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Business Implications of Divergences in Multi-Jurisdictional Merger Review by International Competition Enforcement Agencies

*W. Adam Hunt**

I. INTRODUCTION

Antitrust and competition laws lie at the nexus of international law and business.[1] Since 1890, antitrust law has expanded from its origins of regulating trusts in the United States to what is now a global body of law. However, this expansion has not come without drawbacks. As the number of worldwide competition review and enforcement agencies in both developing and developed nations continues to increase,[2] multinational businesses contemplating mergers are faced with growing uncertainty and transaction costs. These escalating costs have led business community leaders to conclude "that greater harmonization of merger law enforcement, at both the substantive and the procedural levels, would be of significant benefit."[3]

The discussion and advocacy for the creation of an international antitrust regime has been ongoing since the early twentieth century.[4] Unfortunately, most attempts at international harmonization[5] to this point

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[1] American antitrust law is synonymous with competition law in the rest of the world.

[2] *See* Diane P. Wood, *Antitrust: Antitrust at the Global Level*, 72 U. CHI. L. REV. 309, 309 (2005) (noting that "[w]e live in a world in which more than one hundred countries now have national antitrust laws").

[3] Diane P. Wood, *International Harmonization of Antitrust Law: The Tortoise or the Hare?*, 3 CHI. J. INT'L L. 391, 399 (2002)

[4] *Id.* at 392.

[5] It is important to clarify the differences in critical terms used by commentators when discussing changes to international competition law. Harmonization is "a supranational or multilateral law" that in the competition context can apply to (1) competition rules; (2)

are characterized by weak forms of voluntary cooperation.[6] Efforts have been made by various intergovernmental bodies to produce model codes or principles for developing countries to adopt. For example, the Organization for Economic Cooperation and Development ("OECD") and the United Nations Conference on Trade and Development ("UNCTAD") each adopted non-binding competition codes.[7] The International Competition Network ("ICN") and the Global Competition Forum ("GCF") have also made progress "in the direction of global convergence toward sound merger practices and procedures" by developing eight guiding principles and three recommended practices.[8]

As discussed in Part IV, the general problem with these proposals is that they attempt to regulate the entire body of competition law. In addition to merger review, competition law addresses horizontal restraints between competitors at the domestic and worldwide levels,[9] and vertical restraints within a distribution chain.[10] This overly ambitious approach ultimately results in little progress being made and justifies the more moderate approach advanced in this Comment.

Part II of this Comment discusses the increasing presence of economic analysis in antitrust law. Part III describes the various costs and benefits resulting from overlapping multi-jurisdictional merger review. Part IV describes several of the most notable proposals for remedying this undesirable international situation. Part V argues that a more reasonable and manageable step is to first create a supranational merger review body utilizing U.S.-type economic analysis, before further attempts to harmonize other aspects of international competition law are made. This would help to reduce transaction costs to businesses and should result in a more globally

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competition policy; or (3) enforcement procedures. *See* Sharon E. Foster, *While America Slept: The Harmonization of Competition Laws Based Upon The European Union Model*, 15 EMORY INT'L L. REV. 467, 472 (2001). Convergence refers to "the movement towards the standardization of laws." *Id.* Cooperation and coordination refers to "an agreement between states, bilaterally or multilaterally, to assist each other in enforcing their laws." *Id.* These concepts are not completely independent as "influential authorities . . . look upon cooperation and coordination as a method to achieve greater convergence and, ultimately, harmonization." *Id.* at 493.

[6] *See* Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 356 (1997).

[7] *See id.* at 351-52.

[8] Deborah Platt Majoras, Deputy Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Speech Before the International Competition Network: Guiding Principles and Recommended Practices for Merger Notification and Review 4 (Sept. 29, 2002), *available at* http://www.usdoj.gov/atr/public/speeches/ 200286.pdf.

[9] The widely publicized 1970s uranium cartel is one example of an international horizontal anticompetitive behavior.

[10] MAHER M. DABBAH, THE INTERNATIONALISATION OF ANTITRUST POLICY 209-10 (Cambridge University Press, 2003).

efficient level of merger regulation.[11] Part VI uses historical developments in the European Union as a predictive model for the success of the proposal in Part V. Finally, Part VII concludes by discussing how this proposal changes our view of international law and the implications of its suggested convergence of antitrust and international trade issues at the WTO.

II. ECONOMICS AND ANTITRUST

The U.S approach to evaluating antitrust issues in merger reviews has evolved from a set of vague standards into a rules-based[12] system utilizing increasingly sophisticated economic analysis to dictate certain outcomes.[13] Conversely, other governments around the world have remained mired in a standards-based approach to the enforcement of competition law when reviewing mergers. Comparing these so-called "rules versus standards"[14] approaches demonstrates both the utility of a rules-based economic approach to antitrust analysis and enforcement[15] in merger review as well as the problems inherent in using vague standards to accomplish the same goals.[16] Applying bright-line rules in the merger context is particularly important because they "provide guidance and ensure businesses that not every action they take, or every merger they propose, will be subject to arbitrary and exacting scrutiny."[17]

A. Economic Analysis in U.S. Antitrust Law

Since the enactment of the first comprehensive antitrust law in 1890, judges and enforcement agencies in the United States have grappled with

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[11] *See generally* Andrew T. Guzman, *Is International Antitrust Possible*, 73 N.Y.U. L. REV. 1501 (1998).

[12] Rules can be defined as "specifications of liability criteria in formal, seemingly precise, and usually short directives." Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 55 (2007). On the other hand, "a standard may entail leaving both specification of what conduct is permissible and factual issues for the adjudicator." Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992). For example, a rule might create a 55 mile per hour speed limit on freeways while a standard "might prohibit driving at an excessive speed." *Id.*

[13] It is important to reiterate that this statement is limited to the merger review context. Others argue that as a general matter, antitrust law in the United States "finds itself in the midst of a creeping transition from rules to standards." Crane, *supra* note 12, at 50.

[14] *See* Guzman, *supra* note 11 (reviewing literature of the "rules versus standards" issue).

[15] *See* ROBERT H. BORK, THE ANTITRUST PARADOX 129 (1978) (asserting that "rules can be devised which reflect and resolve the tension between productive inefficiency and allocative efficiency accurately enough for the law to confer a net benefit").

[16] *See* Crane, *supra* note 12, at 85. Crane notes that "[o]ne strong advantage of rules over standards is predictability, which matters most when one is trying to incentivize appropriate behavior."

[17] *See* Kenneth Heyer, *A World of Uncertainty: Economics and the Globalization of Antitrust*, 72 ANTITRUST L.J. 375, 420 (2005).

defining the goals of antitrust. After years of uncertainty, the publication of Robert Bork's *The Antitrust Paradox* in 1978 fundamentally changed the nature of antitrust analysis in American jurisprudence by casting the nature of all analysis in terms of economics.[18] The following section traces these developments in further detail.

1. Background

According to Judge Bork, "the federal courts in over eighty years have never settled for long upon a definitive statement of the [antitrust] law's goals."[19] Bork reached the conclusion that "antitrust is a cornucopia of social values, all of them rather vague and undefined" after an extensive survey of judicial opinions and scholarly and professional commentaries.[20]

Noting the problematic nature of this vagueness in defining the fundamental goals of antitrust, Bork forcefully argued that "[t]he responsibility of the federal courts for the integrity and virtue of law requires that they take consumer welfare as the sole value that guides antitrust decisions."[21] In sum, Bork proposed using economics to solve the problems inherent in the vague antitrust standards.

2. Modern Approach

Based on Bork's seminal work and argument presented above, "rigorous economic analysis of markets has become the norm for both the agencies and the courts . . . . Today, courts and antitrust enforcers rely much less on structural presumptions and more on the consumer welfare standard of anticompetitive harm."[22] Under the "consumer welfare model," mergers create power to restrict output and cut costs.[23] The consumer welfare model balances the "dead-weight loss" to consumers that occurs when producers restrict output (i.e., "productive inefficiency") with the gains that consumers experience from cost reductions as a result of the merger (i.e., "allocative efficiency").[24] According to Bork, the consumer welfare model clearly illustrates "the relationship between allocative and

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[18] BORK, *supra* note 15, at 50.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 51.

[22] Geoffrey A. Manne & E. Marcellus Williamson, *Hot Docs vs. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication*, 47 ARIZ. L. REV. 609, 614 (2005).

[23] *See* BORK, *supra* note 15, at 107.

[24] *See id.* at 108; *see also* Crane, *supra* note 12, at 84 ("In the current dominant paradigm, antitrust law is supposed to deter firms from engaging in collusive or exclusionary conduct resulting in deadweight losses attendant to the output reductions that result from price increases.").

productive efficiencies in determining consumer wealth."[25] In short, "it is efficiency, not competition, that is the ultimate goal of the antitrust laws."[26]

B. Vagueness in EU Competition Law Standards

On the surface, it may appear that both the U.S. and EU competition laws are directed at increasing consumer welfare.[27] In reality, the EU standards-based approach relies on social and political factors, which influence the decision-making process.[28] For example, in 2001 the European Community created headline news by deciding to block the 2001 GE/Honeywell merger that had already been approved by the U.S. regulators.[29] This decision was largely based on protection of "national champions" in EU member-states.[30] Thus, the European Union's lack of an analytical framework based on economics allowed for a politically-motivated decision based on vague notions of competitor protection.

The standards-based approach of EU merger regulation also tends to view efficiencies as an outcome that may have negative competitive consequences.[31] For example, one position taken by the European Union in blocking the GE/Honeywell merger was that the efficiencies gained from the merger would allow GE to increase its dominant position. This stands

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[25] *See* BORK, *supra* note 15, at 109.

[26] Additionally, the use of economics allow for a "rule of law" with high predictability and strict limits for the discretionary scope of authorities, which can be crucial for the effectiveness of policies. *See* Arndt Christiansen & Wolfgang Kerber, *Competition Policy with Optimally Differentiated Rules Instead of "Per Se Rules vs. Rule of Reason,"* 2 J. COMPETITION L. & ECON. 215, 221 (2006). Thus, even when courts in the United States utilize a standards-based "rule of reason" analysis in reaching a decision for a particular case, the rationale for the decision is typically based on a more rule-like economic analysis.

[27] *See* Erik Johansen, *I Say Antitrust; You Say Anticompetitive: Why Bridging the Divide Between U.S. and EU Competition Policy Makes Economic Sense*, 24 PENN. ST. INT'L L. REV. 331, 332 (2005).

[28] *Id.*

[29] Katherine B. Forrest, *The State of E.U./U.S. Merger Coordination*, 1565 PLI/Corp 223, 231 (2006). *See* Commission Decision 2004/134, Case COMP/M.2220, General Electric/Honeywell, 2004 O.J. (L 48) 1, *available at* http://ec.europa.eu/comm/competition /mergers/cases/decisions/m2220_en.pdf; *see also* W. Adam Hunt, *United States and European Union Merger Reviews: Convergence or Collision?*, http://www.abanet.org/abanet /common/login/securedarea.cfm?areaType=member&role=abanetmo&url=/yld/mo/mergerus veurope.shtml (last visited Nov. 27, 2007) (login required).

[30] *See* Hal. R. Varian, *Economic Scene: In Europe, G.E. and Honeywell Ran Afoul of 19th-Century Thinking*, N.Y. TIMES, June 28, 2001, at C2 ("When evaluating a merger, United States antitrust officials tend to focus on the benefits to consumers, while European regulators give substantial weight to the impact on competitors, especially if they are 'national champions'").

[31] *See* Ilene Knable Gotts et al., *Nature vs. Nurture and Reaching the Age of Reason: The U.S./E.U. Treatment of Transatlantic Mergers*, 61 N.Y.U. ANN. SURV. AM. L. 453, 489-90 (2005).

in marked contrast to U.S. laws that refuse to "protect competitors from mergers that will make the merged firm more efficient, even if they fear being forced from the market as a result."[32] Although the new EU Horizontal Merger Guidelines discussed below make efficiencies an important element of the merger review analysis,[33] the EU is arguably still more sympathetic to the concerns of competitors.[34] This standards-based approach, failure to take economics into account, and resultant blocking of a globally efficient merger impose a high cost not only on society, but on consumers affected by the European Union's decision.

C. Convergence of the United States and the European Union Approaches

Despite the differences outlined above, the European Union has moved closer to a U.S.-type approach to merger review. On May 1, 2004, the European Commission promulgated a new Merger Regulation and issued Horizontal Merger Guidelines.[35] These actions were described as achieving "a major evolutionary leap towards a consumer welfare standard," bringing the underlying EU merger review policy much closer to that of the United States.[36]

Additionally, the U.S. and EU enforcement agencies have a history of formal cooperation in competition law policy dating back to an agreement signed in 1991.[37] As a result of the notification, consultation, and coordination of merger review between jurisdictions, the United States and the European Union have avoided inconsistent results in most cases.[38]

However, the European Court of First Instance's recent decision in *Microsoft Corp. v Commission of the European Communities*[39] demonstrates that significant philosophical disparities still exist between the

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[32] William J. Kolasky, *Conglomerate Mergers and Range Effects: It's a Long Way From Chicago to Brussels*, 10 GEO. MASON L. REV. 533, 536 (2002).

[33] *See* Gotts et al., *supra* note 31, at 496.

[34] *Id.* at 493.

[35] *See id.* at 491; *see also* Council Regulation 139/2004, On the Control of Concentrations Between Undertakings, 2004 O.J. (L 24) 1.

[36] *See* Gotts et al., *supra* note 31, at 490.

[37] *See* Kathryn Fugina, Comment, *Merger Control Review in the United States and the European Union: Working Towards Conflict Resolution*, 26 NW. J. INT'L. L. & BUS. 471, 490 n.162 (2006).

[38] Charles A. James, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Address at the Canadian Bar Association, Annual Fall Conference on Competition Law: International Antitrust in the Bush Administration 4 (Sept. 21, 2001), *available at* http://www.usdoj.gov/atr/public/speeches/9100.pdf (referring to the "close collaboration on facts, analysis and remedies between the Antitrust Division and the European Commission in the Sprint/MCI, Alcoa/Reynolds, MCI/WorldCom, and Dresser/Halliburton investigations").

[39] *See* Case T-201/04, Microsoft Corp. v. Comm'n, 2007 WL 2693858 (Sept. 17, 2007), *available at* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-201/04.

two jurisdictions, at least with respect to civil non-merger cases.[40] It remains to be seen whether the public sparring by antitrust officials from both sides of the Atlantic[41] will jeopardize the progress made in harmonizing merger reviews between the United States and the European Union since the failed GE/Honeywell merger.

III. THE COSTS AND BENEFITS OF INCREASED MULTI-JURISDICTIONAL MERGER REVIEW

The economic modeling used by U.S. antitrust authorities for evaluating mergers provides evidence that some mergers bring a net benefit to society and serve the fundamental goal of allocating society's scarce resources in the most efficient manner possible. However, the multiplicity of international merger review authorities increases transaction costs to companies contemplating transnational mergers. Nor does the potential for increased costs end there. As explained in Part III.C, the true danger comes from the possibility of blocking globally efficient mergers or keeping companies from attempting lower-value mergers in the first place.

A. Quantification of Merger Benefits

Under the consumer welfare model presented in Part II.A. above, the key factor in whether a merger is approved or not is the merged firm's impact on consumer welfare.[42] In practice, mergers are evaluated by taking the sum of its effects on total consumer and producer surplus.[43] When the net benefit outweighs any potential anticompetitive harm, then society's scarce resources are properly allocated, and society as a whole is better off.[44]

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[40] Good summaries of the lengthy decision are available online. *See, e.g.*, Press Release, European Comm'n, Directorate-Gen. Press and Commc'ns, The Court of First Instance Essentially Upholds the Commission's Decision Finding that Microsoft Abused Its Dominant Position (Sept. 17, 2007), *available at* http://curia.europa.eu/en/actu/communiques/cp07/aff/cp070063en.pdf.

[41] *See EU Official Lambasts U.S. Justice Dept on Microsoft*, REUTERS, Sept. 19, 2007, *available at* http://www.reuters.com/article/politicsNews/idUSL19269278200709l9?feedType=RSS&feedName=politicsNews. Specifically European Union Competition Commissioner Neelie Kroes stated "[i]t is totally unacceptable that a representative of the U.S. administration [Department of Justice Assistant Attorney General Thomas Barnett] criticized an independent court of law outside its jurisdiction." *Id.*

[42] *See* Thomas W. Ross & Ralph A. Winter, *The Efficiency Defense in Merger Law: Economic Foundations and Recent Canadian Developments*, 72 ANTITRUST L.J. 471, 474 (2005). Closely related to this is the idea of the "Pareto Principle." This refers to the notion that "if a merger makes some individuals better off by increasing their surplus as consumers or their profits as shareholders without harming others, it should be allowed." *Id.*

[43] *See id.* at 475.

[44] The increased gains to society from a firm facing a fall in the cost of production as the result of a merger can be quantified because more goods are produced at a lower unit cost,

Other potential benefits from mergers include the creation of new products or innovations. There may also be other economic savings such as increased research and development activities, which can be extremely important in stimulating long-term economic growth.[45]

B. Increased Transaction Costs to Global Businesses

Compliance costs to merging parties are often cited by commentators as a primary justification supporting the need for harmonization of global competition law.[46] Yet the typical argument only makes brief recitals regarding the benefits to businesses that would theoretically flow from integrated worldwide multi-jurisdictional merger review.[47] A typical statement is: "In the area of mergers and acquisitions, compliance with competition laws is becoming an increasingly expensive and time consuming aspect of transnational business."[48]

A recent study commissioned by the International Bar Association provides excellent empirical support for these arguments.[49] The study reveals that the typical international merger is worth €3.9 billion, requires six filings with a merger review authority, and generates on average €3.3 million in external merger review costs.[50] These costs begin with determining what jurisdictions require notification of the merger.[51] Other costs include attorney fees, filing fees, document production costs, fees for

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which increases overall welfare. "Consumers gain because the cost of the good has fallen, allowing them to either purchase more of the good for the same amount of money or purchase the same amount of the good for less. Producers with market power benefit because their profits increase." Guzman, *supra* note 11, at 1509.

[45] *See* ANALYTICAL FRAMEWORK SUBGROUP, ICN MERGER WORKING GROUP, PROJECT ON MERGER GUIDELINES: REPORT FOR THE THIRD ICN ANNUAL CONFERENCE IN SEOUL ch. 6 (2004) [hereinafter ICN MERGER WORKING GROUP], *available at* http://www.internationalcompetitionnetwork.org/media/library/conference_2nd_merida_2003/amg_chap6_efficiencies.pdf.

[46] *See, e.g.*, Dane Holbrook, Comment, *International Merger Control Convergence: Resolving Multijurisdictional Review Problems*, 7 UCLA J. INT'L L. & FOREIGN AFF. 345, 349 (2002).

[47] *See, e.g.*, Jennifer R. Johnson, *It's a Small World After All: Proposed Solutions for Global Antitrust in a System of National Laws*, 1 SANTA CLARA J. INT'L L. 118, 118 (2003).

[48] Waller, *supra* note 6, at 385.

[49] Press Release, Int'l Bar Ass'n, IBA/ABA Survey Identifies Costs to Business of Competition Referrals on Cross-Border M&A Deals (June 23, 2003) [hereinafter *IBA Press Release*], *available at* http://archive.ibanet.org/news/NewsItem.asp?newsID=99; *see also* PRICEWATERHOUSECOOPERS, A TAX ON MERGERS? SURVEYING THE TIME AND COSTS TO BUSINESS OF MULTI-JURISDICTIONAL MERGER REVIEWS (2003), *available at* http://www.pwc.com/Extweb/pwcpublications.nsf/docid/9A1944672D36773680256EDF00387C15.

[50] *See IBA Press Release*, *supra* note 49.

[51] *See* Holbrook, *supra* note 46, at 349.

retaining local counsel, and translation costs.[52] Of the €3.3 million, 65% of this figure is from legal fees, 19% from filing fees, and 14% in fees for other advisers.[53] Additionally, the average merger takes seven months to complete, although in certain jurisdictions it can take much longer.[54]

The data also indicates that prices increase dramatically when a competition authority expresses concern regarding potential anticompetitive effects of a proposed merger.[55] Specifically,

> [I]n-depth reviews are eight to ten times more expensive than those subject only to initial review. The latter generate average external costs of €545,000 (or €110,000 per filing). Deals subject to one or more in-depth reviews incur average external costs of €5.4 million per transaction (on average, €6 million-plus per deal with management and staff time added in). Larger, more complex deals incur significantly higher costs. PricewaterhouseCoopers' research shows that a number of major deals, subject to at least one in-depth review, incur external costs of €10 million-plus.[56]

Furthermore, if countries without competition laws adopt new laws and continue to increase the number of jurisdictions with their own merger review policies, these costs will continue to increase.[57] One potential danger of these increasing costs is that the compliance costs for merging parties may become so great that an otherwise pro-competitive merger is abandoned by the parties.[58] Because of this, "[i]t is hard to disagree with the assessment of the business community that greater harmonization of merger law enforcement, at both the substantive and the procedural levels, would be of significant benefit."[59]

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[52] *See id.* (citing INT'L COMPETITION POLICY ADVISORY COMM., U.S. DEP'T OF JUSTICE, FINAL REPORT TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST 92 (2000), *available at* http://www.usdoj.gov/atr/icpac/finalreport.htm).

[53] *See IBA Press Release, supra* note 49.

[54] *Id.*; *see also* J. William Rowley & A. Neil Campbell, *A Comment on the Estimated Costs of Multi-Jurisdictional Merger Reviews*, THE ANTITRUST SOURCE, Sept. 2003, *available at* http://www.abanet.org/antitrust/at-source/03/09/comment.pdf (noting that "Brazil, followed by the United States, emerged as the jurisdictions most often involving the longest reviews. The average review durations for the transactions where these jurisdictions were last to complete their reviews, were 11.9 and 8.8 months, respectively. Even more alarming is the finding that the slowest reviews (i.e., top quartile) had an average duration of 16 months, which far exceeds the timing objectives of most merging parties.").

[55] *IBA Press Release, supra* note 49.

[56] *Id.*

[57] *See* Holbrook, *supra* note 46, at 349.

[58] *See id.* at 347.

[59] *See* Wood, *supra* note 3, at 399.

C. Indirect Costs of Blocking Globally Efficient Mergers

A model for the "optimal global policy" for merger review has been defined as "the [policy] that allows all activities for which the global change in profits plus the global change in consumer surplus is positive."[60] Because this model suggests that countries will sometimes block globally beneficial mergers,[61] businesses might be deterred from even attempting welfare enhancing mergers in the first place. These costs could ultimately be greater than the increased transaction costs to businesses discussed above in Part III.B. Ultimately it is these "total welfare costs"[62] that provide the strongest support for greater harmonization of merger review at the international level.[63]

IV. PREVIOUS PROPOSALS FOR HARMONIZATION OF COMPETITION LAWS

In order to address the problems identified in Part II, commentators have proposed a variety of solutions ranging from bilateral cooperation agreements to World Trade Organization ("WTO") oversight of international competition law.[64] The following section discusses several of the most popular approaches to harmonizing global competition law along with their inherent limitations.

A. Bilateral Cooperation

Bilateral cooperation agreements are formal agreements between two countries regarding the procedure for notification, information sharing, and

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[60] Guzman, *supra* note 11, at 1512; *see also* Foster, *supra* note 5, at 484-85 (stating that "the indirect costs, such as the impact a delay has on the welfare of the global market, are potentially high").

[61] *See* Guzman, *supra* note 11 at 1517 ("[C]ountry B will sometimes block an activity that increases global welfare because it does not take into account the gains that would be enjoyed by firms in country A.").

[62] The total welfare cost "considers a merger's likely effect on all members of society, not simply the consumers of products produced by the merging firms." Kenneth Heyer, *Welfare Standards and Merger Analysis: Why not the Best?* 3 (U.S. Dep't of Justice Econ. Analysis Group Discussion Paper 06-8, 2006), *available at* http://www.abanet.org/antitrust/at-source/pdf/references/heyer-ken-06-8.pdf.

[63] It should be noted that this analysis of overall economic efficiency is somewhat different than the maximization of consumer welfare discussed *supra* Part II.A.2. "The critical difference is that economy-wide efficiency involves accounting for the effects of actions on the welfare of both producers and consumers, while a consumer-welfare standard considers only the latter." Michael L. Katz & Howard A. Shelanski, *Mergers and Innovation*, 74 ANTITRUST L.J. 1, 7 (2007). Some commentators have already argued in favor of this approach. *See, e.g.*, Heyer, *supra* note 17.

[64] *See, e.g.*, Eun Sup Lee, *Anti-competitive Practices as Trade Barriers Used by Korea and Japan*, 17 TRANSNAT'L LAW 177, 180 (2004).

cooperation between government officials.[65] The bilateral cooperation agreement between the United States and EU[66] has increased the consistency of outcomes in trans-Atlantic merger reviews and has made the entire merger review process more efficient.[67] The success of this and other bilateral agreements has led scholars to comment that the approach is likely the most effective option for the global marketplace[68] because of the greater consistency in outcomes.[69]

Although helpful, bilateral cooperation agreements are still not the globally optimal policy for merger review.[70] In the long-run, bilateral cooperation agreements offer little hope for creating a harmonized worldwide competition law, because they do not sufficiently reduce the number of jurisdictions exercising control over mergers. If only four states in the world (A, B, C, and D) had merger review regulations and states A and B entered into a bilateral cooperation agreement and states C and D entered into a similar agreement, then both the relative and absolute efficiency gains would be substantial.

However, similar efficiency gains are unlikely in today's world with approximately eighty jurisdictions that have some form of merger review and control mechanisms.[71] Even if states 1 through 40 each entered into a bilateral cooperation agreement with a counterpart in states 41 through 80 (i.e. state 1 entered into an agreement with state 41, 2 with 42, etc.) there would still be forty jurisdictions conducting merger reviews. Although this represents a fifty percent decrease in the number of jurisdictions conducting merger reviews, in absolute terms, having forty different merger review jurisdictions conducting merger reviews is still quite burdensome from a business perspective. There is also the additional problem that the cooperating states would not always reach the same decision in each merger review.[72] Therefore, uncertainty and transaction costs to businesses

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[65] *See* Sarah Stevens, *The Increased Aggression of the EC Commission in Extraterritorial Enforcement of the Merger Regulation and Its Impact on Transatlantic Cooperation in Antitrust*, 29 SYRACUSE J. INT'L L. & COM. 263, 299 (2002).

[66] *See* Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, U.S.-EC, 1995 O.J. (L 95) 47. This agreement was subsequently amended in 1998. *See* Agreement Between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, Apr. 6, 1998, U.S.-EC, 1998 O.J. (L 173) 28.

[67] *See* Stevens, *supra* note 65, at 299.

[68] *See* Charles W. Smitherman III, *The Future of Global Competition Governance: Lessons From the Transatlantic*, 19 AM. U. INT'L L. REV. 769, 772-73 (2004).

[69] DABBAH, *supra* note 10, at 222.

[70] *See* Guzman, *supra* note 11, at 1512.

[71] *See* Stevens, *supra* note 65, at 302 n.1 (noting that "[t]oday, some 80 countries have a form of merger review, and the figure is expected to be 200 countries by 2025").

[72] The disparate result reached by U.S. and EU regulators in the GE/Honeywell case

contemplating mergers would still be significant.

The number of states involved in a bilateral agreement forms another impediment to producing a globally efficient level of antitrust enforcement. So long as a proposed merger produces no anticompetitive effects in the states reviewing the merger, the countries involved will approve the merger regardless of the potential anticompetitive effects for countries that are not part of the cooperation agreement. As stated in a recent WTO report, countries "not tak[ing] into account adverse effects on the welfare of producers and consumers abroad may lead to situations where the enforcement of national competition law will not adequately take into account the interests of trading partners."[73] In sum, bilateral agreements are valuable but should not be relied on exclusively or as a replacement for harmonization.[74]

B. Regional Agreements

When multiple jurisdictions form regional agreements to govern antitrust and merger review policy, there is a greater chance for improving certainty and reducing transaction costs than a situation with a multiplicity of bilateral agreements. The European Union arguably has the largest regional agreement with respect to competition law. The twenty-seven Member States consent to decisions made by the Directorate-General IV, which in turn acts pursuant to the EU Merger Regulation.[75]

Some commentators have argued for using an "amalgamated approach"[76] to merger review. This approach suggests that harmonization of merger review can be achieved by combining the enforcement efforts of various regional coalitions.[77] This approach also allows for greater consideration of the pro- and anti-competitive effects of a merger before a decision is made.

The principal limitation to this strategic approach for achieving a substantive convergence in merger review policy is that it lacks a unifying standard for joining the disparate policies between regional actors. In other words:

> A lack of consensus as to the ultimate aims and goals of antitrust law means that there is a significant likelihood that a merger will be

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provides strong empirical support for this statement.

[73] DABBAH, *supra* note 10, at 229.

[74] *See* Waller, *supra* note 6, at 404.

[75] *See* Council Regulation 4064/89, 1989 O.J. (L 395) 1. *See generally* William Elland, *The Merger Control Regulation*, 3 EUR. COMP. L. REV. 111 (1990); Derek Ridyard, *An Economic Perspective on the EC Merger Regulation*, 6 EUR. COMP. L. REV. 247 (1990).

[76] *See* Fugina, *supra* note 37, at 489.

[77] *See id.*

reviewed and perceived differently by different antitrust authorities, with the consequential risk of inconsistency and conflict when one authority purports to exercise extraterritorial control.[78]

Unfortunately this leaves us no better off than under the situation with a multiplicity of bilateral agreements.

C. WTO Oversight[79]

Many commentators support greater involvement for the WTO in international competition law and policy issues. Foremost among their arguments is the notion that anti-competitive behavior by private firms could impair "the expansion of world trade and economic development in individual countries."[80]

The first WTO efforts to address competition law issues came in 1996 at the Singapore Ministerial Conference. At this conference, the WTO created the Working Group on the Interaction between Trade and Competition Policy ("WTO Working Group")[81] to consider whether the regulation of anti-competitive practices should be added to the WTO framework.[82] Further progress was made at the 2001 WTO Ministerial Conference in Doha, where trade representatives recognized the need for a multilateral approach to improve the development of international trade policies.[83] However, the representatives decided to put off any further decisions until the WTO Ministerial Conference in Cancún in 2003.[84] Unfortunately the WTO Working Group at the 2003 Ministerial Conference in Cancún was also unable to reach consensus on any of the competition issues.[85]

Finally, on August 1, 2004, the WTO General Council adopted the "July 2004 package" which decided that the issue of convergence in

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[78] *See* Stevens, *supra* note 65, at 284.

[79] *See generally* Douglas K. Schnell, Note, *All Bundled Up: Bringing The Failed GE/Honeywell Merger In From the Cold*, 37 CORNELL INT'L L.J. 217, 252 (2004).

[80] DABBAH, *supra* note 10, at 207.

[81] *See* WTO Working Group on the Interaction Between Trade and Competition Policy—History, Mandates and Decisions, http://www.wto.org/english/tratop_e/comp_e/history_e .htm (last visited Nov. 27, 2007).

[82] *See id.*

[83] *See id.*

[84] *See id.* However, the representatives did agree to instruct the WTO Working Group to focus on the clarification of a broad range of core competition issues, including "transparency, non-discrimination and procedural fairness; provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building." *Id.*

[85] *See id.*

competition policy would no longer take place within the WTO.[86] Since this decision by the WTO General Council, no further efforts have been made to address competition policy at the WTO and the WTO Working Group is currently inactive.[87]

D. OECD Oversight

The thirty nations that comprise the OECD consist of mainly Western industrial countries. In 1967, these countries agreed to a notification and cooperation process whenever competition matters affected the interests of OECD members.[88] This type of agreement is now known as "information sharing" or "soft harmonization."[89] Despite creating "aspirational texts" on approaches to competition law, none of the OECD's proposals were intended to create legally binding obligations.[90] Instead the goals are limited to improving communication on competition issues.[91]

The main limitations of using the OECD as a venue for the harmonization of competition law are that its membership does not include many developing countries and it lacks a dispute resolution mechanism.[92]

E. International Competition Network ("ICN")

In 2001 the ICN was founded "to provide a venue for all competition agencies worldwide to discuss issues of mutual interest with a view toward promoting cooperation and policy convergence."[93] Unlike other organizations, the ICN does not have a permanent staff or headquarters.[94] The ICN members work together and with other organizations from around the world to promote a set of best practices in competition enforcement. Members address the entire range of competition law issues in addition to multi-jurisdictional merger review.[95]

Like the WTO, the ICN established a Merger Working Group.[96] But

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[86] *See id.*

[87] *See* WTO Working Group, *supra* note 81.

[88] *See* Honorable Pamela Jones Harbour, *Developments in Competition Law in the European Union and the United States: Harmony and Conflict*, 19-SPG INT'L L. PRACTICUM 3, 6 (2006).

[89] *See* Lee, *supra* note 64 at 181.

[90] *See id.* at 181-82.

[91] *See* Andrew T. Guzman, *The Case for International Antitrust*, 22 BERKELEY J. INT'L L. 355, 371 (2004).

[92] *See* Foster, *supra* note 5, at 497.

[93] Randolph W. Tritell, *International Antitrust Convergence: A Positive View*, 19-SUM ANTITRUST 25, 27 (2005).

[94] *See id.*

[95] *See id.*

[96] John J. Parisi, Comment, *International Regulation of Mergers: More Convergence,*

unlike the WTO, the ICN has made substantial progress in the field of competition law since its inception. One of the ICN's primary accomplishments is the compilation of a set of best practices for merger notification as well as review procedures.[97] The ICN

> has also encouraged and monitored implementation of its recommended practices; in fact, over fifty percent of ICN members with merger review laws have made or planned revisions to their merger regimes that bring them into greater conformity with the recommended practices. Such efforts will lead to convergence, marking merger review easier for merger parties and enforcers alike.[98]

Unfortunately, the ICN suffers from the same underlying problem as other solutions; its rules are non-binding on its members. In any situation without rules, enforcers, or dispute settlement mechanisms,[99] there are no assurances that countries will abide by any of the potentially useful guidelines or recommendations. Until a workable approach is identified that produces a globally optimal amount of antitrust enforcement, increasing certainty and reducing compliance costs, continued debate should occur.[100]

V. NEW PROPOSAL FOR RESOLVING MULTI-JURISDICTIONAL MERGER REVIEW PROBLEMS

Proposals for an international competition law have been discussed since the League of Nations in the early 1900s.[101] As noted in Part IV, most of these proposals suffer from the same flaw of attempting to provide a framework that encompasses all aspects of competition law. Because of this and other challenges,[102] many commentators "do not expect to see the creation of a single worldwide competition enforcement agency in our

Less Conflict, 61 N.Y.U. ANN. SURV. AM. L. 509, 525-26 (2005).

[97] *See* Harbour, *supra* note 88, at 7.

[98] *Id.*

[99] Parisi, *supra* note 96, at 525-26.

[100] For an excellent discussion of the problem with voluntary information sharing agreements see Guzman, *supra* note 91, at 370 (noting in part that "[a]lthough these information-sharing agreements play an important role in international antitrust enforcement, they are not and cannot be a solution to the problem of international cooperation.").

[101] *See* Kenneth J. Hamner, *The Globalization of Law: International Merger Control and Competition Law in the United States, the European Union, Latin America and China*, 11 J. TRANSNAT'L L. & POL'Y 385, 403 (citing Andre Fiebig, *A Role for the WTO in International Merger Control*, 20 NW. J. INT'L L. & BUS. 233 (2000)).

[102] In addition to the sheer number of issues within the realm of competition law, additional barriers include the sovereignty of nation states. *See* Harbour, *supra* note 88, at 4.

lifetimes."[103] The following section argues that the creation of a more limited merger review authority with a U.S.-type approach that uses economic analysis to merger review is a more realistic proposal for achieving a convergence in multi-jurisdictional merger review.

A. Overview

This section provides an overview for this Comment's proposal of a new international merger review authority ("IMRA"). Unlike criminal enforcement of anticompetitive behavior, "[m]ergers, joint ventures, and strategic alliances . . . involve the integration of resources; hence, they have the ability to generate real efficiencies."[104] By limiting the proposal for harmonization of competition law to the area of merger review, gains from harmonization can be realized more quickly than through implementation of a more far-reaching proposal. As an additional benefit, this modest initial implementation still provides for the possibility of long-term substantive convergence in additional areas of competition law.

In the first stage of development, the IMRA could act as a clearinghouse for information regarding pre-merger notification and filing requirements. In other words, it would be a "one-stop-shop" for businesses contemplating international mergers. The second stage of development would be the adoption of a limited set of merger review policies. In this way, the organization would develop a common threshold for evaluating the net global benefit or harm of a given merger. Key to this would be the focus on merger efficiencies that can offset potential anticompetitive effects of a merger. The IMRA would also share the core tenets of modern antitrust law with respect to the goal of increasing consumer welfare, and the importance of utilizing economic analysis.[105]

The last stage of the IMRA proposal would involve the creation of a dispute resolution body for competition law within the WTO's dispute resolution mechanism. This feature of the proposal would make the IMRA one of only a handful of international organizations with an ability to exercise binding authority over non-state actors.[106]

The IMRA proposal advanced in this Comment is broader than the

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[103] *Id. But see* Gotts et al., *supra* note 31, at 508 (noting that "[i]f competition officials continue to work together, bilaterally and through multilateral fora such as the ICN, to streamline and coordinate their merger review processes both substantively and procedurally, and to develop further the legal and economic principles underpinning those regulatory frameworks, we may yet enter an age of reason in global merger review").

[104] *See* ICN MERGER WORKING GROUP, *supra* note 45, at 3.

[105] *See* Tritell, *supra* note 93, at 26.

[106] *See* Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 LAW & CONTEMP. PROBS. 63, 89 (2005).

worldwide pre-merger notification regime proposed by Andre Fiebig.[107] It would also go further than projects limited to non-binding best-practices that rely on the voluntary actions of governments around the world.[108] At the same time, the narrow focus of this proposal on merger review and clearance is still more limited than a supranational antitrust code governing all aspects of international competition law. Commentators have noted that due to the large number of jurisdictions with pre-merger notification systems, some degree of analytical harmonization is desirable at the international level.[109] While the world may not yet be ready for a comprehensive set of multilateral competition rules,[110] now may very well be the perfect opportunity to develop a set of multilateral rules for transnational merger review.

B. Step One: Procedural Agreement

An entire article could be devoted to a comprehensive discussion of procedural reforms necessary to implement the IMRA proposal. For the purposes of this Comment, it is sufficient to highlight the main issues that should be considered in any merger review regime.

The first important procedural issue to consider is how large a merger must be before it is subject to the worldwide merger review process. This is an important issue because the vast majority of mergers are approved after submitting the preliminary filing fees and documents.[111] Therefore the ultimate "turnover" figure should be set at a sufficiently high level where only the largest mergers are subject to an in-depth review. The rationale for this is that the largest mergers have the greatest potential for producing sub-optimal levels of efficiency if anticompetitive. When considering the immense size of the worldwide market, small mergers, even if anticompetitive, will only have a de minimis impact on worldwide efficiency.

An alternative way for determining which mergers to subject to the worldwide review would be based on the number of countries the proposed merger impacts. As discussed throughout this Comment, one goal of the worldwide merger review should be to reduce the number of redundant filings in multiple jurisdictions for each discrete merger. For example, if a merger triggered the filing requirements in seven countries, it might be a suitable candidate for a unified, worldwide review. An added benefit of using this approach is that you are more likely to correctly estimate the pro-

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[107] *See* Fiebig, *supra* note 101, at 247 (arguing for the creation of a pre-merger notification unit in the WTO).

[108] James, *supra* note 38, at 8-10.

[109] *See* Tritell, *supra* note 93, at 27.

[110] *See id.* at 25.

[111] Forrest, *supra* note 29, *at* 230.

and anti-competitive effects of a transnational merger with inputs from multiple countries sharing information.[112]

Filing fees are another critical issue in any merger review scheme. Like any other antitrust agency, a worldwide merger review authority would need adequate funding to carry out its mission.[113] One funding possibility is for the proposed agency to receive funding from member governments like the funding structure of the United Nations. However, the cost of merger review is typically paid for by fees from the merging parties.[114] A possible solution would be to have a baseline level of government support, with a sliding scale of fees based on transaction sizes.[115]

C. Step Two: Substantive Agreement and Adoption of U.S.-Style Economic Analysis

A critical aspect of this proposal is the need for substantive convergence in merger review policy. As commentators have noted, "any attempt to create a 'global standard' within antitrust law and policy could be doomed to failure" without consensus as to the goals of antitrust law.[116] The existence of disparate policy goals between review authorities in different jurisdictions is precisely why divergent outcomes are so likely to occur.[117] It follows that for true harmonization to occur, countries must first agree on the goals of antitrust regulation.[118]

1. The Argument for Increased Economic Analysis

By adopting the U.S. economic-efficiency approach as a worldwide efficiency standard,[119] and economic analysis more generally, costly

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[112] Information-sharing can present unique problems for antitrust enforcement officials, since some nations have enacted laws designed to prevent the sharing of confidential business information between antitrust enforcement officials in different jurisdictions. For present purposes, it is sufficient to assume that even exchange of non-confidential information (i.e. market share data) would still aid worldwide analysis of potential merger effects.

[113] *See* Holbroook, *supra* note 46, at 371.

[114] *See id.* at 372.

[115] *See id.* at 373.

[116] DABBAH, *supra* note 10, at 51.

[117] *See* Schnell, *supra* note 79, at 253.

[118] *See* Stephen Schmitz, *The European Commission's Decision in GE/Honeywell and the Question of the Goals of Antitrust Law*, 23 U. PA. J. INT'L ECON. L. 539, 588 (2002).

[119] *See* Edward M. Graham, *Economic Considerations in Merger Review*, *in* ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC COOPERATION? 56 (Simon J. Evenett et al. eds., 2000) (arguing that efficiency should be the primary consideration in merger review); *see also* Daniel Gifford & Thomas Sullivan, *Can International Antitrust Be Saved for the Post-Boeing Merger World? A Proposal to Minimize International Conflict and to*

divergences in substantive policy can be avoided by providing greater certainty to businesses contemplating transnational mergers. Currently, worldwide competition enforcement agencies treat merger efficiencies inconsistently.[120]

A number of factors influence how merger efficiencies are treated, including:

> [T]he nature of the particular economy in question, the degree to which it is integrated with the economies of other trading nations, its historical economic experience with competition and competition law, the goals of its competition law and the economic theory background, the extent of regulation and deregulation, and its size.[121]

Despite these inconsistencies, it has been argued that nations should recognize the increase in economic growth and development resulting from mergers and the importance of evaluating the role of efficiencies in the merger review process.[122]

In the United States, the creation of efficiencies can heavily influence the ultimate approval of a merger because of the possibility for lowering prices, which is a pro-competitive outcome.[123] In other words, U.S. laws will not protect competitors simply because the merged firm will be a stronger and more efficient competitor.[124]

2. *Potential Pitfalls*

Not all commentators view efficiencies as a positive factor when reviewing mergers.[125] Because of this,

> [t]here is also a difficult burden facing the parties to a merger who seek to argue the pro-competitive efficiency-enhancing elements of a transaction. The parties must define and demonstrate the size and nature of anticipated efficiencies, often at a very preliminary stage in their due diligence and business planning, and certainly before they have the opportunity to fully assess the reality of the integration

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Rescue Antitrust from Misuse, 45 ANTITRUST BULLETIN 55 (2000), *available at* 2000 WL 24952762.

[120] *See* ICN MERGER WORKING GROUP, *supra* note 45, at 2. Factors "includ[e] how they should be factored into merger review, what kinds of efficiencies should be considered, and whether efficiencies should be discounted as post-merger market shares approach uncomfortably high levels." *Id.*

[121] *Id.* at 1.

[122] *Id.*

[123] *See* Schnell, *supra* note 79, at 232-33.

[124] Kolasky, *supra* note 32, at 536.

[125] *See* ICN MERGER WORKING GROUP, *supra* note 45, at 3. The European Union's block of the GE/Honeywell merger is typically cited as a practical example of this concept.

challenges they may face.[126]

Additionally, given the lack of experience that authorities in developing countries have in evaluating merger-specific efficiencies, it is quite possible that they will discount or dismiss the predicted efficiencies.[127]

The proposed IMRA worldwide efficiency standard also runs the risk of over-emphasizing the importance of merger efficiencies, since the decision to approve or reject a merger is rarely based solely on the claimed efficiencies resulting from the merger.[128] Furthermore, agencies and courts sometimes ignore merger efficiencies, or treat them with hostility, which can ultimately impact a firm's decision to attempt an international merger.[129] Even in jurisdictions that support an efficiency defense, concerns still arise when a merger would create a monopoly.[130]

One way to resolve this potential problem is to conduct an ex post evaluation of claimed merger efficiencies at six months and one year after completion of the merger, similar to the FTC program to review merger consent decrees.[131] Although ex post implementation of structural remedies could be difficult, it is not outside the realm of possibility. Ideally the merged firm's pricing decisions should also be monitored because efficiencies could give the merged firm an ability to actually increase the post-merger prices, thereby harming consumer welfare.[132]

D. The Final Step: Adding a Dispute Resolution Mechanism

Under the status quo, if a private firm in one nation (the "Blocked Nation") that has approved a transnational merger is blocked from completing a merger with a firm from another nation (the "Blocking Nation"), the Blocked Nation has limited options for recourse. One option is to retaliate by blocking the next merger proposed by a Blocking Nation's firm based in that Blocked Nation's jurisdiction. Another possibility involves increasing cooperation to limit the occurrence of reaching divergent results in merger reviews between the two countries.[133] If neither

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[126] *Id.*

[127] *See id.*

[128] *See id.* at 4.

[129] *See id.* at 5.

[130] *See* Kim D.G. Alexander-Cook, *Advisory Panel Releases Report on Efficiencies*, THE COMPETITOR, Dec. 2005, *available at* http://www.stikeman.com/pdf/publications/CompDec05.pdf (noting "there is ample evidence that in a merger-to-monopoly situations, the absence of competition leads the monopolist to generate its own inefficiency in the long run, so that the eventual efficiency losses may outweigh any short-term efficiency gains").

[131] Gotts et al., *supra* note 31, at 507.

[132] Ken Heyer, *supra* note 17 at 404.

[133] This was the path chosen by the United States and the European Union following the European Union's decision to block the proposed GE/Honeywell merger. *See supra* Part

of these options is appropriate, because, for example, cooperation is impossible and the Blocked Nation does not have any large multinational firms based within its borders, then a dispute settlement mechanism is needed.[134] In other words, "[t]he purpose of an effective dispute settlement mechanism is to resolve disputes that cannot be resolved nationally."[135]

Because the proposed IMRA would involve many nations, these types of disputes are bound to occur. The disputes are especially likely to arise when the supranational merger review agency approves a globally efficient merger, but the optimal result for a particular nation would be to block the merger.[136] In these situations, I believe that using the pre-existing WTO dispute settlement system (the Dispute Settlement Understanding, or "DSU") is the most effective way to resolve these types of disputes.[137] One benefit of this approach is that the WTO has already decided at least one antitrust case.[138] Utilizing the WTO's DSU is also consistent with other international schemes that regulate member state compliance.[139]

One reason for selecting the WTO as the dispute settlement mechanism is that it is not realistic to separate international trade policies from competition policies, given the substantial amount of overlap between these two policies.[140] It is logical to include disputes over market access available to firms contemplating transnational mergers because it is the goal of organizations like the WTO to create free and fair trade opportunities for all of its members.[141]

In the international trade context, the WTO's DSU process gives an injured state the ability to inflict costs on a "rogue state" by retaliating

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II.C.

[134] The extraterritorial application of national laws is also not a viable option because only "economically strong states . . . have the ability to coerce compliance through economic sanctions." Foster, *supra* note 5, at 488.

[135] *See* Holbrook, *supra* note 46, at 369.

[136] *See generally* Guzman, *supra* note 11.

[137] *See* Mark L. Movesian, *Enforcement of WTO Rulings: An Interest Group Analysis*, 32 HOFSTRA L. REV. 1, 1 (2003) ("The WTO's Dispute Settlement Understanding ('DSU') provides that disputes are to be resolved in adversarial proceedings before impartial panels of experts.").

[138] *See* Panel Report, *Mexico—Measures Affecting Telecommunications Services*, WT/DS204/R (Apr. 2, 2004). However, one commentator cautions that "the world competition regime is not closer because of *Mexico Telecom*." Eleanor M. Fox, *The WTO's First Antitrust Case—Mexican Telecom: A Sleeping Victor for Trade and Competition*, 9 J. INT'L ECON. L. 271, 291 (2006).

[139] *See* Stewart, *supra* note 106, at 9-10.

[140] *See* Lee, *supra* note 64, at 179; *see also* Foster, *supra* note 5 ("The problem today in continuing to treat trade and competition laws as distinct from one another is that we are now dealing with an increasingly global economic market.").

[141] *See* Lee, *supra* note 64, at 177.

against protectionist policies in the rogue state.[142] Because the WTO dispute settlement mechanism retains an aspect of retaliation existing in the status quo, political actors in the Blocking Nations could be forced to confront the costs of shirking their free trade commitments.[143]

Finally, limiting the dispute settlement issue to merger review and clearance as proposed in this Comment holds promise for reopening the discussion and negotiation of competition law issues described above.[144]

VI. THE EUROPEAN UNION AS A GLOBAL MODEL

This section proposes that the European Union should be used as a model to study the future development of a worldwide "common market,"[145] and also as an administrative model for managing nation-states within this worldwide common market.

A. The EU Model

Like other international regimes, the European Union functions by pushing down directives to Member States, which implement domestic laws and administrative decisions consistent with the directives and apply them to non-state actors.[146] However, other decisions are made at the Commission level with each Directorate instructed to monitor discrete areas, and implement regulations. Like the International Monetary Fund and the World Bank, EU regulations are only focused on the conduct of states.[147] With respect to the EU economy, the goal of EU policies is to promote a single, unified market.[148]

B. Implications for the Adoption of a Worldwide Efficiency Standard

One of the greatest challenges of implementing the IMRA proposal is that "competition laws have traditionally reflected domestic views, taking into consideration social, political, and economic perspectives."[149] An international agreement requires nation-states to set aside some or all of these considerations in order to reach an agreement. It is somewhat unclear

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[142] Jide O. Nzelibe, *Interest Groups, Power Politics, and the Risks of WTO Mission Creep*, 28 HARV. J.L. & PUB. POL'Y 89, 90 (2004).

[143] *Id.* at 90-91.

[144] *See supra* Part III.C.

[145] This is a new approach. The essence of this argument is that like the nation-states of Europe, which have created a single, unified "common market," the worldwide economy is moving towards a single, unified "common market."

[146] *See* Stewart, *supra* note 106, at 67-68.

[147] *See id.* at 89.

[148] Eleanor M. Fox, *The End of Antitrust Isolationism: The Vision of One World*, 1992 U. CHI. LEGAL F. 221, 222-23 (1992).

[149] Foster, *supra* note 5, at 481.

as to the extent global actors are willing to do this.

Based on the EU model, harmonization of disparate laws and political views in the merger setting appears to be possible. The European Union has successfully harmonized competition law while encouraging other states to adopt laws based on its model.[150] For example, the European Union used the PHARE program to encourage former Soviet states to adopt EU-type competition laws and trade agreements that comport with EU competition standards.[151]

Two additional factors support the notion that harmonization is possible at the worldwide level. First, harmonization is occurring already through the "soft harmonization" efforts of international groups like the ICN. Second, states having an economic incentive to participate in the international economy will modify their competition laws if necessary to increase economic prosperity.[152] The implication of the second factor is that states will indeed participate in the worldwide common market, as long as it is in their long-term economic interests.

The EU model also suggests a checklist of things to consider when taking efficiencies into account.[153] Scholars of the checklist approach emphasize (1) the calculation of baseline or minimum efficiencies and (2) verification of actual efficiencies.[154] These scholars strongly argue that these two factors should be explicitly and transparently identified and evaluated in any merger review.[155] This checklist approach demonstrates that at least one way exists to implement the worldwide efficiency standard proposed by the IMRA in Part V.

In closing, it is important to note that similar efforts to create a "one-stop-shop" for merger reviews in the European Union were blocked in large part by the efforts of the EU Member States.[156] If the twenty-seven Member States of the European Union were able to block a regional version of the merger clearinghouse envisioned in this Comment, then it is quite possible that similar results could be obtained by a regional group of countries outside of the European Union.

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[150] *See id.* at 469-70.

[151] *See id.* at 475; *see also* Fiebig, *supra* note 101, at 236.

[152] *See* Foster, *supra* note 5, at 474.

[153] *See* DIRECTORATE-GEN. FOR ECON. AND FIN. AFFAIRS, EUROPEAN COMM'N, EUROPEAN ECONOMY: THE EFFICIENCY DEFENCE AND THE EUROPEAN SYSTEM OF MERGER CONTROL (2001), *available at* http://ec.europa.eu/economy_finance/publications/european_economy/2001/eers0501_en.pdf. The checklist "includes the choice of the welfare standard, whether efficiencies can be viewed as an offence, and how efficiencies are passed on to consumers." *Id.* at 1.

[154] *See id.* at 2.

[155] *See id.*

[156] *See* Harbour, *supra* note 88, at 4.

VII. CONCLUSION

Divergences in multi-jurisdictional merger review result in unnecessarily high transaction costs to global businesses and may block potentially beneficial mergers from ever occurring. By integrating global merger review regimes, governments across the globe could take a modest step towards harmonizing competition law policy. This would reduce compliance costs for businesses while increasing certainty and reducing the prices consumers pay for goods. In sum, it would create a more globally optimal level of antitrust enforcement.

This Comment argues that the international community must achieve greater harmony in terms of a fundamental set of principles used in merger review to avoid holding businesses hostage to duplicative regulations and review of the same transaction. In particular, this Comment argues that the emphasis given by competition authorities to merger efficiencies must be expanded and treated in a more uniform manner to provide greater certainty to businesses dealing with the new global economy. The proposal advanced by this Comment also seeks to combine the dispute settlements procedures for worldwide trade and competition issues at the WTO.

Although national concerns will always produce somewhat different policy goals and substantive rules,[157] the EU model predicts that a move toward a global efficiency standard will succeed as long as it is in the long-term economic interests of those nations involved and based on rules supported by economics, rather than vague standards. Since the IMRA proposal should produce the globally optimal level of merger control, it stands to benefit all those that consent to its process. If successful, this approach to global merger review and clearance promises "more efficient and substantively sound antitrust enforcement that transcends national borders, to the benefit of consumers all over the world."[158]

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[157] *See* Foster, *supra* note 5, at 502-03.
[158] *See* James, *supra* note 38, at 10-11.