IS INTERNATIONAL ANTITRUST POSSIBLE?

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This Article analyzes the economic incentives countries face in selecting an antitrust policy. It demonstrates that, in the presence of international trade, antitrust policies chosen by national governments will generally not lead to an outcome that is desirable from an international perspective. Professor Guzman identifies the reasons why national policies are different from the optimal global policy and shows how the direction of the deviation from the optimal policy depends on trade patterns and the extent to which national laws are applied extraterritorially. The author concludes that, although international agreement is not impossible, the prospects for substantive cooperation on international antitrust policy are slight. Unlike trade policy, an international agreement on antitrust policy would benefit some countries at the expense of others. The Article identifies the potential winners and losers from such an agreement and points out that because international compensatory transfer payments are unlikely, an agreement will be difficult to achieve.

Recognizing that agreement is nevertheless desirable to avoid welfare losses associated with a noncooperative approach to international antitrust policy, Professor Guzman analyzes the fora in which antitrust agreements are most likely to be negotiated and assesses the likelihood of success in each forum. Because concessions in other areas of negotiation may be necessary to compensate countries that will suffer a loss under a cooperative antitrust policy, the analysis suggests that negotiations on antitrust policy should be combined with the negotiations of other issues.

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INTRODUCTION

Since the late 1940s, average worldwide tariff levels have fallen from an estimated forty percent to the current level of less than five percent.[1] As tariff barriers have fallen, other trade-related policies have attracted the attention of academics and government officials.[2] Antitrust law is one such policy,[3] and it may very well be on the

[1] See Paul J. Carrier, Sovereignty Under the Agreement on Government Procurement, 6 Minn. J. Global Trade 67, 70 n.14 (1997) (citing Michael J. Trebilcock, On the Virtues of Dreaming Big but Thinking Small: Comments on the World Trading System After the Uruguay Round, 8 B.U. Int'l L.J. 291, 292 (1990)).

[2] The need to address nontariff barriers has been recognized by the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO), among others. For example, the Tokyo Round of GATT negotiations, which ended in 1979, was the first to devote substantial attention to nontariff barriers, addressing government procurement policies, subsidy policies, customs valuation policies, and technical standards in addition to tariffs. See John H. Jackson et al., Implementing the Tokyo Round: Legal Aspects of Changing International Economic Rules, 81 Mich. L. Rev. 267, 273-76 (1982). The Uruguay Round, which was signed in 1994, also tackled previously neglected issues including agricultural trade, trade in services, and intellectual property. See David W. Leebron, An Overview of the Uruguay Round Results, 34 Colum. J. Transnat'l L. 11, 25-26, 28-30 (1995).

[3] See Mário Marques Mendes, Antitrust in a World of Interrelated Economies: The Interplay Between Antitrust and Trade Policies in the US and the EEC (1991) (analyzing relationship between antitrust and trade policies in United States and European Economic Community); Harvey M. Applebaum, The Interface of Trade/Competition Law and Policy: An Antitrust Perspective, 56 Antitrust L.J. 409 (1987) (presenting antitrust perspective on interface of trade and competition policy); Ronald A. Cass, Price Discrimination and Predation Analysis in Antitrust and International Trade: A Comment, 61 U. Cin. L. Rev. 877, 877 (1993) (examining differences between antitrust and international trade law as sources

agenda of the next round of World Trade Organization (WTO) talks.[4] The question remains, however, whether international cooperation in antitrust policy is possible. The existing literature on this question lacks an analytical foundation. There is, therefore, little understanding of the incentives facing individual countries and the effect of those incentives on antitrust policies.[5]

This Article provides a framework which allows more careful consideration of international antitrust policy and injects into the debate a more realistic view of country incentives. It explains why past attempts at cooperation have failed and suggests what the future may hold for international antitrust policy. The Article analyzes the consequences of cooperation and harmonization of antitrust policies on in-

of constraint on pricing practices); Kenneth G. Elzinga, Antitrust Policy and Trade Policy: An Economist's Perspective, 56 Antitrust L.J. 439, 441 (1987) (presenting view that impetus for protectionism is rent seeking); Eleanor M. Fox, Toward World Antitrust and Market Access, 91 Amer. J. Int'l L. 1, 2 (1997) (contrasting European and American visions of trade policy and concluding that there is need for liberal antitrust policy); Thomas J. Schoenbaum, The International Trade Laws and the New Protectionism: The Need for a Synthesis with Antitrust, 19 N.C. J. Int'l L. & Com. Reg. 393, 395 (1994) (addressing four problem areas with respect to relationship between international trade laws and antitrust policy, and proposing framework to reconcile them); A. Paul Victor, Antidumping and Antitrust: Can the Inconsistencies Be Resolved?, 15 N.Y.U. J. Int'l L. & Pol. 339 (1983) (reviewing relationship between U.S. antidumping and antitrust laws); A. Paul Victor, Task Force Report on the Interface Between International Trade Law and Policy and Competition Law and Policy, 56 Antitrust L.J. 461, 463-66 (1987) (presenting analyses of various trade statutes and discussing their interface with competition policy); Diane P. Wood, A Cooperative Framework for National Regulators, 72 Chi.-Kent L. Rev. 521 (1996) [hereinafter Wood, A Cooperative Framework] (addressing antitrust policy and its importance to international trade).

4 See Eleanor M. Fox, Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade, 4 Pac. Rim L. & Pol'y J. 1 (1995) (examining expansion of world trading agenda and competition law).

5 The rise in prominence of antitrust policy should come as no surprise. The globalization of the economy has affected antitrust policy just as it has affected virtually every other area of commercial dealings. See Douglas A. Melamed, International Antitrust in an Age of International Deregulation, 6 Geo. Mason L. Rev. 437, 437 (1998) ("Nearly 30 percent of the Antitrust Division's enforcement work involves international or transnational matters."); Diane P. Wood, United States Antitrust Law in the Global Market, 1 Ind. J. Global Legal Stud. 409, 427 (1994) (citations omitted):

> [A] great percentage of the mandatory premerger notifications in the United States made pursuant to the Hart-Scott-Rodino Act (perhaps as many as one-third) involve either foreign parties or significant foreign assets. The world-wide nature of these markets has led in many cases to the need to seek regulatory approval from several different authorities . . . .

See also C. Benjamin Crisman, Jr. & Matthew S. Barnett, Mergers & Acquisitions: Recent Trends in Antitrust Enforcement 401-27 (PLI Corp. L. and Practice Course Handbook Series No. B0-0023, 1998) (commenting on impact of globalization on U.S. antitrust enforcement).

dividual nations and focuses on whether individual countries are likely to find it in their interest to reach a negotiated agreement.[6]

Following a brief discussion of extraterritoriality and imperfect competition in Part I of the Article, Part II considers how international trade affects national antitrust policies. It demonstrates that the preferred antitrust policy of a country depends on the trade patterns of imperfectly competitive goods and services and on the ability of countries to apply their laws to activities that take place abroad. Net importers who are able to apply their laws to foreign activities will tend to overregulate anticompetitive activity relative to the optimal global level of regulation, while net exporters will tend to underregulate. Countries that cannot enforce their laws abroad will, all other things equal, tend to underregulate. These results imply that, under the existing system of national regulation, as opposed to one of greater international cooperation, countries are unlikely to pursue the best possible level of regulation for the world as a whole.

Using the analysis of country behavior developed in Part II, Part III derives implications for international cooperation with respect to antitrust policy. In international negotiations, different countries will want different levels of international antitrust regulation. Part III shows that some countries will prefer the status quo to any agreement that imposes stricter regulation, while other countries will prefer the status quo to any agreement that weakens regulation. In other words, the benefits of cooperation are one-sided and likely to leave one or more countries worse off. As a consequence, the would-be losers will simply refuse to participate.

There is a tension between the two conclusions that emerge from this analysis. First, regulating antitrust at the national level is suboptimal, and an international approach to antitrust is likely to be welfare increasing. Second, the incentives facing individual countries make it extremely difficult—perhaps impossible—to negotiate substantive international antitrust agreements. Part IV offers some evidence supporting the difficulty of reaching agreement. Part V reviews

[6] Harmonization can be defined quite broadly. Part VI, infra, discusses how the results of the analysis affect specific forms of cooperation. In general, it is sufficient to note that the discussion refers to any of the following: the creation of a single supranational law; the harmonization of substantive laws across countries; the establishment of choice of law provisions designed to clarify jurisdictional questions; and international treaties intended to apply national competition law to international activity in a consistent and systematic way among countries. The only form of cooperation that is excluded from this description is information sharing by regulators designed to allow the effective enforcement of national laws within a country. This form of cooperation is much easier to achieve and, indeed, exists today. For reasons that are discussed in Part VI, infra, the analysis does not apply to this sort of information sharing.

additional challenges facing attempts to regulate international antitrust policy.

Because an international antitrust agreement could yield welfare gains, attempts to negotiate such an agreement are likely to take place despite the incentive problems discussed in Parts II and III. With this fact in mind, Part VI turns to a prescriptive analysis of how the international community can maximize the likelihood of overcoming these incentive problems. Several conclusions emerge. First, cooperation is more likely among countries that have similar trade patterns (e.g., countries within the Organisation for Economic Co-operation and Development (OECD)) than among countries with dissimilar trade patterns (e.g., developed and developing countries). When the trading partners of countries differ significantly, agreement will only be possible if the nations that gain from the agreement compensate the countries that lose.

Moreover, agreement is more likely in some fora than in others. Because antitrust agreements between developed and developing countries are unlikely without transfer payments, negotiations are least likely to yield agreement if they do not encompass any other issues. As Part VI explains, agreement might be possible within a WTO framework if payment is made from developing to developed countries. This payment could take the form of concessions in other areas of negotiation, which implies that, if antitrust policy forms part of a larger package of negotiations, there is a greater chance of agreement. Bilateral negotiations provide the most promising forum for reaching agreement because they require only two countries to agree that cooperation will increase national welfare, and transfer payments through concessions in other areas of dispute are more likely.

Not all agreements will have the same impact, however. A broad multilateral agreement, if one could be reached, would be more successful in reducing costly distortions to international trade. Cooperation among countries that already have similar laws will yield only modest gains because it will lead to few substantive changes. Furthermore, bilateral or regional agreements may reduce the distortion of antitrust policy among the parties to the agreement, but they will not do so between those countries that are part of the agreement and those countries that are not.

I
EXTRATERRITORIALITY AND IMPERFECT COMPETITION

A. *Extraterritoriality*

An analysis of international antitrust policy requires consideration of the manner in which countries apply their laws to conduct that takes place abroad. "Extraterritoriality" refers to a country's ability to govern activity in foreign countries. "Territoriality" describes the situation in which a country's laws apply only to national activity.

Countries vary in their abilities to regulate foreign activity. At one extreme, for example, is a country that has minimal power over the behavior of foreign firms because those firms do only a small fraction of their business in the country and hold no assets there. Such a country, even if it threatens to deny access to the national market, will be relatively powerless to affect the behavior of foreign firms. Alternatively, a country may simply decide that it does not wish to apply its laws to conduct that occurs abroad, leaving foreign conduct beyond its reach.

This territorialist approach describes the position adopted by the U.S. Supreme Court in 1909 in *American Banana Co. v. United Fruit Co.*[7] Stating that "the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done,"[8] Justice Holmes, writing for the majority, held that the conduct of the defendant was beyond the reach of the Sherman Act,[9] despite the fact that both the plaintiff and the defendant were American corporations, because the acts in question took place in Panama and Costa Rica.[10] Under the *American Banana* approach, the reach of domestic law is coextensive with the geographic territory of the country. Acts that take place within the physical confines of the country are subject to local law; those acts that occur abroad are not.[11]

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[7] 213 U.S. 347 (1909).

[8] Id. at 356.

[9] 15 U.S.C. §§ 1-7 (1994).

[10] See *American Banana*, 213 U.S. at 357. Interestingly, Justice Holmes mentioned and dismissed a standard that would eventually become known as the "effects test":

> In cases immediately affecting national interests [countries] may . . . make, and, if they get the chance, execute similar threats as to acts done within another recognized jurisdiction. . . . For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations . . . .

Id. at 356.

[11] See id. at 357.

At the other extreme is a country in which foreign firms have substantial assets and conduct a large proportion of their business. The country's government has considerable leverage against the foreign firms and, should it choose to do so, can regulate the foreign firms' behavior much as it can regulate the behavior of domestic firms. If the foreign firms fail to comply with the country's demands, the country can penalize them with monetary sanctions enforceable against firm assets or it can restrict the activities of the firm within the country.

The United States adopted a policy of applying its antitrust laws to conduct occurring abroad in *United States v. Aluminum Co. of America*[12] *(Alcoa)*. Judge Learned Hand, ignoring *American Banana*, adopted a new test that permitted the assertion of jurisdiction over acts outside the United States "if they were intended to affect imports and did affect them."[13] This test is generally referred to as the "effects test." Following the *Alcoa* decision, the United States began a period of aggressive extraterritorial enforcement.[14]

12 148 F.2d 416 (2d Cir. 1945). In *Alcoa*, the Second Circuit, acting in lieu of the Supreme Court due to lack of quorum among the Justices, determined that the Court had subject matter jurisdiction over the dispute. See id. at 421. The facts were as follows: In 1928, Aluminum Limited was incorporated in Canada to take over the properties of Alcoa, a corporation organized under the laws of Pennsylvania. See id. at 422, 439. Aluminum Limited entered into an agreement with several European corporations to form the Alliance, a Swiss corporation. See id. at 442. Thus, the Alliance was a Swiss corporation whose shareholder corporations were European and Canadian. The Alliance made agreements in 1931 and 1936 that governed the sale of aluminum by each of the shareholder corporations. See id. at 442-43. The agreements at issue in the case were made outside the United States, and there is no indication that significant planning took place within the United States. See id. at 443-44.

13 Id. at 444. The Supreme Court adopted the *Alcoa* standard in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704 (1962); see also Steele v. Bulova Watch Co., 344 U.S. 280, 288 (1952) (adopting similar test with reference to trademark law under Lanham Act of 1946).

14 See Diane P. Wood, The Impossible Dream: Real International Antitrust, 1992 U. Chi. Legal F. 277, 280-81 [hereinafter Wood, Impossible Dream] (exploring possibility of an international competition regime and obstacles to such a regime). For evidence of U.S. enforcement efforts, see, e.g., In re Grand Jury Investigation of the Shipping Indust., 186 F. Supp. 298 (D.D.C. 1960) (international shipping); In re Investigation of World Arrangements, 13 F.R.D. 280 (D.D.C. 1952) (oil industry); United States v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945), aff'd, 332 U.S. 319 (1947) (titanium dioxide); United States v. Watchmakers of Switz. Info. Ctr., Inc. 1963 Trade Cases (CCH) ¶ 70,600, judgment modified, 1965 Trade Cases (CCH) ¶ 71,352 (S.D.N.Y. 1965) (Swiss watchmaking); see also Wilbur L. Fugate, 1 Foreign Commerce and the Antitrust Laws ch. 2 (3d ed. 1982) (addressing jurisdiction over foreign commerce and antitrust trends and policies in foreign trade); 2 id. ch. 15 (same); Barry E. Hawk, 1 United States, Common Market and International Antitrust: A Comparative Guide, 12-13, 114-17 (2d ed. 1985 & Supp. 1989) (describing history of antitrust laws in international trade and scope of application of U.S. antitrust laws).

The use of the extraterritorial effects test remains a part of American antitrust law, as evidenced by *Hartford Fire Insurance Co. v. California.*[15] In *Hartford Fire*, the Supreme Court stated that principles of international comity should be used only where there exists a "true conflict" between American and foreign law. The Court explained that a true conflict exists only when a party cannot simultaneously comply with the laws of both countries.[16] The Court held that in the absence of a true conflict the *Alcoa* "intended effects" test should be used.[17]

Extraterritoriality is, of course, a question of degree. Nevertheless, it is assumed throughout that some countries are able and willing to apply their laws to conduct that takes place abroad while others are unable or unwilling to do so. Although a more graduated approach to extraterritoriality could be utilized, in the interest of expositive ease, the analysis is limited to the polar cases in which a country can regulate foreign firms as it would domestic firms and, alternatively, in which a country cannot regulate the behavior of foreign firms at all. This assumption does not alter the analysis.

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15 509 U.S. 764 (1993). For commentaries on the *Hartford Fire* decision, see Scott A. Burr, The Application of U.S. Antitrust Law to Foreign Conduct: Has *Hartford Fire* Extinguished Considerations of Comity?, 15 U. Penn. J. Int'l Bus. L. 221, 223 (1994) (examining application of U.S. antitrust law to foreign conduct after *Hartford Fire*); Joseph P. Griffin, Extraterritorial Application of U.S. Antitrust Laws Clarified by United States Supreme Court, 40 Fed. Bar News & J. 564, 564-69 (1993) (examining history of U.S. antitrust jurisdiction and future implications of *Hartford Fire* decision); Larry Kramer, Extraterritorial Application of American Law After the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble, 89 Amer. J. Int'l L. 750, 750-58 (1995) (emphasizing ways *Hartford Fire* will affect future litigation); Andreas F. Lowenfeld, Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case, 89 Amer. J. Int'l L. 42, 45-51 (1995) (focusing on international conflict of laws); Phillip R. Trimble, The Supreme Court and International Law: The Demise of Restatement Section 403, 89 Amer. J. Int'l L. 53, 53-57 (1995) (examining application of customary international law); John A. Trenor, Comment, Jurisdiction and the Extraterritorial Application of Antitrust Laws after *Hartford Fire*, 62 U. Chi. L. Rev. 1583, 1585 (1995) (arguing that courts should focus on congressional intent and international conflict of laws principles in extraterritoriality analysis).

16 See *Hartford Fire*, 509 U.S. at 799. The facts of the case were such that the activity in question was a violation of U.S. law but was permitted under British law. The Court held that no true conflict existed because British law did not mandate the activity. Thus, although the defendant's conduct occurred in Britain and was lawful under British law, the defendant could have complied with U.S. law without violating the laws of Britain.

17 See id. at 796-97; see also U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement Guidelines for International Operations, Apr. 1995, at 24 ("[T]he Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.").

B. *Market Power and Productive Efficiency*

In devising antitrust policy, the policymaker weighs the merits of increased government regulation designed to reduce anticompetitive behavior against the risk that such regulation will prevent firms from taking actions that improve the efficiency of production.[18] For example, a merger may both increase the market power of a firm (reducing overall welfare) and raise the efficiency of production due to economies of scale (improving overall welfare). Antitrust policy will seek to prevent those activities that reduce overall welfare and allow those activities that increase overall welfare.[19]

1. *The Effect of Efficiency Gains*

Consider first the effect of an increase in productive efficiency. Any firm, including firms with market power, facing a fall in the cost of production will react by reducing its price and increasing its production and sales.[20] Such efficiency gains lead, all other things equal, to increased welfare for the society as a whole, with benefits flowing to both consumers and producers. Society gains because more goods are produced at a lower unit cost, which increases overall welfare. Consumers gain because the cost of the good has fallen, allowing them to either purchase more of the good for the same amount of money or purchase the same amount of the good for less. Producers with market power benefit because their profits increase.

2. *The Effect of an Increase in Market Power*

The second effect of behavior with potentially anticompetitive effects is an increase in market power. Firms can increase or maintain

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[18] See Phillip Areeda & Louis Kaplow, Antitrust Analysis 30-42 (1988) (listing reasons to deemphasize competition, including economies of scale); Joseph F. Brodley, The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress, 62 N.Y.U. L. Rev. 1020 (1987) (discussing competing goals of consumer welfare and efficiency).

[19] The Article considers only this simple objective because it is common to all antitrust policies. Governments sometimes pursue additional goals. The omission of these other goals strengthens the conclusion that international cooperation is unlikely because cooperation is more likely when all parties share common goals. Accounting for varying, often country-specific, objectives in addition to the common goal of raising general welfare would only reduce the likelihood of reaching a cooperative agreement. See infra Part V.

It is possible to express the competing goals of reducing market power and increasing efficiency formally as a problem of maximizing the sum of consumer surplus and producer surplus (profits). In formal terms, the activity will be permitted if and only if: $\Delta CS + \Delta\Pi > 0$, where CS represents expected consumer surplus and Π represents expected producer surplus.

[20] See Jean Tirole, The Theory of Industrial Organization 66-67 (1988) (describing behavior of monopolists).

market power in many different ways, including by merging with other firms, by preventing new firms from entering the market, and by putting in place horizontal or vertical restraints on competition.

As a firm's market power increases, the firm is able to increase the price of its goods and services above the level that would prevail in a competitive market. By reducing the amount it sells and raising its price, the monopolist is able to increase its profits.[21] This behavior is, however, bad for consumers who must pay more for the good. It is also bad for society as a whole because an increase in market power always reduces overall welfare.[22]

To study the relationships among national antitrust policies, Part II develops a simple model of imperfectly competitive industries in which firm activities can both increase the concentration of the industry (increasing market power) and generate improvements in productive efficiency (yielding efficiency gains).

II
The Behavior of Individual Countries

In order to assess the behavior of individual countries, this Part compares a country's self-interested behavior to the behavior that maximizes global welfare. To the extent that their behavior is different from behavior that maximizes world welfare, the international antitrust regime will be suboptimal.

A. *A Policy to Maximize World Welfare*

Before analyzing the effect of trade on national antitrust regulations, consider the optimal global antitrust policy. That is, imagine the policy that would be chosen by a planner with complete information seeking to maximize global welfare. Once the welfare-maximizing global policy is identified, it can be used as a benchmark against which to compare other outcomes.

21 Formally, an increase in market power corresponds to a more inelastic demand curve. As the demand curve becomes more inelastic, a given change in price has a smaller effect on quantity sold.

22 See Andreu Mas-Colell et al., Microeconomic Theory 384-87 (1995) (describing effects of monopoly power). An increase in the price of the good has two effects on consumers. First, some consumers will continue to buy the good at the higher price. The loss felt by these consumers will be offset by the increased profits enjoyed by the monopolist. Second, the price increase will drive some consumers from the market. Consumers who do not value the good enough to pay the higher price will lose the benefits they gained from the good, but the firm will receive no offsetting gain. The loss suffered by these consumers is not captured by anyone and is simply a loss to society, referred to as a deadweight loss. In other words, the total loss to consumers exceeds the increase in profits to the firm, and society as a whole is worse off. See id.

Assume that the planner seeks to maximize the economic well-being of the citizens of the country, in the case of a national planner, and of the world, in the case of the global planner.[23] Because the planner's objective is to maximize overall economic well-being, both consumers and producers matter. In economic terms, the planner maximizes the sum of the consumer and producer surplus.[24] This assumption is a mild one and is commonly made in economic analyses of antitrust policy.[25]

The model does not incorporate noneconomic goals of antitrust policy, which might include, dispersed control of economic resources,

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23 It is, of course, possible for different observers and different countries to disagree on what constitutes the optimal policy for a given set of economic conditions. The model abstracts from this point in order to focus on the difference between what a country would choose as an optimal policy if it were an autarkic state as compared to the international antitrust policy it actually chooses.

24 Some commentators refer to a gain in total welfare as a gain in "consumer welfare." See, e.g., Phillip E. Areeda, Introduction to Antitrust Economics, in Antitrust Policy in Transition: The Convergence of Law and Economics 45, 56 (Eleanor M. Fox & James T. Halverson eds., 1984) (defining consumer welfare as productive and allocative efficiency); Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself 107-08 (1978) (defining what he calls "consumer welfare" in such a way as to make it equivalent to sum of producer and consumer surplus); Brodley, supra note 18, at 1032 (defining consumer welfare as synonymous with consumer surplus). This Article adopts the more standard economic terminology by distinguishing between consumer and producer surplus.

25 See, e.g., Bork, supra note 24, at 107-10 (describing factors that are included in consumer welfare calculus); Eleanor M. Fox & Lawrence A. Sullivan, Cases and Materials on Antitrust 2-3, 10-11, 845-51 (1989) (investigating intersection of antitrust policy with law, economics, and politics); Janusz A. K. Ordover, Transnational Antitrust and Economics, in Annual Proceedings of the Fordham Corporate Law Institute: Antitrust and Trade Policies in International Trade 233, 237-38 (Barry E. Hawk ed., 1995) ("Economic approaches to antitrust policy proceed—implicitly or explicitly—on the assumption that the goal of competition policy . . . is to maximize *net national welfare* . . . ."); Richard A. Posner, Antitrust Law: An Economic Perspective 3-4, 8-35 (1976) (explaining basics of law and economics of antitrust).

There is widespread agreement that efficiency is relevant to antitrust policy. See, e.g., Brodley, supra note 18, at 1025, 1023-42 ("The first constituent of antitrust welfare is economic efficiency."); Joseph F. Brodley, Proof of Efficiencies in Mergers and Joint Ventures, 64 Antitrust L.J. 575, 575 (1996) ("The relevance of economic efficiency to the analysis of antitrust transactions is an issue on which all schools of antitrust analysis now agree."). Although some commentators argue against permitting defendants in an antitrust action to use the potential efficiency enhancing effects of their activities as a defense (i.e., they oppose case-by-case efficiency assessments), it is generally agreed that efficiency considerations are relevant to the creation of antitrust laws. See, e.g., Alan A. Fisher & Robert H. Lande, Efficiency Considerations in Merger Enforcement, 71 Cal. L. Rev. 1580, 1691-96 (1983) (discussing role of efficiency in antitrust policy); cf. Oliver E. Williamson, Economies as an Antitrust Defense: The Welfare Tradeoffs, 58 Am. Econ. Rev. 18 (1968) (suggesting that there should be efficiency defense on case-by-case basis). The Department of Justice's Merger Guidelines themselves recognize the relevance of efficiency considerations. See 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,552, 41,554 (1992) ("[The Department of Justice and the Federal Trade Commission] assess[ ] any efficiency gains that reasonably cannot be achieved by the parties through other means.").

fairness concerns, and concern for small business. Regardless of the appropriateness of considering such goals, the result remains that the economic interests of nations are often inconsistent, making an international agreement on antitrust policy unlikely.[26]

The global planner faces the same problem as a policymaker in a country that has no international trade. The optimal policy is the one that allows all activities for which the global change in profits plus the global change in consumer surplus is positive.[27]

B. The Trading Nation with Extraterritoriality

1. Firms and Consumers in Different Countries[28]

The next question to consider is how countries will behave in the presence of international trade. Consider first a two-country model in which one country is home to exporters of imperfectly produced goods but not to importers of those goods and the other country is home to importers and not exporters. After examining how policy is established in this simple case, more realistic cases in which both importers and exporters are located in each country will be considered.[29]

Imagine two countries, A and B, that engage in trade. The relevant producers of the good are in country A, but there are no consumers of the good in country A—which implies that the entire production of the relevant firms in country A is exported to country B.

Consider the policy response of country A to an activity that is efficiency enhancing but that also has potentially anticompetitive effects. As discussed in Part I.B.2, the global effect of an increase in market power is to reduce welfare. Because country A produces but does not consume the goods in question, the country and its policymakers are only concerned with the effects a given activity might have on firm profits.[30] Any proposed activity will be expected to increase

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26 It is possible for the noneconomic interests of a country to offset exactly the divergent interests of its economic goals. However, such a situation would be a mere coincidence and is unlikely to occur.

27 Formally, this optimal policy would be one that allows an activity if and only if: $\Delta CS + \Delta\Pi > 0$. See supra note 19.

28 Throughout this Article, references are made to "importers" and "exporters" of imperfectly competitive goods. Most countries, of course, are net importers of some goods and net exporters of other goods. The analysis assumes that countries are able to aggregate their trading patterns across industries to determine if they are net importers or net exporters over the entire set of imperfectly competitive industries.

29 See infra Parts II.B.2-B.4. The assumption in this Part is that every country can regulate the activity of foreign firms.

30 The model assumes that a firm located in country A is owned entirely by the citizens of country A. Such a simplifying assumption is justified empirically. As of 1991, foreigners owned only 6.7% of the shares of publicly traded firms in the United States. That figure

the profits of the firm—otherwise the firm would not choose to undertake it. Country A, therefore, shares the interests of the firm and will always expect to benefit from activities that the firm chooses to undertake. There is, therefore, no reason to prevent this, or any other, activity on antitrust policy grounds. From the point of view of country A, the optimal antitrust policy is no policy. Country A should allow the activity regardless of its impact on world welfare.[31]

Country A's policy (or lack of policy) can be compared to the optimal global policy. On the one hand, country A, like the global planner, will allow all activities that increase global welfare. The firm will choose to undertake every available welfare-improving activity because every such activity benefits the firm in the form of higher profits. Because there is no antitrust regulation, the activity will be allowed. On the other hand, country A will not prevent all welfare-reducing activities. Under the optimal global policy, the global planner will only allow activities that increase overall welfare, taking into account any reduction in consumer surplus. Country A, however, will allow any activity that the firm chooses to undertake to increase its profits, regardless of the effect on consumer welfare.[32]

> EXAMPLE. Suppose that two firms in country A wish to merge. If they are allowed to merge, the combined firm will have greater market power than either of the existing firms. As a result, they will be able to raise the price of their goods, which will increase their profits by $100. The monopolistic behavior of the merged firm, however, will lead to a fall in consumer surplus of $130. The overall effect of the merger, therefore, is a net welfare loss of $30.[33] Country A, however, prefers to allow the merger because it cares only about the welfare of the merging firms. For country A (and for the firms), the activity generates a gain of $100. Although country A

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was 4.2% in Japan, 12.3% in the United Kingdom, and 17.7% in Germany. See Mitsuhiro Fukao, Financial Integration, Corporate Governance, and the Performance of Multinational Companies 22 tbls.2-4 (1995). Note that the figures for the United Kingdom and Germany include, no doubt, considerable ownership by European "foreigners," who, under the model, are more appropriately considered national owners because European antitrust policy is made at the EU level. This simplification allows a more straightforward analysis of national policy. The analysis could still be carried out considering more general ownership structures, but government policy would depend on the nationalities of the ultimate owners of firms rather than on the geographic locations of those firms.

31 In formal terms, country A will allow any activity the firm undertakes, which is equivalent to allowing activities if and only if $\Delta\Pi > 0$.

32 The activities allowed by country A but not permitted under the optimal global regime are those activities for which $\Delta\Pi > 0$, but $\Delta\Pi + \Delta CS < 0$, that is, all activities that increase profits but reduce global welfare.

33 In order to keep the example simple, it is assumed that there is no efficiency gain from the merger. Including an efficiency gain in the example would not change the analysis significantly.

captures the profit from the increase in market power, country B suffers a loss that outweighs that gain.[34] Overall, global welfare is reduced.

Although the preceding case of a pure exporter is not typical, the policy implications are not unrealistic. The existing laws of the United States serve as a graphic example. American antitrust laws provide an explicit exception for export cartels.[35] Other countries have similar exemptions.[36] By adopting a policy of exemptions for export cartels, a country identifies those industries in which it is a pure exporter and, with respect to those exempted industries, behaves as the model predicts. As long as the welfare loss from anticompetitive activities is borne by foreign consumers, the optimal international antitrust policy, from a national perspective, is no policy at all.

Turning to country B, the importer, recall that there are no firms in country B that produce the good in question, so all consumption

34 Although the example refers to costs and benefits as if they were borne by one country or another, these costs and benefits are, of course, actually borne by the firms and consumers within the country. Because the model does not distinguish the interests of the country and its government from the interests of the citizens and firms of the country, this description should not cause ccnfusion. A brief discussion of how a public choice approach would affect the analysis is provided in Part III.F, infra.

35 The Webb-Pomerene Act, Pub. L. No. 65-126, 40 Stat. 516 (1918) (codified at 15 U.S.C. §§ 61-66 (1994)) creates an exemption from the Sherman Act and from section 7 of the Clayton Act for export associations formed for the sole purpose of engaging in export trade and actually engaged solely in such export trade. Export associations must register with the Federal Trade Commission. The Webb-Pomerene Act does not, however, protect activity that has anticompetitive effects within the United States, and there are other restrictions on its applicability. See A. Paul Victor, Export Cartels: An Idea Whose Time Has Passed, 60 Antitrust L.J. 571, 572 (1992). By the early 1980s, the Webb-Pomerene Act, for various reasons, was not being used by exporters and was, in that sense, no longer effective. See id. at 573-74. Congress responded by enacting the Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233-45 (codified at 15 U.S.C. §§ 4001-4021 (1994)), and the Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246-47 (codified at 15 U.S.C. §§ 6a, 45(a)(3) (1994)). "Through these Acts, Congress hoped to spur U.S. exports by removing alleged impediments to export trade arising from the antitrust laws." Victor, supra, at 574. The Export Trading Company Act allows a firm to apply for and receive a Certificate of Review from the Secretary of Commerce by demonstrating that its activities will not have harmful effects in the United States. The Certificate does not grant complete immunity to the firm, but it does provide immunity from treble damage awards and criminal liability, as well as establish a presumption of legality, for any activity that is covered by the Certificate. The Foreign Trade Act offers a more direct exemption for export activity. It exempts from Sherman Act prosecution activity that does not have a "direct, substantial, and reasonably foreseeable" effect on American commerce. 15 U.S.C. § 6a (1994).

36 See Victor, supra note 35, at 575-77 (discussing similar statutes in United Kingdom, Germany, Japan, and various other countries). For more on export cartels, see Nina Hachigian, Essential Mutual Assistance in International Antitrust Enforcement, 29 Int'l Law. 117, 126-27 (1995) (stating that France and Japan permit export cartels).

must be imported from country A.[37] Full extraterritoriality is also assumed—country B is able to prevent the merger in country A if it chooses to do so.[38]

On the one hand, an increase in the market power of the firms in country A will reduce the welfare of consumers, as discussed in Part I.B.2. Because all of the consumers of the good are located in country B, it is country B that will suffer this loss. On the other hand, if the merger generates efficiency enhancing effects, consumer surplus will tend to rise, as shown in Part I.B.1. The total change in welfare caused by the merger depends on the net effect of these two factors. The optimal policy for country B, therefore, is to allow the merger if and only if the effect of the efficiency gain on consumer surplus outweighs the effect of the increase in market power on consumer surplus.[39]

The policy of the importing country is different from the optimal global policy because it fails to take into account the increase in profits earned by producers. Like the optimal global policy, the optimal national policy for country B blocks all welfare-reducing activity. Any activity that reduces global welfare will reduce the welfare of country B and, therefore, will not be allowed. Unlike the optimal global policy, however, country B's policy will block activities that increase total welfare if those activities reduce the welfare of the consumers in country B.[40] The following numerical example demonstrates how an importer can frustrate a globally welfare-increasing activity.

> Example. Suppose that firms in country A wish to merge—an activity that will generate an increase in market power and lead to economies of scale. Specifically, imagine that the change in market power, taken by itself, would lead to an increase in profits of \$100 and a loss of consumer surplus of \$110. Suppose further that an efficiency gain from greater economies of scale would increase profits by \$30 and consumer surplus by \$50. Summing these effects, the net impact of the activity is to increase global welfare by \$70. Country B, however, is only interested in the welfare of its consumers, a group that suffers a net loss of \$60 (\$110-\$50). Country B, therefore, will block the merger to protect the interests of its consumers, even though a global planner would allow the merger to proceed.

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37 This assumption is made to maintain a simple framework. The nature of the results would not change if the model allowed for producers in country B, as it does in Part II.B.2 infra.

38 The opposite assumption—that laws cannot be applied outside a country's own borders—is considered in Part II.C infra.

39 In other words, country B should allow the activity if and only if $\Delta CS > 0$.

40 Thus, activities for which $\Delta CS < 0$ but $\Delta\Pi + \Delta CS > 0$ increase world welfare but will nevertheless be blocked by country B.

2. *Firms in Both Countries, Consumers in One Country*

The case of firms in one country and consumers in another country is the simplest analytical model. A slightly more realistic example is the case in which there are firms located in both country A and country B. For the moment, continue to assume that all consumers remain in country B.

Although the firms are located in both countries now, country A will behave in the same way as when all of the firms were located in its territory. It will continue to approve all firm activities, regardless of their potentially anticompetitive effects, because it cares only about producer welfare, which is always enhanced by activities the firm chooses to undertake. The only change for country A is that the profit from the activity will not flow entirely to firms in country A. Some of the increased profits will go to firms in country B. The lack of policy in country A implies not only that all globally welfare-enhancing projects will be undertaken but also that some globally welfare-reducing projects will be allowed.

Because country B now has firms, its evaluation of the desirability of the activity is more complex. The policymaker in country B will continue to consider the impact of the activity on its consumers, but now he or she also will assess the activity's impact on the firms in country B. Specifically, country B will allow the activity if and only if the increased profits of the firms in B, due to the increase in market power and efficiency gains, plus the change in consumer surplus, is positive.[41] Note that, because an increase in market power always has a negative impact on consumer surplus that outweighs its positive impact on producer surplus, country B will never approve an activity that does not generate some efficiency gain.

Recall that the optimal global policy is to approve the activity if the total change in profits, considering firms in both countries, plus the total change in consumer surplus sum to a positive total effect on welfare. Country B, however, considers only its own firms when deciding whether to approve the merger.[42]

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[41] Formally, country B will approve the activity if and only if: $(1 - \alpha_f)\Delta\Pi + \Delta CS > 0$, where α_f represents the share of firms in country A and $(1 - \alpha_f)$, therefore, represents the share of firms in country B. For simplicity, it is assumed that all firms are identical and that any increase in profits is shared evenly among the firms.

[42] Thus, country B will prevent a globally welfare-enhancing activity if $(1 - \alpha_f)\Delta\Pi + \Delta CS < 0$ and $\Delta\Pi + \Delta CS > 0$. These inequalities can be restated as: $\alpha_f\Delta\Pi > \Delta\Pi + \Delta CS$ and $\Delta\Pi + \Delta CS > 0$. Thus, when consumer surplus is reduced and country A receives a sufficiently large share of the increase in profits (which implies a small share for country B), country B will prevent the activity.

> EXAMPLE. Suppose the firms in countries A and B wish to merge such that after the merger there will remain only two firms—one in country A and the other in country B. The merger will increase the market power of the two remaining firms, leading to an increase in profits of $100 and a loss of consumer surplus of $120. The merger also leads to economies of scale, which increase profits by $40 and consumer surplus by $30. To keep the example simple, assume that the increase in profits is split evenly between the two countries, with each firm receiving $50.
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> From a global perspective, this merger is clearly desirable because it increases overall welfare by $50 ($100 - $120 + $40 + $30). Country A will approve the merger because it is interested only in the welfare of its firms. Country B, however, will block the merger. The firms in country B would gain $70 [($100 + $40) /2] in profits, and the consumers would gain $30 due to the increase in efficiency, but the increase in market power would lead to a consumer loss of $120. Overall, country B would suffer a net loss of $20 and, therefore, will prevent the merger from taking place.

This example illustrates a more general result. Country B will never allow an activity that reduces global welfare because its own consumers are the ones who would bear the loss. However, country B will sometimes block an activity that increases global welfare because it does not take into account the gains that would be enjoyed by firms in country A. Country B will block an activity that increases global welfare if, despite the fact that the overall impact on consumer and producer surplus is positive, enough of the gain to producers goes to country A that the net effect on country B is negative.[43]

> EXAMPLE. Change the preceding example slightly so that the loss in consumer surplus due to the increase in market power is $200 instead of $120. In that case, the merger will no longer be desirable from a global point of view. Under this example, net world welfare would fall by $30 ($100 - $200 + $40 + $30). Country B would block the merger just as before. Country A, however, would still allow the merger because it would lead to a $70 [($100 + $40) /2] increase in profits for the firms in country A.

This modified example illustrates the general result that country A will approve all activities that increase global welfare but will also approve some activities that reduce global welfare.

3. *Firms in One Country, Consumers in Both Countries*

Consider next the case in which consumers are located in both countries but all firms are in country A. Country B will never approve

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43 See supra note 42.

an activity that reduces global welfare because its consumers will always fare worse than under the status quo. It will, however, block some activities that increase global welfare because it will not consider the increase in profits gained by firms or the increase in consumer surplus enjoyed by consumers in country A. Specifically, country B will approve only those activities in which the increase in consumer surplus due to efficiency gains exceeds the welfare loss borne by consumers due to an increase in the monopoly power of firms in country A.[44]

Country A, by contrast, will approve activities in which the sum of the changes in producer surplus and consumer surplus within country A are positive. The outcome is again suboptimal from a global perspective because country A takes no account of the effect of an activity on consumers in country B. Country A will approve all activities that increase global welfare but also will approve some activities that reduce global welfare.[45]

> EXAMPLE. Suppose that two firms in country A wish to merge. Imagine that this merger will increase the profits of the merging firms by a total of $100 but also reduce total consumer surplus by $150. Finally, assume that half of all consumers are in country A and half are in country B. The merger will, if allowed, reduce overall welfare by $50 and is, therefore, undesirable from a global point of view. From the point of view of country A, however, only the loss in consumer surplus to its consumers, $75, is relevant. Country A, therefore, would approve this globally undesirable merger and enjoy a net welfare increase of $25.

4. *Firms and Consumers in Both Countries*

Finally, consider the general case in which firms and consumers are located in both countries. As before, both countries will approve activities for which the sum of the changes in producer and consumer surplus within the country is positive.[46] Without specifying the relative proportions of consumers and firms in each country, it is impossible to predict how a country will respond to an activity with

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[44] Put another way, country B will approve an activity if and only if $(1 - \alpha_c)\Delta CS > 0$, where α_c represents the share of consumers in country A and, therefore, $(1 - \alpha_c)$ is the share of consumers in country B. This, of course, is equivalent to approving an activity if $\Delta CS > 0$.

[45] Country A will approve an activity if and only if: $\Delta\Pi + \alpha_c\Delta CS > 0$. When this inequality holds true, and $\Delta\Pi + \Delta CS < 0$, country A approves a globally welfare-reducing activity.

[46] Country A will approve an activity if and only if: $\alpha_f\Delta\Pi + \alpha_c\Delta CS > 0$. Country B will approve an activity if and only if: $(1-\alpha_f)\Delta\Pi + (1-\alpha_c)\Delta CS > 0$.

potentially anticompetitive effects. Two points are worth noting, however.

First, if each country consumes the same proportion of worldwide output as it produces, then both countries will pursue the optimal global policy, approving all mergers that improve global welfare and blocking all mergers that reduce global welfare.[47] For example, assume that country A has 75% of all consumers and is responsible for 75% of all imperfectly competitive production, and country B is responsible for 25% of consumption and imperfectly competitive production. Country A will only take into account the proportion of increased profits that is enjoyed by its firms, and that proportion of consumer surplus that benefits its consumers. Therefore, country A will take into account 75% of the global change in profits and 75% of the global change in consumer surplus.

Country A's policy is identical to the optimal global policy because, like the optimal global policy, country A weighs consumer and producer interests evenly. Therefore, country A will allow the same activities, and prevent the same activities, as the optimal global policy. Country B, which takes into account only 25% of world production and 25% of world consumption, also will behave in the same way as the optimal global policy. Because the decision to approve or block an activity depends on a balancing of producer and consumer interests, countries reach the globally efficient result when they weigh the interests of consumers and producers equally.

> EXAMPLE. Assume that country A accounts for 75% of worldwide production and consumption and country B accounts for the other 25%.[48] Suppose two firms propose a merger that will increase total profits by $100 but will reduce global consumer surplus by a total of $99. The global policymaker would approve this merger because there is a net increase in global welfare of $1. Similarly, country A would approve the merger because its firms would gain $75 and its consumers would suffer a loss of $74.25—a net gain of $0.75. Country B would approve the merger because its firms would gain $25 while its consumers would lose $24.75—a gain of $0.25. Moreover, any activity that reduces global welfare will be blocked by both countries.

The second noteworthy point is that a country whose share of global consumption is different from its share of global production will

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[47] This case is the one in which $\alpha_f = \alpha_c$. When this condition holds true, it is clear from the above discussion, see supra note 46, that the national antitrust policies are the same as the optimal global policy. This result depends on the assumption that the impact of an activity is spread between the two countries in proportion to their production levels.

[48] Throughout this discussion, "production" and "consumption" refer to production and consumption of imperfectly competitive goods.

not adopt the optimal global policy. In the two-country example, as the proportion of worldwide productive capacity located in country A increases (holding its share of consumption constant), country A will have an incentive to approve more and more welfare-reducing activities while country B, whose proportion of global production must be declining, will have an incentive to block more and more welfare-increasing activities.[49] The countries have these incentives because they do not take into account the effects of firm activities on producers and consumers outside their own countries.

The general result is the following: A country whose firms are responsible for $x\%$ of global production will take into account $x\%$ of the change in global producer surplus generated by a particular activity. A country whose consumers account for $y\%$ of global consumption will take into account $y\%$ of the total change in global consumer surplus generated by the activity.

> EXAMPLE. Assume that, in a two-country world, country A accounts for 75% of global consumption while country B accounts for 25%, but country A carries out only 25% of global production while country B produces the remaining 75%. Assume further that the proposed activity will lead to an increase in worldwide industry profits of $200 million but will reduce worldwide consumer surplus by $100 million due to an accumulation of market power by the firms involved. This activity offers a net gain in global welfare and, therefore, should be allowed, as it would be under the optimal global policy. Country B will approve the activity because it will take into account 75% of the increase in global profits ($150 million) and 25% of the loss in global consumer surplus ($25 million). The activity, however, will be blocked by country A. Country A will take into account only 25% of the increase in global profits ($50 million) and weigh that against 75% of the loss in global consumer surplus ($75 million).

This analysis demonstrates that a country that can apply its laws extraterritorially will underregulate anticompetitive behavior if it is a net exporter and overregulate such behavior if it is a net importer.[50] The analysis also makes clear why leaving antitrust policy entirely in the hands of importers, a notion that is supported by at least one

[49] Formally, as α_f increases relative to α_c, country A will approve more globally welfare-reducing activities and country B will block more globally welfare-increasing activities.

[50] This result can be shown formally. If $\alpha_f > \alpha_c$, country A is a net exporter and country B is a net importer. In light of the inequalities in supra note 46, as compared to the optimal global policy, see supra note 27, country A will underregulate and country B will overregulate.

prominent commentator,[51] would be unwise. If importers alone determined antitrust policy, they would not take into account the effect of the antitrust regulations on exporters. International policy would be biased toward protecting import consumers rather than assisting export producers—leading to overregulation. Table 1 summarizes the results of Part II.

TABLE I: THE EFFECT OF TRADE ON ANTITRUST POLICY (WITH EXTRATERRITORIALITY)

Country Characteristics		Percentage of Global Surplus Taken into Account		Policy Result Relative to Optimal Global Policy
Percentage of Global Production of Imperfectly Competitive Goods	Percentage of Global Consumption of Imperfectly Competitive Goods	Producer Surplus	Consumer Surplus	
100	100	100	100	Optimal Regulation
100	0	100	0	Underregulation
0	100	0	100	Overregulation
50	100	50	100	Overregulation
100	50	100	50	Underregulation
x	y	x	y	If $x>y$: Underregulation If $x<y$: Overregulation If $x=y$: Optimal Regulation

C. *The Trading Nation Without Extraterritoriality*

The preceding analysis addressed the effect of trade on a country's choice of antitrust law when the country is able to enforce its laws globally. If a country cannot enforce its laws beyond its own borders and cannot influence the laws of other countries, its antitrust laws will be affected in a different fashion.

Consider first a country that imports a good and does not produce the good domestically. If it can apply its laws extraterritorially, the previous analysis of the pure importer[52] describes its regulatory behavior. If it cannot, however, there is little the country can do to prevent anticompetitive activity by foreign producers. The exporting country, however, even if it cannot enforce its laws extraterritorially,

[51] See Wood, A Cooperative Framework, supra note 3, at 530 ("I think that the optimal enforcer for any competition case is the country whose consumers are harmed by the particular practice in question.").

[52] See supra Part II.B.1.

is in the same situation as the pure exporter—it will approve any activity that domestic firms choose to undertake.[53]

When a country has both producers and consumers, the situation is more complex. Domestic firms can, of course, be prevented from engaging in a particular anticompetitive activity, but foreign firms cannot. The choice for the antitrust authorities, therefore, is between taking no action to prevent the activity and taking action that only prevents local producers from engaging in it. For this reason, the country has an incentive to allow the anticompetitive activity if the change in domestic consumer surplus plus the change in domestic profits is greater when the activity is allowed than when it is prevented domestically. If the country blocks the activity domestically (it cannot do so abroad), local firms will enjoy no increase in profit, but local consumers will nevertheless be hurt by foreign anticompetitive activity.[54] The following example illustrates this point.

> EXAMPLE. Imagine that there are several firms within an industry that wish to merge. Assume that these firms are located in several different countries and the merger is welfare-reducing from a global perspective. In country A, there is one such firm which, if allowed to merge with the other firms, will enjoy an increase in profits of $100 due to both economies of scale and greater market power. If the firm is not allowed to join the merger, its profits will remain unchanged.[55] The consumers in country A, however, will suffer a loss of $125 if all firms merge. If the foreign firms merge but the local firm is prevented from participating in the merger, the effect on consumer surplus will be reduced because the local firm will compete with the merged firm, reducing the latter's market power. Assume that if the foreign firms merge, but the local firm does not, consumers will suffer a reduction of $80 in consumer surplus. Coun-

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53 See supra Part II.B.1.

54 Country A's decision in the absence of extraterritoriality can be modeled formally. If country A allows the activity, it receives $\alpha_f \Delta\Pi + \alpha_c \Delta CS$. To examine the effect of blocking the activity, assume that if country A blocks the activity, local profits remain unchanged and the change in local consumer surplus is reduced to $(1-\alpha_f)$ times the level it would be if firms in A participated. That is, because the number of firms participating in the activity is reduced by a factor of α_f, assume that the effect on consumer surplus is reduced proportionally. This assumption simplifies the problem. Other assumptions would lead to similar results. Under the stated assumption, if country A blocks the activity, it receives $(1 - \alpha_f)\alpha_c \Delta CS$. So, in the absence of extraterritoriality, country A will allow any activity if and only if: $\alpha_f \Delta\Pi + \alpha_c \Delta CS > (1 - \alpha_f)\alpha_c \Delta CS$. Simplifying this expression yields: $\Delta\Pi + \alpha_c \Delta CS > 0$. Recognizing that)A will be positive for any activity that a firm seeks to undertake, it is clear that the rule represented by this expression is more permissive than the rule that exists in the presence of extraterritoriality: $\alpha_f \Delta\Pi + \alpha_c \Delta CS) > 0$.

55 The firm in country A might still gain even if it is not allowed to merge because it could experience an increase in market power as the number of its competitors is reduced. This effect is ignored for simplicity. Such an effect could be incorporated into the example without affecting the intuition behind the results.

> try A's choice, therefore, is between preventing the firm in country A (and no other firm) from participating in the merger and allowing the firm to participate in the merger.
>
> The policymaker, therefore, must choose between preventing the merger, a decision that would lead to a net loss of $80 for the country, and allowing the merger, a choice that would lead to a net loss of $25. Obviously, the country is better off if it allows the merger.[56]

In the above example, country A allows the merger despite the fact that it is harmful both to the country and at the global level. The merger is allowed because country A receives the full benefit of the increased profits that flow to the firm, whereas the benefits of blocking the merger would be spread to consumers around the world, and the policymaker takes into account only that fraction enjoyed by local consumers.

This example demonstrates a general result. A country's antitrust policy will be weaker if it cannot apply its laws extraterritorially. Furthermore, without extraterritoriality, international antitrust policy will be weaker than the optimal global policy.[57] The intuition behind both of these results is that a strict domestic policy without extraterritoriality tends to prevent local firms from engaging in profit-increasing anticompetitive activities but does not prevent foreign firms from reducing domestic consumer surplus. With extraterritoriality, a country can block the anticompetitive activities of those foreign firms, increasing the likelihood that the country will adopt a stricter policy.

When countries cannot apply their laws extraterritorially, the deviation of national policies from the optimal global policy increases as trade between countries grows. This divergence occurs because, as trade increases, the beneficial effects of regulating anticompetitive activities are felt increasingly by foreign consumers and decreasingly by domestic ones, while the costs of preventing local firms from engaging in similar activities continue to be borne entirely at home. Therefore, antitrust policies will be watered down on the domestic level.

As international trade continues to increase, countries face reduced incentives to enforce antitrust policies that apply only to their own firms. This development suggests that either national policies will become less strict or countries' efforts to apply their laws extrater-

[56] By assumption, country A cannot, by preventing its own firms from participating in the merger, frustrate the merger plans of the firms in country B. If country A does have the ability to undermine an activity by preventing its own firms from participating, it is effectively able to apply its laws extraterritorially, and the decisions of a policymaker should be analyzed using that assumption.

[57] Indeed, as the preceding example shows, a country may approve an activity that is welfare-reducing for both the country and the world.

ritorially will increase. This result is consistent with the increase in extraterritoriality that has taken place in recent years.[58] Moreover, the pressure to weaken national antitrust laws rises as the optimal global policy grows stricter because increased trade expands the size of the market which, in turn, leads to a tougher optimal policy.

Note the difference between a world with extraterritoriality and one without it. With extraterritoriality, the toughest law is the binding law because an inefficient activity imposes a net loss on at least one country, and that country can prevent the activity through extraterritorial application of its laws. Thus, all globally inefficient anticompetitive activities are prevented. However, many efficient activities also will be blocked. If a single country suffers a net loss, even if the global benefits far outweigh this loss, the country can block the activity. The law, therefore, is much tougher than the optimal global policy. In contrast, when there is no extraterritoriality, the antitrust policies of countries are weaker than they would be if national laws could be applied to activity occurring abroad, and they are weaker than the optimal global policy.

III
Implications for Cooperation

A. *The Two-Country Case*

In a world of two countries, the countries will independently adopt the same antitrust policy only if they each produce the same share of monopolistically produced goods as they consume.[59] If they do, both countries will place the same weight on the interests of producers and consumers, implying that cooperation should be simple to negotiate. In fact, the agreement also will conform to the optimal global policy because both countries will weigh the interests of producers and consumers equally, as would a global planner.

If each of the countries does not produce the same proportion of global production as it consumes, the two countries will not give the same relative weight to producer and consumer interests. In fact, be-

58 One example of this phenomenon is the conflict between American and Japanese antitrust authorities. As recently as the 1980s, "[t]he United States explicitly charged that inadequate sanctions and weak enforcement of Japan's postwar Antimonopoly Law constituted a barrier to U.S. access to Japanese consumer and industrial markets . . . ." John O. Haley, Competition and Trade Policy: Antitrust Enforcement: Do Differences Matter?, 4 Pac. Rim L. & Pol'y J. 303, 303 (1995). Another example is the relaxation of domestic American antitrust policies, combined with an increase in the reach of American laws—both of which are consistent with what the model predicts will happen as trade increases. See Barry E. Hawk, The International Application of the Sherman Act in Its Second Century, 59 Antitrust L.J. 161, 161-62 (1990).

59 That is, if $\alpha_f = \alpha_c$.

cause there are only two countries, one of the countries must be a net importer and the other a net exporter of the good; therefore, the countries have different incentives. For example, if country A is responsible for 70% of global production, but consumes only 50%, it will weigh the interests of producers more heavily than would the global planner. Country B, by contrast, with only 30% of world production and 50% of world consumption, will weigh the interests of consumers more heavily than would the global planner. Agreement will be difficult to reach because country A will prefer a policy that is looser than the optimal global policy, while country B will prefer a policy that is tougher than the optimal global policy.

B. *The Case of More Than Two Countries*[60]

In a world in which there are more than two countries, two negotiating countries will reach agreement with respect to antitrust policy without any transfer payments only if they have the same ratio of consumption share to production share.[61] If these ratios are the same, the two countries weigh the interests of importers and exporters equally, making agreement relatively easy. For example, if each country produces 40% of global output, but consumes only 10%, then both countries will favor producers over consumers to the same degree. Agreement should be possible between these countries, although the agreement will not be consistent with the optimal global policy. Both countries will favor producer surplus at the expense of consumer surplus, so the common antitrust policy will be less strict than the optimal global policy.

Notice that although agreement may be possible, it will not be of much benefit to the two countries. Agreement is possible because both countries will be pursuing the same policy independently. The cooperative policy, therefore, will be similar to the noncooperative policies prior to agreement.[62]

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60 This Part considers negotiations in a world with more than two countries, regardless of whether those countries actually take part in the negotiations. It is the total number of countries in the world that is critical, not the number of countries at the negotiating table. This Part continues to assume that only two countries are negotiating, but the results generalize to any number of negotiating countries. If more than two countries negotiate, agreement will become more difficult to reach because every country will have to conclude that signing the agreement is in its interest.

61 The model assumes for simplicity that every country consumes in the same proportion from the production of each other country. Thus, if a country consumes 50% of worldwide production, it consumes 50% of the production of every country, rather than, say, 100% of the production of some countries and 0% of the production of others.

62 The cooperative policy may differ somewhat from the noncooperative policies because the cooperative policy considers a larger market.

This result demonstrates two important points. First, the analysis must consider not only the agreement's likelihood but also its importance. That is, even if an agreement is reached, will it substantively increase the welfare of the negotiating countries or, for that matter, the world? Second, cooperative agreements among groups of countries will not necessarily lead to the globally optimal result. Such agreements lead to the adoption of policies that maximize the welfare of the negotiating parties, and this result will not in general coincide with global welfare because only a subset of the world's countries are negotiating. In evaluating an agreement among a group of countries, therefore, it is important to remember that the policy incentives described in Part II apply to the group as a whole as surely as they apply to individual countries.

C. *Extraterritoriality*

The analysis now turns to a consideration of the effects of extraterritoriality on negotiation. This analysis applies both to the two-country case and to the case of more than two countries. Recall that under a regime of full extraterritoriality all welfare-reducing activities are blocked, as are some welfare-increasing activities, and antitrust policy is more restrictive than the optimal global policy.

Notice how the gains from a cooperative agreement will be distributed. In the two-country example, the country that is the net exporter will benefit from an agreement that moves international antitrust policy toward the optimal global policy because such an agreement will be less restrictive than the current policy. That is, additional welfare-improving activities will be allowed. The net exporter, therefore, will favor a negotiated agreement.

The net importer, however, will suffer a welfare loss because the agreement will allow activity that the importer otherwise would have prevented. With full extraterritoriality, the strictest national law will govern international activities. This law will be the law of the net importer.[63] In the absence of an international agreement, therefore, the net importer controls international antitrust policy. An agreement that establishes an international standard that is closer to the optimal global policy than is the policy of the net importer would undermine the control enjoyed by the net importer and reduce its welfare. There is, therefore, no reason for the importer to accede, without compensa-

[63] If more than two countries are involved, it would be the law of the country with the largest share of consumption of imperfectly competitive goods relative to its share of production of those goods.

tion, to an antitrust policy agreement that moves the countries closer to the optimal global policy.

Consider each country's preferred outcome. The net exporter would like an agreement making the laws less strict than under the optimal global policy, while the net importer would prefer laws that are stricter than the optimal global policy. Because of extraterritoriality, the importer can unilaterally impose the strict laws that it prefers. Therefore, it has no need for an agreement.[64] The only way for the net exporter to reach agreement with the net importer is by making some form of payment to the importer to compensate the importer for the loss it will suffer under an agreement.

D. *No Extraterritoriality*

Assume once again that there is no extraterritorial application of antitrust laws. What prospects for harmonization exist in this case? As Part II.C demonstrated, in the absence of extraterritoriality, a trading country's optimal antitrust policy is weaker than the optimal global policy, regardless of whether the country is an importer or an exporter. Specifically, its policy preference grows stricter as the country's share of world consumption increases, reaching the optimal level only when its share of consumption reaches unity. This result emerges because the country will always take full account of the impact of its antitrust policy on firm profits (because the full effect on profits is felt locally) but will only take partial account of the impact on consumer surplus (because the effect on consumer surplus is felt worldwide). Only if the country is home to all consumers will the optimal national policy be the same as the optimal global policy.[65]

Without extraterritoriality, there may be room for negotiation between countries with respect to antitrust policy. Because it is not possible for a country to discipline foreign firms, all countries tend to underregulate and all participants in a negotiation would prefer a stricter policy. Net importers would prefer a policy that is even stricter than the optimal global policy because they weigh consumer surplus more heavily than does the global planner. Net exporters would prefer a policy that is weaker than optimal, thereby privileging producer surplus, but would still prefer a tougher policy than the noncooperative policy.

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[64] In the case of more than two countries, it is possible that neither negotiating country is a net exporter or that both are. However, the country that exports more (net of imports) will still prefer a more lenient policy, and the country that exports less will prefer a stricter policy (though less strict than the optimal global policy if both countries are net exporters), which it will be able to implement through extraterritorial measures.

[65] See supra Part II.C.

EXAMPLE. Suppose the firms in an industry wish to undertake an activity that will increase profits by \$100 million but also will reduce consumer surplus by \$240 million. Assume further that country A accounts for 25% of world consumption of the good and 50% of the production (i.e., country A is a net exporter). If country A could set the global policy unilaterally, it would weigh 25% of the total consumer surplus loss (\$60 million) against 50% of the total increased profits (\$50 million) and conclude that the activity should not be permitted.

Without the ability to apply its laws extraterritorially, however, country A cannot prevent the firms in other countries from engaging in the anticompetitive activity. If it bars its own firms from participating, it will still face a loss of consumer surplus due to the actions of the firms in other countries. In other words, if it prevents the activity, it will suffer a consumer surplus loss of \$30 million [(0.50) × (0.25) × (\$240 million)].[66] Country A, therefore, will choose to allow the activity, which will lead to a net welfare loss of \$10 million, rather than prevent its own firms from undertaking it, which would lead to a loss of \$30 million.

Because all countries prefer a regime that is tougher than the existing laws, there is room for negotiation. The form of agreement that the countries reach depends on the bargaining power of the parties. In a two-country world, for example, if the parties simply split the difference and average their preferred policies, the global optimum will result.[67] If, however, one party has much greater bargaining power, the result will approximate that country's policy preference. In any event, the agreement will be at least as strict as the status quo because all parties want a policy that is tougher than the status quo. It is reasonable to expect that some agreement will be reached because all countries prefer a negotiated alternative to the noncooperative outcome.

E. *Partial Extraterritoriality*

Suppose now that country A has the power to act extraterritorially but country B does not. If country A prefers tougher laws than country B, agreement is unlikely because country A can unilaterally implement what it considers to be the optimal policy. There is no incentive for country A to negotiate, let alone enter into an agreement,

[66] See supra note 54 for a discussion of the assumptions used in this calculation.

[67] This result, in which two parties split the bargaining surplus, is a "Nash Bargaining" solution. See Douglas G. Baird et al., Game Theory and the Law 21-23 (1994) (explaining that, in two-player game, Nash equilibrium results when each player cannot do better given strategy other player has adopted).

unless country B agrees to make some form of payment that would make it worthwhile for country A to change policies.

If, however, country B desires tougher laws than country A, it is still unlikely that an agreement will be reached. Country B would prefer an international law that is tougher than the status quo (which is simply country A's law), but country A once again has no incentive to agree. If country A wanted a tougher law, it could easily adopt one itself and apply it extraterritorially. In fact, country A may be very happy with the noncooperative equilibrium because, as long as country B's laws provide an independent check on the activity of country B's firms, country A can legislate without adjusting its laws to guard against anticompetitive activity by firms from country B. That is, country A can adopt weak laws and rely on the tougher laws of country B to regulate firms in country B. In this way, country A's firms get the benefit of weak domestic laws and country A's consumers get the benefit of the tough laws governing country B's firms.

Furthermore, even if the countries manage to reach an agreement on antitrust policy, it is unlikely that all other countries will be invited to join the agreement. Imagine, for example, a small country, C, that cannot apply its laws extraterritorially and is a net importer of monopolistically produced goods. Now suppose that countries A and B negotiate an international agreement that establishes a common set of antitrust laws to govern transactions among the signatories to the agreement. As an importer, country C would happily sign the agreement to protect its consumers. For the signatories, however, there is no reason to let country C join. By letting country C in, countries A and B would force their exporters to follow relatively strict rules when they export to country C. Thus, because the agreement only covers trade among signatories, there is an incentive to exclude country C and let the producers in other countries continue to extract monopolistic rents from it. Without extraterritoriality, country C has no leverage with which to force its way into the agreement.

F. Accounting for Public Choice Theory

The model, up to this point, has assumed that government officials have as their only objective the maximization of national welfare. In pursuit of this objective, policymakers adopt national laws that improve the lot of their citizens, even if foreign citizens are harmed as a result. The preceding analysis, for example, predicts that an exporting country will prefer a relatively weak antitrust law because behavior with potentially anticompetitive effects benefits the country's producers and imposes costs only on foreign consumers.

This simple model of government behavior overlooks other objectives that government officials may pursue. For example, government officials may favor producers over consumers because they are reliant on producers for campaign financing or, alternatively, they may favor consumers because consumers have the power to vote them out of office. Public choice models are used to analyze national policymaking under the assumption that government officials may be seeking such goals.[68] This Article adopts a more conventional approach to policymaking in order to focus on the impact of trade on antitrust policy. Public choice models represent an alternative way in which antitrust policy may deviate from welfare-maximizing policy.[69]

Although the Article does not explicitly adopt a public choice approach, the model presented can be adapted to accommodate such an approach. Imagine, for example, that government officials place greater weight on the interests of producers than on the interests of consumers. In this situation, even if a country is a net importer of imperfectly competitive goods, laws may be adopted that are more favorable to producers than is the optimal global policy. Such laws will be adopted if the preference for producers is strong enough to overcome the fact that the country is a net importer.

To capture this possibility in the model, simply change the way in which "imports" and "exports" are defined. Rather than considering the actual value of imports and exports, a public choice model would consider the value of imports and exports *in the eyes of the policymaker*. In other words, the actual value of imports and exports must be adjusted to reflect the biases of the policymaker.

For example, a policymaker who values producer welfare twice as much as consumer welfare will approve a merger that raises domestic producer welfare by 11 and reduces domestic consumer welfare by 20, but will prevent a merger that raises producer welfare by 9 and reduces consumer surplus by 20, and is indifferent between approving and preventing a merger in which the benefit to producers is 10 and

[68] For a detailed treatment of antitrust from a public choice perspective, see The Causes and Consequences of Antitrust: The Public-Choice Perspective (Fred S. McChesney & William F. Shughart II eds., 1995).

[69] Public choice models have also been applied to international trade policy. See Warren F. Schwartz & Alan O. Sykes, Toward a Positive Theory of the Most Favored Nation Obligation and Its Exceptions in the WTO/GATT System, 16 Int'l Rev. L. & Econ. 27 (1996) (analyzing Article XXIV of GATT under public choice framework); Alan O. Sykes, Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations, 58 U. Chi. L. Rev. 255 (1991) (examining Article XIX of GATT from public choice point of view).

the loss to consumers is 20.[70] The decisions of this pro-producer policymaker are identical to the decisions of the national welfare-maximizing policymaker if the production of the latter's country is doubled. That is, the policymaker's bias in favor of producers can be taken into account by weighting producer surplus twice as much as consumer surplus. Similar adjustments can be made to account for any bias in favor of producers or consumers.

Having established that the simple model can incorporate public choice objectives, now consider whether these objectives affect the results. Regardless of the policymaker's incentives, the basic result remains: International trade will affect the policymaker's preferred policy. Moreover, trade affects the preferred policy in the same way as under the simple model. Thus, for example, a policymaker of a net importer that is able to apply its laws extraterritorially will select a stricter policy than he would if there were no trade, even if the policymaker is pursuing goals other than national welfare maximization.

The normative effect of the distortions created by trade depends on the initial assumptions made about policymakers. Under the simple model, trade causes a shift in policy away from the optimal global policy. From a public choice perspective, however, trade can improve antitrust policy in some situations. For example, imagine a closed economy in which policymakers are disproportionately influenced by consumer groups, so that antitrust policy is stricter than optimal. If the country opens up to trade and becomes a net exporter of imperfectly competitive goods, antitrust policy will be weakened.[71] This loosening of antitrust policy will improve overall welfare. Thus, the welfare implications of the policy changes created by trade depend upon the welfare implications of the applicable public choice model.

Finally, the simple model's conclusion that achieving international antitrust agreements is unlikely remains valid even under a public choice approach. International antitrust agreements are difficult to achieve because trade patterns cause a divergence of country interests. Regardless of the model chosen to represent the decisionmaking process of national policymakers, the presence of trade will create such a divergence.[72]

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[70] In formal terms, producer surplus must be weighted relative to consumer surplus. Using θ to represent the weight placed on producer surplus, with the weight on consumer surplus being normalized to unity, and returning to the two-country case of note 46, country A will approve an activity if and only if: $\theta\alpha_f\Delta\Pi + \alpha_c\Delta CS > 0$.

[71] See supra Part II.

[72] The one exception to this result is if national policies differ in the absence of trade (because of the differing biases of the policymakers in each) and, when the countries begin to trade, the distortions of trade policy happen to counteract these differences.

IV
EVIDENCE

A. Hartford Fire

The Supreme Court's most recent decision regarding the international reach of U.S. antitrust laws, *Hartford Fire Insurance Co. v. California*,[73] is an excellent example of the preceding analysis. In *Hartford Fire*, the plaintiffs—nineteen states and numerous private parties—alleged that the defendants, including certain London reinsurers, had violated the Sherman Act.[74] The defendants offered several arguments, including that the Court should decline jurisdiction on international comity grounds.[75] Because the laws of the United Kingdom permitted the anticompetitive conduct while the laws of the United States forbade it,[76] the jurisdictional battle assumed great importance.

Consider the competing interests of the United States and Britain in this case. The United States, on the one hand, had an interest in overregulating the activity because the harmful effects of the activity would be felt in the United States while the profits would remain in Britain. Britain, on the other hand, had an incentive to underregulate for the same reason.[77]

Rather than explicitly ruling on the role of comity, the Supreme Court held that comity is relevant only if there is a "true conflict," and a true conflict does not exist if a "'person subject to regulation by two states can comply with the laws of both.'"[78] This decision greatly reduces the applicability of comity analysis and, therefore, accentuates the tension between regulation by importers and exporters. In other words, the case extends the extraterritoriality of American law and ensures that, if the laws of the United States and those of another country regulate the same activity, the stricter of the laws will govern a case like *Hartford Fire*. The Court's decision to maintain jurisdic-

[73] 509 U.S. 764 (1993); see also supra notes 15-17 and accompanying text.

[74] See *Hartford Fire*, 509 U.S. at 769.

[75] See id. at 797.

[76] See id. at 798-99.

[77] In fact, the incentives of the countries were slightly more complicated because some of the defendants were American. Nevertheless, Britain was in position to gain a portion of the profits from the alleged activity while all of the costs would have fallen within the United States. Although some of the profits also would have gone to American parties, the net impact on the United States still would have been negative. Within the framework of this Article, *Hartford Fire* is an example of firms in both countries and consumers in only one country. See supra Part II.B.2.

[78] *Hartford Fire*, 509 U.S. at 799 (quoting Restatement (Third) Foreign Relations Law § 403 com. e).

tion ensured that the toughest law would govern, thereby favoring the interests of the U.S. government in this particular case.

To understand the danger in the Court's decision, imagine a variation of the facts of *Hartford Fire* in which all of the defendants and almost all of the plaintiffs are British. Assume the few remaining plaintiffs are American. Under the Court's rule, even though the United States, through the American plaintiffs, represents only a small part of the market, the defendants are still required to comply with the laws of both Britain and the United States. The stricter of the two laws governs.

Under international comity, however, the Court could decline jurisdiction on the ground that Britain has a greater interest in the case. Although Britain might have some incentive to underregulate the British reinsurers, the fact that a majority of the plaintiffs are British would considerably reduce that incentive.[79] Under the assumed facts, Britain's regulation is likely to be closer than the American regulation to the optimal global policy.[80]

From the point of view of the United States, *Hartford Fire* is welfare enhancing. By refusing to engage in comity analysis, the Court kept jurisdiction in the United States and allowed American interests to prevail. The outcome illustrates why the United States would not want a negotiated agreement to govern this case. Assuming such an agreement would seek to account for the welfare of all relevant parties, it would regulate less than the United States would like, leading to an increase in global welfare but a reduction in the welfare of the United States.

B. *Exemptions*

The analysis to this point has assumed that countries regulate their own producers in the same way that they regulate foreign producers. As a general matter, this characterization is accurate, but there is at least one important exception. Countries with antitrust laws often have explicit exemptions for firms that export all of their production and, therefore, do not affect domestic consumers.[81]

In the United States, for example, the Webb-Pomerene Act,[82] passed in 1918, exempts trade associations formed "for the sole pur-

[79] See supra Part II.B.4.

[80] Under different facts, the United States may align more closely with the optimal global policy. By considering international comity, however, at least the most obvious cases can be decided in a manner that gives jurisdiction to the county most affected by the activity.

[81] See supra notes 35-36.

[82] Pub. L. No. 65-126, 40 Stat. 516 (1918) (codified at 15 U.S.C. §§ 16-66 (1994)).

pose of engaging in export trade" from the reach of the Sherman Act.[83] The Act, thus, provides an explicit exemption for export cartels. Because the FTC specifies the scope of the immunity when the association registers with it, and because governmental authorities and private parties can challenge the trade association's actions on the ground that the association has exceeded the scope of its immunity, these associations have never been a popular vehicle for avoiding antitrust laws.[84]

In an effort to expand the availability of the exemption for export cartels, Congress enacted Title III of the Export Trading Company Act of 1982.[85] Under the Act, the Secretary of Commerce may, upon request, issue a "Certificate of Review" to any U.S. person (as defined in the Act) engaged in export trade. The certificate gives the holder protection against treble damage liability and criminal prosecution for the conduct detailed in the certificate and creates a presumption of legality for covered conduct. A certificate also allows the holder to recover legal costs from an unsuccessful plaintiff.[86]

These exemptions allow exporters to engage in behavior that would not be permitted within the country.[87] These exemptions are

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[83] 15 U.S.C. § 62 (1994). In order to qualify, the association must file with the FTC and meet certain reporting requirements. See id. § 65 (1994).

[84] For a more detailed discussion of the Webb-Pomerene Act, see John F. McDermid, The Antitrust Commission and the Webb-Pomerene Act: A Critical Assessment, 37 Wash. & Lee L. Rev. 105, 108-10 (1980) (explaining reasons for and scope of Act); see also United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 206-09 (1968) (examining legislative history of Webb-Pomerene Act).

[85] See the Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233 (1982) (codified as amended at 15 U.S.C. § 4011-4021 (1994)).

[86] For more on the Export Trading Company Act of 1982, see generally George E. Garvey, Exports, Banking and Antitrust: The Export Trading Company Act—A Modest Tool for Export Promotion, 5 Nw. J. Int'l L. & Bus. 818 (1983) (explaining goals and provisions of Act); Eleanor Roberts Lewis, Title III of the Export Trading Company Act: A Case Study in Interagency Coordination to Promote Exports, 5 J.L. & Com. 451 (1985) (examining Title III of Act); Dennis Unkovic, Joint Ventures and the Export Trading Company Act, 5 J.L. & Com. 373 (1985) (explaining history and provisions of Act); Donald Zarin, The Export Trading Company Act: Reducing Antitrust Uncertainty in Export Trade, 17 Geo. Wash. J. Int'l L. & Econ. 297 (1983) (detailing legislative history of Act and its impact on export trading).

[87] In addition to the principal exemptions discussed here, there are other, less significant, exceptions. See, e.g., Capper-Volstead Act, 7 U.S.C. § 291 (1994) (agriculture and fishermen cooperatives); Bank Merger Act of 1960, 12 U.S.C. § 1828 (1994) (banking); McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1994) (insurance); National Cooperative Research Act of 1984, 15 U.S.C. §§ 4301-4305 (1994) (research joint ventures); 15 U.S.C. § 17 (1994) and Norris-Laguardia Act, 29 U.S.C. §§ 101-115 (1994) (labor unions); 42 U.S.C. § 6272 (1994) (international energy agreements); Shipping Act of 1984, 46 U.S.C. §§ 1701-1720 (1994) (international ocean shipping); Communications Act of 1934, 47 U.S.C. §§ 151-156 (1994) (international communications); 49 U.S.C. §§ 1382, 1384 (1994) (international aviation); Defense Production Act of 1950, 50 U.S.C. § 2158a(j) (1994) (national defense programs); see also Connell Const. Co. v. Plumbers & Steamfitters Local

consistent with the theoretical discussion presented in Part II. Because the costs of the behavior of exporting firms are borne by foreigners while the benefits are enjoyed domestically, the government has an incentive to underregulate. Export exemptions are a dramatic example of such underregulation.

In the case of the pure exporter with no domestic consumers, the model predicts that such a country will allow any firm activity.[88] By issuing antitrust exemptions to pure exporters, countries can achieve this policy objective without compromising the laws applied to domestic consumption.

C. *Past Attempts at Cooperation*

To date, efforts to achieve international cooperation with respect to antitrust policy have achieved very little success.[89] Current calls for an international antitrust policy initiative represent merely the latest attempts to establish a meaningful regulatory framework across countries.[90] At present, however, no meaningful international agreement exists to govern the application of antitrust policies to cross-border activities.[91] Unsuccessful past efforts offer support for the model's predictions not only because they failed to generate an international consensus, but also because of the responses they triggered from various countries.

The first important effort to establish an international framework for antitrust policy was included in the Havana Charter, the proposed charter of the International Trade Organization (ITO) developed

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Union No. 100, 421 U.S. 616, 635 (1975) (holding state antitrust laws not to apply to labor unions); Ronald G. Carr, The International Energy Program and United States Antitrust Law, 15 Nat. Resources Law. 503, 503-04 (1983) (discussing limited antitrust defense for oil companies articipating in International Energy Program).

88 See supra Part II.B.1.

89 There are agreements in place that permit the sharing of information, but these agreements usually are limited to nonconfidential information and do not seek to harmonize policies. For a discussion of existing cooperative agreements and their impact, see Spencer Weber Waller, The Internationalization of Antitrust Enforcement, 77 B.U. L. Rev. 343, 360-70 (1997) (arguing that bilateral and regional agreements have had greater success than multilateral agreements).

90 See Fox, supra note 3, at 25 (arguing for integrated vision of government and private restraints); Wood, Impossible Dream, supra note 14, at 313 (proposing trilateral agreement among Canada, European Community, and United States as initial framework that could ultimately include all nations).

91 The European Union (EU) represents an obvious exception to this statement. For a discussion of how the EU exception can be reconciled with the conclusions of this Article, see infra note 135.

shortly after World War II.[92] The ITO failed to garner the support of the U.S. Congress, in part because of objections to its antitrust policy provisions.[93] A second attempt to formulate international antitrust policy, under the auspices of the Economic and Social Council (ECOSOC) of the United Nations, was undertaken in the early 1950s and was similarly rejected by the United States.[94]

American resistance to the development of an international antitrust policy in the years following the Second World War is not surprising. After the *Alcoa* decision in 1945,[95] the United States was able to apply its laws extraterritorially, which it proceeded to do.[96] Because other countries did not apply their laws to American exports[97] and because imports could be regulated by American laws, the United States enjoyed enormous control over the regulations that affected American producers and consumers. There was no incentive for the United States to support a cooperative international agreement.

After World War II, the United States was in the desirable position of being the only country able to apply its laws extraterritorially. As discussed in Part III.E, a country in such a position has no incentive to negotiate an international agreement. It is, therefore, no surprise that the United States, despite its position as one of the strongest proponents of national antitrust laws, declined to support efforts to increase international cooperation in antitrust policy.

Today, the United States remains uninterested in international cooperation beyond basic information sharing. Future cooperation is expected through the International Antitrust Enforcement Assistance Act of 1994[98] which authorizes the United States to negotiate bilateral treaties to permit sharing of information for the purpose of enforcing

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92 See U.S. Dep't of State, Pub. No. 3206, Havana Charter for an International Trade Organization 114 (1948). For a discussion of the history of the ITO, see Robert E. Hudec, The GATT Legal System and World Trade Diplomacy 11-61 (2d ed. 1990).

93 See Wood, Impossible Dream, supra note 14, at 284 (noting awkwardness of U.S. decision to reject ITO given American support for antitrust policy).

94 See id. at 284-85 (noting Eisenhower Administration's preference for national programs as opposed to international organizations).

95 United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). For a discussion of *Alcoa*, see supra note 12.

96 For a discussion of enforcement efforts, see supra note 14 and accompanying text.

97 See Wood, Impossible Dream, supra note 14, at 298-99 (stating that "the rest of the world had not yet 'gotten religion'" on the idea of extraterritorial enforcement). Not surprisingly, foreign governments have been hostile to the extraterritorial application of American law. See Joseph P. Griffin, Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction, 6 Geo. Mason L. Rev. 505, passim (1998) and sources cited therein for a detailed discussion of foreign reaction.

98 15 U.S.C. §§ 6201-6212 (1994).

national antitrust policies. The form of cooperation envisioned by the Act, however, is limited to noncompulsory informational exchanges.[99]

The efforts of developing countries to achieve an international antitrust agreement stand in stark contrast to the actions of the United States. Developing countries, though often without effective antitrust laws of their own, have frequently sought to promote international regulation.[100]

Developing countries typically are unable to apply their laws extraterritorially[101] and are, at least as a group, net importers of imperfectly produced goods and net exporters of competitive goods, including agricultural goods. The model suggests, therefore, that these countries will have weak antitrust laws because they are unable to affect the competitiveness of their imports. The model also suggests that these countries have a great deal to gain from an international antitrust policy and, accordingly, will lobby for one. This prediction is consistent with the behavior of developing countries.[102]

The model is also consistent with the development of a regional antitrust policy in Europe. European countries engaged in complicated and wide-ranging negotiations on many issues, of which antitrust was only one.[103] Trade has historically accounted for a large proportion of the gross domestic product and consumption of European countries. Furthermore, prior to the creation of the European Community (EC), individual countries did not apply their laws extraterritorially.[104] Predictably, the antitrust policies of these countries were relatively permissive,[105] as the analysis of the trading nation without extraterritoriality predicts.[106]

With the creation and growth of the EC, and later the European Union (EU), however, it became possible to enact rules to govern the

99 See id. §§ 6202(d), 6203(c).

100 For example, developing countries were strong proponents of the United Nations Conference on Trade and Development (UNCTAD) Restrictive Business Practices Code (Code). See Wood, Impossible Dream, supra note 14, at 300 (noting that Code's practical effect has been minimal).

101 See id. at 300.

102 See supra note 100.

103 See infra note 135.

104 See Wood, Impossible Dream, supra note 14, at 298-99 (describing initial opposition to U.S. style antitrust laws in countries other than Japan and Germany, which had U.S. style antitrust laws imposed on them).

105 See Wood, Impossible Dream, supra note 14, at 300-01 (noting EC's growing acceptance of extraterritoriality). A notable exception was Germany, whose competition law had been transplanted from the United States after the Second World War. See Kurt Stockmann & Volkmar Strauch, Federal Republic of Germany § 1.03(1)-(2), B5 World Law of Competition (Julian O. von Kalinowski ed., 1987) (describing legislation decentralizing postwar German economy).

106 See supra Part II.C.

entire community. The EU has, in fact, established an antitrust law that has many similarities to American antitrust laws.[107]

There are two explanations for the tougher policies of a unified Europe. First, a larger proportion of European consumption now comes under the control of one governing body, making regulation more effective. Within the EU, trade among member states is regulated by a single regime in much the way a single country regulates trade within its borders. In other words, prior to unification, one would expect intra-European trade to have generated the distortions in antitrust policy discussed in Part II.C, but once antitrust policy moved to the European level, those distortions were eliminated. This change explains why Europe would adopt a stricter policy following unification.[108]

Second, the increased size and power of a unified Europe has allowed it to begin to apply its laws extraterritorially.[109] This change, too, generates an incentive to toughen policies because imports are governed by those laws.[110]

V
Additional Challenges to Agreement

This Article focuses on the challenges to cooperation that arise as national economies seek regulation that advances their own self-interest rather than that of the entire world. The discussion is not intended to suggest that no other challenges to international cooperation exist. In fact, such challenges are legion. This Part discusses sev-

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[107] See Treaty Establishing the European Economic Community, March 25, 1957, arts. 85, 86, 298 U.N.T.S. 11, 47-49 (prohibiting agreements, decisions, and actions which either attempt to impose or result in unfair or improper restraints on competition); see also Wood, Impossible Dream, supra note 14, in which Judge Wood writes:

> Article 85(1) prohibits anticompetitive agreements between undertakings, such as price-fixing, limitations on production, division of markets, and tying arrangements, in a manner reminiscent of Section 1 of the Sherman Act. Article 86, which prohibits the abuse of a dominant position, reaches the same kind of practices as one would condemn under Section 2 of the Sherman Act. The Merger Regulation of December 1990 provides a review mechanism for concentrative transactions that have a "Community dimension," and it permits the Commission to forbid any merger that might create or strengthen a dominant position within the Common Market.

Id. at 290 (footnotes omitted). See generally Lennart Ritter et al., EEC Competition Law: A Practitioner's Guide (1991) (explaining fundamentals of EC competition law and focusing on principles and application of Articles 85 and 86).

[108] See supra Part II.C.

[109] See Wood, Impossible Dream, supra note 14, at 300-01 (noting that growth in economic power and refinement of extraterritorial theory helped increase reach of EC laws).

[110] See supra Part II.B.

eral of the more salient hurdles to reaching a substantive international agreement on antitrust policy.

Harmonizing antitrust policies is difficult in part because antitrust policy serves different goals in different countries.[111] In the United States, the primary goal of the antitrust laws is the encouragement of competitive markets.[112] In other countries, other objectives are often important to the formulation of antitrust policy. Although the goals that countries pursue through antitrust policy may have converged in recent years,[113] significant differences remain. For example, Canadian antitrust policy explicitly seeks not only to promote efficiency, but also to protect small and medium-sized businesses.[114]

A second important factor that determines a country's antitrust policy is the size of the relevant market. A small country has two reasons to have a weak antitrust policy (or none at all). First, in any industry in which the economy is closed to international trade, a small country must tolerate a greater degree of market power than would a larger country in order to achieve desired economies of scale. The benefits of competition may be outweighed by the need for scale economies.

Second, if the country is open to trade, there is less need to accept firms with market power.[115] Trade increases the size of the relevant market and allows firms to achieve efficient scale without accumulating large amounts of market power. Nevertheless, the small country

111 See Eleanor M. Fox, The End of Antitrust Isolationism: The Vision of One World, 1992 U. Chi. Legal F. 221, 223-25 (examining differences between goals of U.S. and EC antitrust policy); Joseph P. Griffin, EC/U.S. Antitrust Cooperation Agreement: Impact on Transnational Business, 24 L. & Pol'y Int'l Bus. 1051, 1051-52 (1993) (explaining that even industrialized democracies differ in their views of industrial organization and when deviations from norm of competition are appropriate); Hachigian, supra note 36, at 123-25 (giving examples from Britain and Japan); Wood, Impossible Dream, supra note 14, at 304 (describing differences among antitrust laws in United States, Canada, and EC).

112 See Bork, supra note 24, at 7-8, 50-89 (noting secondary values in caselaw but arguing that consumer welfare should be only goal); Fox & Sullivan, supra note 25, at 2-3, 10-11, 845-51 (1989) (describing economic efficiency as important antitrust value); Posner, supra note 25, at 3-4, 8-35 (arguing that sole goal of antitrust policy should be promotion of economic efficiency); Frank H. Easterbrook, The Limits of Antitrust, 63 Tex. L. Rev. 1, 2 (1984) (discussing courts' difficult task of balancing cooperation and competition in encouraging competitive markets).

113 See, e.g., Gary N. Horlick & Michael A. Meyer, The International Convergence of Competition Policy, 29 Int'l Law. 65, 66 (1995) ("[A]n increasing number of nations share . . . competition policy concerns.").

114 See Competition Act R.S.C., ch. C-34, §1.1 (1995) (Can.) ("The purpose of this Act is to maintain and encourage competition in Canada in order to . . . ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy . . . .").

115 Note that even under a regime of full free trade the problem will persist in the non-tradeables sector.

has little reason to pursue a strict antitrust policy. If the country represents only a small part of the market, its firms normally will represent only a small proportion of all firms, suggesting that they are unlikely to have great market power. Moreover, if the country's firms do have market power in a particular industry, the country will export a large percentage of its production in that industry. As a result, it will capture the producer surplus that its monopolistic firms generate, while suffering only a small reduction in consumer surplus relative to what could be achieved by a stricter antitrust policy. Under this scenario, the small country faces an incentive to avoid the adoption of a strict policy. A large country and a small country, therefore, will not be able to harmonize their policies easily.

A third impediment to international cooperation in antitrust policy is enforcement.[116] The problem of enforcement is conceptually simple. Antitrust policy is generally expressed through relatively vague statutes and enforced exclusively by government authorities.[117] The government authorities inevitably have some discretion in their choice of actions to pursue. As a result, antitrust policies that are statutorily similar may be radically different as enforced. For example, American observers often allege that Japanese antitrust authorities turn a blind eye to vertical *keiretsu*,[118] despite the fact that Japan has laws restricting vertical integration.[119] Additionally, similar statutes may be interpreted differently in different countries, leading to a divergence in the legal standards employed in those countries.

The model provides at least one possible explanation for differing levels of enforcement of antitrust laws. Just as the preceding discussion demonstrates that self-interested countries will not necessarily adopt globally optimal antitrust policies,[120] countries may be swayed by their own self-interest in choosing how to enforce their antitrust policies. A country that has significant vertical integration, for example, may choose not to enforce its antitrust policies against vertically integrated industries if those industries export a large share of their

116 For more on the enforcement problem, see Fox, supra note 4, at 5-7 (discussing various initiatives to enhance international cooperation in antitrust enforcement).

117 The United States policy of allowing private parties to bring claims under the antitrust laws is an exception.

118 "[I]t is argued that vertical relationships between domestic input suppliers and manufacturers, and between manufacturers and distribution networks in Japan . . . unfairly inhibit access by foreign exporters and investors . . . ." Michael J. Trebilcock & Robert Howse, The Regulation of International Trade 123 (1995). These relationships are referred to as *keiretsu*. See Edward Iacobucci, The Interdependence of Trade and Competition Policies 3 (University of Toronto Law and Economics Working Paper Series WPS-51, 1996) (noting U.S. allegations of Japanese restraints).

119 See Iacobucci, supra note 118, at 3.

120 See supra Part II.

output.[121] By allowing for prosecutorial discretion in enforcement, a country can realize some of the benefits that it might otherwise obtain through adjustments to its substantive policy.

Countries will be hesitant to enter into international agreements if those agreements can be circumvented simply by adjusting the levels and methods of enforcement.[122] In the United States, for example, the existence of civil jury trials would make it virtually impossible for American negotiators to promise fair treatment of foreigners in antitrust enforcement. Whether or not juries treat foreigners differently from Americans,[123] if foreign negotiators believe that they do, negotiations will become more difficult. Additionally, agreements that address enforcement levels and require minimum enforcement standards are likely to be difficult to negotiate.[124]

An additional problem is that certain enforcement regimes make it difficult for a country to control the enforcement of its own laws. For example, the antitrust laws of the United States are enforced by private parties, states, and various federal agencies. This system makes it difficult for the United States government to bind itself to any particular enforcement strategy. The Parker doctrine,[125] for example, allows states to create exemptions from the federal antitrust laws for particular industries. The ability of states to exempt these industries from compliance with federal antitrust laws makes foreign governments less confident in American negotiators because they lack the authority to remove these state exemptions.

121 This policy of weak enforcement would achieve the same result as adopting weaker than optimal competition laws.

122 See, e.g., Wood, Impossible Dream, supra note 14 at 306-07 ("If a country has autonomy over [the enforcement of] its competition policy, it has de facto power to make exceptions to even the strictest rule.").

123 Cf. Kevin M. Clermont & Theodore Eisenberg, Xenophilia in American Courts, 109 Harv. L. Rev. 1120, 1122, 1143 (1996) (concluding that foreigners have higher success rate in federal courts than do American citizens).

124 The enforcement structure of American law illustrates the difficulty of ensuring comparability and fairness in enforcement efforts across countries and firms, whether local or foreign. See Joseph P. Griffin, United States Antitrust Laws and Transnational Business Transactions: An Introduction, 21 Int'l Law. 307, 312-14 (1987) (describing federal, state, and private antitrust enforcement procedures). Several different enforcement organs exist in the United States, including the FTC, the Department of Justice, the states, and private parties. As a result of these numerous enforcement mechanisms, it would be difficult to construct an international agreement that would offer foreign signatories assurances as to the manner of antitrust enforcement.

125 See Parker v. Brown, 317 U.S. 341, 362 (1943) (granting California right to control its domestic industries even though doing so might affect interstate commerce).

VI
Possible Strategies for Negotiation

Although achieving cooperation in antitrust policy is difficult, without some form of international coordination it is not possible to achieve a globally optimal regime. With or without extraterritoriality, individual countries will adopt policies that, although optimal from a national perspective, are suboptimal from a global perspective. Net importers will overregulate while net exporters will underregulate. Unlike trade policy agreements, antitrust policy agreements do not necessarily improve the welfare of all countries that participate in a cooperative regime; some may suffer a welfare loss. These potential losers will refuse to join a cooperative agreement unless they receive some form of compensation. But the goal of creating international antitrust policy is not hopeless. This Part considers the types of agreements that are likely to be established and the fora in which agreements on substantive antitrust policy are most promising.

A. *Information Sharing Agreements*

Consider a simple form of agreement—a negotiation over the sharing of information and assistance in the enforcement of antitrust policies across borders. Such negotiations already have been pursued with some success.[126] Agreements of this type typically mandate that the parties provide for notification of enforcement actions that may affect the interests of the other party and the sharing of nonconfidential information. They facilitate the enforcement of existing law but

[126] At the multilateral level, both the United Nations and the Organisation for Economic Co-operation and Development (OECD) have adopted nonbinding recommendations intended to encourage the sharing of information. See Organisation for Economic Co-operation and Development, Competition Law Enforcement: International Co-operation in the Collection of Information 69-70 (1984) (discussing UN's nonbinding rules and OECD's guidelines). There are also a number of bilateral agreements that deal with the exchange of information. See, e.g, Agreement Between the United States and Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, EC-U.S., 30 I.L.M. 1487 (1991) (EU and United States); Memorandum of Understanding Between the Government of the United States of America and the Government of Canada as to Notification, Consultation, and Cooperation with Respect to the Application of National Antitrust Laws, Mar. 9, 1984, Can-U.S., 23 I.L.M. 275 (1984) (Canada and the United States); Agreement Concerning Cooperation on Restrictive Business Practices, May 28, 1984, F.R.G.-Fr., 26 I.L.M. 531 (1987) (Germany and France); Closer Economic Relations-Trade Agreement, Mar. 28, 1983, Austl.-N.Z., 22 I.L.M. 945 (1983) (Australia and New Zealand); Agreement Relating to Cooperation on Antitrust Matters, June 29, 1982, U.S.-Austl., 34 U.S.T. 388 (1982) (Australia and the United States); Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, U.S.-F.R.G., 27 U.S.T. 1956 (1976) (United States and Germany).

do not represent harmonization of policy or even cooperation beyond simple information sharing.[127] Although these agreements are important, they do not represent the sort of substantive cooperation that many commentators envision.[128]

The existence of these modest efforts at cooperation is consistent with the model's predictions. Without such agreements, even the domestic enforcement of antitrust laws could be frustrated. For example, a few firms could agree to partition the global market along country lines. Without international cooperation, this form of collusion would be difficult to prosecute—to investigate the legality of an activity, authorities in one country would need access to information from other countries. The absence of information-sharing agreements would affect enforcement in a manner not unlike *American Banana*[129]—by moving anticompetitive activities outside of national borders, firms could avoid prosecution.

Furthermore, countries have only a small interest in frustrating such information-sharing agreements. Although country A may not wish to assist country B in investigations against firms from country A, the limited scope of the information-sharing agreements makes it unlikely that country A's minimal assistance will furnish much benefit to country B's enforcement efforts. Moreover, existing agreements are typically discretionary,[130] allowing regulatory authorities to cooperate in those enforcement activities that are most likely to be mutually beneficial.

Information-sharing agreements are likely to become more commonplace in the future. As international trade increases, countries will need at least these minimal levels of cooperation because the alternative is weak enforcement of national laws.[131]

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127 The notable exception is an agreement between Canada and the United States. See Treaty on Mutual Legal Assistance in Criminal Matters, Mar. 18, 1985, Can-U.S., 24 I.L.M. 1092 (1985). That agreement, which covers only criminal antitrust cases, allows parties to use their compulsory powers to gather evidence from the other party (which other agreements do not) and allows the exchange of confidential information.

128 See, e.g., Fox, supra note 4, at 33 (1995) (proposing various kinds of cooperation among nations in antitrust enforcement).

129 See supra Part I.A.

130 See Hachigian, supra note 36, at 118 (noting that some nonbinding mechanisms have enjoyed moderate success in encouraging countries to communicate).

131 See id. at 119-23 (describing advantages of information-sharing agreements). This same argument is made from a public choice perspective by Professors Colombatto and Macey. See Enrico Colombatto & Jonathan R. Macey, A Public Choice Model of International Economic Cooperation and the Decline of the Nation State, 18 Cardozo L. Rev. 925, 935 (1996) (noting that national regulators will face increasing pressure to coordinate activities).

B. Substantive Agreements

As agreements become more substantive, difficulties are likely to arise. International cooperation increases the ability of a given country to enforce strict antitrust policies. For countries that prefer a lax policy (e.g., net exporters), heightened cooperation may be harmful. Imagine that a net importer, unable to apply its laws extraterritorially, is negotiating with a net exporter. Both countries may agree to a low level of cooperation because even the net exporter prefers some limits to firm behavior, and an agreement may facilitate implementation of the laws the exporter prefers. More substantive agreements, however, only serve to increase the importer's ability to regulate the behavior of the exporter's firms. For example, access to the compulsory processes and confidential information of the exporter may allow the importer to apply its strict policies to the exporter's firms. Because the exporter prefers a policy that is less strict, it will not consent to such an agreement.

Recall that the optimal global policy, though not generally optimal for every country, maximizes global welfare. Enough can be gained from a transaction for all countries to benefit from increased welfare. The problem lies in the distribution of those gains—some countries may face losses that outweigh their gains.

Reaching agreement would be simple if countries could costlessly negotiate transfer payments. Those countries that stood to gain from an agreement could compensate those countries that stood to lose. With costless negotiation of transfer payments, countries would agree to the optimal global policy.[132]

However, in the world of international commercial law, transaction costs are far from zero and information is less than perfect. Costs arise due to a variety of factors, including the political realities faced by negotiators (e.g., voters may be against an agreement), uncertainty with respect to the magnitude of the costs and benefits of an agreement, and concern regarding the future behavior of other countries. Moreover, there are free rider problems—some countries may choose not to contribute to the compensation package offered to those countries that lose from an agreement—and agency problems—the objectives of negotiators may differ from the objectives of the citizens they represent. The key to reaching agreement is to reduce these costs as much as possible.

[132] See R. H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1, 15 (1960). For a straightforward discussion of the Coase Theorem, see A. Mitchell Polinsky, An Introduction to Law and Economics 11-14 (2d ed. 1989).

C. Single Topic Negotiations

Consider the likelihood of success in negotiating antitrust policy apart from other issues. Suppose that countries authorize their negotiators to negotiate only on issues pertaining directly to antitrust policy. The negotiators cannot, for example, offer concessions on other issues or provide for transfer payments of any kind.

Under this arrangement, agreement is unlikely. First, if many countries are present, the costs and benefits of an agreement will be difficult to assess. Therefore, it will be difficult to estimate the value of the transfer payments necessary to compensate the countries opposing cooperation. Second, even if the required transfer payments were estimable, the negotiators, by assumption, are not authorized to commit to making them. Under these conditions, agreement among a large number of countries is unlikely.[133]

D. Wide Ranging Negotiations

A more promising forum for negotiations would be a multilateral meeting of policymakers who have the authority to consent to transfer payments. Although establishing how much should be paid to whom would still be difficult, at least those present could estimate the value of the transfers and authorize their payment.

Notice that the transfer payments need not involve money. For example, within the context of WTO negotiations[134] countries may be able to negotiate an antitrust policy agreement if those countries that stand to lose are able to extract concessions in other areas of negotiation. Therefore, despite the fact that negotiations are more complex when many issues are negotiated at once, international agreement on antitrust policy is more likely if other unrelated issues are considered at the same time. If other issues are on the table, the potential winners from an antitrust agreement will be able to compensate the po-

133 Other commentators have discussed the problems related to international negotiations over a single issue. See, e.g., Ernest H. Preeg, Traders in a Brave New World: The Uruguay Round and the Future of the International Trading System 27-28 (1995) (discussing difficulties of single issue negotiations).

134 Various commentators believe that antitrust policy will be negotiated under the WTO. See Fox, supra note 4, at 1 ("It is widely expected that issues of competition . . . will be on the agenda for the next round of the GATT."); Horlick & Meyer, supra note 113, at 76 ("With the GATT now under the auspices of the World Trade Organization . . . [a] proposal to bring competition policy under the GATT could become a topic of the next GATT round."). This view is not limited to the academic community. In early 1994, President Clinton stated that he advocated placing antitrust policy on the agenda for the next round of GATT/WTO talks. See Fox, supra note 4, at 7-8; see also Lionel Barber, Clinton Places Environment on Top in GATT, Fin. Times, Jan. 12, 1994, at 6 (describing President Clinton's decision to put environmental, antitrust, and labor standards on agenda).

tential losers in other areas under negotiation, thereby gaining the benefits of reaching an antitrust agreement.[135]

E. Most Likely Agreements and Regional Agreements

The analysis sheds light on which countries are most likely to reach agreement. If one country is a pure importer of monopolistically-produced goods and another country is a pure exporter, agreement is unlikely. The importer prefers strict antitrust laws, while the exporter prefers lax antitrust laws. Even if a transfer payment is possible, the exporter may stand to lose so much from the deal that concessions in other areas will not make up for the loss.

Two countries that export the same proportion of monopolistically-produced goods, however, may be able to agree on a common substantive antitrust policy.[136] Imagine, for example, that country A produces 100 units of good X each year but does not produce good Y at all. Suppose further that country B produces 100 units of good Y but does not produce good X. Finally, assume that both countries consume fifty units of each good—implying that each country exports fifty units of the good it produces and imports fifty units of the other good—and the goods are of the same value. If the markets for both goods are imperfectly competitive, and equally so, then the two countries will agree on a common antitrust policy, and no transfer payment will be necessary.

This example illustrates that countries are more likely to agree on a substantive antitrust law if their net trade balances in imperfectly competitive goods are similar. Put another way, the greater the similarity in trade, the smaller the compensatory transfer payment that must be paid from countries that benefit from the agreement to countries that do not.

For example, negotiations among developed countries are more likely to succeed than negotiations between developed and developing countries. Because developing countries are more often net importers of imperfectly competitive goods and developed countries are more often net exporters of such goods, agreement is unlikely without the use of transfer payments. To make matters worse, developing coun-

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135 The one successful international antitrust policy agreement in the world—that of the EU—followed this approach. Antitrust policy was only one of many important issues included in the negotiation of the Treaty of Rome. Because the treaty sought to create a common integrated market, it offered the signatories a complex set of tradeoffs, including the effects of a cooperative antitrust policy. Thus, the countries that stood to lose from a cooperative antitrust policy stood to gain from other aspects of the treaty and, therefore, agreement was possible.

136 Even in this case, there are significant hurdles to agreement, such as the problems discussed in Part V supra.

tries would have to compensate developed countries because the developing countries stand to gain from a cooperative agreement. In light of the resource constraints on developing countries, such payments seem unlikely.

In addition, bilateral negotiations are more likely to succeed than multilateral negotiations because a smaller group of countries is more likely to find common ground. With only a few countries at the negotiating table, there is a greater chance that a policy that will benefit all parties can be found. As more countries enter the negotiations, it becomes more likely that one or more of them will suffer a welfare loss under any given proposal.

Unfortunately, when reaching agreement is most likely, the gains from doing so are the smallest. The magnitude of the gains from agreement depend on the number of parties and the extent to which their policies move toward the global ideal. Welfare gains are larger if the agreement includes more parties and if the differences between the regimes prior to agreement are greater. Thus, for example, an agreement between two countries whose policies prior to negotiations are nearly identical should be easy to achieve but will yield only modest welfare gains.

Regional agreements, like all agreements that include only a small number of countries, may yield gains to participating countries, but they do nothing to improve the relationship between the policies of the regional group and the rest of the world. Such regional agreements have the potential to increase or decrease global welfare.[137]

VII

Conclusion

After fifty years of falling tariffs, other trade-related issues, such as antitrust policies, have become ripe for serious analysis. The model developed in this Article furnishes a framework for studying the influence of international trade on the development of international antitrust policies, and the resulting effects on global welfare.

137 In fact, although a regional agreement may reduce trade distortions within the group, it may exacerbate trade distortions between the group and the rest of the world. See Jacob Viner, The Customs Union Issue 119 (1950) (demonstrating that regional agreements reduce global welfare if they are trade diverting and increase global welfare if they are trade creating); Jagdish Bhagwati & Arvind Panagariya, Preferential Trading Areas and Multilateralism—Strangers, Friends, or Foes?, in The Economics of Preferential Trading Agreements 1, 7 (Jagdish Bhagwati & Arvind Panagariya eds., 1996) (explaining that individual countries might suffer welfare loss even if trade creation outweighs trade diversion for agreeing countries as group).

The most striking conclusion is pessimistic: International agreements on antitrust policy will continue to be difficult—and may be impossible—to reach because not all countries will benefit from such agreements. This result stems from the very problem that antitrust laws seek to solve. Antitrust policy is intended to restrain the behavior of monopolistic firms to increase the welfare of consumers. Because firms and consumers are distributed unequally across countries, governments do not have identical interests.

An analysis of the incentives that countries face demonstrates the importance of cooperation in developing international antitrust policy. A country that is a net exporter of imperfectly competitive goods can be expected to underregulate its firms relative to the optimal global policy. By doing so, the country favors its own firms at the expense of foreign consumers. By contrast, a net importer able to apply its laws extraterritorially will do exactly the opposite—it will overregulate firm behavior to favor its consumers over foreign firms. Without extraterritorial application of law, all countries will underregulate firm behavior because the costs of regulation will be felt only by their own firms while the benefits of such regulation will flow to consumers around the world.

The model predicts that without international cooperation, national policies will fail to implement the optimal global policy. Moreover, the trading patterns of countries and their abilities to apply their laws extraterritorially determine whether national policies will be too strict or not strict enough.

Although the prospects for successful negotiation of an international antitrust agreement are not good, if such negotiations take place, the analysis in this Article offers recommendations about how they should be structured. Agreement will be more likely if negotiations are conducted on a broad basis and include a wide range of issues. By structuring negotiations in this fashion, those countries that stand to gain from an agreement will be better able to compensate those countries that stand to suffer a drop in welfare.

Regardless of the form in which negotiations occur, however, the prospects for antitrust policy harmonization are not good. The noncooperative global regime is the result of forces that are difficult to overcome. Because exporters prefer a relaxed antitrust policy, they can simply refuse to agree to an international antitrust law. In sum, cooperation on international antitrust policy remains an unlikely possibility. Although potential gains from agreement exist, optimism that they can be realized easily is probably misplaced.