frankel and coauthors have demonstrated a strong positive correlation between trade openness and labor productivity, a reliable proxy for innovation.[94] A more recent paper by Francisco Alcalá and Antonio Ciccone refines these results by looking at the relationship between productivity and openness in tradable goods, as opposed to gross measurements of an economy's openness to trade.[95] Their analysis shows an even stronger link between innovation and an economy's exposure to international competition.

It is important to clarify what this work does and does not indicate. Under conventional models of development, a country's economic growth depends both on its physical and human capital and on its efficiency in using these assets. Other considerations, in particular institutional quality, has a strong relationship with levels of capital stocks, and the link between economic openness and institutional quality is not well understood. What the empirical work indicates, then, is not that openness is the most influential factor in economic growth, but that it is an important factor in explaining how effectively an economy exploits the stock of physical and human capital it has.

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[92] See Paul M. Romer, Endogenous Technological Change, 98 J. Pol. Econ. S71, 72 (1990):

> Once the cost of creating a new set of instructions has been incurred, the instructions can be used over and over again at no additional cost. Developing new and better instructions is equivalent to incurring a fixed cost. This property is taken to be the defining characteristic of technology.

[93] For empirical evidence, see Richard R. Nelson & Gavin Wright, The Rise and Fall of American Technological Leadership: The Postwar Era in Historical Perspective, 30 J. Econ. Lit. 1931 (1992).

[94] Jeffrey A. Frankel & David Romer, Does Trade Cause Growth? 89 Amer. Econ. Rev. 379 (1999); Jeffrey Frankel & Andrew Rose, An Estimate of the Effect of Common Currencies on Trade and Income, 117 Q. J. Econ. 437 (2002).

[95] Francisco Alcalá & Antonio Ciccone, Trade and Productivity, Draft June 2002.

This is not to say, however, that barriers to competition will not depress investment as well as innovation. Monopoly rents derive from restricting production below a level that efficient competition would dictate. Lowering production implies, although it does not require, reducing the level of investment in the industry. Barriers to entry, whether imposed by private agreement or the state, implies fewer opportunities for the deployment of capital.[96]

To be sure, the link between investment and barriers to competition is not as well documented as that between innovation and market size. But the hypothesis that inefficient limits on competition serve as a barrier to investment is plausible. Moreover, one can draw an indirect inference from some data that do exist. The strong finding in the trade literature that declining industries, rather than infant ones, have the greatest demand for protection is suggestive.[97] It implies that industries that have lost their capacity to attract new investment tend to gravitate toward less competitive market structures.

These claims frame an argument as to why competition policy that does not pursue efficiency will prove costly to states. First, states that permit local producers to construct inefficient constraints on competition are functionally equivalent to states that undertake such protection directly. Tolerance of inefficient collusion in an industry is likely to lead to lower rates of investment and innovation than otherwise would obtain. Except in the case of industries that depend heavily on local factor endowments (petroleum in the Middle East, diamonds in South Africa and Russia), these losses should lead to low growth or shrinkage in the affected sector. Gradual immiserization eventually should either impair an industry's ability to resist regulation or lead to its economic irrelevance.

Second, states that use their competition law to impose inefficient organizational structures on foreign producers, with the object of protecting local producers, encourage lower rates of investment and innovation in the protected sector. If bad competition law is the functional equivalent of trade protectionism, then equivalent consequences should follow.

The significant counter-example would be state intervention in a rivalry between oligopolists in an industry characterized by positive returns to scale. In theory, punishing foreign producers with competition law would facilitate the local producer's ascendancy as an efficient global monopolist.[98] If states generally can choose when to invest in industries that will become globally dominant, then they should include competition law among the tools that they can use to implement such decisions.

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[96] Early statement of the connection between monopolization and reduced opportunities for investment can be found in John A. Hobson, Imperialism—A Study 74-78 (3rd ed. 1948).

[97] For a review of the evidence and a theoretical justification, see see Oona A. Hathaway, Positive Feedback: The Impact of Trade Liberalization on Industry Demands for Protection, 52 Int'l Org. 575 (1998).

[98] U.S. Competitiveness in the World Economy (Bruce Scott & George C. Lodge eds. 1987); James A. Brander & Barbara J. Spencer, Export Subsidies and International Market Share Rivalry, 16 J. Int'l Econ. 83 (1985). For claims by figures whose later roles in governments to some extend undermined their thesis, see Ira Magaziner & Robert Reich, Minding America's Business (1982).

Considerable evidences suggests, however, that states rarely do a good job of picking winners. A decade ago many U.S. scholars saw Japan as a model of successful strategic trade policy and ventured to identify industries where government-led success would generate great local benefits at no significant global cost. Revisionist studies of Japanese policy reveal that the government generally supported industries that did not have much success in international competition and did little for those sectors—automobiles and consumer electronics—where Japanese producers did enjoy some success. More generally, as noted above, governments tend to weigh in on behalf on declining industries more often than they bestow favors on rising sectors. And the ability of declining firms to procure government protection should not grow over time.[99]

This argument for virtuous pressures to produce efficient competition law is subject to two important qualifications. First, states that serve as a base of operations for firms that largely export their products may seek to free ride on the regulatory efforts of importing states. If no single importing state were to consume a substantial share of the global output of such producers, those states might not invest sufficient resources in imposing competition rules. Under these circumstances, consumers over the short run would suffer losses due to excess prices and low supply, while the producing country might witness the eventual decline of the industry it hosts. Here collective action by the affected states to impose an appropriate competition policy might produce a better outcome.

Second, the argument assumes that states eventually will respond to the decline of local producers by withdrawing the protection that contributes to their decline. There is some point at which this assumption must be correct: An industry that collapses completely must not have any ability to procure desired outcomes from government. But it does not follow that economic and political decline must be symmetrical. A sense of beleaguerment might lead an industry to overcome internal divisions and concentrate more directly on influencing governmental outcomes. The U.S. steel industry provides a case in point: Although some firms have increased their international competitiveness through increased investment and higher labor productivity, others have used adversity as a ground for procuring repeated episodes of protection from import competition and have made no significant improvements in their production methods. There is plenty of evidence that failing industries can obtain costly protection until collapse becomes imminent.

These qualifications are important, but do not seriously undermine the claim that virtuous forces make international cooperation less desirable. First, the free-riding scenario seems somewhat hypothetical. States generally have some incentive to protect their consumers from anticompetitive practices, whether or not the local injury is a large portion of the global injury. Most importantly, they do not have to limit their remedies to recovery of the cost of local injury. Criminal sanctions, punitive damages and injunctions give local authorities the capacity to

[99] Hathaway proposes a theory that ties the withering away of protection to the decline of protected industries. Oona A. Hathaway, note supra.

address a local harm proportionately to its global ramifications.

Second, the disconnect between economic and political power is a general problem and not limited to local law production and enforcement. Any state that will protect a failing industry by prosecuting its foreign rivals will use its international relations to pursue similar goals. In particular, such a state will block any international accord that takes away its discretion to impose such protection.

I do not mean to suggest that the appeal of a competition law that both frustrates inefficient collusion and does not impede beneficial industrial cooperation is always manifest, or that the consequences of bad competition law is immediately painful. Rather, I make two claims. First, in industries that compete for capital internationally and that can realize significant returns from increases in labor productivity, good competition law matters. Second, the political mechanism that mediates between an industry's economic status and a state's policy preferences should not change when the state pursues those preferences through international cooperation rather than by domestic lawmaking and enforcement. These claims in turn suggest that, with respect to economic sectors to which the argument applies, states have some incentive to eschew competition policies that otherwise might generate short-term gains at the expense of global welfare.

B. Regulatory Competition and International Antitrust Revisited

Models of regulatory competition, such as those developed in Romano's work, invoke a stylized market in which states offer packages of law to firms that have the capacity to select among them. In these models, states gain some benefit by having firms choose their law and thus wish to attract buyers; firms choose laws that maximize benefits to the firms' decisionmakers. As I noted above, setting up such a market for competition law seems undesirable. We would expect firms not to choose laws that maximize general welfare, but rather to seek opportunities for monopoly rents. For this reason, we do not find it disturbing that, in the contemporary world, firms have little influence over the choice of competition regulation that will apply to their activities. For the most part firms can avoid a state's competition law only by avoiding that jurisdiction entirely, neither producing, selling, basing personnel, or holding attachable assets in the territory of that state.

The dynamic model of competition law's effects on innovation and investment, however, introduces an indirect form of regulatory competition. If states compete for capital and opportunities to generate returns from knowledge, they should have some incentive to choose competition law that increases its opportunities for both. Under this model, states would not compete for producers as such, but rather for capital and innovation. To the extent good competition law increases a state's attraction for either, a virtuous cycle may proceed without the need for international coordination of state choices.

This vision of virtuous competition for innovation and investment is not as far fetched as one

might think. A conventional story about the rise of Europe, endorsed by a Nobel prize winner and supported by a recent review of the historical evidence, stresses the pressure placed on nearby states by innovation in their neighbors.[100] The evidence suggests that rent-seeking becomes more expensive in the face of a neighbor's technological progress, and that competition among neighbors offers a powerful explanation for a state's willingness to sacrifice vested interests in the service of adaptation. Europe, a geographically fragmented entity, experienced more of this competition; the vast, geographically and hermetic empires of China and Russia did not. And in today's world, with lower costs in transportation and communication, geographical contiguity places less of a role in economic competition among states than in the past.[101]

This hypothesis requires important qualifications. First, it applies largely to high value-added goods, including services, and not to industries that depend mostly on factor endowments. Second, the mechanism driving the virtuous cycle is considerably less transparent than the seemingly straightforward competition for corporate charters, a contest the existence of which still remains subject to debate.[102] The incentive for virtuous policy involves a long-term effect rather than short-term payoffs. One might plausibly respond that political cycles do not run this long, and that no one can realistically expect political actors to respond reliably to such forces.

These objections have great force. Their rebuttal depends largely on guess about the future rather than on evidence from the past. The fundamental issue is the nature and extent of the much hyped "new economy" at the international level. For virtuous competition in competition policy to have much purchase, two discernible trends in international economic relations will have to become more pronounced. First, the portion of international transfers involving high value-added goods will have grow even more. Second, the pace of technological innovation, and the response of mobile capital to this pace, also will have to quicken. These developments would increase the importance of competition policy and shorten the time between policy choice and economic consequences.

Looking only at the last two years, one might argue that the new economy never was much more than a pipe dream, and that any expectation of its near term recovery rests on delusion more than evidence. If one were to expand the horizon to the past decade, however, the story becomes more complicated and less crazy. Japan, a country that exports capital rather than investing it at home and that displays considerable structural rigidity and resistance to domestic competition, has experienced zero or negative growth during the period. The EC, with a competition policy that has more bite than Japan's but still seems more slanted toward protecting local producers than does U.S. policy, has not enjoyed nearly the same growth in labor

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[100] Douglass C. North, Structure and Change in Economic History 29 (1981); E.I. Jones, The European Miracle: Environments, Economies, and Geopolitics in the History of Europe and Asia (1987); Azam Chaudhry & Phillip Garner, Political Competition Between Countries and Economic Growth (Draft Aug. 29, 2002).

[101] Less, of course, does not mean no role. The United States' largest trading partner remains Canada, not Japan or any European country, and cross-border trade and investment among members of the European Union exceeds flows between those members and the rest of the world. [cite]

[102] See authorities cited in note supra.

productivity or inflows of capital that the United States has seen. Push back fifty years and the picture becomes even muddier, with postwar recovery driving great early growth in Japan and Europe. One simply cannot make any strong claim, positive or negative.

Still, the possibility that competition law can become the subject of a race to the top remains intriguing. If one takes seriously my criticism of international cooperation, international anarchy can start to look good. The chance that trends now at work in the world economy may reduce the need for hard law at the international level should temper our enthusiasm for lawmaking projects that a minimum divert resources, and possible may make the problems of international antitrust worse.

IV. CONCLUSION

In the last decade or so economists have developed the concept of "government failure" to complement the traditional notion of "market failure."[103] The idea, roughly put, is that the structure of government can cause certain outcomes to occur that deviate from what otherwise would be both preferable and attainable. The broader implication of the concept is an analyst cannot make the case for government action simply by identifying a market failure. Always there remains the question of whether a governmental response will make the problem better or worse. The economist's cliché, "Compared to what?" applies here too.

This paper argues that the problem of government failure exists at the international level. To make the point, I have focused on a classic market failure problem, namely private actions that frustrate competition. A conventional analysis argues that, in a world of international transactions, states will fail to pursue competition policy that maximizes global efficiency. Most analysts have taken this argument to dispose of the question of whether some kind of international governance is necessary to respond to the problem, with disagreement limited to the best design of the institutional response. I, in contrast, argue that a serious risk of government failure attends any proposal for serious international governance in this area, and that under certain assumptions the market failure may not be as great as first believed.

Why has the policy consensus so largely settled on a different approach? Perhaps I am simply a contrarian, and the case for some kind of international governance is stronger than I acknowledge. One should consider, however, reasons why policy debate might skew in favor of governance even though an objective case has not been made.

A sociological observation might provide one answer. Legal élites benefit from governmental action. They design the structure, staff it, and criticize it. This general point takes on particular salience in the international arena, where messy encumbrances on élite policy formation—elections, competitors, and the like—do not exist. For someone committed to the proposition that ideas and articulateness have a privileged role in policy formation, international governance is an inviting playground.

[103] See Anne O. Krueger, Government Failures in Development, 4 J. Econ. Persp. 9 (1990).

The possibility that technological innovation and capital might provide a better check on anticompetitive behavior than do government agents is especially disconcerting for members of this class. The people who make these economic forces possible—compulsive tinkerers, lunatic risk-takers—often have little affinity with the bright, well spoken and presentable folks who make legal institutions work.[104] Ceding power to people who often cannot explain what they do is sufficiently unwelcome that fair minded lawyers will struggle with evidence suggesting that they should.

I do not argue that this sociological explanation suffices as a ground for governmental inaction across the board. Rather, it suggests that the proponents of new governmental structures, free of the constraints that bind national states, bear a special burden of justification and need to draw on special reserves of skepticism. The debate on international antitrust wants these qualities.

[104] See also Robert Nozick, Why Do Intellectuals Oppose Capitalism? 20 Cato Online Policy Report (Jan.-Feb. 1998), published at http://www.cato.org/pubs/policy_report/cpr-20n1-1.html (last visited January 8, 2003).