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Anu Bradford
Columbia Law School, abradf@law.columbia.edu

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Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation

ANU PIILOLA*

I. INTRODUCTION

An effective, legitimate model of global governance must strike a delicate balance between national sovereignty and international cooperation. As such, governance on an international level is a constantly evolving discourse among multiple actors whose respective roles and influence vary across time and policy realms. The participation of multiple actors in global governance is widely recognized, but there is considerable disagreement as to the appropriate distribution of power among these participants and the optimal pattern for their interaction. We may never be able to construct an ideal global governance model. But the attempt to create such a model by examining the current needs of individual nations and the international community in key areas, such as global antitrust regulation, plays a critical role in promoting sound public policy.

Antitrust law is illustrative of the legal realms in which conflicting ideas of international and national regulatory frameworks have yet to find a satisfactory equilibrium. While competition among multinational enterprises has increasingly disregarded national borders, antitrust laws have remained predominantly national. The traditional, though perhaps most controversial, way to deal with international antitrust issues is to rely on a unilateral application of national antitrust laws. This type of extraterritoriality, however, has caused significant tension and resistance.¹ A more radical, equally controversial approach would be to harmonize national antitrust laws or establish unified supranational antitrust rules. This is a far-reaching solution that lacks adequate support in today's political climate.² Other alternative

* LL.M., Harvard Law School, 2002; Licentiate in Laws, University of Helsinki, 2001; Master of Laws, University of Helsinki, 2000. I am grateful to my supervisor, Professor Anne-Marie Slaughter, for her criticism, encouragement, and inspiration during the writing process.

¹ Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781, 1803 (2000) [hereinafter Fox, *Antitrust and Regulatory Federalism*].

² See Joel I. Klein, *Time For A Global Competition Initiative?*, Address at the E.C. Merger Control 10th Anniversary Conference in Brussels (Sept. 14, 2000), <http://www.usdoj.gov/atr/public/speeches/>

routes to solving existing frictions would be, for example, to expand bilateral and regional cooperative arrangements or to establish a choice of law system.

Consequently, there is an ongoing debate over whether there is a need to create an international antitrust regime that could better respond to the new economic environment, increased cross-border business activity, and the integration of markets. Proponents of such a regime view international antitrust rules as necessary tools to reduce transaction costs, increase efficiency, and cultivate legal certainty. However, there is little agreement concerning the form, substance, or timeframe of the proposed regulatory reform. Those who oppose the creation of an international antitrust regime emphasize the divergent policy goals of different nations and the conflicting understandings of the role and extent of antitrust enforcement in different jurisdictions. They argue that discrete policy and enforcement concerns clearly hinder attempts at internationalization and highlight the necessity of maintaining regulatory diversity. In this view, countries should retain regulatory powers on the national level, as part of the exclusive right of sovereign states to design their market structures and economic policies.

This Article adopts a critical stance within the ongoing debate by applying different theories of global governance to antitrust law at the international level. My analysis will encompass three proposed forms of global governance: intergovernmental, transgovernmental, and transnational models.³ The intergovernmental model consists of states, represented by their heads of government, cooperating and bargaining within international regimes. In the antitrust realm, this would be the model of governance used to reach an international agreement on antitrust law and incorporate it into an institutional framework, such as the World Trade Organization (“WTO”). In the transgovernmental model, lower-level government officials interact directly with one another, forming transgovernmental networks. When the transgovernmental governance model is applied in the antitrust sphere, the focus is on the substate level, with an emphasis on direct cooperation among national antitrust agencies. Finally, the transnational model highlights the importance of global nongovernmental organizations and other nonstate actors in shaping policy preferences and regulatory agendas. In this context, the Article discusses the role corporations and consumer organizations can play in influencing the construction of an international antitrust regime.

6486.htm [hereinafter Klein, *Time for a Global Competition Initiative?*]. The United States has opposed this approach most notably, yet U.S. leaders have more recently recognized that some measures on the international level are inevitable. *Id.*

³ Mark A. Pollack & Gregory C. Shaffer, *Who Governs?*, in *TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY* 287, 287–89 (Mark A. Pollack & Gregory C. Shaffer eds., 2001) [hereinafter Pollack & Shaffer, *Who Governs?*] (introducing the three distinct models). In addition to the three models of global governance discussed in this Article, there are other networks that influence global governance. For example, increased interaction between national judiciaries offers valuable possibilities for innovation and superior judicial decisionmaking worldwide through the process of cross-fertilization. Ongoing dialogue enables different courts to transplant ideas and borrow from each other. Also, national legislators are increasingly cooperative. Parliamentary delegations hold joint meetings where they exchange ideas and perceptions on issues of common concern. These forms of international governance are outside the scope of this study, but that is not to say that they lack significance.

After reviewing international antitrust law with reference to these three models, I conclude that none of them alone is sufficient or desirable as a governance regime. The temptation simply to impose an intergovernmental model on international antitrust law must be tempered by concerns about coercion and about legitimate economic, political, and social differences at the national level. On the other hand, the convergence of antitrust regulation that is presently occurring through ongoing dialogue among substate actors offers promise for the transgovernmental governance model. However, no regime will garner legitimacy without participation from the nonstate actors discussed in the transnational model. As my analysis of international antitrust law attempts to demonstrate, any workable global governance regime must incorporate aspects of all three models to avoid the pitfalls of each.

The Article proceeds in two stages: a theoretical discussion that examines the different models of global governance, followed by a case study that applies these models to the field of antitrust law. Part II will expand on the theoretical models outlined above, concluding that all three operate to varying degrees of success in the context of global governance, often coexisting in larger mixed networks. I also address the challenges supranational rulemaking imposes on democracy and discuss the specter of regulatory imperialism that haunts any global governance regime, whatever its structure. Part III addresses global antitrust law directly, looking at its historical development, adopted structures, and systemic problems. Following this, I examine the different governance theories as applied to antitrust, and determine that only a combination of all three will suffice to bring about the benefits of a global regime while addressing its costs.

Accordingly, Part IV examines intergovernmental cooperation and the feasibility of establishing a multilateral antitrust agreement within an international institution. Part V turns towards the transgovernmental model of governance, focusing on bilateral cooperation agreements, including an evaluation of the ability of the national antitrust agency networks to achieve greater convergence and to mitigate existing frictions. Part VI will address the prospect of integrating nonstate actors, such as corporations and consumer organizations, into a framework for designing an international antitrust regime.

Part VII will pull all of these discussions together by outlining the implications for the development of a potential international antitrust regime that can be drawn from the governance perspective. Finally, Part VIII concludes the article by returning to the discussion of global governance generally, and offering closing remarks on the implications that the antitrust case study may bear for international governance in general.

II. DIFFERENT MODELS OF GLOBAL GOVERNANCE

This Part explores intergovernmental, transgovernmental, and transnational models as proposed forms of international governance. As discussed above, the intergovernmental model consists of states, represented by their heads of government, cooperating and bargaining within international regimes. In the

transgovernmental model, lower-level government officials interact directly with one another, forming networks that span national boundaries. In the transnational model, the focus is on global civil society and the role of nongovernmental actors participating directly in governance.

A. Intergovernmental Model of Global Governance

In the intergovernmental model of global governance, the primary actors are states, and coordination takes place through multilateral agreements and organizations.⁴ Heads of government, foreign ministers, and diplomats from different nations interact, defending and promoting the interests of their respective states. Government representatives face the dilemma of balancing national interests with international obligations that potentially conflict with the national interests in the short term, but that are believed to advance them in the long term.⁵ In this scenario, nations are left with the difficult task of complying with international obligations without compromising national sovereignty.

Heads of state operating within the intergovernmental model of global governance must also decide whether to incorporate the preferences of their domestic electorate, which may or may not coincide with their perception of the national interest, and set their goals and negotiation strategies accordingly. Thus, according to Robert Putnam's "two-level games" model, international negotiations take place simultaneously on international and domestic levels.⁶ Government representatives negotiate with their foreign counterparts at the international level in order to reach a mutually advantageous outcome. Concurrently, negotiators engage in a bargaining process with their domestic constituencies, with the goal of securing domestic acceptance of the internationally negotiated agreements.⁷

⁴ Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism*, 17 NW. J. INT'L L. & BUS. 1014, 1021, 1038 (1996-97) [hereinafter Picciotto, *Networks*].

⁵ Daniel W. Drezner, *On the Balance between International Law and Democratic Sovereignty*, 2 CHI. J. INT'L L. 321, 321-23 (2001).

⁶ See Mark A. Pollack & Gregory C. Shaffer, *Transatlantic Governance in Historical and Theoretical Perspective*, in TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY 3, 21 (Mark A. Pollack & Gregory C. Shaffer eds., 2001) [hereinafter Pollack & Shaffer, *Historical and Theoretical Perspective*].

⁷ See *id.* Putnam's model combines the domestic and international negotiation processes within a single framework. However, his model of bargaining does not necessarily reflect the balance of preferences of different national constituencies. Government negotiators sometimes manipulate the preferences of governmental subunits and domestic interest groups. Statesmen may, for instance, be more eager than their domestic constituencies to reach an agreement at the international level. *Id.* at 21-24. The New Transatlantic Agenda, a joint action plan signed between the European Union and the United States in 1995, serves as an illustrating example. See The New Transatlantic Agenda, http://europa.eu.int/comm/external_relations/us/new_transatlantic_agenda/text.htm (last visited Apr. 28, 2003); see also Karel Van Miert, Address at the American Chamber of Commerce in Belgium (Nov. 26, 1996), http://europa.eu.int/comm/competition/speeches/text/sp1996_060_en.html. The Clinton administration and the European Commission were arguably more committed to transatlantic economic liberalization in comparison with the majority of their domestic electorate in the European Union and the United States. See Pollack & Shaffer, *Historical and Theoretical Perspective*, *supra* note 6, at 23.

1. *The Process of Bargaining: Defending National Interests*

In the course of intergovernmental negotiations, heads of state frequently tie together various policy issues when trying to secure domestic acceptance of policy proposals.⁸ An unpopular policy reform proposal relevant to a particular sector can be linked with popular policy reforms in other sectors in a sort of international package deal. Such linkages help secure domestic support for the otherwise unpopular policy reforms.⁹ The negotiated package, embracing several policy realms, often reflects a compromise between various opposing interests and preferences of different states.

However, rather than reflecting some commonly defined supranational interests, the compromise often reflects merely the relative bargaining power of the participating nations. The negotiations do not focus on an ideal solution for the world at large, as representatives of the states often fail to look beyond national gains. The result also does not reflect the true compromise of interests within a policy realm, but rather the balance of bargaining power across a range of different policy areas. The competing interests between policy realms are used as tools, trade-offs, and linkages to arrive at an acceptable political equilibrium. Thus, politics does not only enter into policy, it also dictates the content of the policy and determines its outcome.

2. *Interdependence between Different Policy Realms*

Despite the manipulative use of issue linkages, these “international package deals” contribute to the superiority of international institutions as forums to negotiate compromises on a wide range of policies. One reason for this is the existence of important interdependencies between different policy realms. Antitrust policy, for example, interacts in a complex manner with industrial, trade, environmental, and other policies. A forum with a mandate to deal with all of these divergent, yet interdependent, policy areas has the capacity to consider those interactions and adopt policies which do not counteract or frustrate the measures taken with respect to other policy areas. Seeing such interlinkages and being able to address them jointly enables policymakers to efficiently, coherently, and consistently achieve interdependence and avoid fragmented policymaking. However, this ideal is only attainable when the goals of the different policy realms are shaped in light of their effects on other policy realms, not when the interdependence is seen only as a bargaining tool to maneuver and coerce negotiators into a political compromise.

B. Transgovernmental Model of Global Governance

The transgovernmental model of governance questions the exclusive role of heads of governments in setting regulatory agendas and influencing the

⁸ Pollack & Shaffer, *Historical and Theoretical Perspective*, *supra* note 6, at 22.

⁹ *Id.*

outcome of international policy reforms. The model does not seek to deny the important role of heads of state in global governance, but emphasizes the influence of lower-level governmental actors in shaping international policy outcomes.¹⁰ In other words, transgovernmental regulatory networks do not try to replace traditional actors in the international system. Rather, they seek to complement the international system by coordinating efforts across borders in an attempt to define common solutions to problems that all networking states share.¹¹

1. *The Rise of Transgovernmental Networks*

As a consequence of globalization, economic integration, and the internationalization of formerly domestic policy agendas, it has become increasingly difficult for states to manage and regulate a complicated, international, market-driven economic order. As a result, there has been a general move towards governance by “networks.”¹² The public sector has been reduced in size and many traditional functions of the state have been transferred to the private sector. At the same time, management strategies formerly employed exclusively in the private sector have made their way to this reconfigured public sphere, as there has been an increasing need to find effective and less cumbersome ways to govern dynamic markets and increasingly international economies. The adoption of neo-liberal policy perspectives has further facilitated the movement away from the traditional emphasis on the state towards less hierarchical network governance.¹³

Government networks offer a new vision of global governance that is horizontal rather than vertical, and decentralized rather than centralized. This form of governance is based on the idea of a technocratic, disaggregated state dominated by subgovernmental experts, rather than by chiefs of government or civil society.¹⁴ Networks are self-organizing and comprise state and nonstate actors, ignoring the traditional divisions between public and private sectors.¹⁵ Cooperation among agencies leads to an informal international rulemaking

¹⁰ *Id.* at 25. International financial regulatory organizations such as the Basle Committee on Banking Supervision (the “Committee”) are examples of this model. The Committee consists of governors of central banks of Switzerland and Luxembourg, in addition to the central bank governors of the G-10 countries. Even though the Committee is only empowered to make nonbinding recommendations, those recommendations have in fact been implemented by the participating countries as well as by some countries whose central banks are not represented in the Committee. See Anne-Marie Slaughter, *Governing the Global Economy Through Government Networks*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* 177, 181–84 (Michael Byers ed., 2000) [hereinafter Slaughter, *Governing*] (discussing the Basle Committee and its influence shaping international financial regulation).

¹¹ Slaughter, *Governing*, *supra* note 10, at 204–05.

¹² Pollack & Shaffer, *Who Governs?*, *supra* note 3, at 288. Governance by networks can be distinguished from governance by hierarchies (authoritative commands from governments) or by markets. When governance is left for markets, the outcomes result from an uncoordinated set of individual decisions.

¹³ Picciotto, *Networks*, *supra* note 4, at 1038.

¹⁴ Pollack & Shaffer, *Historical and Theoretical Perspective*, *supra* note 6, at 29.

¹⁵ Pollack & Shaffer, *Who Governs?*, *supra* note 3, at 288.

process that engages national officials directly.¹⁶ Heads of governments can only imperfectly monitor and control the interactions of relatively independent agencies such as central banks, courts, and regulatory agencies. These actors' expertise and control of information provide them with a sufficient degree of autonomy, enabling them to engage in active policymaking.¹⁷

Anne-Marie Slaughter has characterized the transgovernmental networks as forming the "Real New World Order," in which "[t]he state is not disappearing, it is disaggregating into its separate, functionally distinct parts. These parts—courts, regulatory agencies, executives, and even legislatures—are networking with their counterparts abroad, creating a dense web of relations that constitutes a new, transgovernmental order."¹⁸ This growth of international networks has emerged from national regulators' awareness of the inadequacies of purely domestic regulatory schemes and the recognized need for internationally coordinated responses.¹⁹ National regulatory agencies reach out to their counterparts in other countries in order to cooperatively develop joint approaches and harmonized policies.²⁰ These networks are a fast, flexible, and effective way of cooperation among lower-level government regulators.²¹ In addition, through transgovernmental networks, national governments are able to coordinate their responses to common international problems without ceding their sovereignty to international organizations.²²

The direct collaboration among national administrators has different objectives. Transgovernmental policy coordination facilitates the smooth management of cross-border issues and allows states to cooperate effectively in their policymaking tasks without the bureaucratic procedures of formal international institutions.²³ Transgovernmental interaction also facilitates coalition building. Subunits of governments can gain support from their like-

¹⁶ Slaughter, *Governing*, *supra* note 10, at 189.

¹⁷ Pollack & Shaffer, *Historical and Theoretical Perspective*, *supra* note 6, at 25.

¹⁸ Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183, 184 (1997) [hereinafter Slaughter, *The Real New World Order*].

¹⁹ Picciotto, *Networks*, *supra* note 4, at 1045.

²⁰ Slaughter, *Governing*, *supra* note 10, at 189.

²¹ See Anne-Marie Slaughter, *The Accountability of Government Networks*, 8 IND. J. GLOBAL LEGAL STUD. 347, 347 (2001) [hereinafter Slaughter, *Accountability*]. Slaughter identifies three types of transgovernmental regulatory networks: (1) networks of national regulators that develop within the context of already existing international organizations (such as the Organization for Economic Cooperation and Development ("OECD")), (2) networks of national regulators that develop within the framework of an agreement negotiated by governments (such as the Transatlantic Economic Partnership agreement of 1998), and (3) networks of national regulators that develop outside of any formal framework. Networks in the third category have prompted the greatest concern, being most detached from democratically elected decisionmakers and thus standing apart from more legitimate governance structures. *Id.* at 355, 359.

²² See Pollack & Shaffer, *Who Governs?*, *supra* note 3, at 297–99. Pollack and Shaffer find that Slaughter's new world order consisting of transgovernmental networks is limited to specific issue areas such as competition policy. Transgovernmental networks can gain importance in the transatlantic antitrust domain because of the similarity of regulatory laws and cultures on both sides of the Atlantic, as well as because of the independence of regulatory authorities. See discussion *infra* Part V.A.

²³ Slaughter, *Accountability*, *supra* note 21, at 347.

minded counterparts abroad, and thereby generate pressure and promote their cause to their own chiefs of government.²⁴

2. *From Political to Administrative Decisionmaking*

The rise of transgovernmental networks has also meant “a shift in normative power out of the legislative realm into an increasingly complex and variegated administrative sphere.”²⁵ Today, administrative agencies use power formerly reserved to democratically accountable political decisionmakers. Within states, there has been an increasing delegation of regulatory authority and normative competence from political decisionmakers to professionals and experts.²⁶ On both the international and domestic levels, administrative governance has increased because existing institutional capacities cannot deal with the growing complexity of highly sophisticated policy areas.²⁷ This complexity leads to delegation of normative power to independent agencies that possess the high level of expertise needed to exercise discretion over intricate policy issues.²⁸ The power and utility of administrative agencies thus lie in their expertise and in “their very appearance of objectivity, rationality, and universality.”²⁹

The growth in administrative policymaking has caused some loss of government control over policy outcomes. This devolution of power to less democratic institutions and agents has led to technocratic governance, which has been seen to depoliticize policymaking, giving rise to some serious concerns about democratic accountability.³⁰

3. *Internal Dynamics of Networks*

Policy coordination can take place among agencies composed of experts who enjoy significant autonomy within hierarchical government structures. When the regulatory goals and institutional structures of cooperating agencies are similar, the policy coordination is more likely to be effective.³¹ For example, the European Union and the United States share similar policy agendas and preferences over a wide range of issues, which eases the progress of establishing functioning networks among them.³²

²⁴ Pollack & Shaffer, *Historical and Theoretical Perspective*, *supra* note 6, at 26.

²⁵ Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 98 COLUM. L. REV. 628, 632 (1999).

²⁶ Picciotto, *Networks*, *supra* note 4, at 1018.

²⁷ Lindseth, *supra* note 25, at 632, 634, 688.

²⁸ Giandomenico Majone, *The Rise of the Regulatory State in Europe*, 17 W. EUR. POL. 77, 89 (1994).

²⁹ See Picciotto, *Networks*, *supra* note 4, at 1038.

³⁰ See Pollack & Shaffer, *Historical and Theoretical Perspective*, *supra* note 6, at 18. However, others argue that it is not that political questions have been transformed into technical ones, but merely that they have been moved into the administrative realm. See Lindseth, *supra* note 25, at 687.

³¹ Pollack & Shaffer, *Who Governs?*, *supra* note 3, at 303.

³² *Id.* at 292.

Participation in transgovernmental networks arguably leads to a redefining of national interests. As a result of continuous interaction, national agencies become increasingly bound to a common enterprise and commonly defined goals. This may cause them to shift from their purely domestic preferences when trying to define goals in the international arena. Regulators may thus gradually become advocates of these shared agendas, rather than of a narrowly defined national interest.

Alvin Gouldner has researched the changes in the incentive structure of regulators operating in a transnational network.³³ He has distinguished between two types of regulators: “cosmopolitans” and “locals.” Cosmopolitans tend to embrace an “international reference-group orientation,” whereas locals are likely to have a “national or subnational reference-group orientation.”³⁴ Similar conclusions about the internal dynamics of networks have been reached in recent game-theory work on the role of reputation in repeated transactions.³⁵ These theories start from the observation that cooperation can lead to credible commitments. Cooperating members are subject to peer pressure and are conscious that pride and self-respect are endangered by the breaking of commitments. Thus, in the context of the present discussion, rather than seeing itself as a part of a national bureaucracy advancing local interests in the international arena, the cooperating agency recognizes its role as a part of the transnational network pursuing similar objectives with foreign counterparts. The leaders of these agencies have a strong interest in the upkeep of their reputations among the other members of their network, as the prospect of future cooperative endeavors increases the commitment to the commonly defined goals and raises the level of compliance.

Consequently, transnational networks facilitate the development of behavioral standards by creating shared expectations. The social mechanisms of reputational enforcement guarantee the accomplishment of these mutual expectations.³⁶ The dynamics of an international network may thus encourage the transformation of national regulators from “locals” to “cosmopolitans.”³⁷

³³ Giandomenico Majone, *International Regulatory Cooperation: A Neo-Institutionalist Approach*, in *TRANSATLANTIC REGULATORY COOPERATION* 136, 138 (George A. Bermann et al. eds., 2000) [hereinafter Majone, *International Regulatory Cooperation*].

³⁴ *Id.*

³⁵ *Id.* (citing JOHN MILGROM & PAUL ROBERTS, *ECONOMICS, ORGANIZATION AND MANAGEMENT* 138–143 (1992)).

³⁶ *Id.* at 138–39.

³⁷ Drawing on the European experience, Lindseth speaks about the same phenomenon as “community capture,” referring to the shift in loyalties on the part of national regulators sitting on the committees at the European Community level. They move slowly from the advocates of national interests to the “representatives of a Europeanized inter-administrative discourse.” Lindseth, *supra* note 25, at 690 (quoting Christian Joerges & J. Neyer, *From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology*, 3 *EUR. L.J.* 273, 291 (1997)). However, contrary to the above, it has been claimed that the European Commission, for example, is highly sensitive to member states’ concerns and responsive to their preferences. See Lindseth, *supra* note 25, at 635.

4. *Benefits of Transgovernmental vis-à-vis Intergovernmental Networks*

Transgovernmental networks often prove to be the most efficient means of global governance for various reasons. Insofar as transgovernmental actors may deemphasize national interests in relation to policy goals within their area of expertise, they may be insulated from a purely national bias. Furthermore, transgovernmental networks exercise “soft power,” which emphasizes cooperation and persuasion rather than coercion and facilitates voluntary convergence.³⁸ The voluntary nature of this regulatory cooperation makes reaching international compromises easier by minimizing the implications for national sovereignty. Cooperative government networks also serve to avoid the bureaucratic formality and universality of international organizations.³⁹ Nonetheless, the strength of the transgovernmental networks depends on their internal cohesion, existence of mutual trust, good faith, and ability to reach consensus, as well as on their ability to define common goals. In addition, while transgovernmental networks are noted for their efficiency and expertise, they face the challenge of exercising this influence within “a framework that is accountable and responsive.”⁴⁰

Transgovernmental networks are not a substitute for the intergovernmental model of global governance, and the networks are unlikely to replace international institutions. Networks can indeed excel where institutions fail, but the demonstrated success of international organizations across many fields speaks for their valuable role in international policymaking. Nonetheless, an effective international regime does not require a high level of institutionalization, and institutions themselves do not guarantee the effectiveness of the regime.⁴¹ In summary, networks are sometimes more apt at governing global economic order than more formal institutional structures, and sometimes institutions have overriding benefits. Rather than being a feasible alternative to international organizations, governmental networks need to coexist and interact with institutions and complement their role in the overall governance regime.

C. *Transnational Model of Global Governance*

Transnational governance emphasizes active participation by nonstate actors in policy deliberation and global governance.⁴² While transnational dialogues do not constitute an alternative to national governments, but exist in

³⁸ Robert O. Keohane & Joseph S. Nye, Jr., *Power and Interdependence in the Information Age*, 77 FOREIGN AFF. 81, 86 (1988) (defining “soft power”).

³⁹ Slaughter, *Governing*, *supra* note 10, at 199.

⁴⁰ Sol Picciotto, *North Atlantic Cooperation and Democratizing Globalism*, in TRANSATLANTIC REGULATORY COOPERATION 495, 506 (George A. Bermann et al. eds., 2000) [hereinafter Picciotto, *North Atlantic Cooperation*].

⁴¹ See Majone, *International Regulatory Cooperation*, *supra* note 33, at 136.

⁴² Kenneth W. Abbott, “Economic” *Issues and Political Participation: The Evolving Boundaries of International Federalism*, 18 CARDOZO L. REV. 971, 996–97 (1996).

partnership with those governments,⁴³ the increasing role of civil society in global governance has strengthened the potential of this model. A U.N. report has recognized that “the activity of non-state actors has today become an essential dimension of public life at all levels and in all parts of the world.”⁴⁴

Accordingly, international politics has recently witnessed a “participatory revolution” as nongovernmental organizations (“NGOs”), other substate actors, and individuals have established a presence in international governance.⁴⁵ This is a parallel development to what has taken place on domestic levels, where democratic liberalism has arisen in response to frustration felt towards the conventional models of governance.⁴⁶ Young people have increasingly turned their backs on party politics and other traditional democratic means to advance their ideological and political objectives. Instead, they have opted more often to channel their political activity through issue-specific NGOs. To many young activists, traditional democratic channels represent stagnated old-world structures, corrupted party politics and failed promises. The rise of issue-specific NGOs can also be seen as the result of an increasing gulf between the public sphere and political life. Issue-oriented NGOs are ideal domains for direct and efficient outcomes, compared to traditional state actors, in that their focused concentration enables them to have a clear vision, graspable target, and more straightforward strategies of action. However, they can also lead to an overly narrow understanding of the complicated, multi-faceted political reality and to the neglect of other, strongly interconnected policy concerns.

Transnational actors face the challenge of successfully promoting their causes by changing the policy preferences of individual states. Much depends on their financial and human resources, and on their ability to best frame the issues to effectively influence public opinion, shape agendas, and change the behavior of states and international organizations. A significant shortcoming of functioning transnational networks stems from the unequal distribution of resources among civil society groups.⁴⁷ For example, business groups are traditionally equipped with superior resources compared to labor, consumer, and environmental groups, enabling them to gain access to a higher level of the governance process. Additionally, civil society groups in the European Union and the United States are better organized and possess greater resources than analogous groups elsewhere.⁴⁸ Furthermore, although there are functioning dialogues between interest groups participating in the governance process, the

⁴³ Pollack & Shaffer, *Who Governs?*, *supra* note 3, at 299.

⁴⁴ *General Review of Arrangements for Consultations with Non-Governmental Organizations: Report of the Secretary-General*, U.N. ESCOR, 1st Sess. at 3, U.N. Doc. E/AC.70 (1994).

⁴⁵ See generally Kal Raustiala, *The ‘Participatory Revolution’ in International Environmental Law*, 21 HARV. ENVTL. L. REV. 537 (1997) (describing how NGOs have been incorporated into international law).

⁴⁶ Abbott, *supra* note 42, at 996.

⁴⁷ Kenneth Abbott divides substate actors into three groups: (1) traditional interest groups such as labor and business organizations, (2) scientific and technical groups, and (3) issue-oriented groups such as environmental NGOs. *Id.* at 996–97.

⁴⁸ Pollack & Shaffer, *Who Governs?*, *supra* note 3, at 292.

dialogues are segmented by sector, and there is no “dialogue among the dialogues.”⁴⁹ Business representatives do not meet with consumer, labor, and environmental groups in the same public sphere to discuss common agendas.⁵⁰

The involvement of NGOs in the policymaking process contributes to a more inclusive governance process. The engagement of civil society in the international political process helps to assure public support for international agreements, and facilitates implementation of the agreements in domestic society.⁵¹ However, although NGOs are often touted as the “voice of the public,” many doubt that they are truly representative in nature.⁵²

Transnational governance, with the participation of nonstate actors in an international regulatory agenda, holds great promise for facilitating transparency, openness, and democracy in global governance. However, it is a mistake to assume that increased NGO involvement will necessarily lead to a superior social outcome. It is not clear that NGOs reflect the preferences of society, nor that they provide a representative perspective on complex, multi-faceted policy domains.⁵³ In order to be an effective force, NGOs must actively engage in dialogue not only with their members and stakeholders,⁵⁴ but also with other participants in global governance, including government representatives, corporations, interest groups, and other NGOs.

D. *The Existence of Mixed Networks*

Recent research shows that, in the transatlantic sphere, the intergovernmental model continues to be predominant. Transgovernmental networks have emerged in certain policy realms (such as competition policy), but remain insignificant in others.⁵⁵ Additionally, transnational networks have assumed a vital role but have not managed to take on the role predicted by more optimistic advocates of a global civil society.⁵⁶ The result is a complex

⁴⁹ Francesca Bignami & Steve Charnovitz, *Transatlantic Civil Society Dialogues*, in *TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY* 255, 259 (Mark A. Pollack & Gregory C. Shaffer eds., 2000).

⁵⁰ Pollack & Shaffer, *Who Governs?*, *supra* note 3, at 303–04.

⁵¹ Abbott, *supra* note 42, at 1008.

⁵² See, e.g., Raustiala, *supra* note 45, at 567 (“The representative character of NGOs has not, however, been established empirically; indeed, many powerful NGOs come from a small minority of advanced industrial states, and NGO views are often far from reflective of the public at large.”); see also Slaughter, *Governing*, *supra* note 10, at 196.

⁵³ Abbott, *supra* note 42, at 1009.

⁵⁴ Picciotto, *North Atlantic Cooperation*, *supra* note 40, at 516.

⁵⁵ Pollack and Schaffer argue that governance based on transgovernmental networks is limited to policy areas in which regulators enjoy significant independence from political decisionmakers and in which regulatory approaches are similar, whereas the intergovernmental model of governance remains predominant when these preconditions are not present. Pollack & Shaffer, *Who Governs?*, *supra* note 3, at 298–99. For example, disputes over genetically modified food and beef hormones provide examples of regulatory conflicts that are managed through interstate litigation rather than through transgovernmental networks.

⁵⁶ *Id.* at 293. Cf. KEN CONCA & RONNIE LIPSCHUTZ, *THE STATE AND SOCIAL POWER IN GLOBAL ENVIRONMENTAL POLITICS* (1993) (arguing that a common environmental fate among sovereign states, with which traditional authority finds itself increasingly unable to deal effectively, will lead to an upsurge in the political involvement of grass-roots and other nongovernmental groups); PAUL K. WAPNER,

interaction and interdependence between all three forms of governance—a web of mixed networks, which by some accounts has become the dominant form of governance.⁵⁷

Mixed networks exist beyond the transatlantic sphere, characterizing global governance more generally. However, no single global governance model embracing all policy spheres exists. There are significant differences in governance structures, cultures, and traditions across nations and policy domains. Consequently, the relative weight of intergovernmental, transgovernmental, and transnational actors in the mixed model of network governance depends on the policy realm and geographic region under consideration. Furthermore, the comparative importance of each of these actors depends to a significant extent on the relative power and influence of the actor within each network. Those possessing fewer resources exist on the margins of governance, whereas those with significant resources have more influence over policy outcomes.⁵⁸

E. A Note on Democracy and Global Governance

Supranational institutions are not self-legitimizing. They continue to derive their legitimacy from the constitutional structures of the institutions' member states. All supranational bodies face a similar dilemma: how to balance the legitimate prerogatives of the organization's sovereign member states with the broader interest of the overall membership,⁵⁹ and how to achieve the benefits of international cooperation without sacrificing legitimate concerns over democracy. To a greater or lesser extent, these concerns inform an understanding of each of the governance regimes discussed in this Article. Accordingly, before moving on, it is appropriate to address them briefly.

1. Democratic Deficit

Government networks can depoliticize issues by removing them from a domestic political forum to a technocratic sphere.⁶⁰ The networks of agencies exercise unchecked administrative discretion, which extends beyond political or legal control.⁶¹ Democratic deficit occurs when legitimate, politically accountable decisionmakers are replaced by technocratic, unresponsive

ENVIRONMENTAL ACTIVISM AND WORLD CIVIC POLITICS (1996) (discussing the expansion of influence of environmental groups beyond their traditional lobbying of sovereign states to participation in global civil society); Ronnie D. Lipschutz, *Reconstructing World Politics: The Emergence of Global Civil Society*, 21 *MILLENNIUM* 389, 391 (1992) (discussing the emergence of transnational political networks while observing that nation-states are likely to be around for some time to come); Christopher Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law?*, 4 *EUR. J. INT'L L.* 447, 451 (1993) (stating that there have been numerous regional and global organizations created over the last few decades, but that their presence alone does not necessarily mean that any significant changes have taken place to the structure of the international system).

⁵⁷ Pollack & Shaffer, *Who Governs?*, *supra* note 3, at 301.

⁵⁸ *Id.*

⁵⁹ Lindseth, *supra* note 25, at 735, 737.

⁶⁰ Slaughter, *Accountability*, *supra* note 21, at 363.

⁶¹ Lindseth, *supra* note 25, at 714.

administrative agencies without any direct accountability to the people, thereby shifting decisionmaking processes away from democratic governance.⁶²

Democratic deficit is a growing concern in most supranational institutions. Principles of market and principles of democracy seem to be clashing.⁶³ Our enormous mission is to let globalization proceed; at the same time, we need to incorporate democratic values into decisionmaking. We ought to do this by creating monitoring mechanisms and guaranteeing transparency in supranational decisionmaking. Instead of focusing our attention on whether the administrative agencies operate under explicit accountability mandates, we should ask whether their decisions are made in the context of well-informed discourse embracing as broad a representation of the public as possible.⁶⁴

What is needed is a deepening of open governance. Transparent, open, inclusive governance includes access to documents and the opportunity to monitor and criticize decisionmaking and to participate in a dialogue. In essence, global governance ought to be participatory and sensitive to public opinion and concerns of the world as a whole. At its best, convergence is achieved as a result of a lively dialogue among all interested parties leading to the adoption of policies that reflect a wide array of preferences. The optimal model of governance should thus be representative, embracing the concerns of the powerful and powerless alike.

Democratic checks on administrative decisionmaking also should not be overlooked in constructing a global governance model for antitrust laws. Legitimacy crises could well threaten achievements in increased convergence and cooperation and weaken the credibility of an international antitrust regime. If the process of regulatory cooperation among antitrust agencies is geared towards more transparent, inclusive, and participatory decisionmaking among agencies, the legitimacy of the decisionmaking is enhanced and accountability concerns decrease.⁶⁵ The direct engagement of civil society in international antitrust policymaking would also have the potential to alleviate apprehensions and furnish a regulatory process with desired elements of legitimacy.

2. *Regulatory Imperialism*

Some commentators argue that international law is increasingly employed to circumvent sovereignty.⁶⁶ This criticism applies to transgovernmental as well as intergovernmental policymaking. Critics of government networks allege that international networks serve as devices for the most powerful countries to impose their policy preferences on less powerful states.⁶⁷ The

⁶² Slaughter, *Governing*, *supra* note 10, at 193.

⁶³ Ludger Kühnhardt, *Globalization, Transatlantic Regulatory Cooperation, and Democratic Values*, in *TRANSATLANTIC REGULATORY COOPERATION* 481, 484 (George A. Bermann et al. eds., 2000).

⁶⁴ Picciotto, *North Atlantic Cooperation*, *supra* note 40, at 515.

⁶⁵ Robert Howse, *Transatlantic Regulatory Cooperation and the Problem of Democracy*, in *TRANSATLANTIC REGULATORY COOPERATION* 469, 471 (George A. Bermann et al. eds., 2000).

⁶⁶ See, e.g., Drezner, *supra* note 5, at 323.

⁶⁷ See, e.g., Pollack & Shaffer, *Who Governs?*, *supra* note 3, at 295 (arguing that the New Transatlantic Agenda "can be read as an effort by the [Clinton] administration and the [European]

notion of regulatory imperialism suggests that powerful parties like the European Union and United States have managed to institutionalize their joint preferences and incorporate their concerns within the international trading system by means of their relative power advantage.⁶⁸ The expertise and superior resources of U.S. government institutions, for example, enable them to exercise influence over less powerful government agencies.⁶⁹

Slaughter points out that the informality, flexibility, and lack of coercion of government networks, however, prevent powerful states from imposing their will on others.⁷⁰ The success of the networks, she argues, is based on engagement and persuasion and on the establishment of mutual trust among the participants, not on power and coercion.⁷¹ This analysis is correct to emphasize the lack of coercive elements and the inability of the networks to formally bind less powerful states to the policies and practices of more powerful states. However, if one believes that “soft law,” persuasion, and voluntary convergence have palpable impact, one has to take the concerns over regulatory imperialism seriously. Even if we understand transgovernmental networks merely as loosely cooperating agencies exchanging information and developing best practices, issues of regulatory imperialism remain. Information flow, which is more likely to proceed from the agencies of developed countries to the agencies of developing countries, creates a notable asymmetry and raises the question of external accountability of one nation to another.⁷²

Despite the dangers explored above, the connotation of the term “regulatory imperialism” overstates the negative aspects of international regulatory cooperation and overlooks the positive features of regulatory reform, such as the ability and willingness of more powerful nations to aid less powerful nations and provide desperately needed expert assistance. However, while it is in the interest of all nations to create stable and efficient regulatory regimes all over the world, this is not always achieved by imposing the systems of powerful states on less powerful ones. The apprehensions of

Commission to institutionalize their joint preference for the ongoing liberalization of transatlantic and global trade and investment.”); see also Drezner, *supra* note 5, at 323 (alleging that “the United States and European Union employ diplomatic, economic, and other forms of coercion to codify their preferences in international law.”). Additionally, transgovernmental networks could be argued to favor the powerful countries at the expense of the less powerful ones even more so than international organizations, as transgovernmental networks do not provide any framework within which all countries would have equal voting rights as some of the international institutions do.

⁶⁸ Pollack & Shaffer, *Who Governs?*, *supra* note 3, at 295. The idea of regulatory imperialism and the view that international cooperation only reflects power relations correspond to realist theories on international relations. Drezner goes further by saying that the European Union and the United States use coercion to codify their preferences in international law, using “forum-shopping” among different governmental organizations to advance their interests by pushing international law to desired ends. The strategy employed first involves an agreement among a coalition of the willing, followed by enticing the resisting sovereign states to agree. Drezner admits, however, that the advance of international law by the means described above has occasionally helped to preserve democratic sovereignty from antidemocratic impulses. See Drezner, *supra* note 5, at 323, 329, 332.

⁶⁹ Slaughter, *Governing*, *supra* note 10, at 205.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Slaughter, *Accountability*, *supra* note 21, at 364–65.

developing countries cannot be disregarded, and a high level of sensitivity has to be exercised when imposing regulatory models on them.

III. ANTITRUST LAW AND GLOBAL GOVERNANCE

Antitrust laws shape the market order and define how much power large firms should have in society and how actively the state should be involved in regulating economic actors. This task has become increasingly difficult in the wake of globalization and the integration of markets. The inability of national antitrust regimes to adequately control the increasingly international market conduct of multinational enterprises has been widely recognized.⁷³

There is a growing consensus that antitrust laws have to be reassessed given the new, dynamic, and often borderless economic environment that they are meant to regulate. To seek an appropriate framework for antitrust law in the era of global markets is to attempt to lay out a vision of the roles and relationships among individuals, enterprises, and governments in the world economy.⁷⁴ The optimal antitrust regime for the integrated economy should produce a sound regulatory framework for multinational corporations. It should also provide antitrust authorities across jurisdictions with adequate and effective devices to control the market power and conduct of corporations. Lastly, and most importantly, the international antitrust scheme should promote greater global economic efficiency and prosperity for the benefit of consumers throughout the world.

Considerably less consensus, however, has emerged with respect to *how* this reassessment of national antitrust laws ought to be accomplished.⁷⁵ Consequently, the ideal vision of a global antitrust policy—one that assures the competitiveness of global markets and the maximization of global welfare—is subject to intense dispute.⁷⁶

⁷³ See discussion *infra* Part III.B; Sir Leon Brittain, *The Need for Multilateral Framework of Competition Rules*, in TRADE AND COMPETITION POLICIES, EXPLORING THE WAYS FORWARD / OECD 29 (1999) (discussing how the interaction between competition policy and trade can be best addressed in a global economy); Fox, *Antitrust and Regulatory Federalism*, *supra* note 1 (analyzing regulatory federalism and regulatory competition with respect to competition law); Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501 (1998) [hereinafter Guzman, *Is International Antitrust Possible?*] (analyzing the economic incentives facing countries when selecting an antitrust policy).

⁷⁴ See Spencer Weber Waller, *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust*, 42 U. KAN. L. REV. 557, 604 (1994) (“Competition policy broadly construed is the jurisprudence of capitalism, and it speaks to a society’s view of the role and the relationship of the individual, the enterprise and the government in a pluralistic society and economy.”).

⁷⁵ See Brian Portnoy, *Constructing Competition: Antitrust and the Political Foundations of Global Capitalism* 35 (2000) (unpublished Ph.D. dissertation, University of Chicago) (on file with the University of Chicago).

⁷⁶ For example, the European Union and the United States, possessing the most extensive and elaborate antitrust regimes in the world, disagree to a significant extent about the appropriate treatment of antitrust law at the international level. The European Union has urged for negotiations to be held on an international competition policy agreement that establishes minimum standards for competition policy and enforcement. The agreement, according to the European Union, should be grounded in the WTO framework. The United States has been reluctant to agree to the idea of an international antitrust regime and prefers regulatory cooperation based on bilateral agreements between national and regional antitrust

Whatever the embodied goals of a global antitrust policy might be, however, it is evident that the existing, suboptimal antitrust policy hinders the functioning of global markets and the competition-based economy. The lack of adequate international convergence and cooperation not only inhibits the activities of multinational corporations and national antitrust authorities, but also deprives consumers throughout the world of the full benefits of open trade and protection that efficient antitrust laws would provide.

Below, I explore alternative ways to govern antitrust law in the new global era. The focus of the inquiry will be on the three models of global governance discussed above (intergovernmental, transgovernmental, and transnational) as they apply to the antitrust sphere. Before entering into a discussion on the advantages and disadvantages of each model, I will briefly lay out the background against which the internationalization of antitrust must be discussed, namely (1) the differences in national antitrust laws, (2) the reasons to seek convergence and cooperation, and (3) the history of antitrust cooperation at the international level to date.

A. Differences in National Antitrust Regimes

Currently, approximately eighty to one hundred countries have established national antitrust regimes, and more than half of these regimes were adopted in the last decade.⁷⁷ These countries have designed their antitrust policies to serve a variety of goals that differ markedly from country to country. In the United States, for example, the primary goal of antitrust laws is to encourage the efficient functioning of competitive markets and maximize consumer welfare, whereas Canadian antitrust laws view the promotion of small and medium-sized enterprises as being at least as important.⁷⁸ The European Union takes a view on antitrust that goes beyond efficiency concerns to include consideration of distributional effects, fairness, and broader goals of market integration. Some view Japan's antitrust laws as designed to promote significant industrial policy goals, which is demonstrated by its lenient treatment of certain cartel arrangements.⁷⁹

However, the diverse goals that countries pursue through antitrust laws have in some ways converged in recent years.⁸⁰ This convergence is mostly due to growing economic integration, which has created a need for national

authorities. See, e.g., Joel I. Klein, *A Reality Check on Anti-trust Rules in the World Trade Organization and a Practical Way Forward on International Anti-trust*, in *TRADE AND COMPETITION POLICIES, EXPLORING WAYS FORWARD* 41, 41–42 (1999) [hereinafter Klein, *A Reality Check*].

⁷⁷ U.S. DEP'T JUSTICE, ANTITRUST DIV., INT'L COMPETITION ADVISORY COMM. TO THE ATT'Y GENERAL AND ASSISTANT ATT'Y GENERAL FOR ANTITRUST, FINAL REPORT 33 (2000) [hereinafter ICPAC REPORT] (stating that there are 80 countries with antitrust regimes). However, some of the most recent estimates indicate that there are between 90 and 100 jurisdictions that have adopted antitrust laws. See Konrad von Finckenstein, *Recent Developments in the International Competition Network*, Address at the Forum on International Competition Law (Feb. 6, 2003), available at http://www.internationalcompetitionnetwork.org/speech_aba.html.

⁷⁸ Guzman, *Is International Antitrust Possible?*, *supra* note 73, at 1539.

⁷⁹ Julian Epstein, *The Other Side of Harmony: Can Trade and Competition Laws Work Together in the International Marketplace?*, 17 *AM. U. INT'L L. REV.* 343, 358–59 (2002).

⁸⁰ *Id.* at 359.

antitrust authorities to cooperate and exchange views on common antitrust concerns. Increased contacts and communication have led to a cross-fertilization of ideas and the gradual development of a common approach to certain issues. By now, there is widespread consensus among nations regarding the anticompetitive nature of certain types of conduct. A consensus at some level could be reached, for example, with respect to how to treat price fixing, market division, and bid rigging.⁸¹ However, outside this relatively limited realm there remain areas of divergence of national antitrust laws that continue to cause friction.⁸²

The differences between domestic antitrust regimes have the potential to contribute to "system friction."⁸³ In other words, one country's antitrust laws may facilitate conduct that another country's laws prohibit. In the domain of antitrust, there are no supranational rules for choice of law, jurisdictional priority, or proportionality to restrict enforcement. As a result, companies are always subject to the most restrictive jurisdiction.⁸⁴

There have been several attempts to achieve greater convergence among national antitrust regimes and to increase cooperation among national antitrust authorities.⁸⁵ Intensified cooperation among regulators has succeeded in facilitating enforcement and achieving greater convergence among antitrust laws.⁸⁶ This increased convergence has in turn fostered cooperation, as there have been fewer disagreements to overcome. Accordingly, cooperation and convergence are mutually reinforcing.⁸⁷

⁸¹ Several documents reflect this consensus. For example, see the 1998 OECD Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, OECD Doc. C(98)35/Final (1998); see also Recommendation of the Council for Cooperation between Member Countries in Areas of Potential Conflict, OECD Doc. C(86)65/Final (1986); Recommendation of the Council on Competition Policy and Exempted or Regulated Sectors, OECD Doc. C(79)155/Final (1979).

⁸² Fox, *Antitrust and Regulatory Federalism*, *supra* note 1, at 1783. Approaches towards mergers, for example, vary significantly across jurisdictions. Unlike the United States and Germany, the European Union, Japan, and France, for example, are more concerned with market conduct than market structure. Regimes also differ in terms of the capital thresholds that trigger a merger review. In addition to substantial differences in national merger control policies, there are remarkable procedural differences, such as variant notification procedures. See Portnoy, *supra* note 75, at 101.

⁸³ Sylvia Ostry, *Policy Approaches to System Friction: Convergence Plus*, in NATIONAL DIVERSITY AND GLOBAL CAPITALISM 333, 333 (Suzanne Berger & Ronald Dore eds., 1996). According to Ostry, "harmonization of competition policy will be necessary but not sufficient to mitigate system friction that has emerged from the more intense competition within the Triad (the EC, the United States, and Japan) in high-tech sectors." *Id.*

⁸⁴ Fox, *Antitrust and Regulatory Federalism*, *supra* note 1, at 1805.

⁸⁵ For purposes of this discussion, "convergence" refers to increasing similarity in substantive antitrust standards and domestic policy outcomes, while "cooperation" refers to mutual assistance among antitrust authorities such as coordination of enforcement, exchange of information, and assistance in gathering evidence.

⁸⁶ *Report on the Internationalization of Competition Law Rules: Coordination and Convergence*, 1999 A.B.A. SEC. ANTITRUST L. & INT'L L. & PRAC. 37-38, available at <http://www.abanet.org/antitrust/convexe.html> (noting that the OECD is the "forerunner of positive comity").

⁸⁷ Portnoy, *supra* note 75, at 4.

B. *Reasons for Seeking Increased Cooperation and Convergence*

The lack of an international approach to antitrust law poses a number of problems that can be solved only through increased convergence and cooperation among national antitrust regimes. First, there is serious concern that the benefits of trade liberalization can be undermined by the restrictive business practices of private enterprises. The benefits of successfully eliminating government barriers to trade can be frustrated when these barriers are replaced by anticompetitive practices.⁸⁸ Consequently, one of the most compelling reasons for internationalization of antitrust law and policy has been the need to complement the trade liberalization process.⁸⁹

Second, the need for intensified international cooperation is supported by the existence of international cartels. National antitrust authorities are unable to effectively investigate and prosecute price-fixing and territorial allocation that stretch across jurisdictional boundaries. Investigations often require gathering evidence spread throughout the world that is difficult to obtain without cooperation among antitrust authorities.⁹⁰

Third, one may fear the potential emergence of global oligopolies and monopolies, which cannot be regulated successfully by national antitrust laws alone. Once industries consolidate and a global monopoly or oligopoly develops, it may be too late to invent an efficient remedy.⁹¹

Finally, the existence of duplicative enforcement policies is a critical argument for increased convergence and international cooperation. Globally competitive enterprises are subject to divergent antitrust regimes in multiple jurisdictions. Investigations taking place simultaneously in multiple jurisdictions burden both businesses and antitrust authorities. Multinational corporations operating across jurisdictions face cumbersome procedures and conflicting legal standards with which they need to comply. Inconsistent procedures cause unnecessary delays, increase transaction costs, and reduce predictability within the legal environment in which businesses operate.⁹² If a more consistent antitrust framework existed, national antitrust agencies would also save costs and be able to work more effectively. These agencies would undoubtedly benefit from coordinated investigations, jointly negotiated remedies, and various work-sharing arrangements.

In the absence of a coordinated effort, concurrent investigations may lead to conflicting substantive outcomes. The recent proposed merger between two

⁸⁸ F.M. SCHERER, *COMPETITION POLICIES FOR AN INTEGRATED WORLD ECONOMY* 12, 15–16 (1994).

⁸⁹ ICPAC REPORT, *supra* note 77, at 216–18 (outlining a number of industries where private anticompetitive practices in fact form barriers to market access).

⁹⁰ Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478, 479–480 (2000). The prominence of international cartel enforcement is well illustrated in statistics from the Department of Justice: over ninety percent of criminal fines collected in 1997 and 1998 derived from international cartel prosecution. See Douglas Melamed, *Antitrust Enforcement in the Global Economy*, Address before the Fordham Corporate Law Institute, 25th Annual Conference on International Antitrust Law and Policy (Oct. 22, 1998), available at <http://www.usdoj.gov/atr/public/speeches/2043.htm>.

⁹¹ Tarullo, *supra* note 90, 479–481.

⁹² *Id.* at 482.

U.S. corporations, General Electric Company and Honeywell International Inc., demonstrated this danger.⁹³ The merger was approved by the U.S. antitrust authorities, but blocked by the Commission of the European Communities ("European Commission"). Even though inconsistent decisions are rare, their mere possibility creates uncertainty and diminishes the credibility of the antitrust system in general.

The problems relating to burdensome enforcement measures are especially noteworthy with respect to conflicting premerger notification schemes. A rapidly increasing number of countries has adopted premerger screening procedures. To date, approximately sixty countries have introduced national merger control regimes and the number of jurisdictions is growing.⁹⁴ This growth has increased the costs imposed on transnational mergers that require clearance in several jurisdictions. For each merger, the kind of information that must be provided to each antitrust authority often differs, and the waiting periods during which the authorities analyze the merger vary among the merger regimes. Laws are not identical and, even when identical, are interpreted and applied differently. A country whose market is only slightly affected can delay a complex transaction that has already been successfully cleared in some twenty or thirty other jurisdictions.⁹⁵

The controversies related to extraterritorial application of national antitrust laws have further encouraged countries to seek more cooperative and less conflict-ridden ways to handle cross-border antitrust matters.⁹⁶ The unilateral application of antitrust law is seen as an encroachment on the sovereignty and territorial integrity of another nation. Finding ways to address collective problems jointly with other interested parties leads to more acceptable outcomes and serves the goals of international antitrust enforcement more aptly.

⁹³ Commission Decision of 3 July 2001 Declaring Concentration to be Incompatible with the Common Market and the EEA Agreement, General Electric/Honeywell, COMP/M.2220 (2001) [hereinafter Commission Decision of 3 July 2001].

⁹⁴ ICPAC REPORT, *supra* note 77, at 33 (stating that at least sixty jurisdictions provide for merger control regimes). For the list of individual countries with established merger regulation, see Annex 2-C of the ICPAC Report. *Id.* annex 2-C.

⁹⁵ Fox, *Antitrust and Regulatory Federalism*, *supra* note 1, at 1803. The divergence between different national merger control laws is more procedural than substantive and should therefore be easier to overcome. The OECD has attempted to streamline transnational merger regulation by issuing a "Report of Notification of Transnational Mergers." See Report on Notification of Transnational Mergers, Committee on Competition Law and Policy, OECD Doc. DAF/CLP(99)2/Final (Feb. 23, 1999). The OECD Recommendation includes a draft "Framework for Notification and Report Form for Concentrations." Until today, however, not even procedural harmonization has been achieved among merger regimes.

⁹⁶ The concept of extraterritoriality has always been a highly controversial issue. See P.M. Roth, *Reasonable Extraterritoriality: Correcting the 'Balance of Interests,'* 41 INT'L & COMP. L.Q. 245, 251-52 (1992) (discussing the contradictory nature of extraterritoriality); see also Anu Piilola, *Is There a Need for Multinational Competition Rules?*, 10 FIN. Y.B. INT'L L. 263, 276-282 (1999) (discussing the controversial nature of extraterritoriality and the criticism and retaliatory action in which it has resulted); Aidan Robertson & Marie Demetriou, *'But That Was in Another Country...': The Extraterritorial Application of U.S. Antitrust Laws in the U.S. Supreme Court*, 43 INT'L & COMP. L.Q. 417, 420 (1994) (discussing the U.S. Supreme Court's consideration of international comity when deciding whether to assert extraterritorial jurisdiction).

C. *History of International Cooperation and Convergence Efforts*

The 1948 Havana Charter (the “Charter” or the “Havana Charter”) was the first attempt to provide an international framework for regulating anticompetitive practices.⁹⁷ Chapter V of the Charter was the first time an international agreement attempted to impose an obligation on its contracting parties to prevent restrictive business practices of private enterprises.⁹⁸ The Charter fell through, however, primarily because of the opposition it faced in the U.S. Congress.⁹⁹

Since the failure of the Havana Charter, there have been subsequent efforts to address the issue at the international level, but thus far none of the proposals has led to the creation of a truly international antitrust regime. Discussions on international aspects of antitrust law have taken place in international institutions such as the United Nations, the General Agreement on Tariffs and Trade (“GATT”), the Organization for Economic Cooperation and Development (“OECD”), and, most recently, within the WTO framework.¹⁰⁰ Past efforts and the potential of the WTO and the OECD to provide a setting for future international antitrust issues will be discussed below.

Despite the unsuccessful attempts to establish an international antitrust regime, cooperation and convergence have gradually proceeded partly within and partly outside the scope of international institutions. Aggressive extraterritorial application of domestic antitrust laws characterizing the postwar era has given way to comity and cooperation among antitrust authorities.¹⁰¹ Bilateral cooperation agreements have arisen among national antitrust authorities and have resulted in continuously increasing convergence.¹⁰²

Achieving regional convergence has been more successful than convergence efforts at the global level. The most extensive convergence can be found in the European Union. European Community (“E.C.”) competition law is the only example of a far-reaching, supranational antitrust architecture at the regional level. The E.U. Member States have, to a significant extent, ceded their sovereignty to this supranational body. The common antitrust regime that has resulted from this cession of sovereignty can be seen as an essential component of economic integration and the creation of the single market.¹⁰³

⁹⁷ *Havana Charter for an International Trade Organization*, U.N. Conference on Trade & Development, Final Act and Related Documents, art. 46.1, U.N. Doc. E/Conf. 2/78 (1948).

⁹⁸ Nataliya Yacheistova, *The International Competition Regulation: A Short Review of a Long Evolution*, 18 *WORLD COMPETITION, L. & ECON. REV.* 99, 99–100 (1994).

⁹⁹ SCHERER, *supra* note 88, at 89.

¹⁰⁰ Ever since the Havana Charter, the United States has held de facto veto power over the creation of an international antitrust code. The United States remains the main opponent of a multilateral antitrust regime by opposing the incorporation of antitrust provisions into the WTO framework. *See* Portnoy, *supra* note 75, at 196.

¹⁰¹ *Id.* at 40.

¹⁰² *See, e.g.*, Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws, June 15, 1995, E.C.–U.S., 1995 O.J. (L 132) [hereinafter E.U.–U.S. Agreement on Competition Law].

¹⁰³ *See* TREATY ESTABLISHING THE EUROPEAN COMMUNITY, 2002 O.J. (C 325).

Outside the European Union, the most developed regional antitrust agreement is the one in existence between Australia and New Zealand. This agreement is built on OECD recommendations¹⁰⁴ and is part of the Closer Economic Relations Trade Agreements between the countries. These two countries have largely harmonized their respective competition laws and even replaced antidumping duties with antitrust law.¹⁰⁵ However, it is important to note that such a comprehensive agreement has taken place in the context of an extensive trade agreement between countries with highly similar antitrust laws and legal cultures. The North American Free Trade Agreement (“NAFTA”) incorporates rather modest antitrust provisions, stating that the United States, Canada, and Mexico should “adopt or maintain measures to proscribe anticompetitive business conduct and take appropriate action with respect thereto, recognizing that such measures will enhance the fulfillment of the objectives of this Agreement.”¹⁰⁶ No measures have been taken to establish specific standards or procedural rules applicable to anticompetitive conduct affecting trade between NAFTA states.¹⁰⁷

Academic experts have also contributed to the discussion on international antitrust rules. In 1993, the Munich Group, a group of academic experts and practitioners, outlined one of the most far-reaching proposals. The proposal consisted of a model agreement, the Draft International Antitrust Code (“DIAC”), which could be incorporated into the WTO framework.¹⁰⁸ The DIAC discusses the minimum standards that would need to be obeyed by contracting parties and suggests that an international antitrust agency would be established to safeguard the consistent application of national antitrust provisions. In the end, this proposal received strong criticism, but succeeded in stimulating worldwide debate on the need for an increasingly international approach to antitrust issues.¹⁰⁹

Another group of experts was formed by the European Commission to analyze alternative ways to internationalize antitrust policy (the “1995 Expert Group”).¹¹⁰ The 1995 Expert Group Report, entitled “Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules,” concluded that bilateral cooperation should be further extended and enhanced.¹¹¹ In addition, this report recommended that a multilateral framework for antitrust ought to be created to ensure that certain basic

¹⁰⁴ See *infra* note 145 and accompanying text.

¹⁰⁵ Portnoy, *supra* note 73, at 173.

¹⁰⁶ NORTH AMERICAN FREE TRADE AGREEMENT, ch. 15, § 1501.

¹⁰⁷ R.O. Cunningham, & A.J. LaRocca, *Harmonization of Competition Policies in a Regional Economic Integration*, 27 LAW & POL’Y INT’L BUS. 879, 898–99 (1996).

¹⁰⁸ See generally Wolfgang Fikentscher, *Competition Rules for Private Agents in the GATT/WTO System*, 1994 AUSSENWIRTSCHAFT (analyzing DIAC); Bernard Phillips, *Comments on the Draft International Antitrust Code*, 1994 AUSSENWIRTSCHAFT (discussing DIAC).

¹⁰⁹ Ernst-Ulrich Petersmann, *Competition-Oriented Reforms of the WTO World Trade System—Proposals and Policy Options*, in TOWARDS WTO COMPETITION RULES 43, 48 (Roger Zäch ed., 1999).

¹¹⁰ See Report of the Group of Experts, *Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules*, European Commission, Brussels (1995), http://europa.eu.int/comm/competition/international/streng_h_en.pdf.

¹¹¹ Petersmann, *supra* note 109, at 50–53 (outlining the main points of the Expert Group Report).

competition principles would be respected and incorporated into national antitrust laws. Implicit in this recommendation is a progressive approach for attaining its ambitious goals. For example, minimum standards could first be adopted among a number of developed antitrust regimes. Later, the agreement could be expanded to include other states and to incorporate broader substantive rules.¹¹²

IV. INTERGOVERNMENTAL GOVERNANCE OF INTERNATIONAL ANTITRUST LAW

This Part discusses various institutional contexts in which an agreement on international antitrust could be negotiated and implemented. The cooperation and monitoring that would be required pursuant to the signing of the agreement would likely be rooted in some institutional setting if the coverage of the agreement were extensive. This intergovernmental agreement could take place within the framework of an existing international institution or within a new, independent international antitrust body. A far more unlikely alternative is that an agreement could be negotiated outside the scope of any institutional framework.

Institutions often shape the policies they are supposed to implement. Common antitrust policy could therefore take different forms and yield divergent results depending on the institutional alternative chosen. The institutional advantages and disadvantages differ depending on whether one would incorporate antitrust law and policy into a multi-issue institution or into an independent, one-issue institution that would exclusively focus on antitrust matters. An agreement within a multi-issue institution, such as the WTO, for example, would likely be influenced by the norms and procedures governing that trading regime.¹¹³ The institutional alternatives that have received the most attention in the context of internationalization of antitrust law are the WTO, the OECD, and an independent, international antitrust forum.¹¹⁴

¹¹² Jean-Francois Pons, *International Cooperation in Competition Matters—Where Are We Four Years after the Van Miert Report?*, in *TOWARDS WTO COMPETITION RULES* 195, 196–97 (Roger Zäch ed. 1999).

¹¹³ Tarullo, *supra* note 90, at 479, 503.

¹¹⁴ The third institution that addresses antitrust concerns is the United Nations through the Conference on Trade and Development (UNCTAD). See UNCTAD website, at <http://www.unctad.org>. However, I see the UNCTAD as the least feasible alternative for hosting an international antitrust agreement and do not analyze its advantages and disadvantages as an institution within the scope of this study. For the purpose of comparing and contrasting intergovernmental, transgovernmental, and transnational models of governance, the WTO and the OECD provide sufficient examples of institutionalized intergovernmental alternatives.

A. *The Capacity and the Desirability of the WTO to Foster International Convergence in Antitrust Law*

One of the most compelling arguments for the establishment of an international antitrust agreement is that the restrictive business practices of private enterprises undermine the gains of trade liberalization that have been realized through the successful elimination of governmental trade barriers.¹¹⁵ Thus, the potential for anticompetitive conduct to offset the benefits guaranteed by GATT has stimulated the debate on integrating trade and antitrust issues through the incorporation of antitrust provisions into the WTO framework.¹¹⁶

The WTO is among the most successful of the various international economic organizations. The accomplishment of the WTO in opening world markets has drawn more and more issues into the institution's framework, including antitrust policy.¹¹⁷ Even though the WTO can be argued to have the greatest capacity among existing institutions for hosting an international antitrust agreement, the inclusion of antitrust within the WTO framework has been highly controversial. The European Union has urged the commencement of negotiations on an international antitrust agreement through the WTO. The proposal of the European Commission requires WTO member states to (1) enact national antitrust laws that would entail at least core antitrust provisions, (2) establish an effective enforcement mechanism for substantive antitrust laws respecting principles of nondiscrimination and transparency, (3) set up cooperation devices among antitrust authorities, and (4) provide for the gradual convergence of national practices.¹¹⁸

Canada has joined the European Union in advocating the adoption of antitrust issues into the WTO agenda whereas the United States has repeatedly rejected the initiative.¹¹⁹ The United States most worries about the inability to overcome existing national differences in antitrust regimes.¹²⁰ The lack of national antitrust laws in almost half of the WTO countries may also complicate the establishment of an international antitrust regime. Furthermore,

¹¹⁵ Portnoy, *supra* note 75, at 217 (outlining a number of industries where private anticompetitive practices in fact form barriers to market access).

¹¹⁶ See, e.g., TOWARDS WTO COMPETITION RULES (Roger Zäch ed., 1999) (discussing key issues from a 1998 WTO report on trade and competition); Annelie Bongardt, *Vertical Interfirm Relations: A Competition Policy Issues?*, in COMPETITION POLICY IN THE GLOBAL ECONOMY: MODALITIES FOR CO-OPERATION 307, 338 (Leonard Waverman et al. eds., 1997) (stating that "[c]ompetition policy is beyond WTO rulings" and that "the WTO does not encompass every practice through which governments or industries can protect their home markets"); Phedon Nicolaidis, *For a World Competition Authority, The Role of Competition Policy in Economic Integration and the Role of Regional Blocs in Internationalizing Competition Policy*, 30 J. WORLD TRADE 131 (1996) (discussing the question of "whether the WTO is the right institution to deal with distortions to competition" between countries).

¹¹⁷ Tarullo, *supra* note 90, at 487-494.

¹¹⁸ Working Group on the Interaction between Trade and Competition Policy, *Communication from the European Community and Its Member States*, WTO Doc. W/WGTCP/W/115 (May 25, 1999); see also Brittain, *supra* note 73, at 29-31 (discussing the need for a new framework agreement on competition).

¹¹⁹ Fox, *Antitrust and Regulatory Federalism*, *supra* note 1, at 1787.

¹²⁰ Klein, *A Reality Check*, *supra* note 76, at 41-42.

the United States is concerned that negotiations at the international level would be cumbersome, thereby resulting in a weak, ineffective regime.¹²¹ Instead, the United States promotes a gradual voluntary convergence of antitrust law and emphasizes the development of a “culture of competition.”¹²²

Despite the difference of opinion between the European Union and the United States, the WTO established the Working Group on Interaction between Trade and Competition Policy during the 1996 WTO Ministerial Conference in Singapore to investigate the potential of private restraints to undermine the benefits of trade liberalization.¹²³ Its tasks are analytical and exploratory, and its purpose is not to negotiate new rules or commitments.

1. *Advantages of Incorporating Antitrust into the WTO Framework*

The primary advantages of the WTO over other forums are its universal membership and its experience in successfully managing the negotiation and implementation of complex international agreements.¹²⁴ The fact that many countries, including the United States, submit major trade agreements to their legislatures for approval also has the benefit of increasing the legitimacy of the WTO agreements.¹²⁵

Due to the interdependence between antitrust and trade policies, there is a great need to consider the implications of one policy regime vis-à-vis the other. The inclusion of antitrust law and policy into the WTO would allow a greater coordination of the respective policy realms. The WTO would have the ability to consider the interactions between trade and competition and adopt policies in one area that do not counteract or frustrate the measures taken in another area.¹²⁶ Consequently, the WTO can effectively manage interdependence, avoid fragmented policymaking, and foster efficiency and consistency in the trade and antitrust domains.

¹²¹ Joel I. Klein, *No Monopoly on Antitrust: It Would Be Premature for the WTO to Seek to Enforce Global Competition Rules*, FIN. TIMES, Feb. 13, 1998, at 20.

¹²² The creation of a Global Competition Initiative, proposed by the United States, has been a recent step taken to explore the furthering of international cooperation in the antitrust field. The purpose of the Initiative is to establish a forum where those responsible for the development and management of antitrust policy could discuss issues of common interest. See Klein, *Time for a Global Competition Initiative?*, *supra* note 2 (discussing the need for a “global competition initiative”). The European Union has given its support to the Initiative, but has emphasized that the forum must be regarded as complementary to, not as an alternative to, the measures taken on antitrust within the framework of the WTO. See Mario Monti, *Competition Policy and Globalisation*, Address Before the American Bar Association Meeting, Washington, D.C. (Mar. 29, 2001), <http://europa.eu.int/rapid/start/cgi/guesten.ksh> (enumerating issues that the proposed forum should ideally discuss); see also Alexander Schaub, *The Global Competition Forum: How It Should be Organised and Operated*, Address to the European Policy Centre, Brussels (Mar. 14, 2001), http://europa.eu.int/comm/competition/speeches/text/sp2001_003_en.pdf (discussing ways to overcome barriers to antitrust enforcement).

¹²³ Ministerial Conference, *Singapore Ministerial Declaration*, WTO Doc. WT/MIN(96)/DEC (Dec. 18, 1996).

¹²⁴ Andrew Guzman, *Antitrust and International Regulatory Federalism*, 76 N.Y.U. L. REV. 1142, 1157–58 (2001) [hereinafter Guzman, *Antitrust and International Regulatory Federalism*].

¹²⁵ See Tarullo, *supra* note 90, at 488.

¹²⁶ In addition to the complementarities between trade and competition policies, the WTO would be in a position to consider, for example, the interface between the protection of intellectual property and the functioning of free competition.

The clear benefit of the WTO is its potential to overcome divergent national incentives created by international trade flows and local regulatory objectives.¹²⁷ The WTO covers multiple issue areas and thus enables states to negotiate transfer payments in one area to achieve agreement in another.¹²⁸ The WTO provides an institutional setting in which a wide range of policy areas can be linked and concessions discussed. An example of successful WTO negotiations based on issue linkages and concessions is the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"). Though they had little to gain from the stricter intellectual property standards introduced during the Uruguay Round negotiations, developing countries consented to the TRIPS proposal in exchange for trade concessions from developed countries.¹²⁹ This ability to negotiate across issue areas has been argued to be a fundamental precondition to the achievement of an agreement on antitrust at the international level.¹³⁰

The existence of a dispute settlement system in the WTO also indicates the superiority of the WTO as a forum for international antitrust. The presence of procedures to compel countries to honor their commitments can be viewed as the only way to guarantee compliance with international norms.¹³¹ However, the inclusion of dispute resolution in an agreement on international antitrust law could discourage participation by countries most concerned with ceding their economic sovereignty to a supranational body of antitrust enforcers.¹³²

2. *Disadvantages of Incorporating Antitrust into the WTO Framework*

Notwithstanding the clear benefits the WTO possesses as a potential institution for hosting an international antitrust agreement, there are also obvious weaknesses. Trade and antitrust domains have somewhat different and sometimes even conflicting goals that have the potential to hamper their smooth coordination.¹³³ Trade laws are designed to open markets to exporters,

¹²⁷ Guzman argues that, unless trade in imperfectly competitive markets remains balanced, the objectives of net importers and net exporters are inconsistent. Net exporters promote weak antitrust standards while net importers seek stricter antitrust laws. Guzman, *Antitrust and International Regulatory Federalism*, *supra* note 124, at 1504.

¹²⁸ Multilateral solutions would bring more benefits to developing countries, which are not capable of imposing their antitrust laws on others extraterritorially. The United States, therefore, has little to gain and much to lose if a multilateral agreement is negotiated. See Fox, *Antitrust and Regulatory Federalism*, *supra* note 1, at 1807.

¹²⁹ Guzman, *Antitrust and International Regulatory Federalism*, *supra* note 124, at 1157.

¹³⁰ *Id.* at 1157–58.

¹³¹ *Id.* at 1158 ("Dispute settlement within the WTO is certainly imperfect, but it is the best available mechanism for ensuring compliance with a competition agreement.")

¹³² Eleanor M. Fox, *Competition Law and the Millennium Round*, 2 J. INT'L ECON. L. 665, 677 (1999) [hereinafter Fox, *Competition Law*].

¹³³ When vertical restraints, for example, are considered from a trade perspective, the conclusions regarding the effects of the restraint can be quite different than if they were considered from an antitrust policy perspective. See ICPAC REPORT, *supra* note 77, at 210. At the same time, overlapping policy concerns lead to different conclusions regarding the effects of a particular restraint. For example, U.S. antitrust law might find a vertical distribution practice efficiency-enhancing and beneficial to consumers, while a trade policy perspective might find the same practice exclusionary and adversely affecting access to markets. *Id.*

not to optimize the efficiency of the marketplace or the benefits to the consumer.¹³⁴ In addition, the WTO is accustomed to governing rules constraining government behavior, not regulating private conduct.¹³⁵

The WTO also has a rather adversarial character, which makes it somewhat inappropriate for fostering regulatory cooperation among states. The cooperative approach distinctive to antitrust policymaking deviates significantly from the practices familiar to trade negotiations. The traditional strength of the WTO has been to fashion rules that restrict nations from pursuing aims that conflict with the interests of other nations. The institution is designed to set limits on governments' interference with trade flows, not to help governments address shared regulatory issues. In other words, the virtue of the organization has been "the elimination of certain government practices, not their coordination."¹³⁶ Thus, inclusion of antitrust rules in the WTO framework would require the institution to "move beyond its traditional area of advantage."¹³⁷ In addition, the WTO's adversarial tradition could jeopardize the trust that has been established among national antitrust authorities. This could result in a diminished willingness to share information or assist in investigations on matters outside the scope of the WTO.¹³⁸

As there is no interpretive authority in the WTO, agreements must often entail rules that are precisely specified in order to enhance legal certainty.¹³⁹ Antitrust law, however, follows the trends and discoveries in economic learning and must be able to change with new market conditions.¹⁴⁰ Freezing antitrust analysis into exact standards would reduce the flexibility needed for effective, case-specific interpretation of antitrust rules and principles. Any need to subsequently modify the negotiated rules would be a cumbersome and slow process. Therefore, negotiating a binding set of accurate international antitrust principles and agreeing on precisely defined common standards from the outset could be counterproductive. On the other hand, conflicting views on the appropriate content of the antitrust agreement could also encourage the adoption of imprecise, general provisions with vaguely defined exemptions, leaving the negotiated outcome to reflect a diluted compromise or entail provisions negotiated to the lowest common denominator. This would be an equally counterproductive outcome and would only weaken the existing antitrust regimes.¹⁴¹

The trade and antitrust realms are also characterized by very different negotiation dynamics. Trade negotiations taking place in the WTO framework depend on national trade negotiators seeking to maximize the export

¹³⁴ Epstein, *supra* note 79, at 345.

¹³⁵ Tarullo, *supra* note 90, at 489.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 479, 489, 493–94. International convergence efforts should strive to supplement, not replace, cooperation based on bilateral agreements. *Id.* at 500–01.

¹³⁹ *Id.* at 490.

¹⁴⁰ *Id.*

¹⁴¹ Piilola, *supra* note 96, at 315–16.

opportunities of their domestic industries.¹⁴² The “winner-take-all dynamic” that characterizes antitrust disputes, however, would seriously differ from these established negotiation practices.¹⁴³ The formation of issue linkages and attempts to offer transfer payments and negotiate concessions are common to trade negotiations. This culture of political bargaining, however, is at odds with the decisionmaking practices employed in the field of antitrust. The trade law tradition of political intervention, including the use of threats of retaliation, is in sharp conflict with the very nature of the rule-oriented law of antitrust.¹⁴⁴ Bringing antitrust law within the realm of trade negotiations could therefore lead to the politicization of antitrust issues and impede achieving the desired goals and initial purposes of an international antitrust regime.

This is not to suggest that the institutional design and adopted practices of the organization could not be modified. New negotiation mechanisms could be created, and the WTO’s trade expertise could be supplemented by administrators with specialized knowledge and experience in antitrust issues. If negotiations on international antitrust laws were to take place within the WTO, institutional changes would be required anyway to prevent the WTO from becoming overburdened and unproductive.¹⁴⁵ However, the challenges of any institutional transformation should not be underestimated. Institutional transformation would not only involve the reform of rules and procedures, but also call for a fundamental change in the way of thinking about and facilitating the goals of the organization.

In addition to the above, the WTO and other international institutions increasingly struggle with problems of legitimacy. Critics believe that the organization is drifting away from the preferences of civil society to establish a supranational, nondemocratic, and influential elite of its own.¹⁴⁶ The negative side effects of globalization and the unequal distribution of the gains of free trade continue to garner more and more public attention. Under these circumstances, adding antitrust to the WTO repertoire could risk aggravating the organization’s already existing legitimacy problems.

¹⁴² Tarullo, *supra* note 90, at 488.

¹⁴³ Epstein, *supra* note 79, at 362. Antitrust laws are rule-oriented, and the disputes concerning antitrust matters are solved on a case-by-case basis in accordance with the national legal process. As part of this process, antitrust violation is either found to exist or not. There is no scope for the “give and take diplomacy,” bargaining, or “linking” of one antitrust procedure with another, unrelated dispute in order to reach a politically acceptable compromise. The winner in the antitrust dispute has no obligation to make concessions in connection with another dispute, whereas trade disputes often involve elements of bargaining, political maneuver, and the giving of concessions in exchange for victories. *Id.*

¹⁴⁴ Youri Devuyt, *Transatlantic Competition Relations: A New World Order?*, in *TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY* 127, 149–150 (Mark A. Pollack & Gregory C. Shaffer eds., 2001).

¹⁴⁵ See Guzman, *Antitrust and International Regulatory Federalism*, *supra* note 124, at 1161.

¹⁴⁶ For discussions of the events in Seattle and their implications, see generally *SEATTLE, THE WTO, AND THE FUTURE OF THE MULTILATERAL TRADING SYSTEM* (Roger B. Porter & Pierre Sauvé eds., 2000); JEFFREY J. SCHOTT, *THE WTO AFTER SEATTLE* (2000); Pierre Sauvé & Arvind Subramanian, *Dark Clouds Over Geneva? The Troubled Prospects of the Multilateral Trading System*, in *EFFICIENCY, EQUITY, LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM* 16 (Roger B. Porter et al. eds., 2001).

B. The Capacity and the Desirability of the OECD to Foster International Convergence in Antitrust Law

The OECD has been instrumental in fostering international cooperation and convergence in antitrust law and policy. The organization undertakes extensive research on the internationalization of antitrust law, organizes conferences, and coordinates international cooperation. The OECD has also issued recommendations for enhancing international cooperation on antitrust matters. The Recommendation Concerning Cooperation Between Member Countries on Anti-Competitive Practices Affecting International Trade was adopted in 1967 and amended in 1973, 1979, 1986, and 1995 (the "OECD Recommendation").¹⁴⁷ The original OECD Recommendation laid down procedures for notification and international consultation and established the norm of negative comity. Later versions adopted the concept of positive comity and elaborated provisions on notification, consultation, investigative assistance, and information exchange.¹⁴⁸

The OECD Competition Committee (the "Competition Committee")¹⁴⁹ has had a central role in facilitating contacts and achieving greater cooperation and convergence among national regulators.¹⁵⁰ The Competition Committee consists of representatives of national antitrust enforcement agencies and serves as a principal international forum for the exchange of views on antitrust policy issues.¹⁵¹ Under the auspices of the OECD, this body is a form of intergovernmental, institutionalized governance. However, the operation of the Competition Committee in practice is more reminiscent of a transgovernmental network of national antitrust authorities.

The discussions among the Competition Committee members lay a foundation for greater convergence in the analysis of antitrust issues and facilitate practical cooperation among the national antitrust enforcers.¹⁵² In this way, the Competition Committee is an example of the regulatory convergence approach to the governance of international antitrust law and policy.¹⁵³ It is important to note that participants understand convergence as

¹⁴⁷ Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade, OECD Doc. C(95)130/Final (July 28, 1995).

¹⁴⁸ *Id.* See also earlier recommendations: OECD Doc. C(86)44/Final (May 21, 1986); OECD Doc. C(79)154/Final (Sept. 25, 1979); OECD Doc. C(73)99/Final (July 3, 1973); OECD Doc. C(567)53/Final (Oct. 5, 1967). "Negative comity" refers to the obligation of a government to take into consideration the interests of other governments when enforcing its national antitrust laws. See Portnoy, *supra* note 75, at 167. "Positive comity" goes a step further by establishing a principle of enduring cooperation between antitrust authorities. See Slaughter, *The Real New World Order*, *supra* note 18, at 190. "Positive comity" also enables the party affected by anticompetitive conduct to request the other party to take action in the case. See Devuyt, *supra* note 144, at 135–36.

¹⁴⁹ The Competition Committee was known as a "Competition Law and Policy Committee" until January 1, 2002.

¹⁵⁰ For additional information, refer to the OECD website at <http://www.oecd.org>.

¹⁵¹ See Tarullo, *supra* note 90, at 490.

¹⁵² *Id.* at 495.

¹⁵³ "Regulatory convergence" refers to a system of structured international activities that facilitate the congruence of national laws and regulations, or coordinate their enforcement.

referring to “de facto consistency” rather than to uniformity or harmonization.¹⁵⁴ In other words, national differences are legitimate and do not necessarily contradict the idea of convergence. Less attention is given to strict uniformity in law and institutions, and more emphasis is placed on similarity in underlying principles, policy objectives, and enforcement practices.¹⁵⁵

The Competition Committee has also produced nonbinding recommendations including, remarkably, a 1995 recommendation on international cooperation between competition authorities¹⁵⁶ and a 1998 recommendation on the prohibition of hard-core cartels.¹⁵⁷

The convergence efforts of the Competition Committee rely on voluntary cooperation between national antitrust authorities, not on any binding instrument. The “soft law” character of the recommendations has raised doubts about the efficacy of the provisions they provide. However, despite their nonbinding nature, the recommendations have unquestionably facilitated international consensus on antitrust rules and served as a model for such bilateral cooperation agreements as those between the European Union and United States and between Australia and New Zealand.¹⁵⁸

1. *Advantages of Incorporating Antitrust into the OECD Framework*

The OECD has provided a successful framework for international cooperation by bringing together antitrust communities from several jurisdictions. The organization’s reliance on voluntary cooperation and convergence enables deliberation on important antitrust concerns without triggering apprehensions of losing national sovereignty. The development of common approaches within the OECD framework is relatively smooth owing to a rather homogeneous membership with similar economies and antitrust traditions.

The OECD has the advantage of gathering under its auspices significant intellectual capacity to research and analyze many aspects of international economic law and policy. Thus, it can consider the interdependencies among different policy realms and facilitate coherence. Specifically, the Competition Committee’s expertise and its ability to call on other OECD committees and working groups also put the organization as a whole in a unique position to assess antitrust problems following changes in economic environment.¹⁵⁹

¹⁵⁴ Interim Report on Convergence of Competition Policies, Working Paper No. 79, OECD Doc. OECD/GD(94)64 (1994).

¹⁵⁵ Portnoy, *supra* note 75, at 89–91.

¹⁵⁶ Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade, *supra* note 147.

¹⁵⁷ See Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, *supra* note 81. The Recommendation attempts to facilitate international cooperation on “naked cartels” that fix prices, establish quotas, restrict output, allocate markets, or make rigged bids. *Id.*

¹⁵⁸ Portnoy, *supra* note 75, at 169 (discussing Diane Wood, *The Impossible Dream: Real International Antitrust*, 1992 U. CHI. LEGAL F. 227, 289 (1992)).

¹⁵⁹ Tarullo, *supra* note 90, at 502. The OECD has also established a Joint Group of Trade and Competition (“Joint Group”). The Joint Group brings together government representatives of the trade

2. *Disadvantages of Incorporating Antitrust into the OECD Framework*

The promise of the OECD's regulatory convergence approach is, however, limited. Some shortcomings arise from the cumbersome organizational structure of the OECD. The organization consists of relatively autonomous, policy-specific forums for discussion and cooperation. This successfully serves the goal of fostering institutional linkages among national regulators and policymakers in each policy realm. Notwithstanding, the OECD remains a weak and fragmented organization, as no single ministry within member states has responsibility for the organization.¹⁶⁰ Furthermore, the national authorities have always viewed the OECD as more of a forum for discussion than for decisionmaking.¹⁶¹ This view has given the organization a second-class status in the international arena. The recent expansions in membership have opened new possibilities in policymaking as the OECD can no longer be seen simply as a club of like-minded, influential, economically developed democracies. Still, the OECD has been unable to formulate a coherent new role for itself.¹⁶²

Today, the OECD's membership is too limited for it to host a truly international antitrust agreement. Even though the limited membership alleviates the problems involved in reaching a common approach, an international agreement within the OECD would only solve frictions among a select group of developed countries. Even if developing countries would later be invited to join, the agreement would not adequately reflect their interests. The involvement of the developing countries from the outset would lead to an international antitrust regime reflecting the interests of developing nations in a more acceptable manner.¹⁶³

C. *The Establishment of an Independent Antitrust Institution*

Eleanor Fox has argued that trade-related antitrust issues, such as private market access restraints, should be negotiated within the WTO, whereas other antitrust issues should be addressed in an independent forum outside its scope.¹⁶⁴ Fox proposes the establishment of an independent international antitrust institution that would focus exclusively on international antitrust negotiations.¹⁶⁵

The proposal for a free-standing "World Competition Forum" stems from the belief that an international institutional framework for international antitrust matters is needed and that none of the existing institutions provides an adequate framework.¹⁶⁶ The WTO is bound by its focus on trade: It lacks the

and antitrust communities to examine issues at the nexus of trade and competition policy and thus fosters coherent policymaking in both realms.

¹⁶⁰ *Id.* at 494–95.

¹⁶¹ *Id.* at 498.

¹⁶² *Id.* at 494–95, 498.

¹⁶³ Piilola, *supra* note 96, at 319.

¹⁶⁴ Fox, *Competition Law*, *supra* note 132, at 666, 674–75.

¹⁶⁵ *Id.* at 674–78.

¹⁶⁶ *Id.* at 677.

expertise and decisionmaking structures designed to host an antitrust agreement. Similarly, the OECD's membership is too limited for it to facilitate a truly international agreement. Despite the apparent interdependence among antitrust and other policy areas, antitrust should be treated in its own right. This exclusive treatment is required for the development of sound rules and principles.¹⁶⁷

However, establishing a new international organization does present significant challenges. First, it would be costly and add to an already extensive bureaucratic network. Moreover, as Fox accepts, proliferation of a new international organization cannot be a goal as such,¹⁶⁸ unless an institutional setting is needed and there is no existing institution that could incorporate a new policy area into its existing framework. The creation of a specialized organization focusing exclusively on antitrust matters would also limit the opportunities for cross-issue learning and lead to incoherent and fragmented policymaking.¹⁶⁹

V. TRANSGOVERNMENTAL GOVERNANCE OF INTERNATIONAL ANTITRUST LAW

Attempts to harmonize antitrust law at the international level have, for the most part, failed. However, national regulators have responded to the need for increased cooperation by forming direct contacts with their counterparts in other jurisdictions.¹⁷⁰ The rise of these networks among antitrust authorities has established a form of transgovernmental antitrust governance that provides a "fast, flexible and effective" means of cooperation among antitrust regulators.¹⁷¹ Direct contacts among antitrust authorities enhance the ability of states to work together and to coordinate their antitrust laws and policies without the centralized bureaucracy and burdensome procedures of formal international institutions. This cooperation is an ideal example of an informal international rulemaking process that engages national officials directly.¹⁷²

Cooperative arrangements among antitrust authorities are often superior solutions to initiating a WTO action. The problem of regulating international cartels, for example, lies in the difficulty of obtaining evidence located in a foreign jurisdiction. This difficulty is more directly overcome by establishing cooperation mechanisms among national antitrust authorities than by bringing the matter to an organization that does not specifically deal with the enforcement of international cartels.¹⁷³

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ See Tarullo, *supra* note 90, at 503.

¹⁷⁰ See Devuyt, *supra* note 144 (discussing the rationale and instruments of international cooperation).

¹⁷¹ Slaughter, *The Real New World Order*, *supra* note 18, at 193.

¹⁷² Slaughter, *Governing*, *supra* note 10, at 189.

¹⁷³ Tarullo, *supra* note 90, at 491.

I will focus on two aspects of regulatory cooperation among the networks of national antitrust authorities. First, I will explore the cooperation that takes place between antitrust authorities in developed antitrust regimes with relatively similar regulatory laws and cultures. This analysis will focus on the transatlantic cooperation between the European Union and the United States, which is based on a bilateral agreement. Second, I will discuss cooperation between antitrust authorities from developed market economies and those from developing countries or emerging market economies that are in the process of adopting antitrust regimes. In the latter case, cooperation faces very different challenges by reason of the inequality of knowledge, experience, resources, and the differences in the economic environments in which the regulators operate.

A. Bilateral Agreements among Similar Antitrust Regimes

Bilateral agreements create a framework for consultation and cooperation among national antitrust agencies. The agreements are often established among similar antitrust regimes—a fact that makes negotiation and implementation significantly less problematic than if they were established at the international level among nations with divergent regimes.

Several reasons lead countries to enter into bilateral cooperation arrangements. First, cooperation is designed to avoid problems arising from the exercise of extraterritorial jurisdiction. Second, cooperation facilitates the investigation and enforcement of international antitrust cases by providing access to essential evidence. The evidence needed for taking a remedial action is often located beyond the reach of the national antitrust enforcement officials and can only be obtained with the help of foreign authorities. Third, effective cooperation can prevent conflicts in reaching conclusions and assessing remedies. Finally, through cooperation and coordination, unnecessary duplication of work can be avoided, saving transaction costs.¹⁷⁴

The preconditions laid out above for the efficient functioning of transgovernmental networks can be verified when explored in the antitrust realm. The common perception is that policy coordination can take place among agencies composed of experts enjoying considerable autonomy in hierarchically superior government structures.¹⁷⁵ The similarity of regulatory goals and institutional structures of cooperating agencies further facilitates coordination. The demonstrated success of the cooperation between E.U. and U.S. antitrust agencies can be explained in large part by the relative independence of the agencies, as well as the similarity of their policy agendas and preferences over a wide range of antitrust issues.¹⁷⁶ “Shared substantive beliefs about markets, law, and regulation facilitate collective action.”¹⁷⁷

¹⁷⁴ Devuyt, *supra* note 144, at 132.

¹⁷⁵ See Pollack & Shaffer, *Who Governs?*, *supra* note 3, at 303.

¹⁷⁶ *Id.* at 292, 303.

¹⁷⁷ Portmoy, *supra* note 75, at 170.

The downside of bilateral agreements is that they are inadequate in promoting coherence among different, interdependent policy fields. As discussed above, one of the most appealing arguments for international antitrust rules has been the recognized linkages between antitrust and trade policies. By relying exclusively on bilateral cooperation mechanisms, coherence in antitrust and trade policies is not adequately advanced. The antitrust authorities cooperating in this bilateral framework may not focus on the broader goals of globalization and trade liberalization when pursuing cooperation in individual cases. Transgovernmental antitrust networks thus pose a danger of pursuing policy outcomes that conflict with trade concerns. However, this problem of incoherence could be overcome by establishing a dialogue with regulators and policymakers specializing in trade issues.

Finally, bilateral agreements generally do not provide for antitrust authorities to exchange confidential business information, which is essential for effective interagency cooperation. However, confidential information can be exchanged if a party or parties under investigation explicitly permit authorities to do so.¹⁷⁸ This is more likely to occur in merger cases where the merging parties may benefit from a speedy review process. In contrast, parties in cartel cases have nothing to gain from a sound investigation and are often reluctant to aid antitrust authorities in their investigation. Governments have recognized the importance of exchanging confidential information for effective cooperation on antitrust matters. When the U.S. Congress, for example, passed the International Antitrust Enforcement Assistance Act in 1994,¹⁷⁹ the Act authorized the U.S. Federal Trade Commission ("FTC") and the U.S. Department of Justice ("DOJ") to enter into antitrust assistance agreements with their foreign counterparts with the purpose of sharing confidential information.¹⁸⁰ The authorization outlines strict conditions of confidentiality and reciprocity, which set the limits on the exchange of confidential information.¹⁸¹ Thus far, an agreement based on the Act has only been signed with Australia, in 1999.

B. Bilateral Agreement between the European Union and United States

E.U.-U.S. antitrust relations are characterized by a culture of genuine regulatory cooperation with sincere efforts to address common goals and shared concerns. The daily interaction between the authorities has led to increasingly cooperative attitudes among antitrust enforcers on both sides of the Atlantic. Instead of being guardians of the interests of their national industries, the antitrust enforcers have come to redefine their roles as members of a transatlantic antitrust community who share common concerns with their

¹⁷⁸ See Devuyt, *supra* note 144, at 148 ("In the Microsoft case of 1994, for instance, the company consented to an exchange of confidential information [between the E.U. and U.S. antitrust agencies], thus enabling the two competition authorities to jointly negotiate a settlement with Microsoft.")

¹⁷⁹ International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. § 46 (2002). Note that mergers fall outside the scope of the agreement.

¹⁸⁰ Devuyt, *supra* note 144, at 132.

¹⁸¹ *Id.*

professional counterparts.¹⁸² This cooperation has been an ideal example of a new form of “fast, flexible and effective governance” by transgovernmental networks.¹⁸³

A bilateral agreement between the European Union and the United States was signed in 1991 (the “1991 Agreement”).¹⁸⁴ The 1991 Agreement contains provisions on notification, exchange of nonconfidential information, and coordination of enforcement activities and possible remedies.¹⁸⁵ The agreement generates a presumption that antitrust authorities of one country may request the authorities in another country to investigate and, when necessary, remedy anticompetitive conduct according to their antitrust laws.¹⁸⁶

Between 1991 and 1999, the E.U. and U.S. antitrust agencies cooperated in 689 cases of mutual interest.¹⁸⁷ The cooperation has facilitated antitrust enforcement in cases of mutual interest and has often led to the adoption of a common approach. For instance, the E.U. and U.S. antitrust authorities jointly and successfully investigated the Microsoft case in 1994. The FTC, the DOJ, and the European Commission coordinated their positions, investigations, and remedies. Microsoft itself facilitated investigations by granting the agencies permission to share confidential information. The investigations led to joint settlement negotiations and nearly identical remedies.¹⁸⁸

Another high-profile case leading to tensions between the U.S. and E.U. antitrust communities was the merger between Boeing and McDonnell Douglas.¹⁸⁹ After the FTC had cleared the proposed merger, the European Commission threatened to block the transaction. The FTC and the European Commission then consulted each other, and the Commission accommodated U.S. concerns by agreeing to limit the scope of its action.¹⁹⁰ After the merging

¹⁸² *Id.* at 127–28.

¹⁸³ See Slaughter, *Governing*, *supra* note 10, at 193–94 (discussing implications and problems of regulating the global economy through government networks).

¹⁸⁴ E.U.-U.S. Agreement on Competition Law, *supra* note 100.

¹⁸⁵ Devuyt, *supra* note 144, at 135. Confidential information may only be exchanged if the corporations under investigation grant a waiver. *Id.* In addition, the 1991 Agreement also established provisions on negative and positive comity. The principle of positive comity was reinforced in the Decision of the Council and Commission 98/386/EC, 1998 O.J. (L 173) 26.

¹⁸⁶ Portnoy, *supra* note 75, at 176.

¹⁸⁷ Devuyt, *supra* note 144, at 138. A total of 473 cases of cooperation concerned transatlantic mergers. Strategic alliances and monopolization resulted in cooperation in 216 cases. The figures illustrate that the cooperation is based on well-balanced mutual notification practice. The European Commission notified the United States in 358 cases, whereas the notifications by the United States were almost as frequent, numbering 331. *Id.*

¹⁸⁸ The U.S. and the E.U. authorities carried out a first ever joint investigation, arriving at a coordinated remedy. See Anne K. Bingman, Speech Before the American Law Institute 72nd Annual Meeting (May 16, 1996), <http://www.usdoj.gov/atr/public/speeches/96-05-16.htm> (discussing cooperation by enforcement in international antitrust matters).

¹⁸⁹ Commission Decision 97/816/EC of 30 July 1997 Declaring a Concentration Compatible with the Common Market and the Functioning of the ECA Agreement, Case IV/M.877, Boeing/McDonnell Douglas, 1997 O.J. (L 336) 16 [hereinafter Commission Decision of 30 July 1997].

¹⁹⁰ Thomas Lampert, *International Cooperation among Competition Authorities*, 20 EUR. COMPETITION L. REV. 214, 218–19 (1999).

parties had consented to the Commission's requirements, the European Union also cleared the merger.¹⁹¹

Only rarely have the agencies reached a conflicting final assessment.¹⁹² This happened recently when the proposed GE/Honeywell merger was approved by U.S. antitrust authorities but blocked by the European Commission.¹⁹³ According to some, the transatlantic divergence suggested significant substantive and economic differences between the E.U. and U.S. merger regimes.¹⁹⁴ Others emphasize that divergent appraisals, though possible, are exceptional.¹⁹⁵ Each antitrust authority performs its own assessment and sometimes reaches unique conclusions despite genuine efforts to cooperate and coordinate investigations. However, such outcomes are rare, and therefore the GE/Honeywell decision hardly marks a new era of disagreements.¹⁹⁶

C. Cooperation between Developed and Emerging Antitrust Agencies

Close to one hundred member countries in the WTO have no antitrust regimes. The International Monetary Fund, the World Bank, the European Union, and the United States in particular have eagerly encouraged those countries to adopt antitrust laws. In addition, the European Union and the United States have enthusiastically exported their respective antitrust models and offered advice and technical assistance.

The assistance provided to developing countries and emerging economies in their efforts to establish antitrust regimes is of remarkable significance. Antitrust policy plays an important role for developing countries in their transition to market-based economies. The adoption of antitrust laws and the establishment of enforcement agencies serve broader economic goals and strengthen market structures in the countries concerned. Competitive markets do not emerge merely through deregulation of some key industries. Instead, competitive markets must be constructed and maintained through institutionalized antitrust rules and principles.¹⁹⁷

Technical assistance in the antitrust domain originates from U.N. initiatives.¹⁹⁸ Since the 1980s, an international group of experts established

¹⁹¹ Commission Decision of 30 July 1997, *supra* note 189; *see also* Press Release, European Commission, The Commission Clears the Merger between Boeing and McDonnell Douglas under Conditions and Obligations, IP/97/729 (July 30, 1997).

¹⁹² *See* Devuyt, *supra* note 144, at 127.

¹⁹³ Commission Decision of 3 July 2001, *supra* note 91 (declaring concentration to be incompatible with the common market).

¹⁹⁴ Donna E. Patterson & Carl Shapiro, *Trans-Atlantic Divergence in GE/Honeywell: Causes and Lessons*, 16 ANTITRUST 18, 18 (2001), *available at* <http://faculty.haas.berkeley.edu/shapiro/divergence.pdf>.

¹⁹⁵ *See, e.g.*, Alexander Schaub, *The Direction of Competition Policy: Reconciling National and International Objectives*, Address at the Annual Fall Conference on Competition Law, Ottawa 9 (Sept. 21, 2001), http://europa.eu.int/comm/competition/speeches/text/sp2001_033_en.pdf.

¹⁹⁶ *Id.*

¹⁹⁷ Portnoy, *supra* note 73, at 107–08.

¹⁹⁸ *Id.* at 111, 118–19.

under the auspices of the United Nations Conference on Trade and Development has encouraged developing countries to adopt national antitrust laws. The group has assisted in drafting legislation and training antitrust officials. In the 1990s, technical assistance was increasingly provided by antitrust agencies from the United States and the European Union and by the experts of the OECD. For instance, the OECD has established an "Outreach Program" that assists developing countries with broad-based regulatory reform. As part of the program, representatives from developing countries attend meetings of the OECD Competition Committee. In addition, developing countries receive assistance in drafting legislation, building institutions, training officials, and implementing and enforcing their antitrust policies.

However, some raise concerns that the eagerness of the developed antitrust regimes to offer antitrust expertise stems from self-interest. The assistance can be seen as an opportunity for the powerful countries to exercise "regulatory imperialism" and impose policy preferences on less powerful states.¹⁹⁹ It is true that superior expertise and resources of developed antitrust nations give them power to incorporate their own policy objectives in antitrust laws they help establish in developing countries. Nonetheless, it is in the interest of both developed and developing nations to create stable and efficient antitrust regimes all over the world. This is not always achieved by simply replicating the antitrust provisions and preferences of developed nations.

VI. TRANSNATIONAL GOVERNANCE OF INTERNATIONAL ANTITRUST LAW

Intergovernmental and transgovernmental models of global governance fail to include multinational corporations, consumers, and other nonstate actors in the construction of an international antitrust framework. At best, the intergovernmental model of governance views private actors as "domestic interests," constraining the margin of maneuverability available to the representatives of government in intergovernmental bargaining forums.²⁰⁰ The limited involvement by societal actors in global governance is consistent with a traditional state-centered view of international order.

However, antitrust policy, located at the intersection of the public and private spheres, can benefit immensely from the increased involvement of the private sector in setting the regulatory agenda. In various fields, increased blurring of the line dividing private and public spheres and the growing involvement by private actors in governance have relocated public governance functions from states to transnational private actors.²⁰¹ This has led to the development of a new private institutional order demanding a stronger public-private partnership in domestic and international governance. With this

¹⁹⁹ See discussion *supra* Part II.E.2.

²⁰⁰ Maria G. Cowles, *The Transatlantic Business Dialogue: Transforming the New Transatlantic Dialogue*, in *TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY* 213, 215 (Mark A. Pollack & Gregory C. Shaffer eds., 2001).

²⁰¹ Saskia Sassen, *What's Wrong with International Law Scholarship?: The State and Economic Globalization: Any Implications for International Law?*, 1 *CHI. J. INT'L L.* 109, 110 (2000).

scenario in mind, creating a true public-private partnership to enhance international cooperation on antitrust would have many advantages.

Governments sometimes overlook market failures that occur when the economic environment changes. Because firms bear the costs of regulation, they can provide valuable information on the effects of different regulatory approaches on their business. Multinational companies are often ahead of governments in thinking about trade liberalization and the effects of market integration. They benefit from a truly open, international marketplace and a sound regulatory framework. The corporations operating in global markets therefore have the ability to look beyond national interests and think globally.²⁰²

How could civil society contribute to the dialogue on international antitrust law? The Transatlantic Business Dialogue (“TABD” or “Dialogue”) offers a helpful framework. Although the TABD focuses on E.U.-U.S. business relations in general and has not focused in particular on antitrust issues, its success in other areas suggests a potential to contribute to discussions on an appropriate transnational governance model for antitrust.

Returning to the three-model taxonomy of global governance—intergovernmental, transgovernmental, and transnational—the TABD does not fit perfectly into any of these categories. It is best conceptualized as a form of transnational governance even though it is not a typical transnational pressure group focusing on activities independent of the state.²⁰³ The participating corporations of the TABD work closely with government officials to help them create solutions for potential regulatory disputes. The TABD’s contribution to the negotiating and signing of the E.U.-U.S. Agreement on Competition Law is an illustrative example of where cooperation between industry and government can lead.²⁰⁴ At the same time, the TABD has not only provided a setting for E.U. and U.S. officials to discuss issues of common interest, but it has also successfully shaped and facilitated the transatlantic dialogue and fostered a participatory process of regulatory cooperation.²⁰⁵ Thus, some have argued that the greatest instructive value of the TABD is in the suggestion of the effectiveness of a “bottom-up, pragmatic” approach to formulating regulation.²⁰⁶

However, the range of private actors engaged in governance should not encompass only large corporations, which often possess superior capacities and greater resources to pressure political decisionmakers and get involved in drafting regulatory agendas. For example, the failed WTO meeting in Seattle provided a stark illustration of this principle by conveying the public’s

²⁰² Cowles, *supra* note 200, at 213–14, 218.

²⁰³ *Id.* at 214.

²⁰⁴ E.U.-U.S. Agreement on Competition Law, *supra* note 100; *see also* Cowles, *supra* note 200, at 215 (noting that progress in the negotiations on the Mutual Recognition Agreement was made only after chief executives of E.U. and U.S. corporations took the initiative).

²⁰⁵ Cowles, *supra* note 200, at 213–14.

²⁰⁶ *Id.* at 226.

concerns over the undue influence of large corporations in international trade matters.²⁰⁷

To balance the influence of the business community in designing regulatory frameworks and international antitrust regimes, transnational governance should also involve active participation by consumer organizations. In the transatlantic setting, for example, the Transatlantic Consumer Dialogue (“TACD”) was established in response to concerns that, through the TABD, business interests were disproportionately influencing bilateral trade talks to the detriment of consumers.²⁰⁸

The influence of civil society groups depends on at least two factors. First, different civil society groups are equipped with very different resources and thus have unequal access to the governance process. Among the existing transatlantic dialogues, for example, those that focus on labor, consumer, and environmental issues have enjoyed far less success than the TABD in obtaining policy results. The TACD has not managed to secure an equal footing with the TABD in influencing decisionmaking, and groups such as Consumers International have never had direct, formal access to policymakers in the course of intergovernmental negotiations. Second, domestic institutions are designed to accommodate or exclude certain interests. The trade policy establishment in the United States, for example, has simply not been organized to accommodate demands from consumers and consequently has been significantly more responsive to the concerns of business groups than to those of consumers.²⁰⁹

Just as the success demonstrated by the inclusion of business organizations in transatlantic policymaking could be duplicated at the global level, the problems faced by consumer organizations are likely to be reproduced if they seek access to global antitrust policymaking. Still, a greater role for corporations and consumers in designing an international antitrust regime has the potential to lead to a more efficient, fair, and legitimate regulatory framework.

Another challenge to the incorporation of civil society into international policymaking is the need to create a “dialogue among dialogues.”²¹⁰ It is reasonable to assume that transnational groups participate in international policymaking to ensure that their interests are taken into account. However, the dialogues are often segmented by sectors: Business representatives do not meet with consumer, labor, and environmental groups to discuss common agendas.²¹¹ While there is no need for a single overarching dialogue, different dialogues and issue-specific networks ought to communicate with each other. In the antitrust domain, this would entail improved interaction between the

²⁰⁷ *Id.* at 229.

²⁰⁸ Bignami & Charnovitz, *supra* note 49, at 261–62. Consumers International, an organization with members in both the United States and European Union, was chosen to lead the effort. Consumers International has 260 member organizations in 110 countries and is considered the “principal player in the realm of international consumer affairs.” *Id.* at 264.

²⁰⁹ *Id.* at 258–59, 268–69, 278.

²¹⁰ See generally *id.* (discussing the importance of an open dialogue in a single public sphere).

²¹¹ Pollack & Shaffer, *Who Governs?*, *supra* note 3, at 300, 303–04.

business community and consumer organizations. This interaction could potentially shape the agendas and preferences of each group and lead to increased and beneficial cross-fertilization and mutual understanding.²¹²

VII. CONCLUSIONS ON GLOBAL GOVERNANCE DRAWN FROM THE CASE STUDY OF ANTITRUST LAW

A. *The Insufficiency and Impropriety of Relying Solely on Intergovernmental Antitrust Governance*

From the notion that current international antitrust law is characterized by coexisting diversity and convergence comes a critical question: When do we tolerate diversity and when should we strive for convergence? In other words, which differences among national antitrust laws have to be reconciled and which ones can be left to national economic sovereignty?²¹³ A certain amount of divergence in national antitrust regimes encourages innovation and experimentation while preventing stagnation. Only those differences that hinder the efficient functioning of the international economic order should be the target of convergence efforts. Thus, individual countries should have substantial leeway to design their own antitrust laws, policies, and practices. Managing differences among various antitrust regimes should be as important a goal as facilitating convergence.

The international antitrust debate is presently focused on intergovernmental efforts to enhance cooperation and foster convergence. In particular, it is centered on whether or not international antitrust rules ought to be incorporated into the WTO framework.²¹⁴ Thus far, concrete proposals for an international antitrust regime have envisioned the regime as a full-fledged global institution with substantive antitrust provisions. The greatest obstacle for politically realistic solutions has been the all-or-nothing position taken by many participants in the international antitrust debate. Comprehensive global solutions often turn out to be too broad and too inflexible. They threaten a loss of sovereignty, which generates the fear that international integration prevents governments from delivering preferred benefits to their citizens.²¹⁵

At least for today, it is neither possible nor desirable to construct an agreement on antitrust law at the international level. National antitrust regimes differ so widely that there is no common ground upon which to build an agreement.²¹⁶ An international agreement on specific antitrust rules would likely include only a very narrow core set of rules reflecting shared preferences across nations. Such an agreement would only proscribe some of the most

²¹² Bignami & Charnovitz, *supra* note 49, at 281.

²¹³ The essential task of the international network is to define the differences that have the potential to hinder the efficient functioning of global markets and international trade.

²¹⁴ See *supra* note 116 and accompanying text.

²¹⁵ Fox, *Antitrust and Regulatory Federalism*, *supra* note 1, at 1801.

²¹⁶ Portnoy, *supra* note 75, at 26.

hard-core antitrust offenses, such as price-fixing and market allocation. Meanwhile, vertical restraints and the abuse of market dominance are two areas where substantive differences remain strong.²¹⁷

Countries have different ideas of what competition means and interpret market conduct in light of their own distinct economic traditions. Only about half of the WTO member states have incorporated antitrust laws into their domestic legal regimes, and, of those countries that have, many have done so only recently. An international antitrust code imposed upon inexperienced regimes lacking traditions of antitrust enforcement can easily lead to counterproductive market outcomes. For its part, the WTO, the most widely discussed institutional alternative for providing antitrust regulation, lacks the capacity to provide an adequate institutional framework. The inclusion of antitrust into the WTO's agenda would likely lead to subordinating antitrust law to trade policy concerns, which could be more detrimental than beneficial from the point of view of competition.

B. The Desirability of Developing Transgovernmental Antitrust Governance

Rather than drafting overarching multilateral agreements on antitrust laws, cooperation efforts in the immediate future are more likely to succeed in managing existing diversity and promoting voluntary convergence based on approximation of domestically applied standards. Networks of antitrust authorities are well-suited to facilitate this process of cooperation and voluntary convergence. They provide a setting for cross-fertilization and foster common understanding. Voluntary codes of conduct, nonbinding recommendations, and informal agreements on cooperation among national antitrust agencies further a common regulatory approach. The reliance on soft law as a tool to harmonize antitrust regimes allows for policy experimentation and permits flexibility and adaptability of law to local circumstances.²¹⁸

Furthermore, mutual trust evolves among regulators as a result of increased contacts and forms a basis for future harmonization efforts. If more formal cooperation becomes necessary, the negotiations will run more smoothly due to an existing degree of convergence and history of mutual trust. Consequently, it is desirable for countries to continue to negotiate bilateral agreements, including provisions on information-sharing and positive comity. New bilateral agreements lay the foundation for an international antitrust agreement and prepare countries for more sophisticated international cooperation.²¹⁹

By comparison, hard rules and associated sanctions often cause hesitancy and decrease the likelihood of an agreement. The prospect of binding rules changes the dynamics of negotiations. Negotiators are more conscious of their national interests and bargain every detail carefully. Exceptions are often

²¹⁷ Tarullo, *supra* note 90, at 490.

²¹⁸ Portnoy, *supra* note 75, at 29, 204.

²¹⁹ Tarullo, *supra* note 90, at 500–01.

introduced to ensure that the country does not bind itself to something contrary to its sovereign interests.

To illustrate this distinction, the current international antitrust regime is becoming increasingly cooperative. States are relying on soft law and developing informal, voluntary measures to manage conflicts arising from incompatible national antitrust policies. The preferred process of developing an international approach to antitrust is based on the deliberation and building of an antitrust culture rather than on coercion.²²⁰ Increased contacts, meetings, and workshops among antitrust officials, scholars, and practitioners, as well as the increase of technical assistance by developed antitrust nations to developing ones, have bridged gulfs in economic thinking and provided a setting for common understanding.²²¹ Increased cooperation among participants in the antitrust network has shaped, and continues to shape, their respective perceptions on the common regulatory agenda, gradually leading to shared understandings and common practices. A consensus on the centrality of competition is steadily developing among antitrust regulators across jurisdictions.²²² Thus, convergence among national antitrust regimes and cooperation among antitrust authorities are mutually reinforcing.

The most compelling argument against the mere reliance on bilateral cooperation is that globally optimal solutions require there to be at least some players who are charged with the responsibility of enhancing the welfare of the world at large.²²³ In other words, mere cooperation among national antitrust authorities does not produce a globally optimal antitrust regime. Instead, some supranational standard or authority is required. Though any far-reaching international antitrust regime is at present unworkable, some form of international coordination of the various bilateral arrangements may be beneficial and serve the goal of achieving broad regulatory consistency.

The existing bilateral agreements could, for example, be supplemented by voluntary multilateral cooperation agreements in the OECD setting. Alternatively, the potential of the recently established International Competition Network to develop its role and take a greater responsibility in harmonizing national antitrust laws is worth exploring.²²⁴ The concentration of cooperation efforts in a single forum could contribute to coordinated analysis and joint action in cases involving, not just two, but multiple markets.

By way of illustration, one concrete task for the OECD Competition Committee would be to harmonize premerger notification procedures.²²⁵ The variations in the kind of information that must be provided to each antitrust

²²⁰ Portnoy, *supra* note 75, at 7, 196.

²²¹ Fox, *Antitrust and Regulatory Federalism*, *supra* note 1, at 1787.

²²² As an example, internationalization of the so-called "Chicago School" of antitrust has been remarkable. European antitrust authorities are increasingly adopting the teachings of the Chicago School and its emphasis on the efficiency justification. See Portnoy, *supra* note 75, at 196.

²²³ Fox, *Antitrust and Regulatory Federalism*, *supra* note 71, at 1801.

²²⁴ For additional information, refer to The International Competition Network website, at <http://www.internationalcompetitionnetwork.org>.

²²⁵ ABA Special Comm. on Int'l Antitrust, Report of the Special Committee on International Antitrust 19 (1991).

agency could be minimized to reduce the unnecessary burden that occurs when a merger has to be filed in several jurisdictions simultaneously. Time frames for premerger reviews could also be homogenized. The differences in timing and the content of notifications do not represent genuine policy choices by sovereigns and should thus be easy to overcome. The harmonized notification processes would not only reduce the burden faced by merging parties, but also enable antitrust authorities to better coordinate their investigations. This scheme would ensure that all agencies receive the same information simultaneously and allow them to initiate their consultative mechanism and to coordinate investigation. Duplicative enforcement efforts and undue delays in the approval process could be avoided and remedial measures coordinated.²²⁶

Furthermore, the membership of the sophisticated OECD Competition Committee should also be opened to countries that are not OECD member states. Any country with existing antitrust law and enforcement should be invited to participate in transgovernmental cooperation and dialogue. Countries without established antitrust regimes should also be included as observers in the Competition Committee's activities.²²⁷ This would ensure not only convergence among a selected club, but also adequate protection of the interests of the emerging antitrust regimes.

C. *The Essential Supplementary Role of Transnational Antitrust Governance*

Participation of different transnational actors in global governance ought to supplement rather than replace strong political leadership. They can complement efforts to foster cooperation and achieve increased convergence through intergovernmental and transgovernmental fora. Ideally, the international antitrust architecture would be designed through active, open, transparent, and cooperative dialogue in which all levels of governance participate.

One of the ways to generate broad public support for the international free trade agenda is to increase the involvement of civil society in the policymaking. The involvement of civil society leads to more desirable, transparent, and legitimate antitrust policymaking at the international level. Consequently, the business community and consumer organizations ought to be more engaged in shaping the regulatory framework. The potential of a partnership between business and government in setting regulatory agendas should be exploited for the benefit of both those who regulate and those who are regulated. Corporations should not just assume the role of influencing regulatory agendas by lobbying their respective governments. They ought to be involved in discussing, proposing, and recommending policy preferences side-by-side with state and substate actors.²²⁸ At the same time, the role of

²²⁶ Tarullo, *supra* note 90, at 502.

²²⁷ *Id.* at 503.

²²⁸ Cowles, *supra* note 200, at 221–25 (discussing the “durability and importance of the business dialogue”).

corporations ought to be balanced by engaging consumer organizations, as discussed above.

VIII. CONCLUSION

All three models of global governance have a place in international antitrust law and thus in international policymaking generally. Ideally, the intergovernmental, transgovernmental, and transnational models of governance complement and constrain one another and contribute to an optimally balanced global governance regime. Finding a balance between globalization and sovereignty cannot be done by relying solely on a traditional, state-centered understanding of global governance and ignoring the multiplicity of actors now engaged in international policymaking. Thus, a more nuanced global governance theory provides a more sophisticated analytical framework for policymakers to design governing mechanisms for international policy realms.

The presumptions of the superiority of the intergovernmental model of global governance that underlie the contemporary debate inhibit our capacity to propose feasible alternatives for global governance. In particular, as the above case study of international antitrust regulation illustrates, policymakers face difficulties when they attempt to establish a binding global governance framework under the auspices of an international institution, such as the WTO. These unsuccessful attempts show the limitations of political bargaining and demonstrate the need for adequate political support at the national level.

Antitrust is a prime example of a policy area where the benefits of direct international cooperation through government networks are recognized and realized in practice, and its example provides support for transgovernmental governance theories. The involvement of corporations and consumer organizations in setting regulatory agendas and influencing policy outcomes in the antitrust domain is a rather recent phenomenon, and its effects have been marginal. However, positive experience based on the increased participation of these actors points to the potential of transnational governance to lead to more inclusive, transparent, and participatory global governance.

The preceding examination of international antitrust regulation also validates the mutually reinforcing nature of cooperation and convergence. Increased interaction between antitrust enforcers has led to growing similarity in national regulatory approaches. Moreover, the theoretical assumption that cooperation often takes place between transgovernmental actors sharing similar regulatory laws and cultures is confirmed by the extensive cooperation between U.S. and E.U. antitrust authorities.

The antitrust case study also highlights the apprehensions raised regarding regulatory imperialism. The debate surrounding international antitrust regulation is dominated by traditionally influential nations such as the United States and the European Union. In addition, the success of transgovernmental and transnational models for governing international antitrust has

predominantly been limited to accomplishments with respect to the regulatory convergence between the U.S. and E.U. antitrust policies.²²⁹ Expanding the network of international governance to embrace a more diverse range of regimes is a challenge to which global governance theories do not provide a sufficiently straightforward response. Governance theories must design and develop models of governance that more effectively embrace the concerns of the world community at large.

International institutions and intergovernmental cooperation have established roles in international policymaking. However, relying solely on an intergovernmental model of global governance raises concerns about coercion and loss of sovereignty. This traditional model ought to be complemented by more efficient and flexible transgovernmental networks while being constrained and legitimized by the greater participation of transnational actors. As the case study of international antitrust law demonstrates, any workable global governance regime must incorporate aspects of all three models to avoid the downsides of each.

Regimes created through norms of reciprocity, trust, and consensus are superior to regimes advancing the rule of law through regulatory imperialism. Achieving convergence by compelling nations to harmonize their policies despite a lack of common vision can lead to unsuccessful public policies and ineffective global governance.²³⁰ International cooperation must be based on mutual trust and a reciprocal commitment to commonly defined preferences. Reliance on coercion creates fragile, vulnerable regimes, whereas reliance on voluntary convergence lays a solid foundation on which future cooperation can be built.²³¹

²²⁹ On the other hand, the International Competition Network ("ICN") has grown in fifteen months from sixteen members in fourteen jurisdictions to seventy-seven members representing sixty-seven jurisdictions. More information regarding the ICN is available on their website, at <http://www.internationalcompetitionnetwork.org>. See also von Finckenstein, *supra* note 77 (discussing the growth of ICN). However, the cooperation within the framework of the ICN cannot be compared to the extent and depth of cooperative efforts between the U.S. and E.U. antitrust authorities.

²³⁰ Cf. Majone, *International Regulatory Cooperation*, *supra* note 34, at 130. Majone notes that agreements often lack credibility when the level of implementation is uncertain. He rightly emphasizes the importance of trustbuilding, but also argues that "where such mutual trust is not forthcoming, regulatory cooperation may have to be supported by formal institutions and centralized procedures." *Id.* Finding his notion that formal institutions and centralized procedures would be needed in the absence of mutual trust problematic, I would instead argue that mutual trust is a necessary precondition for establishment of centralized and institutionalized procedures.

²³¹ Drezner, *supra* note 5, at 334.

